Through the prism of religious diversity and law in Canada: public schools as sites of belonging and boundaries

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Abstract

Schools have long been entrusted with a unique mandate, that of socializing society's children. In the Canadian context, this has given rise to a number of litigated cases on the place of religion in public schools. This thesis explores three case studies that challenge the place of religious diversity in public schools, and concurrently, constitute a narrative through which to understand broader discourses about belonging and tolerance. Drawing on legal stories to bring context to how children are discussed, spoken about and spoken to, as well as how they respond, when faced with questions about their community of belonging in the context of schools, the three case studies revolve around: (1) a teacher who seeks to use additional educational resources for kindergarten and pre-kindergarten students to provide more inclusive stories about families; (2) a Sikh student's right to carry his kirpan, a ceremonial dagger, after an incident in his school courtyard; and (3) a student and his parents who wish to be exempt from an ethics and religious culture program. Indeed, although all three of these stories differ in terms of litigious content – books, kirpan and school curriculum – crosscurrent themes are present and engender an important narrative on religion and public education in Canada.

The thesis begins by reviewing the legal regulation of public schools to highlight their capacity as sites of law making. A careful analysis reinforces the mutually constitutive role that law and space play on each other in the context of public schools, as played out through notions of tolerance and belonging. Law's understanding of religion in education is set out in the Canadian context and explores education's uneasy mandate, as agent of socialization, with the subject of religion (education, instruction and beliefs). Second, the presence or absence of children's voices is examined in litigation involving the place of religion in public schools. Legal storytelling can provide an important vehicle by which to discuss these nuanced stories about religion and education. An examination of the jurisprudence and an extensive review of the court records and legal proceedings reveal that formal law and litigation are rarely sufficient to engage in discussions of religious diversity in public schools. Indeed, within the context of these legal disputes, children's voices are oftentimes subdued or non-existent. Third, this dissertation maintains that internal decisions in school contexts, prior to litigation, reveal greater attentiveness to religious diversity and children's voices through their administrative make-up, organizational politics and internal codes of conduct. Schools represent microsystems worthy of their own consideration, and constitutive of their own rules and relationships. Accordingly, we can understand and engage with schools in terms of what this dissertation refers to as "complex constitutions". Within this framing, this dissertation argues that schools as 'complex constitutions' provide a deeply relational approach to rule- and decision-making, built on the power of relationships. This work proposes that schools as constituting complex constitutions underscores that the issue of diversity in schools needs to be taken more seriously as sites of decision-making rather than spaces of accommodation.

Résumé

Le milieu scolaire a, depuis longue date, été confié un mandat unique, soit celui de socialiser les enfants de notre société. Dans le contexte canadien, ceci a suscité un nombre de litiges sur la place de la religion dans les écoles publiques. Cette thèse explore trois études de cas qui interrogent la place de la diversité religieuse dans ces écoles et, en parallèle, forment un narratif à travers lequel il est possible de comprendre les discours de société sur l'appartenance et la tolérance. Cette thèse s'inspire des histoires juridiques pour contextualiser comment les enfants sont évoqués, décrits et interpelés lorsqu'ils font face à des questions à propos de leur communauté d'appartenance dans le milieu scolaire. Les trois études de cas abordent (1) un enseignant qui cherchait à ajouter des ressources supplémentaires pour les étudiants de la pré-maternelle et maternelle, afin de fournir des modèles familiaux plus inclusifs; (2) le droit d'un étudiant de religion Sikhe de porter son *kirpan,* dague rituelle, après un incident dans sa cours d'école; et (3) un étudiant et ses parents qui voulaient obtenir une exemption du programme d'éthique et culture religieuse. Bien que ces histoires se distinguent en terme de sujet contesté – livres, kirpan et curriculum – des thèmes contrecourants sont présents et engendrent une trame narrative importante sur la religion et l'éducation publique au Canada.

Cette thèse examine, en premier lieu, la règlementation juridique des écoles publiques afin d'illuminer leur capacité en tant que sites de processus législatifs. Un examen approfondi renforce le rôle mutuellement constitutif que le droit et l'espace jouent dans le contexte des écoles publiques, tel qu'élaboré à travers les notions de tolérance et d'appartenance. De plus, la compréhension que fait le droit de la religion dans l'espace scolaire est étudié dans le contexte canadien et de manière connexe, cette thèse explore le mandat précaire qu'entretient l'école, à titre d'agent socialisateur, avec le sujet de la religion (soit l'éducation, l'instruction et les croyances). En second lieu, la présence ou l'absence des voix des enfants est examinée dans le cadre des études de cas susmentionnés. Le récit juridique peut fournir un véhicule important pour faciliter les histoires nuancées sur la religion et l'éducation. Une analyse de la jurisprudence et un examen approfondi des dossiers des tribunaux démontrent que le droit dit formaliste et le litige sont rarement suffisants à eux seuls pour entamer un dialogue approfondi sur la diversité religieuse dans les écoles publiques. En effet, dans le cadre de ces litiges, la voix des enfants se retrouve souvent modérée ou même inexistante. Dans un troisième temps, cette thèse soutient que les décisions internes au contexte scolaire, préalables au litige, décèlent une plus grande écoute à la diversité religieuse et à la voix des enfants à travers leur composition administrative, politiques organisationnelles et code de vie. Les écoles sont des microsystèmes qui méritent d'être pris en considération et sont constitutifs de leur propres règles et relations. Une meilleure compréhension de ces microsystèmes ainsi qu'un dialogue avec celles-ci peuvent être établis si les écoles sont comprises à travers ce que cette thèse appelle « constitution complexe ». Cette thèse met de l'avant que les écoles, à titre de lieu de constitution complexe, permet une approche profondément relationnelle sur le pouvoir règlementaire et décisionnel, construit sur le pouvoir des relations. La conception des écoles que propose cette thèse, à titre

de constitution complexe, souligne que les questions de diversité religieuse dans les écoles doivent être prises plus au sérieux comme lieux de décision et non comme espaces d'accommodements.

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General Thesis Introduction

1. Between Boundaries and Belonging

Public schools have long been entrusted with a unique mandate, that of socializing society's children: beyond parents and their particular community of belonging, schools and educators embody "secondary socialization"[1] within the child's social system. Indeed, while children learn necessary skills associated with mathematics, the subtleties of language and many other core subjects, the conjugation of particular beliefs and education programs with outside forms of socialization (namely that of the family), schools can also become distinct spaces of conflict. Religion's place in these public schools engages us in a deeper reflection of how our identities are articulated and situated, as both individuals, and members of communities. Public schools embody a shared mission – and vision – of education and thus create an inimitable site of scholarly investigation about religion, secularism and community.[2] Thus my thesis explores the complexities of 'hearing' children's voices and relationships to their communities of belonging through a careful analysis of the legal regulation of public schools, litigation involving religious communities and the court system more generally. An aspirational goal of my thesis is to

[1] Karen L. Robson, *Sociology of Education in Canada* (Pearson, Toronto, 2013), 161: "Secondary socialization refers to the social learning that children undergo when they enter other social institutions, like schools."

[2] Shauna Van Praagh and Leo Van Arragon both make this point eloquently: Shauna Van Praagh, "The Education of Religious Children: Families, Communities and Constitutions" (1999) 47(3) *Buffalo Law Review* 1343 **[Van Praagh, "Education of Religious Children"]**; Van Arragon, Leo. *"We educate, they indoctrinate" Religion and the politics of togetherness in Ontario public education* (Ph.D. Thesis, Department of Classics and Religious Studies, Faculty of Arts, University of Ottawa, 2015).

ensure that children from all communities, including those from religious minorities, are included and not marginalized or subject to discrimination in public schools.

As with the entire doctoral experience, the choice of thesis topic has been a process in and of itself. My choice of research subject emerged as a result of overlapping factors, both professional and personal in nature. My professional interests occurred, in great part, due to a remarkable number of cases on this subject in the last decade in Canada and Europe, including kirpans in schools,[3] books about same-sex parents and school curriculum,[4] crucifixes in classrooms,[5] distribution of Bibles in schools,[6] dissemination of religious materials on school grounds,[7] requests for prayer space,[8] ethics and religious culture programs,[9] exemptions from religious education programs,[10] exclusion from school for wearing religious garments[11] and

[3] Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 SCR 256 **[Multani]**.
[4] Chamberlain v. Surrey School District No. 36, [2002] 4 SCR 710 **[Chamberlain]**.
[5] Lautsi v. Italy, no 30814/06 (18 march 2011) (GC) **[Lautsi]**.
[6] R.C. v. Ontario (Education), 2014 HRTO 999.
[7] Bonitto v. Halifax Regional School Board, 2014 NSSC 311; Bonitto v. Halifax Regional School Board, 2015 NSCA 80; Sean Bonitto v. Halifax Regional School Board, 2015 NSCA 80, leave to appeal to SCC refused, 36644 (February 19 2016).
[8] Amir & Nazar v. Webber Academy Foundation, 2015 AHRC 8.
[9] S.L. v. Commission scolaire des chênes, [2012] 1 SCR 235 **[Commission scolaire des chênes]**; Loyola v. Quebec (Attorney-General), 2015 SCC 12 **[Loyola]**. In Europe: *Zengin v. Turkey*, no. 1448/04, ECHR 2007-XI; *Folgerø and Others v. Norway* [GC], no. 15472/02, ECHR 2007-VIII.
[10] Erazo v. Dufferin-Peel Catholic District School Board, 2014 ONSC 2072.
[11] R (on the application of Begum) v Headteacher and Governors of Denbigh High School , [2007] 1 AC 100. In this case, a student was excluded from her school for wearing a jilbab, which contravened with school dress policy. It should be noted that the school dress code allowed for variations in school uniform, to better reflect their student population. A jilbab is described in the case as "a long coat-like garment which effectively concealed the shape of the female body and which was considered to represent stricter adherence to the tenets of the Muslim faith." (Begum, *supra*, 100E). Other cases have also challenged religious dress in schools in Europe. See, for example: *Dogru c. France,* no. 27058/05 (4 December 2008); *Kervanci c. France*, no. 31645/04 (4 December 2008). Notes Myriam Hunter-Henin, many claims were launched following the 2004 French law on ostensible religious symbols in schools before the European Court of Human Rights, but were found to be inadmissible: "Law, religion and the school" in Silvio Ferrari (ed.), *Routledge Handbookd of Law and Religion* (New York, Routledge, 2015) 259, at 266 (fn 39).

admission policies to religious schools.[12] In the final months of writing my thesis, the UN Special Rapporteur on Freedom of Religion or Belief released an interim report, recommending that further attention be placed on the child's right to freedom of religion in the setting of international law,[13] confirming my choice of subject and reiterating its continued relevance as a domain of study.

A genuine and overarching interest in this subject emerged from my prior research in the fields of law and religion in Canada.[14] One particular case, *A.C. v. Manitoba (Director of Child and Family Services)*,[15] caught my interest: at issue was whether a minor could refuse blood transfusions on the basis of her religious beliefs. While this case was first and foremost about a child's right to freedom of religion, the majority of the Supreme Court of Canada focused its analysis on her decision-making autonomy rather than her religious beliefs. Most apparent, however, was the lack of place – or voice – given to the minor in these proceedings, despite an argument submitted on age discrimination. The only vocal vestige that could be attributed to this minor during these protracted proceedings emerges from the advance medical directive that she had signed three months before the events arose that led to this embroiled legal battle.[16]

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[12] *R (on the application of E) v. The Governing Body of JFS and the Admissions Appeal Panel of JFS and others*, [2009] UKSC 15.

[13] *Interim report of the Special Rapporteur on freedom of religion or belief,* UNGA, 70th Sess., UN Doc A/70/286 (2015).

[14] This topic is briefly addressed in my master's thesis. See Dia Dabby, *Triangulation of Rights, Balancing of Interests: Exploring the Tensions between Freedom of Conscience and Freedom of Religion in Comparative Constitutional Law* (LLM Thesis, Université de Montréal Faculté de droit, 2010) [unpublished] pp. 98-100. A literature review of a child's freedom of religion is provided further on in this Introductory Chapter.

[15] A.C. v. Manitoba (Director of Child and Family Services), [2009] 2 SCR 181.

[16] Ibid*,* ¶ 159, 167 (McLachlin, C.J.). This directive read: "I am one of Jehovah's Witnesses, and I make this directive out of obedience to commands in the Bible, such as: "Keep abstaining … from blood." (Acts 15:28, 29)."

Yet the focus on children in health settings proved to be too narrow a focus for me, since it often revolved around a binary, life/death, and almost exclusively around Jehovah's Witnesses.[17] This binary created, in my mind, a very particular, potentially narrow and heavily medicalized legal narrative.[18] In pushing this subject further, I became more interested in the intersection between children and education – known as the other area serving as fertile grounds of discussion – and confrontation – between religion and children's rights.

Growing interest in the intersection between children and education against religion's backdrop also transpired, I believe, as a result of my literary readings,[19] as well as personal experiences. In regard to the latter, my thesis is influenced by my parents' stories about growing up Jewish in the 1950s and 1960s, my mother in Montreal and my father in Tehran, and their experiences of

[17] Recent cases involving Aboriginal children and health treatments for cancer signal a shift in this area. See, for example: *Hamilton Health Services Corporation v. D.H., P.L.J., Six Nations Of Grand River Child and Family Services Department and Brant Family and Children's Services* (OntCtJ, C287/14E). For a critique of this decision, see André Picard, "Treating a child's cancer is not an abuse", *Globe and Mail* (November 18 2014), online : http://www.theglobeandmail.com/globe-debate/treating-a-childs-cancer-is-not-an-abuse/article21614519/. This case invites further reflection on how children engage with their beliefs within medical and legal settings and is particularly emblematic because it represents the first time that a freedom of religion claim has been argued by Aboriginal litigant. Much has already been said on the difficulty of Aboriginal claims and freedom of religion. See, for example: Lori G. Beaman, "Aboriginal Spirituality and the Legal Construction of Freedom of Religion" in Lori G. Beaman (ed.), *Religion and Canadian Society: Traditions, Transitions, and Innovations* (Toronto, Canadian Scholars' Press Inc., 2006), 229 at 233-234; Ghislain Otis, "Revendications foncières, "autochtonité" et liberté de religion au Canada" (1999) 40 C. de D. 741, 764; Jean Leclair, "Le droit et le sacré ou la recherche d'un point d'appui absolu" in Jean-François Gaudreault-Desbiens (ed.), *Le Droit, La Religion et le « Raisonnable » : Le fait religieux entre monsime étatique et pluralisme juridique* (Montréal, Les Éditions Thémis, 2009), 475 at 481; John Borrows, "Living Law on a Living Earth: Religion, Law, and the Constitution" in John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), at 239-269.

[18] One exception to the aforementioned is Lori Beaman's remarkable contribution of the Bethany Hughes case. Bethany, a teenager, wished to refuse blood transfusions on the basis of her faith as a Jehovah's Witness, following her diagnosis with leukemia. Despite this, the court ordered that she undergo transfusions against her will. Beaman uses Bethany's story as a gateway to "[c]ontextualizing a discussion of religious freedom in the culture of fear and moral panics": see *Defining Harm: Religious Freedom and the Limits of the Law* (Vancouver, UBC Press, 2008), p. 5.

[19] Chaim Potok has been particularly influential in my reading of children's understanding of religious diversity through education. See Chaim Potok, *The Chosen* (Toronto, Random House Publishing Group, 1967) and Chaim Potok, *My Name is Asher Lev* (Toronto, Random House of Canada Limited, 1972, renewed 2000). See also Louis de Bernières, *Birds Without Wings* (Toronto, Vintage Canada Edition, 2005).

school, as well as my own. These stories inform not only my understanding of religion, but also, the legal and relational framing in which they occurred.[20]

My mother's family came to Canada from the four corners of Eastern Europe in the early 1920s, some to escape earlier pogroms which had touched my extended family, and others, who simply had had the foresight to leave while it was still an economically viable option. By the 1960s, most of Canada's Jews were found in either Montreal or Toronto. According to Harold Troper, these two cities differed greatly from each other, which colored how Jews – and other religious groups – engaged in relationships:

> Montreal, long characterized by lines of separation between linguistic and religious boundaries, remained a city of boundaries – territorial boundaries, boundaries of imagination, boundaries of language, and boundaries of possibility. Montreal's Jews lived very much within their geographic, linguistic, institutional, and mind space, at once part of the larger city yet in many ways separate and distinct from others with whom they shared the same urban complex. Toronto, by contrast, was far more fluid.[21]

This lack of fluidity has been remarked upon by other authors when speaking about Jews in Montreal, suggesting that they even constitute a "third solitude",[22] beyond English and French populations in Quebec, reinforcing the boundaries between communities of belonging.

My mother's family, like many others at the time, was considered observant, but not religious. In practice, this meant that her family kept kosher and observed the Jewish holidays. Yet subtle

[20] See Benjamin L. Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto, University of Toronto Press, 2015) for a persuasive account of, and challenges to, the storied relationship between law and religion in Canada. My personal stories should be distinguished from the adjudicative ones discussed in his book, since they can be understood as qualitatively different in nature.

[21] Harold Troper, *The Defining Decade: Identity, Politics and the Canadian Jewish Community in the 1960s* (Toronto, University of Toronto Press, 2010), p. 32.

[22] Morton Weinfeld, "Jewish Life in Montreal" in Ira Robinson (ed.), *Canada's Jews: in time, space and spirit* (Brighton, MA, Academic Studies, 2013), 152 at 154.

but substantive differences existed within her family structure as well: for example, her maternal grandparents observed the Sabbath pedantically, but her paternal grandparents much less so. At that time, only deeply religious children attended Jewish day schools in Montreal. My mother, then the eldest of three children, attended Barclay School, an elementary (primary K-7) school in Park Extension. My mother's family had migrated, like many others, from the Mile-End area in Montreal, to take advantage of newer housing and lower rents. Park Ex, as it is known, was considered a predominantly Jewish neighborhood in the post-World War II period.[23] At the opening of each school day, my mother, like all other students, was expected to recite the Lord's Prayer and sing accompanying hymns, since Barclay School was part of the Protestant school board of Greater Montreal (PSGBM). Yet she recounts an unspoken understanding between Jewish students attending Barclay, to mouth the words to the Lord's Prayer and hymns, and not actually speak or sing them.[24] This gesture, albeit accomplished without conversation, can be seen as an act of resilience or resistance in the face of majoritarian practices: it is, in other words, an illustration of children's agency and imagination. Despite this expectation to conform to what I refer to here as a 'protestant ethic' (or Christian religious practice), the school did take their significant minority population into account, since the PSBGM school calendars had all the Jewish holidays marked off as "JH" and administrators,

[23] A strong influx of Greek immigration occurred in the 1960-1970s. The composition of this neighborhood has now shifted to accommodate newer waves of immigrants, mostly of Caribbean, South-Asian and Pakistani origin. See Alexandra Ross, *Housing for New Immigrants in Park Extension, Montreal, Quebec: Current Conditions and Alternative Future Adaptations* (A thesis submitted to the Department of Geography and Environment, Mount Allison University, Canada, 2013), at pages 15-17. For a discussion of Parc Extension as 'neighborhood of integration' and 'founding neighborhood' for Greek immigrants and later immigrant groups, see Cécile Poirier, "Parc-Extension: le renouveau d'un quartier d'intégration à Montréal" (2006) 6(2) *Diversité urbaine* 51-68 (it should be noted that the author does not refer in any way to the Jewish population that inhabited Parc Extension).

[24] This is to say nothing of the Protestant children attending the school who may have also chosen to remain silent during this time. Thanks to Lori Beaman for bringing this important point to my attention.

teachers and students alike did not expect the Jewish children to show up on those days. My mother was considered, for all intents and purposes of the school board, an "honorary Protestant",[25] yet very much a Jew.[26] Anecdotally – and yet, without contradiction – she recalls participating in Christmas pageants at the school and also celebrating Christmas morning with her Protestant friend.

My father's story is that of an immigrant to Canada. My father's family were entrenched Baghdadi Jews until 1948, when they left Iraq for Tehran, as a result of ethnic backlash and the creation of the state of Israel. Indeed, although my father's family left Iraq shortly before the exodus, one author describes the mass departures in the following way:

> [b]etween 1950 and 1951, some 120,000 Jews—approximately 90 percent of the Iraqi Jewish community—left for Israel and the West in the whole-scale emigration the emigrants referred to as the tasqiî.[27]

My father's family was part of this mass wave of emigration, and this exodus colored their everyday lives. My grandparents grew up speaking French and English, on top of Arabic and Hebrew, and then Farsi. My grandfather was educated in a religious Jewish school in Bagdad, where students learned mainly prayers and services by rote. He had memorized everything and could recite without looking at a text, a skill he retained until his death. My grandmother, on the other hand, although culturally Jewish, was unobservant and agnostic, and attended the

[25] On this point, see Roderick MacLeod & Mary Anne Poutanen, *Meeting of the People: School Boards and Protestant Communities in Quebec* (Montreal, McGill-Queen's University Press, 2004), esp. chapter 7. Most recently, see David Fraser, *Honorary Protestants: The Jewish School Question in Montreal, 1867-1997* (Toronto, University of Toronto Press, 2015).

[26] This echoes back to the *Act to amend the law concerning education with respect to persons professing the Jewish religion* (1903, 3 Edw. VII, c. 16). See also *Reference in re Educational System in Island of Montreal / Hirsch v. Protestant Board of School Commrs.*, [1926] SCR 246; *Reference in re Educational System in Island of Montreal / Hirsch v. Protestant Board of School Commrs.* [1928] AC 200).

[27] Lital Levy, "Literary Representations of Jewish Baghdad" (2006) 26(1-2) *Prooftexts* 163, at 167.

Alliance Française in Baghdad, like her mother before her. Both my grandparents came from kosher households but did not keep a kosher home by the time they settled down in Tehran in the late 1940s.

My father, a young polyglot, was enrolled in the Community School in Tehran. This school was run by American Presbyterian missionaries, attended by children of American ex-pats, foreign diplomats, journalists and a growing Baghdadi Jewish transplanted middle class. This "American School", as it was known, walked a fine line "between proselytizing Christianity and a broad secular identity that respects students who are Muslim, Jewish, Zoroastrian, Hindu or Sikh".[28] The school was closed on Fridays to respect the Muslim Sabbath, holding classes from Monday to Thursday, and then again on Saturday.[29] And although Tehran was abuzz with activity on Sunday, the Community School was closed to respect the Christian day of rest. Jews attending Community School were in a state of constant religious in-betweens. My father recalls pictures of Jesus and crucifixes hanging in each classroom; every school day began with a general assembly in prayer and hymns in the chapel. He was a member of the choir that put on a Christmas show of hymns every year; indeed, many choir members were Jewish but they joined voluntarily and enjoyed themselves, according to my father. In addition to academic courses (e.g., math, geography, history), all students had to enroll in Bible class (New Testament) and were given grades that *counted*, as he put it. My father notes that these latter classes were taken with a sense of humour and students argued incessantly with teachers about whether or

[28] Victor Dabby, "The Rise and Fall of Tehran's Community School", *Montreal Gazette* (September 24, 2006), online: http://www.canada.com/story.html?id=6de20285-1a10-4f76-a792-f01f9235fe5b.
[29] Ibid.

not Jesus was the Son of God. Even more striking, during my father's time at the school, no fellow student ever converted, despite the school's missionary ethic. Outside of the Community School, my father was enrolled in Jewish and Hebrew classes at his synagogue in Tehran; it was all very perfunctory, mainly to prepare him for his *bar mitzvah*. Although the classes were well attended, few students took them seriously, and were for the great majority, more interested in Western culture and looked to America for inspiration. Under the cover of darkness in early 1965, my father's family made their move to Canada, where my father finished up his high school education in Montreal. Following the Iranian Revolution in 1979, the Community School permanently closed its doors in Tehran in 1980.

Some might think that my parents' stories of school are merely anecdotal; indeed, they represent two amongst countless experiences of religious minorities navigating confessional school systems. In approaching these stories, however, I find comfort and resonance in the proposal that "the very idea of law must be autobiographical".[30] My school experiences also echo law's autobiographical approach: although I began in the public school system in Montreal, I did not continue my education there due to a student's repeated anti-Semitic behavior, unsanctioned by both his parents and school administrators at the time. As a result, I found a place in the lycée system – namely the international networks of schools that share the French national curriculum – like my paternal grandmother and great-grandmother before me. Although the lycée was undoubtedly Catholic in its roots, religion did not play a central role in the school and thus was very welcoming to all kinds of ethnic and religious minorities. Religious

[30] Roderick A. Macdonald & Martha-Marie Kleinhans, "What is a Critical Legal Pluralism?" (1997) 12 *Canadian Journal of Law and Society* 25 at 46.

education at the lycée reflected the provincial government's vision at the time, where students chose between catechism and moral education classes; moral education was populated by those who simply did not want to receive a course in religion, or who were part of another religious denomination.

Indeed, my parents' experiences deeply influenced my understanding of student experiences, including my own. These experiences also shape how and why I engage with this, as the subject of a dissertation in law. Neither of my parents' stories resulted in litigation; neither sought action nor redress via official or institutional mechanisms, nor felt the obligation to take legal action. My story resulted in a swift withdrawal from the public school system, but not litigation. In my parents' stories, accommodations (or 'understandings') were reached in non-official ways to ensure good functioning within the school system; my story reveals a lack of willingness on the part of authorities (both school and parental) to curb inappropriate and unbecoming social behavior.

My parents' stories, however, illuminate the difference in boundaries between Montreal and Tehran: whereas the former found order in meting out boundaries (language, religion, etc.), the latter (in the precise location of the Community School) found order in the challenging or melding of these same divisions. Taken in conjunction with my own story as well as the recent and remarkable court cases on religion in schools, I posit that the relationship between religion and education illustrates the significance that space can play in this discussion as well as how belonging is explained. In other words, the issues are as complex now as they were then:

schools refract how belonging is conceived, articulated and to some extent, managed. What is different, however, is perhaps the site of further inquiry, namely, my doctoral dissertation.

Within the framing of my doctoral research and my growing interest in this field of education and religion, I questioned how these 'identities' converged and how students and schools shifted to reflect, re-fashion and perhaps, reify, how belonging was conceived. In other words, through the prism of religious diversity, I became deeply interested in schools – and public schools in particular – as sites of law-making. Despite a wealth of case materials, three case studies are woven throughout my thesis as sites of deeper investigation for religious practice and religious education programs through the institutional space of schools. These case studies are also stories in their own right, a point I will return to later on in this introductory Chapter.

Hence, academic research and personal experiences converge within my thesis topic and my research interests: I endeavour to highlight these overlapping factors through the theoretical framework of my doctoral dissertation. This thesis can therefore be predominantly understood as arguing that adjudication fails to deal adequately with religious claims in the setting of public schools. It proposes that the institutional framing of schools provides a better lens through which to resolve these claims. In an effort to buttress using stories as my starting point, I provide a brief literature review on the child's right to freedom of religion. Although this subject will run throughout my thesis, its purpose here is to ground the reader in an initial appreciation of the intricacies and frictions that reside within this topic.

2. Literature Review

As intimated already, a child's right to freedom of religion poses complex challenges, in both its articulation and its implementation. The noted case law,[31] my parents' stories, along with mine, underscore the delicate nature of a right as contentious as the one of freedom of religion when combined with education. As such, this section does not seek to be prescriptive in nature, but rather, provide an overview of how a child's right to freedom of religion has been addressed in the academic scholarship. Although there has been a sustained and scholarly interest in the intersection of children, law, and religion in the Canadian context (as addressed below), this thesis argues that no one has yet focused on exploring children's discourses within cases of freedom of religion, which is crucial to understanding how the legal story that is then recounted. This involves examining both how children are talked about, but also, how children talk in the context of these cases.

In Canada, although children are recognized as rights holders,[32] the Supreme Court of Canada has also limited their rights in many contexts, designating them as a 'vulnerable or disadvantaged group' before the law.[33] The latter context provides a place for third parties to

[31] *Supra* notes 3-12, 15 & 17.

[32] *B.(R.)* v. *Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, ¶ 217.

[33] *Canadian Foundation for Children, Youth and the Law* v. *Canada (A-G)*, [2004] 1 SCR 76, ¶ 53, 56. On age differentiation and age-based distinctions, see: *Gosselin* v. *Québec (A-G)*, [2002] 2 SCR 429, ¶ 31-33 (McLachlin C.J., majority), ¶ 227 (Bastarache J., dissenting). On age discrimination and children, see Claire Breen, *Age Discrimination and Children's Rights: Ensuring Equality and Acknowledging Difference* (Leiden, Martinus Nijhoff Publishers, 2006). In light of a recent Supreme Court case, Nicholas Bala has coined the term 'constitutionalization of adolescence', to refer to an alternative presumption of fundamental justice: see Nicholas Bala, "R v. B. (D.): The Constitutionalization of Adolescence" (2009) 47 *SCLR* (2d) 211. A rejoinder to this discussion can be found in Cheryl Milne, "The Differential Treatment of Adolescents as a Principle of Fundamental Justice: An Analysis of R. v. B. (D.) and C. (A.) v. Manitoba" (2009) 47 *SCLR* (2d) 235 **[Milne, "The Differential Treatment"]**.

protect the children's rights, carving out a place for both parents and the State in these claims. Indeed, this distinction between rights bearers and future rights holders reflects the foundational challenge in children's rights discourses between 'will theory' and 'interest theory'[34]. As noted by one author, "[f]or will theory what matters is whether children have the will of the choice to enforce or waive their rights […] interest theory proposes that a right is an interest that is deemed worthy of moral or legal protection."[35] Put differently, whereas the former relies on means (implementation), the latter depends on ends ('recognition'[36]). Yet the oppositional stance between these theories also represents a source of contestation, as underscored by one author, who suggests that these theories are interdependent and thus, ultimately, both "fail as accounts of children's rights."[37] This categorization can be understood as reflecting the distinction between children's legal rights and moral rights, where the latter could be understood as the protection of their future 'fundamental interests'.[38]

[34] For an excellent review of 'interest theory' and 'will theory' with regard to children's rights, see Sylvie Langlaude, *The Rights of the Child to Religious Freedom in International Law* (Leiden, Martinus Nijhoff Publishers, 2007), 37-45. Langlaude completes her typology of children's theories of rights with a third category, which she designates as "non-rights based theories on the legal position of children", which she associates to the writings of Michael Freeman, Onora O'Neill and Neil Campbell. This final category reveals itself to be less useful than the will and choice theories, since in Langlaude's words, "[a]dopting a non-rights based theory would make it useless to argue in favor or a right of the child to religious freedom." (at 40)

[35] Langlaude, *supra* note 34, 43.

[36] Neil MacCormick, *Legal Right and Social Democracy* (Oxford, Clarendon Press, 1982), p. 154 at 163, as cited in Langlaude, *supra* note 34, 43.

[37] Lucinda Ferguson, "Not merely rights for children but children's rights: The theory gap and the assumption of the importance of children's rights" in Michael Freeman (ed.), *The Future of Children's Rights* (Leiden, Brill Nijhoff, 2014), p. 50 at 51.

[38] See Harry Brighouse, "What Rights (If Any)", in David Archard & Colin Macleod (eds.), *The Moral and Political Status of Children* (Oxford, OUP, 2002), pp. 31 at 52, arguing that "children's agency interests are structured quite differently from those of adults. […] But the language of agency rights, in contrast with that of welfare rights, does not usually illuminate what children need." For a more supportive view of children's moral rights, see James G. Dwyer, *Relationship Rights for Children* (Cambridge, Cambridge University Press, 2006), p. 206; David Archard in *Children: Rights and Childhood* (2nd ed., London, Routledge, 2004), summarises children's moral rights as being "possessed and exercised by children if, according to the will theory, they can make choices or, according to the interest theory, they have interests of sufficient importance." (p. 56)

Freedom of religion reflects the very challenge of these theoretical poles – between will and interest theory – since it brings to the fore the question of whether religious rights should be exercised by and for a minor, or rather, whether they should be understood as part and parcel of a parent's right to educate their child in accordance with their religious beliefs, and in line with their communities of faith. Religious rights underscore, therefore, the push and pull between autonomy and dependence. As such, freedom of religion has been portrayed as constituting a "right to an open future"[39] by one author, who posits that it as a right that the child can avail herself of when the age of majority has been attained – in the meantime, however, this right is to be considered a "right-in-trust".[40] Yet freedom of religion as a child's moral right is not a unanimously held position in the literature: others have argued that autonomy is necessary for children to be free to seek (and find) a spiritual home.[41] Another critique of the notion of "rights in trust", is that it can lead to significant questions of jurisdiction, notably in terms of *who* can claim legitimate authority in representing a child's wishes with regard to freedom of religion.[42] Critiques both for and against a child's right to freedom of religion highlight the actors involved in this decision-making process, including: the child, the parents, and the State.

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[39] Joel C. Feinberg, "The Child's Right to an Open Future" in Michael D.A. Freeman (ed.), *Children's Rights, Volume 1* (Aldershot, Ashgate Dartmouth, 2004), 213-242 **[Feinberg, "The Child's Right to an Open Future"]**. See also James Dwyer's argument, in the American context, of the State as holding a fiduciary interest: James G. Dwyer, *Relationship Rights for Children* (Cambridge, Cambridge University Press, 2006), at page 192. Feinberg's argument freedom of religion as a moral right can be contrasted with Jeffrey Shulman argument, at note 41.

[40] Feinberg, "The Child's Right to an Open Future", *supra* note 39, 215.

[41] Jeffrey Shulman, "Who Owns the Soul of the Child?: An Essay on Religious Parenting Rights and the Enfranchisement of the Child" (2012) 6 *Charleston L. Rev.* 101, 108 **[Shulman, "Who Owns the Soul"]**. See also pages 117-118, 135-136, 153-156.

[42] Within the American context, Martha Albertson Fineman argues that when the State and parents are brought into discussions about the education of children, attention often gets diverted away from the latter: see Martha Alberston Fineman, "Taking Children's Interests Seriously" in Martha Albertson Fineman & Karen Worthington (eds.), *What is Right for Children? The Competing Paradigms of Religion and Human Rights* (Farnham, Ashgate, 2009), pp. 229-241.

Indeed, a child's right to freedom of religion has been recognized internationally through the *UN Convention on the Rights of the Child (UNCRC).*[43] This right, along with the others contained in the *UNCRC* are guided by the twin principles of the child's best interest (article 3) and their right of participation (article 12). However, the right to freedom of religion has elicited various reservations by signatory countries.[44] While it is acknowledged that the adoption of the *UNCRC* is not at the origin of the debate on whether a child has a right to religious freedom,[45] it underscores the very issues that this literature review addresses. These include: whether a child can have the right to choice and the potential effect of the presence of a State religion; whether parents (or legal guardians) are recognized as the legitimate source of authority in providing religious direction to the child and the subsequent effect on the bond of belonging; and finally,

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[43] *United Nations Convention on the Rights of the Child*, Nov. 20 1989, 1577 U.N.T.S. 3, art. 14 [*UNCRC*]:

> 1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
>
> 2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

[44] See United Nations Treaty Collection, Database, Chapter IV Human Rights, UN Convention on the Rights of Child, online: http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf. Reservations on the choice component of article 14 UNCRC were emitted by: Algeria, Bangladesh, Iraq, Maldives, Morocco, Oman, Syria, and the United Arab Emirates. Other countries included an interpretive aspect to article 14 UNCRC, such as: Belgium, Holy See, and the Netherlands. The United States of America and Sudan are the only non-signatories of the UNCRC. Article 5 UNCRC also safeguards the parents or legal guardians' jurisdiction over the "appropriate direction and guidance in the exercise of the child of the rights recognized in the present Convention": see article 5 UNCRC, *supra* note 43 (this should be understood in conjunction with article 30 UNCRC, which safeguards the rights of children of minority/indigenous groups "to learn about and practice their own culture, language and religion": see article 30 UNCRC, *supra* note 43). For a comprehensive discussion of the evolution of the UNCRC, including the *travaux préparatoires*, see Langlaude, *supra* note 34, at pages 99-152. On the scope of Article 14 UNCRC, see Eva Brems, *A Commentary on the United Nations Convention on the Rights of the Child: Article 14. The Right to Freedom of Thought, Conscience and Religion* (Leiden, Martinus Nijhoff Publishers, 2006).

[45] The right to freedom of religion is protected at other levels as well: the *International Covenant on Civil and Political Rights* (1966), G.A. res. 2200A (XXI) (16 December 1966) at article 18. At the supranational level, article 9 of the *European Convention on Human Rights* (Rome, 4.XI.1950) and article 2 of the Protocol to the *Convention for the Protection of Human Rights and Fundamental Freedoms* (Paris, 20.III.1952).

whether State-sanctioned limits can be imposed on and lawfully perceived when curbing the child's freedom to manifest his/her religion and religious beliefs. Within the sphere of international law, it appears that the multiplicity of documents available to buttress a child's right to religious freedom can also create chaos in its socio-legal articulation. Others instead have criticized international law's protection of the parents' right to freedom of religion over that of their children:

> [i]nternational law has, for a long time, protected religious freedom and religious choice as a right of the family, rather than a right of the child. It was a right of the parents, seen as agents of their religious community, which was upheld against the state. Even today, international law prevaricates between recognizing a right of the child and protecting a right of the parents over the child's religious education.[46]

Indeed, while some have addressed the complexity of the relationship between a child and their right to freedom of religion in the context of its problematization,[47] few authors have elucidated theoretical models to address this complex right. One illustration of the latter is Langlaude's systematic investigation of how the Human Rights Committee, the Committee on the Rights of the Child, the UN Special Rapporteur on Freedom of Religion and Belief and the European Court of Human Rights understand the right of the child to religious freedom in international law. Langlaude's theoretical model suggests that:

> "the right of the child to religious freedom is the right of every child to be unhindered in their growth as an independent autonomous actor in the matrix of parents, religious community and society. This means that the child has a right to religious freedom, not for the sake of it, but in order to achieve something good, i.e. to be allowed to flourish as a religious being. This also reflects the fact that the child's right to

[46] Anat Scolnicov, *The Right to Religious Freedom in International Law: Between Group Rights and Individual Rights* (London, Routledge, 2011), at 185. Shauna Van Praagh, "Faith, Belonging and the Protection of "Our" Children" (1999) 17 *W.Y.B.A.J.* 154 [**Van Praagh, ""Our Children"**].

[47] See, for example: Ursula Kilkelly, "The Child's Right to Religious Freedom in International Law" in Martha Albertson Fineman & Karen Worthington (eds.), *What is Right for Children? The Competing Paradigms of Religion and Human Rights* (Farnham, Ashgate, 2009), 243-268 (arguing for effective reform and further clarification of article 14 UNCRC via a General Comment).

> religious freedom has a different basis from the adult's right to religious freedom – it is based on a relationship with parents and religious community, rather than being based on autonomy."[48]

Langlaude presents a model that takes into account the uniqueness of children in this religion paradigm. Yet she argues that the above-mentioned bodies have constructed an "impoverished" understanding of the right of the child on the one hand, and have declined the important the role that relationships play in children's lives, on the other. [49]

Within the Canadian context, the religious community has emerged as an important force when a child's right to freedom of religion is at stake; although intertwined with the parents' right to exercise control over their children's religious upbringing,[50] the two should not be understood as synonymous. A basic question remains as to what age a child is able to exert or assert their right to freedom of religion.[51] According to some, this leads to "a number of more complicated questions on the nature that freedom, and the role and importance of children and communities."[52] Others contend "the youngest members of any religious community have a

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[48] Sylvie Langlaude, "Children and Religion under Article 14 UNCRC: A Critical Analysis" (2008) 16 *Int'l J. Children's R.* 475, 480 [**Langlaude, "Children and Religion"**].

[49] Langlaude, *supra* note 34, 246-255. Langlaude draws particular attention to the Human Rights Committee with regard to the importance of relationships. See also Langlaude, "Children and Religion", *supra* note 48, 502: "Finally, the Committee almost never reflects the relationship between child, parents and religious community, but treats children as small adults and autonomous individual believers."

[50] The State also has a legitimate interest in a child's religious education. See, for example: *R. v. Jones*, [1986] 2 SCR 284; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315; *Chamberlain*, *supra* note 4; *Adler v. Ontario*, [1996] 3 SCR 609; *Zylberberg v. Sudbury Board of Education*, 1988 CanLII 189 (ON CA); *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)* (Ont. C.A.), 1990 CanLII 6881 (ON CA); *Commission scolaire des chênes*, *supra* note 9.

[51] This question is also raised by: Mahmud Jamal, "Recent Developments in Freedom of Religion" (2009) 27 N.J.C.L. 253, at 260; Shauna Van Praagh, "Adolescence, autonomy and Harry Potter: the child as the decision-maker" (2005) 1(4) *Int'l J.L.C.* 335, at 369. Interestingly, Jamal does not raise the issue of age in his review of Multani: see Mahmud Jamal, "Freedom of Religion in the Supreme Court: Some Lessons from *Multani*" (2006/2007) 21 *N.J.C.L.* 291. A similar comment can also be made regarding José Woehrling, « La place de la religion dans les écoles publiques du Québec » (2007) 41 *R.J.T.* 651 **[Woehrling, « La place de la religion »]**.

[52] Cheryl Milne, "Religious Freedom: At What Age?" (2008/2009) 25 *N.J.C.L.* 71, 79-80**.**

particular relationship to that community."[53] In light of recent Supreme Court of Canada decisions, communities could have a bigger role to play in this discussion.[54] A standard of deference is not advocated here,[55] but rather, a contextual call: the traditional triad between the child, the parents and the State must be enlarged to take the religious community into account. While these positions are particularly relevant for younger children, the boundaries between vulnerability and maturity (ability to consent) pose other arguments. Lori Beaman has termed this "margins of legal possibility": in her view, "it reveals patterns of sedimentation that are key to gaining insight into the minority (abnormal)/majority (normal) continuum."[56] This position has been recently echoed by another author, cautioning against the "classification of adolescents as "other""[57]. Within the Canadian context, it is clear that children's positioning in this intricate debate over religion remains far from resolved.[58]

This brief survey of the literature on a child's right to freedom of religion suggests a relationship of variable geometry between the child, the parents and the State. It has been suggested by some authors that the broader religious community needs to officially be brought into this discussion;[59] as it will be discussed later on, others have instead proposed that within the

[53] Van Praagh, ""Our Children", *supra* note 46, 175.
[54] On the role of communities, see most recently: *Loyola*, *supra* note 9; *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 SCR 3 **[*Mouvement laïque québécois***].
[55] Unlike Joan Small, "Parents and Children: Welfare, Liberty and *Charter Rights*" (2005) 4 *J.L. & Equal.* 103.
[56] Lori G. Beaman, *Defining Harm: Religious Freedom and the Limits of the Law* (Vancouver, UBC Press, 2008), 120.
[57] Milne, "The Differential Treatment", *supra* note 33, 251.
[58] As illustrated by the Supreme Court of Canada in *S.L.* v. *Commission scolaire des Chênes*, [2012] 1 SCR 235, at ¶ 33, where the door remains open to future challenges to how the Ethics and Religion Course is *taught* to children. This challenge was taken up in *Loyola*, decided in 2015.
[59] *Supra* note 46.

context of education, teachers should be added as a necessary pole in this relationship.[60] The theoretical underpinnings that accompany the discussion on children's religious rights reveal a nuanced picture on how we attribute these rights, as a society. Moreover, it also engages with the question of *when – and at what age* – these religious rights can be exercised. This latter point will be further explored within the context of the case studies contained in this thesis. Finally, the conjunction of international and domestic discussions on a child's right to freedom of religion evinces the role that the State plays in terms of constitutional framing, insofar as the recognition of a State religion, the acknowledgment of historical relationships (through denominational preferences, for instance), as well as in which circumstances religious rights comes into play. The following section of this Introductory Chapter seeks to shed light on how children's voices are heard – or not – within the context of legal disputes on religious diversity in public schools.

3. Methodology

I draw on legal stories to bring context[61] to how children are discussed, spoken about and spoken to, as well as how they respond, when faced with questions about their community of belonging through the context of schools. My thesis is therefore interested in stories that are mediated through law and seeks to unpack the narratives that are behind the legal categories.

[60] See, on this subject: Paul T. Clarke, *Understanding Curricular Control: Rights, Conflicts, Public Education, and the Charter* (London, ON, The Althouse Press, 2013).

[61] Colleen Sheppard & Sarah Westphal, "Narratives, Law and the Relational Context: Exploring Stories of Violence in Young Women's Lives" (2000) 15(2) *Wisconsin Women's Law Journal* 335, 347-351 **[Sheppard & Westphal, "Narratives, Law"]**. On relational theory more broadly, I borrow from Jennifer Nedelsky (see notes 131, 136), Martha Minow (see note 72) and well as Colleen Sheppard (see notes 556, 582 as well as "Children's Rights to Equality: Protection versus Paternalism" (1992) 1 *Annals Health L.* 197).

Throughout my dissertation, I speak of both 'stories' and 'legal storytelling': although each of these terms will be more thoroughly unpacked in Chapter 2, an initial distinction is provided here, to guide the reader in the use of these terms. 'Stories' speaks the recounting of an event, which can include narratives.[62] Telling a story, therefore, or the act of storytelling, engages the teller of the tale to choose their facts, their and perspective, which can consequently, shift the perspective of the tale. In other words, relevance is the filter for stories. This takes on a different qualitative dimension in law's story (or stories), through legal storytelling. 'Legal storytelling' refers to the litigation stories told in court, relying on the evidentiary record established by and for the court, encompassing the stories told by the parties, either directly or indirectly via their lawyers, as well as the judge's rendering of the stories, not to mention expert reports and testimony, as well as court transcripts.[63] The act of recounting an experience through this lens also underscores its relational aspect, where "[a]ttentiveness to the relational context reveals how relations of trust, belief, acceptance and equality allow the narrative voice to flourish, and how relations of coercion, inequality, distrust, and skepticism or silence can restrict stories."[64]

This thesis does not purport to seek out only individual discourses by children, since this can present a false image of how these relationships and exchanges occur and also, construct a distorted sense of agency. Rather, I build on children's narratives to illustrate the importance of relationships, since it enables research from within the existing system, borrowing from

[62] Sheppard & Westphal, "Narratives, Law", *supra* note 61.
[63] See Appendix 1 of this Thesis for Supreme Court of Canada transcript requests.
[64] Sheppard & Westphal, "Narratives, Law", *supra* note 61, 365.

Jennifer Nedelsky, instead of trying to overhaul it.[65] I borrow from these experiences of learning and therefore, build on the relationship not only between writer and reader,[66] but also, between teacher and student. Finally, I underscore that 'voice' is not simply about speaking vocally:[67] this suggests a reorientation in how we appreciate one's voice, as well as the space it occupies, and therefore, how we hear one's contribution.

Within the framing of my thesis, children are often understood as a 'fragile' or excluded group,[68] particularly exposed within the legal setting. Exploring how children are 'talked about' within cases of freedom of religion is therefore crucial to understanding the legal story that is then told. Moreover, stories about difference or exclusion can arise in different media: lessons about legal storytelling can be drawn from actual books,[69] paintings[70] or types of narrative.[71] Within the framing of my dissertation, this technique allows a glimpse into children's lives from

[65] See Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford, Oxford University Press, 2011), p. 236.

[66] On the relationship between writer and reader, see Sheppard & Westphal, "Narratives, Law", *supra* note 61, 344-346.

[67] This shift from visual cues to vocal ones is also addressed by Desmond Manderson, who suggests "the changing paradigms of our age involve a movement from the visual to the aural, which is itself a movement from monism to pluralism." See Desmond Manderson, *Songs without Music: Aesthetic Dimensions of Law and Justice* (Berkeley, University of California Press, 2000), p. 184.

[68] *Canadian Foundation for Children, Youth and the Law* v. *Canada (A-G)*, [2004] 1 SCR 76, ¶ 53, 56.

[69] See, for example: Desmond Manderson, "From Hunger to Love: Myths of the Source, Interpretation and Constitution of Law in Children's Literature" (2003) 15 *Cardozo L.R.* 87.

[70] For instance, Martha Minow, in *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca, Cornell University Press, 1990), at 101, speaks about *pentimento*. This term is employed by art restorers to refer to the process of a canvas having been used for more than one painting. More particularly, it speaks to the effect of the first painting showing through the second. Minow argues that this process acts as "reminders of the past in legal arguments". See also Kirsten Anker, "The Truth in Painting: Cultural Artifacts as Proof of Native Title" (2005) 9 *Law Text Culture* 91-124.

[71] On discourse analysis, see: Dorothy E. Smith, *Texts, Facts and Femininity* (London, Routledge, 1990); James Paul Gee & Michael Handford (eds.), *The Routledge Handbook of Discourse Analysis* (London, Routledge, 2012). On critical discourse analysis, see most recently: Norman Fairclough, 'Critical Discourse Analysis' in James Paul Gee & Michael Handford (eds.), *The Routledge Handbook of Discourse Analysis* (London, Routledge 2012), pp. 9-20. On law and language, see Michael Freeman & Fiona Smith (eds.), *Law and Language* (Oxford, Oxford University Press, 2013).

a different point of view, that of the storyteller. I employ legal narratives (or stories) here, as told by the parties to the Court in order to illustrate that children's voices are often excluded from the legal process when questions of freedom of religion arise. Moreover, despite a re-apportioning of power between the State and the parents in such cases, it is rare that children gain more place in law's arena. Indeed, as Martha Minow has argued, State intervention is always present, to some degree. She refers to this as 'latent power' and suggests that the State can therefore never truly be neutral, nor be an 'uninvolved' party.[72]

I ask the reader, therefore, to reflect upon the following three stories, as 'stories' here, but bearing in mind that they also represent legal cases and therefore, sites of legal storytelling.

- Consider first the case about a teacher who wants to bring in additional educational resources for kindergarten and pre-kindergarten students to share more inclusive stories about families.[73] Titles included *Belinda's Bouquet*, *Asha's Mums* and *One Dad, Two Dads, Brown Dad, Blue Dad*. The school board trustees chose to block these books because they did not reflect the well-being and best interests of children and their families and was not in line with their religious beliefs about familial relationships. The school board's decision was appealed to the court because it had overstepped its mandate and contravened the secular mission of schools.

[72] See Martha Minow, "Beyond State Intervention in the Family: For Baby Jane Doe" (1985) 18 U. Mich. J.L. Reform 933, 951-952. More broadly, Martha Minow and Mary Lyndon Shanley have argued for a reconfiguration of the family to reflect its dual role vis-à-vis its members and the State in "Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory" (1996) 11 *Hypatia* 4.
[73] Chamberlain, *supra* note 4.

- Contemplate now the case about a Sikh student who drops his kirpan, a ceremonial dagger, in his school courtyard.[74] The school board reached an understanding with the Sikh boy and his parents, about how he could carry his kirpan in school. The governing body of the school board, however, rejected the internal agreed-upon decision and suggested instead a symbolic kirpan made of a non-dangerous material; the council of commissioners of said school board confirmed this decision. The latter decisions were appealed to the court because they had substantially infringed with the student's right to freedom of religion.

- Finally, reflect upon the story of a student who wishes to be exempt from an ethics and religious culture program.[75] This program, mandatory in all schools, sought to present one course to all students, irrespective of their (ir)religious background. This vision of education clashed with the student and his parent's understanding and education of their Catholicity, which undergirds their appeal for exemption to the school board. The school board refused the exemption, paving the way for an appeal before the courts.

Indeed, although all three of these stories differ in terms of litigious content – books, kirpan and school curriculum – crosscurrent themes are present. These include the need for encounters with diversity (and a diversity of encounters), the articulation of school boundaries (the expected behavior on school premises as opposed to outside of school grounds, for

[74] Multani, *supra* note 3.
[75] Commission scolaire des chênes, *supra* note 9.

example), the presence of some voices – and the exclusion of others, the internal decision making processes, and finally, the presence of an actionable cause before the courts. Taken as a whole, *Chamberlain*, *Multani* and *Commission scolaire des chênes* engender a *narrative continuum* on religion and public education in Canada.

In this section, I also address the case selection and methodological considerations that I employ in my dissertation; as such, I discuss the choices and structures that undergird my thesis. This thesis draws on qualitative research methods, which don't "depend on statistical quantification, but rather attempts to capture and categorize social phenomena and their meanings."[76] This form of analysis seeks to address the lack of children's voices in legal proceedings when questions of freedom of religion are at stake. In the following paragraphs – and drawing on Webley's terminology – I discuss how I have gathered the relevant data and then, how I proceeded in my analysis of these findings.

This thesis draws on the primary sources from selected cases, in order to establish the methodology that undergirds it. This is accomplished in two ways. First, this requires focusing on the evidentiary record, as established by the parties when the case first went to trial. Included in these oftentimes voluminous files are the original introductory or declaratory motions that led to adjudication. Other documents of interest contained in the evidentiary record include affidavits, transcripts of examinations and cross-examinations, court transcripts,

[76] Lisa Webley, "Qualitative Approaches to Empirical Legal Research" in Peter Cane & Hebert M. Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research* (Oxford, Oxford University Press, 2010), 926 at 929-930 **[Webley, "Qualitative Approaches"]**.

expert reports, newspaper articles, as well as appended or subsequent legal motions. These various documents can be understood as the basis for the qualitative document analysis undertaken in this thesis. Second, this dissertation engages in qualitative empirical legal research through chosen Canadian case studies. Three case studies anchor my legal analysis, as noted above, and are woven throughout this Thesis. Indeed, of the ninety or so cases that have argued for freedom of religion before the Supreme Court of Canada,[77] only one tenth of those involve children.[78] The parameters for case selection were further narrowed to only the scope of education, thus discounting health-related cases.[79] Of the remaining cases, I sought out cases that either focused on litigation due to a religious practice in an institutional space or a religious education program.[80] The rationale behind this case selection can be understood in triangulation of the relationship between the State, the parents and the children. The focus on public schools, rather than *all* schools (public and private), grounds my analysis in a shared understanding of school spaces. Private schools are not immune from either initiating or being on the receiving end of legal challenges rising from religious diversity and education; however, these schools proceed on a confessional framework, and thus are pronated towards the inclusion of religious instruction. The choice of public schools in this case selection insures a

[77] As addressed in Dia Dabby, "An Inevitable "Marriage March"? A Survey of the "arbiter of religious dogma" in Canadian Case Law" (2016) 45(2) *Studies in Religion* 127 **[Dabby, "If not "arbiter of religious dogma"]**.

[78] A.C. v. Manitoba (D.C.F.S.), [2009] 2 SCR 181; Adler v. Ontario, [1996] 3 SCR 609; B.(R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 SCR 315; Chamberlain v. Surrey School District No. 36, [2002] 4 SCR 710; Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 SCR 256; P. (D.) v. S. (C.), [1993] 4 SCR 141; R. v. Jones, [1986] 2 SCR 284; S.L. et al. v. Commission scolaire des Chênes, [2012] 1 SCR 235; Young v. Young, [1993] 4 SCR 3 **[*Young v. Young*]**. See also Lori Beaman and others for a discussion of cases on religion and education in Canada: Lori Beaman, Lauren L. Forbes & Christine L. Cusack, "Law's Entanglements: Resolving Questions of Religion and Education" in Lori G. Beaman & Leo Van Arragon (eds.), *Whose Religion? Issues in Religion and Education* (Leiden, Brill, 2015), pp. 156-182.

[79] A.C., *supra* note 15; *B.(R.)* v. *Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315.

[80] Adler v. Ontario, [1996] 3 SCR 609 is discounted as a possible case analysis here because it addressed the constitutionality of funding denominational schools in Ontario, rather than a specific religious practice or (religious) education programme.

commonality of actors and spaces for this legal analysis and for the broader scope of my thesis narrative. Three cases corresponded to the criteria previously identified. These include *Chamberlain*,[81] *Multani*,[82] and *Commission scolaire des chênes.*[83]

As readers will no doubt notice, there is a Québec-centeredness of litigated education cases in Canada.[84] Although this is further discussed in Chapter 1 of this thesis, it should be noted that the secularization of public schools in Québec, through constitutional amendment, has resulted in several (litigated) discussions about how and where religion should be – and taught – in these schools. Some could argue that the Québec cases on education and religion constitute 'outlier' cases – vestiges of French Quebecers' tenuous relationship with the Catholic Church – and thus, should be discounted from the wider conversation on this subject. Nevertheless, I suggest that the questions asked in the Québec cases are emblematic of broader discussions on this topic, as echoed within the European setting, and invite us to think about how educational spaces and curricula are shaped and their historical (religious) remnants, which remain

[81] Chamberlain, *supra* note 4.
[82] Multani, *supra* note 3.
[83] Commission scolaire des chênes, *supra* note 9.
[84] Setting aside the education and religion cases, one could also argue that there are a disproportionate number of litigated cases on freedom of religion from Quebec before the Supreme Court of Canada as well, including, but not limited to: *Syndicat Northcrest v. Amselem*, [2004] 2 SCR 551 **[*Amselem*]**; *Congrégation des témoins de Jéhovah de Saint-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 SCR 650; *Bruker v. Marcovitz*, [2007] 3 SCR 607 **[*Bruker*]**; *Mouvement laïque québécois*, *supra* note 54. During the corresponding timeframe, that an equivalent number of cases on freedom of religion were contested in the rest of the country before the Supreme Court of Canada: *A.C. v. Manitoba*, *supra* note 15; *Hutterian Brethren of Wilson Colony v. Alberta*, [2009] 2 SCR 567 **[*Hutterian Brethren of Wilson Colony*]**; *R. v. N.S.*, [2012] 3 SCR 726 **[*R. v. N.S.*]**; *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 SCR 467 **[*Whatcott*]**. The *Reference Re Same-Sex Marriage*, [2004] 3 SCR 698 can also be understood within this time frame as well.

embedded in the current day legal discourse. While the focus of my dissertation is primarily on Canadian law, comparative sources will be used, where pertinent.[85]

Obtaining the evidentiary record of a case is subject to many factors, including but not limited to: geographical distance, financial expense in obtaining the case materials as well as the time that has elapsed since the case originally went to trial.[86] After initial research, I found out that the evidentiary records in Chamberlain, Multani and Commission scolaire des chênes still existed, much to my excitement, but was no longer housed at the Supreme Court of Canada (usually, cases are returned to their 'last port of call' before the Supreme Court, i.e., the Appeal Court of that province). Over the course of 2013, I spent much time on the phone between the Supreme Court of Canada and the British Columbia Court of Appeal, not to mention many fruitless other avenues of investigation, of which I will spare the reader. From the Supreme Court of Canada records centre, I was able to obtain the transcripts of the hearings for Multani, Chamberlain and Commission scolaire des chênes.[87] This, in and of itself, represented a type of narrative, one that was more polished, but not perfect. The transcripts revealed deep questions by the judges and necessary clarifications by the lawyers defending their interests. In short, the Supreme Court transcripts represent a dialogue between 'distinguished' actors (Supreme Court

[85] Supra notes 9, 11-12.

[86] Case files are destroyed after a set number of years in the court archives or records section; this can vary according to the jurisdiction.

[87] See Appendix 1 for separate requests to the Supreme Court of Canada Registrar and Records Center. It should be noted that although I obtained the Supreme Court transcript for *Commission scolaire des chênes*, it is struck with a a publication ban, like lower courts. As such, the materials available are lesser than the other two cases; furthermore, the Supreme Court noted the paucity of evidence in Commission scolaire des chênes (*supra* note 9, ¶ 45).

justices and lawyers). From the lower courts, I was able to access the evidentiary records for the three cases.[88]

The primary cases (*Commission scolaire des chênes, Multani* and *Chamberlain*) can be considered as 'small scale' or sites of analysis, as seen through their evidentiary records. The social relations experienced within the particular setting of schools speak to the mutually constitutive relationship between law and space. This interrelated approach feeds into my theoretical framework and methodology, since, as noted recently,

> Legal geography is a stream of scholarship that takes the interconnections between law and spatiality, and especially their reciprocal construction, as core objects of inquiry. Legal geographers contend that in the world of lived social relations and experience, aspects of the social that are analytically identified as either legal or spatial are conjoined and co-constituted.[89]

Legal geography, therefore, invites us to engage consciously with the governance structures that make up our everyday lives.[90] With this framing in mind, I contend that schools, as sites of legal analysis, have not received adequate attention in this regard; a further aim of this thesis is to remedy this discussion. The focus on schools, as institutional structures, reinforces my methodological leaning on law and geography. As underscored by Irus Braverman,

[88] From the BC Court of Appeal, I was able to obtain the evidentiary record in full. This required me to physically go to Vancouver to parse through some 4000 pages of the legal record during a week in May 2014, given that the original Chamberlain case was from 1998 no materials had been digitized.

[89] Irus Braverman, Nicholas Blomley, David Delaney & Alexandre Kedar, "Introduction: Expanding the Spaces of Law" in Irus Braverman, Nicholas Blomley, David Delaney & Alexandre Kedar (eds.), *The Expanding Spaces of Law: A Timely Legal Geography* (Standford, Stanford University Press, 2014), at 1.

[90] Mariana Valverde, "Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory" (2009) 18 *Social & Legal Studies* 139, 142 **[Valverde, "Jurisdiction and Scale"]**; Davina Cooper, "Opening Up Ownership: Community Belonging, Belongings, and the Productive Life of Property" (2007) 32(3) *Law & Social Inquiry* 625.

> Legal geographers' familiarity with administrative structures and bureaucratic reasoning, as well as our affiliation and heightened access to professional experts and government schemes, uniquely situates us to perform what cultural anthropology has termed *studying-up, multi-sited, engaged*, and *para* ethnographies. We are familiar with legal language and are therefore "insiders" in the legal world. As a result, we are probably both better situated and better equipped than scholars in other disciplines to explore the intricacies of various administrative structures.[91]

Within this context and armed with my insights as an "insider", a contextual understanding of *Chamberlain, Multani* and *Commmission scolaire des chênes* offers better awareness of the spaces from which they emerge[92] and a deeper understanding of religious diversity within the context of public schools.

Litigation creates a record of what happened, regardless of the outcome. The story of this record is important in and of itself; it will be argued here that not enough attention has been given to the documents that not only make up the court file, but also create, to a great extent, our understanding and perception of these children, and their relationships. As argued by one author when speaking about documentary practices in organizations, "the bureaucratic uses of documents often assume that someone outside the organization will have a rather different relation to the subjects of their documents."[93] This requires paying close attention to how the legal record is shaped, by whom and according to what internal processes. Particular

[91] Irus Braverman, "Who's Afraid of Methodology? Advocating a Methodological Turn in Legal Geography" in Braverman *et al.*, *supra* note 89, 120 at 120-121. Braverman has argued elsewhere that "the pairing of law and geography is about the hidden stuff that lies behind the physical or spatial sites. " : see Irus Braverman, "Hidden in Plain View: Legal Geography from a Visual Perspective" (2011) 7 *Law, Culture and the Humanities* 173, 176.

[92] I borrow from Kim Lane Scheppele's understanding of constitutional ethnography to explain 'thick analysis', which she describes as "the study of the central legal elements of polities using methods that are capable of recovering the lived detail of the politico-legal landscape. […] its aim is to illuminate constitutional theory by reference to "thick" accounts (Geertz, 1971)." See Kim Lane Scheppele, "Constitutional Ethnography: An Introduction" (2004) 38 *Law and Society Review* 389, 395 & 401.

[93] Carol A. Heimer, "Conceiving Children: How Documents Support Case versus Biographical Analysis" in Annelise Riles (ed.), *Documents: Artefacts of Modern Knowledge* (Michigan, University of Michigan Press, 2006), p. 95 at 97.

consideration is given to how the particular sources are employed, quoted, obliquely referenced or ignored by the judge.

The analysis phase of this research was conducted using classic content analysis and discourse analysis. In this respect, I was guided by Ruth Finnegan's list of eight questions for assessing, and then analyzing the contribution of these sources.[94] Documents were coded in order to reflect themes, discussed in further detail in the later chapters of this thesis. Within the corpus of this thesis, particular attention is placed on how children have been crafted by social agents within these litigation cases on religion and education: this includes parents, school administrators, but also the children themselves as well as expert witnesses, not to mention the judges, lawyers and other intervenors. Discourse analysis is also employed to buttress my approach. As related by Webley, "[t]his form of analysis does not attempt to uncover objective facts. Indeed discourse analysts view discourse as socially constructed and as a way in which the speaker or writer can establish a particular version of the world."[95] The use of discourse analysis dovetails with a later section of this chapter on the importance of legal storytelling, or

[94] Webley addresses Finnegan's list of eight questions within her discussion on qualitative document analysis: see Webley, "Qualitative Approaches", *supra* note 76, p. 939. See Ruth Finnegan, "Using Documents" in Roger Sapsford & Victor Jupp (eds.), *Data Collection and Analysis* (London, Sage Publications Ltd., 1996), p. 138 at pp. 146-149:

(1) Has the researcher made use of the existing sources relevant and appropriate for his or her research topic?
(2) How far has the researcher taken account of any 'twisting' or selection of the facts in the sources used?
(3) What kind of selection has the researcher made in her or his use of the sources and on what principles?
(4) How far does a source which describes a particular incident or case reflect the general situation?
(5) Is the source concerned with recommendations, ideals or what ought to be done?
(6) How relevant is the context of the source?
(7) With statistical sources: what were the assumptions according to which the statistics were collected and presented?
(8) And finally, having taking all the previous factors into account, do you consider that the researcher has reached a reasonable interpretation of the meaning of the sources?

[95] Webley, "Qualitative Approaches", *supra* note 76, p. 942-943.

stories in law. I employ legal narratives (or stories) and analysis thereof, as conveyed by the parties to the Court in order to illustrate that children's voices are often excluded from the legal process when questions of freedom of religion arise. This occurs in part due to the very mechanisms germane to litigation, but also, even when children are perceived as the main actors in legal conflicts about religion, rarely are their narratives central to the litigation process. Relevant excerpts will be employed to illustrate children's experiences in my three case studies. Therefore, in explaining the research methods that will be employed within the framework of this thesis, particular attention is placed on the evidentiary record on a restrained number of cases; analysis will proceed through thematic surveys as well as discourse analysis, in order to develop how children are seen within legal questions about education and religion. In sum, narrative is understood as my theory and discourse analysis is acknowledged as my method. Both narrative theory and discourse analysis draw on the insights of legal geography to understand how school space and identity are shaped by law – and vice versa – within this context: this multi-layered approach to religious diversity in public schools fosters important links between informal law and the multiple sites of lawmaking that are germane to legal pluralism.

4. Chapter overviews

This thesis unfolds in three chapters. Chapter 1, entitled "Everyday Law in Schools: Understanding the Relational Web", sets out how education is understood through the multi-layered legal framework in Canada. Education's mandate as agent of socialization rests uneasily

with the subject of religion (education, instruction and beliefs). This chapter argues that schools constitute a distinct territory – and thus scale of analysis – and consequently, a specific space for legal analysis. Finally, this chapter turns to the particular case of deconfessionalization of schools in Québec as a prism through which to understand the interdependent relationship between secularization policies and the shaping or refashioning of social institutions, as a result. While this discussion illuminates the setting in Quebec in particular, it also underscores the interrelationship between religion and schools in the rest of Canada. In so doing, this chapter sets the stage for the following chapters that address children's belonging in the courts (Chapter 2) and in institutional spaces (Chapter 3).

In Chapter 2, "Children's Voices in Litigation about Religion and Education", I argue that legal storytelling can provide an important vehicle by which to discuss these nuanced stories about religion and education. I focus particularly on the litigation stories told in court, and thus rely on the evidentiary record, as briefly discussed in the methodology section of this General Thesis Introduction. I argue that the benefits of this approach are twofold: first, it invites a much more detailed examination of the various perspectives involved in any case than that which results from a more straightforward doctrinal analysis and second, it seeks to expose the false assumptions that law (and lawmakers) makes when addressing questions involving children, education and religion.

In Chapter 3, titled "Religious Diversity and the Complex Constitution and Administrative Governance of Schools", I argue that schools can be understood through the lens of what I call

'complex constitutions'. Drawing on the insights of legal pluralism and the importance of informal sites of law-making, the particular internal processes in schools can illuminate or conceal children's voices through their administrative make-up, organizational politics and through internal codes of conduct. I suggest that internal processes present the best opportunity for children's voices to be included in the decision-making process. Nevertheless, this institutional space requires that we be particularly attuned to how the organizational politics can shape how we see and engage with children in the face of religious rights claims.

5. Original contribution

In focusing on public school cases, my thesis establishes an important narrative thread about religious diversity and public schools in the Canadian constitutional setting. The selected case studies have a particular impact on *how* – and *what* – we understand belonging and tolerance to be in the realm of public education. A thick analysis of *Chamberlain, Multani* and *Commmission scolaire des chênes* highlights that each of the cases has had its own spotlight, to varying degrees: however, they have never been spoken about in dialogue with each other. This represents a novel contribution to the discussion of religious diversity and public schools in Canada to begin with. An attentive examination of these cases requires that we look as well at the backdrop, or their underbelly, in order to understand more fully the context in which litigation emerged. Such an approach also reveals the challenges of putting children at the forefront of these settings and the inadequacies of children's voices in the legal setting. Approaching these cases through a 'thick' or 'deep' analysis also forces us to slow down when

talking about religious diversity in schools and ask whether we are actually facing a "problem", "conflict" or "issue",[96] or whether it is a question of reframing the concerns in relational terms. As such, my thesis applies both narrative theory and relational analysis to my case studies. In addition, a law and geography lens is employed as part of my theoretical framing in order to understand the spaces in which *Chamberlain, Multani* and *Commmission scolaire des chênes* emerge. This last point speaks to the internal school decisions, which are integrally linked to conceptions of jurisdiction, conveying their perceived their sphere of exercise and administrative control, but also, how they understand diversity within their realm of existence. In producing a form of social relations on the school's territory, this becomes a fertile ground of territorial relationship;[97] drawing on its relational component, territoriality, according to David Delaney, is no longer considered an ""inert" thing and more as an aspect of various dimensions of social interest."[98] Schools constitute, in other words, "micro-territories of everyday life".[99] Within the context of education, John Dewey argued, "it [the school] gets a chance to be a miniature community, an embryonic society. This is the fundamental fact, and from this arise continuous and orderly sources of instruction."[100] A similar argument can be made for administrative agencies, such as school boards, where Roderick Macdonald has noted that "as the characterization of administrative agencies as governments in miniature suggests, each

[96] Lori Beaman has been critical of law's dominance over religion, questioning the adversarial framing of questions of religious diversity. See particularly: Lori G. Beaman, "Deep Equality as an Alternative to Accommodation and Tolerance" (2014) 27(2) *Nordic Journal of Religion and Society* 89 **[Beaman, "Deep Equality"]** and Lori G. Beaman, *'A Certain Fragility': Deep Equality in an Era of Tolerance and Accommodation* (forthcoming, 2016). I engage with her argument further in the context of Chapter 3.

[97] Andrea M. Brighenti, "On Territory as Relationship and Law as Territory" (2006) 21(1) *C.J.L.S.* 65, 76 **[Brighenti, "On Territory as Relationship"]**. See also Andrea Mubi Brighenti, "On Territorology: Towards a General Science of Territory" (2010) 27(1) *Theory, Culture & Society* 52, 57 **[Brighenti, "On Territorology"]**; Richard T. Ford, "Law's Territory (a History of Jurisdiction)" (1999) 97 Mich. L. Rev. 843, 855 **[Ford, "Law's Territory"]**.

[98] David Delaney, *Territory: A short introduction* (Oxford, Blackwell, 2005), 15.

[99] Ibid, 5 as cited in Berger, *supra* note 20, at 49.

[100] John Dewey, *The School and Society* (Chicago, University of Chicago Press, 1907), 32.

agency also disposes of a variety of governing instruments by which it achieves its goals."[101] Taken as a whole, the institutional space of schools, as well as their internal decisions, uncover how we talk about religion and children and their own responsibility within that decision-making process, applying insights from both legal pluralism and law and geography: such an approach makes a compelling case for schools as informal sites of law-making.[102]

Moreover, an analysis of education's domain in federal-provincial division of powers highlights its privileged position within our constitutional structure in Canada, predating even Confederation. Within this context, education's role has been instrumental in understanding the incremental shifts towards the de-coupling of Church from State, or put differently, the secularization of public institutions. A related strand of this thesis unveils a deeper discussion about belonging[103] and the place of the secular state and the importance of transmitting values through education.[104] This approach has been, to some extent, investigated in the field of

[101] Roderick A. Macdonald, "Legislation and Governance" in Willem J. Witteveen & Wibren van der Burg (eds.), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam, Amsterdam University Press, 1999), 279, 291 **[Macdonald, "Legislation and Governance"].**

[102] Desmond Manderson's "Interstices: New Work on Legal Spaces" (2005) 9 *Law, Text and Culture* 1 **[Manderson, "Interstices"]** is particularly apt at bridging the dialogue between legal pluralist theory and legal geography. He argues "[a]dmittedly, law understands itself as spatially delimited – the notion of a territory is a central if relatively modern aspect of law's claim to authority (see Blomley 1994, McVeigh 2005) – but at the same time it is assumed that it exerts the same and absolute force throughout its jurisdiction. Instead, *legal spaces* draws on the tradition of legal pluralism (Griffiths 1986, Falk Moore 1978, Merry 1988, 2000, Kleinhans & Macdonald 1997, Mellisaris 2004) in arguing that how and what law means is influenced by where it means. **Yet unlike much of the work of this tradition, legal spaces explores the diversity of legal norms and the disparateness of legal effects not just in terms of the social elements that constantly work to generate and differentiate it, but the physical elements too, and of course the social and the physical are likewise mutually implicated.**" (*supra,* at 1) [Bold emphasis added]

[103] See Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge University Press, 2001); Lori G. Beaman, "The will to religion: obligatory religious citizenship" (2013) 1 *Critical Research on Religion* 141; Shauna Van Praagh, "Identity's importance: Reflections on – and of – Diversity" (2001) 80 *Can. B. Rev.* 604.

[104] See, on this point, Shauna Van Praagh, "From secondary school to the Supreme Court of Canada and Back: Dancing the Tango of 'Ethics and Religious Culture'" (2012) *Fides et Libertas* 102 **[Van Praagh, "From secondary**

geographies of education,[105] but has not received, I believe, substantive legal attention. My insight into the legal intersection between religion, geography and education, as developed throughout this dissertation, could also foster stronger links with education studies.[106] My research on the governance of school boards and religious claims could be of particular interest to others working in law,[107] but who have, up until now focused on education law through the prism of teachers. The analysis of school board decisions, through qualitative analysis, represents a further strand of distinctive research conducted within my dissertation.

Most significantly, through extensive primary research of court documents and the litigation stories of these three key cases, I highlight the ways in which formal law and litigation fail to adequately engage with religious diversity in public schools, and more specifically, that children's voices are often absent within the context of these legal disputes. These findings led me to examine the potential for the voices of children to be heard in the everyday governance and decision-making processes of schools. Indeed, I propose that the public school administrative and pedagogical context reveals a much thicker discussion about how we deal with religious diversity. Focusing on school interactions highlights their governing rules and

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schools"]; Shauna Van Praagh, *Hijab et kirpan : une histoire de cape et d'épée* (Québec, Presses de l'Université Laval, 2006); Shauna Van Praagh, "The education of religious children: families, communities and constitutions" (1999) 47(3) *Buffalo L. Rev.* 1343; Lori G. Beaman, "Battles over symbols: The 'religion' of the minority versus the 'culture' of the majority" (2013) 28(1) *Journal of Law and Religion* 101.

[105] Damian Collins' work stands out here. See, for example: Damian Collins & Tara Coleman, "Social geographies of schooling: looking within, and beyond, school boundaries" (2008) 2(1) *Geography Compass* 281; Damian Collins, "Culture, religion and curriculum: lessons from the 'three books' controversy in Surrey, BC" (2006) 50(3) *The Canadian Geographer/Le géographe canadien* 342 **[Collins, "Culture, religion and curriculum"]**.

[106] E.g., Michael Manley-Casimir & Kirsten Manley- Casimir (eds.), *The Courts, the Charter, and the Schools: the impact of the Charter of Rights and Freedoms on Educational Policy and Practice 1982-2007* (Toronto, University of Toronto Press, 2009).

[107] Such as Wayne Mackay, Lyle Sutherland & Kimberley A. Pochini, *Teachers and the Law: Diverse Roles and New Challenges* (3rd ed., Toronto, Edmond Montgomery Publications, 2013).

relationships. Schools, therefore, provide a deeply relational approach to rule- and decision-making, built on the power of relationships. As such, we shouldn't be too quick to discount schools as sites where situations around religion can be addressed, though perhaps imperfectly. Schools as complex constitutions underscores that the very issue of diversity in schools needs to be taken more seriously: as such, educational institutional spaces are sites of decision-making rather than spaces of accommodation.

Chapter 1. Everyday Law in Schools: Understanding the Relational Web

Introduction

> "Education is at or near the heart of policies for fostering greater social integration, social mobility and national competitiveness and reducing social exclusion."[108]
>
> […]
>
> "L'école est la meilleure arme de la reconquête"[109]
>
> […]
>
> "When the school is on the reserve the child lives with its parents, who are savages; he is surrounded by savages, and though he may learn to read and write his habits, and training and mode of thought are Indian. He is simply a savage who can read and write. It has been strongly pressed on myself, as the head of the Department, that Indian children should be withdrawn as much as possible from the parental influence, and the only way to do that would be to put them in central training industrial schools where they will acquire the habits and modes of thought of white men."[110]

Education undoubtedly plays a transformative role in children's lives. Through schools, education is understood as a powerful tool of socialization; yet it is also, unreservedly, a tool of power, as seen most clearly in the Canadian context through the legitimation of residential

[108] Tim Butler & Chris Hamnett, "The geography of education: introduction" (2007) 44(7) Urban Studies 1161, 1161 **[Butler & Hamnett, "The geography of education"]**.

[109] « Terrorisme, laïcité, Ukraine : ce qu'il faut retenir de la conférence de Hollande » *Le Monde* (05.02.2015) online : http://www.lemonde.fr/politique/article/2015/02/05/hollande-annonce-une-initiative-franco-allemande-sur-l-ukraine_4570054_823448.html. François Hollande, President of France, speaking in the wake of the Charlie Hebdo and Hyper Cacher attacks in Paris in January 2015. He proposed that secularism be taught in schools as part of civic education, as a way to counter homegrown terrorism.

[110] John A. Macdonald, as cited in the Truth and Reconciliation Commission of Canada, *What we have learned: Principles of Truth and Reconciliation*, online : http://nctr.ca/assets/reports/Final%20Reports/Principles_English_Web.pdf, at 6.

schools.[111] It is therefore not surprising that there is a particular mission and mandate attached to education. And yet one can question education's mission when religion is introduced to this picture since religion can fundamentally alter our understanding of the values, lessons and structures that we impart to students, as well as the spaces in which this teaching is accomplished. I refer specifically to how religion – by which I mean religious education, religious instruction and a student's religious beliefs, amongst others – engages with the spaces that education occupies. This chapter endeavors to investigate law's understanding of religion and education in Canada.

This chapter will argue that schools constitute a distinct territory – and thus scale of analysis - and consequently, a specific space for legal analysis. Indeed, models of education diverge across Canada, since education falls under provincial jurisdiction[112] - but also, under the rules of the specific administrative bodies, such as school boards and council of commissioners, that govern their daily existence. While schools do not differ in a marked way from other administrative structures in terms of hierarchical composition, the impact that school boards

[111] Residential schools remain the most explicit form of control over minority groups in Canada. The Truth and Reconciliation Commission underscored this point in careful detail, through survivors' sharing their experiences of the system and the loss of their culture and language. Other religious minority groups have also been the subject of intense scrutiny and sanctioning in the realm of education, most notably the Doukhobors (''Spirit Wrestlers''), known as a sect of Russian dissenters and staunch pacifists, who emigrated largely to British Columbia at the turn of the twentieth century. The Doubkhobors challenged compulsory education, resulting in children being removed from the community and being placed in residential schools : see Gregory Cran, *Negotiating buck naked : Doukhobors, public policy, and conflict resolution* (Vancouver, UBC Press, 2006), at 15 and 94-95. More generally, see : William Janzen, *Limits on Liberty : the Experience of Mennonite, Hutterite and Doukhobor communities in Canada* (Toronto, University of Toronto Press, 1990).

[112] A striking exception to provincial control over education are the Aboriginal peoples, whose schooling was controlled by the residential schools established by the federal government as part of the great assimilation strategy : see Truth and Reconciliation Commission of Canada, *What we have learned: Principles of Truth and Reconciliation*, *supra* note 110; Janet Epp Buckingham, *Fight over God : A Legal and Political History of Religious Freedom in Canada* (Montreal, MQUP, 2014), at 33-34.

and other administrative bodies (such as council of commissioners, for instance) exert on students' existence is perhaps greater, since the school environment represents a vital pole of socialization[113] for children. The focus of this chapter is therefore on the universe of the school and unfolds in four sections. As expressed within the setting of primary and secondary schools, education is the agent of socialization *par excellence*. Education acts here as both the medium and the message, to paraphrase Marshall McLuhan.[114] In this chapter, I seek to engage in a deeper discussion of law's conversations about religion and education and relatedly, where children are located within this exploration. I posit at the outset that schools embody a singular mission of socialization (1). Second, I contend that schools constitute a distinct scale of analysis (2): I argue that a deeper understanding of space, justice and education is necessary, in order to comprehend their mutually constitutive relationship (2.1, 2.2, 2.3 & 2.4); and this requires exploring how education is addressed 'constitutionally' and 'jurisdictionally' (2.3.1, 2.3.2 & 2.3.3), with particular attention to how religion is treated, engaged with and taught, in the educational realm. I then propose that schools embody a specific space for legal analysis and suggest that particular attention has not been placed on the importance of space when proceeding to the legal analysis of these claims (3). These parts of the chapter therefore establish the mandate of the school as being profoundly transformative for the student and reveal what is considered distinctive about educational space. Having underlined the relationship that exists between the school and student, this chapter then probes a specific event within a particular school setting. I argue that this example – namely the deconfessionalization of schools in Québec – serves here as an illustration of the

[113] *Cf.* Robson, *supra* note 1.
[114] Marshall McLuhan, *Understanding Media: The Extensions of Man* (Boston, MIT Press Edition, 1994), p. 7.

interrelationship between space and secularization (4). Deconfessionalization refers to the process of 'disassociating' confessional learning from schools. This relationship points to the implications of secularization – as a form of social and political policy – on the secular and religious spaces that are reconfigured *en conséquence*. This section emphasizes the importance of context when analyzing the effects of governmental policies, and in particular, begins a deeper conversation about law's understanding of religion and education.

1. Education: a singular mission of socialization

From the age of five until at least sixteen, school is compulsory facet of life for children in most Western countries. By the time students attain the age of majority, or at least that of consent, they will have spent over two-thirds of their young lives in the school system. This represents a significant epoch in their existence, irrespective of whether their experiences in the school system have been positive or negative. Schools also act as a gateway to other forms of socialization, or "secondary socialization": one of its main goals is to produce children who are "socially competent", which occurs "when students embrace and achieve socially sanctioned goals […] (e.g., learning to share, participating in lessons, working in groups)".[115] In acquiring these new forms of socialization, children not only develop in their role as students, but can also translate these teachings to other facets of their life, thereby rendering them more engaged as individuals.

[115] Quotes in the sentence are from Robson, *supra* note 1, 161-162.

Schools can therefore be understood as "truly 'common' places".[116] It follows that schools, as "truly 'common' places", can resonate more broadly and serve as a rallying cry for the masses. This can be evidenced, for example, in Tony Blair's priority to the British following his election in 1997, which was, simply put, "Education, education, education".[117] This mantra spoke to the school as not only agent of socialization, but also of its territorial importance as an institutional site or space.[118] Perhaps more controversial was Progressive Conservative John Tory's argument that all faith schools should receive public funding during the 2007 Ontario provincial elections.[119] Indeed, while this point will be addressed in further detail later on in this chapter, education acts here as a vehicle of change for both the Blair and Tory examples, but their visions can seem at odds with education as a guarantor of future engagement in civil society. Whereas Blair used education as a vehicle to move the economy forward, Tory's proposed funding of all faith schools resulted in an unanticipated fractioning of the electorate, and ultimately, his loss in the elections. Therefore, although education is understood as a vehicle of

[116] Damian Collins & Tara Coleman, "Social Geographies of Education: Looking Within, and Beyond, School Boundaries" (2008) 2(1) Geography Compass 281, 281 **[Collins & Coleman, "Social Geographies of Education"]**.
[117] As referenced in Butler & Hamnett, "The geography of education", *supra* note 108.
[118] Claire Dwyer & Violetta Parutis, "'Faith in the system?' State-funded schools in England and the contested parameters of community cohesion" (2013) 38 Transactions of the Institute of British Geographers 267, 268 **[Dwyer & Parutis, "Faith in the system"]**; Chris Philo & Hester Parr, "Editorial: Institutional Geographies: Introductory Remarks" (2000) 31 Geoforum 513, 517 **[Philo & Parr, "Institutional Geographies"]**.
[119] Jennifer Wilson, "How provincial governments finance religious schools" *CBC News*, online: http://www.cbc.ca/ontariovotes2007/features/features-faith.html. See also Kerry Gillespie, "Tory would expand religious school funding" *The Star*, online: http://www.thestar.com/news/ontario/2007/07/23/tory_would_expand_religious_school_funding.html. The argument to end all funding to Catholic schools in Ontario in the 2014 provincial election also failed to gain traction: Jessica Prince & Grant Bishop, "A Principled Ontario Premier would end funding for Catholic Schools" *Globe and Mail*, online: http://www.theglobeandmail.com/globe-debate/a-principled-ontario-premier-would-end-funding-for-catholic-schools/article19071121/; CBC News, "Ontario Votes: Kathleen Wynne slams door on school board mergers", online: http://www.cbc.ca/news/canada/toronto/ontario-votes-2014/ontario-votes-kathleen-wynne-slams-door-on-school-board-mergers-1.2655636.

change, it is also a vehicle to be examined, *a proprio motu*.[120] This latter point suggests investigating education "in order to understand how social structures shape various aspects of education".[121]

Education as socialization, therefore, can take different paths. Its very site – or location – is also up for debate. In electing to focus my thesis on the formative years of school (i.e., primary and secondary schools), I propose that this period represents a narrative continuum, and this, for three reasons. First, as stated at the outset, schools are not only "common places" but also represent 'common' or 'unifying' experiences for students. This represents a singular moment in their lives: it is the only time that they will share a common curriculum or experience sitting for the same test. Second, the formative years of school also represent a period when the children are under the age of consent and/or majority, categorized as a 'vulnerable or disadvantaged group',[122] but paradoxically, also understood as rights-holders.[123] In this manner, the school system and their parents modulate, to a very large extent, their social and legal

[120] In speaking about *Commission scolaire des chênes* Benjamin L. Berger highlights that "all education is, in a sense, a project of indoctrination. Education is a means of inducing a child into a world. It is about culture, and to exploit the etymology of the term, the cultivation of a certain kind of subject.": "Religious Diversity, Education, and the "Crisis" in State Neutrality" (2014) 29(1) *Canadian Journal of Law and Society* 103, 114 **[Berger, "Religious Diversity, Education"]**. More broadly, Lotem Perry-Hazan notes that "[e]ducation policy is often intertwined with political ideology." See Lotem Perry-Hazan, "Court-led educational reform in political third rails: lessons from the litigation over ultra religious Jewish schools in Israel" (2015) 30(5) *Journal of Educational Policy* 713, 715 **[Perry-Hazan, "Court-led educational reform"]**.

[121] This is known as sociology of education. See Robson, *supra* note 1, 2.

[122] *Canadian Foundation for Children, Youth and the Law* v. *Canada (A-G)*, [2004] 1 SCR 76, ¶ 53, 56. On age differentiation and age-based distinctions, see: *Gosselin* v. *Québec (A-G)*, [2002] 2 SCR 429, ¶ 31-33 (McLachlin C.J., majority), ¶ 227 (Bastarache J., dissenting). On age discrimination and children, see Claire Breen, *Age Discrimination and Children's Rights: Ensuring Equality and Acknowledging Difference* (Leiden, Martinus Nijhoff Publishers, 2006). In light of a recent Supreme Court case, Nicholas Bala has coined the term 'constitutionalization of adolescence', to refer to an alternative presumption of fundamental justice: see Nicholas Bala, "R v. B. (D.): The Constitutionalization of Adolescence" (2009) 47 *SCLR* (2d) 211. A rejoinder to this discussion can be found in Cheryl Milne, "The Differential Treatment of Adolescents as a Principle of Fundamental Justice: An Analysis of R. v. B. (D.) and C. (A.) v. Manitoba" (2009) 47 *SCRL* (2d) 235 **[Milne, "The Differential Treatment"]**.

[123] *B.(R.)* v. *Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, ¶ 217.

agency. Third, and flowing from the previous reason, schools also hold the promise of forming not only the present students but also the future citizens. This also speaks to the 'nationalizing' effect of education and the presence of a political agenda or mandate behind education at primary and secondary schools. This strategy notably enables past governments to leave their mark on future generations (or at least until the education policy is changed). Within this context of socialization, therefore, primary and secondary school education can be understood as the source of a collective experience but also a shared vision of the nation-state. Building on education's singular mission of socialization, the following section will establish the school as a distinct scale of analysis.

2. Schools as a distinct scale of analysis

Introduction

SCHOOL **|skoōl|**
"ORIGIN Old English *scōl*, *scolu*, via Latin from Greek *skholē*
'leisure, philosophy, place where lectures are given,'
reinforced in Middle English by Old French *escole*."[124]

The etymology of 'school' suggests many layers of understanding. First, it reveals both a location (or site) and a purpose to the reader. A second reading of the origins of this word uncovers the initial relationship that exists between those giving the lecture and those receiving the information. A third reading proposes that a school is potentially an immoveable object, but more likely, an institution. A by-product of the latter also discloses its place as a cog in a greater

[124] "School" (Etymology), OED Online (third edition, March 2012): http://www.oed.com/view/Entry/172522?result=1&rskey=LNQXej&.

institutional machine. A final interpretation suggests a relationship between student and school that goes beyond the physical boundaries of the building.

The etymology of 'school' therefore rests on the importance of space, relationship, network and nation building. It comes as no surprise, then, that the study of schools has been undertaken across different disciplinary fields. One purpose of this section to provide an overview of the different branches of research into this domain, as well as establish what I mean here by the school as a distinct scale of analysis. To accomplish this, however, a broader lens must be employed in order to achieve the proper focus. This requires 'mapping' education's role and relationships, as addressed in 2.1, in order to understand the school as territory (2.2). The following part will address education's constitutional terrain in Canada (2.3, 2.3.1, 2.3.2 & 2.3.3), in order to set the stage for addressing the school as a specific space for legal analysis (3).

2.1 Mapping education's role and relationships

> "laws are literally maps. […]
> Maps distort reality in order to establish orientation;
> poems distort reality to establish originality;
> and laws distort reality in order to establish exclusivity."[125]

The previous section proposed that schools act as a form of socialization in children's lives. This section will explore the relationships that exist within education's spaces and places.

[125] Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law Globalization, and Emancipation* (2nd ed., UK, Butterworths LexisNexis, 2002), p. 419.

Boaventura de Sousa Santos' quote, used at the outset of this section, engages with how jurisdiction is ascribed: he suggests that, "just like maps, laws are ruled distortions or misreadings of social territories."[126] He argues instead that maps (and mapping) should not be understood as a one-way endeavor and rather, be cognizant of society and 'social reality's impact in norm (re)creation.[127] As such, although the features of a map can come to distort reality, they become structurally necessary, according to de Sousa Santos.[128] Within the context of schools, maps are also (re)created, enshrining behaviors, social realities (religious or linguistic divides), but also, validating institutional/internal structures and social hierarchies. The use of law and geography as a lens here should not be seen as a stratagem or a metaphorical shortcut to legal analysis: rather, such an approach provides the necessary evaluation of framing of institutional structures and actors. More pointedly, I argue that spatial dimensions are critical to the kinds of narratives that we share, a point I explore further in the next section of this Chapter. As such, concepts of space can (and oftentimes will) influence interactions, relationships and exchanges amongst individuals; according to Desmond Manderson, space is to be understood as both structuring and transforming our experience, application and effect of the law.[129] In this sense, there are social meanings to space and spatial implications to social relations.[130]

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[126] de Sousa Santos, *supra* note 125, p. 419.

[127] Ibid, p. 420: "In my view, the relations laws entertain with social reality are very similar to those between maps and spatial reality. Indeed, laws are maps; written laws are cartographic maps; customary, informal laws are mental maps."

[128] Ibid, p. 420.

[129] Manderson, "Interstices", *supra* note 102, at 1. See also Franz von Benda-Beckman, Keebet von Benda-Beckman and Anne Griffiths, "Space and Legal Pluralism: An Introduction" in Franz von Benda-Beckman, Keebet von Benda-Beckman and Anne Griffiths (eds.), *Spatializing Law: An Anthropological Geography of Law in Society* (Farnham, Ashgate Publishing Limited, 2009), 1 at 3-4.

[130] See in this way David Delaney, *The Spatial, The Legal and the Pragmatic of World Making: Nomospheric Investigations* (New York, Routledge, 2010), 44-45. Drawing on the concept of *nomos,* which points to the

The significance of education's realm as well as the medium of the classroom must therefore be acknowledged in order to explore legal cases involving schools and students. Broadly speaking, schools are devised, theorised and managed by school boards, the Ministry of Education as well as influenced by private parties, such as parents. Their collective imprint can be felt in the materials used in class (or those cast aside), but also in the way that policies are shaped and adhered to with regard to diversity, for example. Schools reflect and respond to the population on a certain territory, according to the relevant geographical school boards. This is illustrated through school board elections and allocated territories, as well as the fiscal implications of these demographic swells. Given education's mission of socialization, which result in student experiences and the development of a common habitus, schools become – for better or for worse – a shared endeavour. Education's realm – or web – can be understood as relational,[131] rather than operating through silos.

Boaventura de Sousa Santos' quote, employed at the outset of this section, is helpful to understand the challenge in legally mapping education's role and place. Although laws may help delineate what is considered to be jurisdiction, it does not necessarily address governance

existence of community or worlds, Delaney suggests that we should be looking not only at the effect of space but also of place on an individual. Delaney refers to this paradigmatic shift as the "nomosphere", which describes "the cultural-material environs that are constituted by the reciprocal materialization of "the legal", and the legal signification of the "socio-spatial", and the practical, performative engagements through which such constitutive moments happen and unfold." (*ibid*, 25).

[131] See Jennifer Nedelsky, "Law, Boundaries and the Bounded Self" (1990) 30 *Representations* 162, 163 **[Nedelsky, "Bounded Self"]** as cited in David Delaney, "Beyond the Word: Law as a Thing of this World" in Jane Holder and Carolyn Harrison (eds.), *Law and Geography* (Oxford, Oxford University Press, 2003), p. 67 at p. 70 **[Delaney, "Beyond the Word"]**. Bounded spheres are explained by Nedelsky as living within bounded imagery, which "teaches both parents and children that security lies in walls. The image of bounded space as essential to autonomy reinforces the image of bounded selves." (Nedelsky, "Bounded Self", *supra*, 175). Nedelsky suggests mediating the use of boundary metaphors through other means to properly understand relationships: see Nedelsky, "Bounded Self", *supra*, 175-178. See also Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy (*NY, Oxford University Press, 2011), pp. 114-117.

scales and structures in a convincing manner.[132] Within the realm of schools, this speaks the need to unbundle people, place and law.

2.2 A consequence of mapping education's role: the school as territory

Thus, in turning one's attention to legal cases involving schools and students, one must acknowledge the importance of education's realm as well as the medium of the classroom. A precursor here, however, is an understanding of territory.[133] It is argued here that a school represents a distinct territory. And although a school constitutes a physical building and space, it is not for this reason that it constitutes a territory. Rather, "[t]erritory serves as an imaginary but nonetheless effective prop for social relationships. But it is not simply a *setting* for social relations: it is also, crucially, *a form* of social relations."[134] Territory, therefore, is relational. Richard T. Ford defines 'jurisdiction' in a similar manner: "a way of speaking and understanding the social world."[135] I argue instead that spatial dimensions are critical to the kinds of narratives that we share. A school can therefore be thought of as also constituting a territory, through its distinct mission and internal rules. Put differently – or 'territorially' – the school becomes a

[132] Stephen Waddams similarly challenges the use of mapping in the common law setting, where he suggests that we cannot think of the common law as a map because it doesn't match reality: see S.M. Waddams, *Dimensions of Private Law:* Categories and concepts in Anglo-American legal reasoning (Cambridge, Cambridge University Press, 2003). Valverde argues that cartography metaphors, like that of de Sousa Santos', are only helpful to a certain point withint this field of analysis; she suggests jurisdiction enables an examination of both the 'what' and 'how' of governance, where the former draws on the objects of governance and its governing capabilities, whereas the latter takes on the justifications of governance. See Valverde, "Jurisdiction and Scale", *supra* note 90, 144.

[133] For an excellent epistemological, historical and legal analysis of territory, see Noura Karazivan, *Of Law and Land and the Scope of Charter Rights* (LL.D., Faculté de droit, Université de Montréal, 2011) (unpublished, on file with the author), especially pp. 10-84.

[134] Andrea M. Brighenti, "On Territory as Relationship and Law as Territory" (2006) 21(1) *C.J.L.S.* 65, 76 **[Brighenti, "On Territory as Relationship"]**. See also Andrea Mubi Brighenti, "On Territorology: Towards a General Science of Territory" (2010) 27(1) *Theory, Culture & Society* 52, 57 **[Brighenti, "On Territorology"]**.

[135] Richard T. Ford, "Law's Territory (a History of Jurisdiction)" (1999) 97 Mich. L. Rev. 843, 855 **[Ford, "Law's Territory"]**.

form of social relations.[136] This situation is exemplified by the presence of codes of conduct, which create a particular territory and provide a living code[137] for students. It is unsurprising, therefore, that schools become contested sites, or battlegrounds,[138] through their unique forms of social relations and relationships.

In order to develop a deep understanding of the school as contested territory, I argue for a 'mapping' of education's jurisdiction in Canada. This occurs in three parts. First, one must trace how education is addressed under the *Constitution Act*, in order to establish jurisdiction (2.3.1), as well as explain minority rights provisions. Second, the *Canadian Charter* revealed a different facet of the relationship between religion and education, now understood through claims of freedom of religion and discrimination (2.3.2). Finally, I explore each province's school act in order to ascertain how – or if – religion, and/or freedom of religion is present in schools (2.3.3). In locating jurisdiction and establishing the forms of social relationships that exist within school settings, the stage is set for addressing the school as distinct scale of legal analysis (3).

[136] Jennifer Nedelsky has argued that "boundaries do structure relationships", she cautions against the use of the boundary metaphor, since it can distort what is really at stake. Instead, she suggests adopting an approach based on interactions rather than limits: see Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford, Oxford University Press, 2011), pp. 110 & 117.
[137] Basil Bernstein, *The Structuring of Pedagogic Discourse, Volume IV: Class, codes and control* (London, Routledge, 1990).
[138] Collins, "Culture, religion and curriculum*", supra* note 105, 346**.**

2.3 An understanding of justice: education's constitutional terrain

The aim of this section is to establish how the State regulates schools. This will further buttress the claim that schools constitute a distinct scale of analysis. Given that Canada represents my main site of analysis, I have chosen to set out how schools are constitutionally provided for, including relevant legislation and regulations. This constitutional background also solidifies one's understanding of the school as territory. This will be addressed in three parts: first, as a result of the "compact of Confederation" (2.3.1); as engendered under the *Canadian Charter* (2.3.2); and third, as a consequence of provincial charters and human rights codes (2.3.3). These points will set the stage for the following section on how provinces address religion within their respective laws on education.

2.3.1 As a result of the "compact of Confederation"

In order to fully appreciate the constitutional effects on education, one must return to the federal-provincial division of powers, as contained in the *Constitution Act of 1867*.[139] I contend here that religion – as "a basic compact of Confederation"[140] – provides an unparalleled story and history of how the domain of education has been managed, articulated and re-asserted in the Canadian constitutional setting. Section 93 of the *Constitution Act 1867* elaborates the

[139] *British North America Act*, (1867) 30 & 31 Victoria, c. 3. (U.K.) **[*Constitution Act 1867*]**.
[140] *Re: An Act to Amend the Education Act,* [1987] 1 SCR 1148, at 1174 (Wilson J.), citing Duff C.J. in *Reference Re Adoption Act,* [1938] 398, 402.

provinces' exclusive right to legislate in the area of education and represents "a fundamental compromise of Confederation in relation to denominational schools".[141] Denominational schools refer here to schools that cater to the religious minority – as established at the time of Confederation and therefore either Catholic or Protestant – in a particular province, upon gaining entry to confederation. Section 93 of the *Constitution Act 1867* bears reproduction in full:

> **93.** In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:
>
> (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union;
>
> (2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec;
>
> (3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education;
>
> (4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.[142]

In ensuring protection to the religious minority in each province (Catholic/Protestant or Protestant/Catholic), the *Constitutional Act of 1867* proffered a right to exclusively legislate in education's domain by the provinces. Concomitantly, it also allowed a right to appeal to the Governor General in case of a challenge to the established line of authority. A caveat is therefore placed on the provinces' exclusive right in matters of education. This nuance is

[141] *Re: An Act to Amend the Education Act,* [1987] 1 SCR 1148, 1152.
[142] *Constitution Act of 1867*, *supra* note 139.

illustrated in a 1987 reference to the Supreme Court on the constitutionality of an Ontario bill (known as Bill 30) enabling full funding for Roman Catholic high schools. I argue that this reference underscores the importance of adopting a contextual understanding of s. 93 *of the Constitution Act.* The Supreme Court of Canada noted that it was within the purview of the province's power to "add to the rights and privileges of Roman Catholic separate school supporters."[143] Prior to confederation, three types of schools existed in Upper Canada: common schools, grammar schools and separate schools. These types of schools therefore benefitted from rights and privileges prior to Confederation[144] and thus had to have their rights reflected under confederation. The purpose of "common schools" was to "provide an education for the common or average person", whereas "grammar schools" were understood to offer "an advanced form of education", yet should not be understood as the equivalent of today's high school or secondary school.[145] Common school and grammar school thus overlapped, subject to regulation, since "there was at this time no statutory restriction on what could be taught in a common school."[146] "Separate schools", by opposition, reflected the presence of minority religious faiths; separate schools were thus established to respond to a minority religious community's request. They followed the same structure as the common schools and therefore held comparable rights and privileges.[147] In translating these rights forward, Justice Wilson

[143] *Re: An Act to Amend the Education Act,* supra note 140, 1176.

[144] *Act respecting Common Schools in Upper Canada*, C.S.U.C 1859, c. 64; *Act respecting Separate Schools*, C.S.U.C. 1859, c. 65; *Act to Restore to Roman Catholics in Upper Canada certain rights in respect to Separate Schools (Separate Schools Act (Scott Act)*), 26 Vict., c. 5 (1865); *Act for the further improvement of Grammar Schools in Upper Canada (Grammar Schools Act)*, 29 Vict., c. 23 (1865).

[145] *Re: An Act to Amend the Education Act,* supra note 140, 1178-1179.

[146] Ibid, 1180.

[147] Ibid, 1180-1181. On the legacy of separate schools, Justice Wilson concludes that "Roman Catholic separate school supporters had at Confederation a right of privilege, by law, to have their children receive an appropriate education which could instruction at the secondary level and that such right or privilege is therefore constitutionally guaranteed under s. 93(1) of the Constitution Act, 1867."

concluded that Bill 30 fell within the purview of the Provincial Legislature:[148] "the province is master of its own house when it legislates under its plenary power in relation to denominations, separate or dissentient schools."[149]

The question of territorial scope returns to the Supreme Court in 1993, in the form of a reference by the Québec government on the constitutionality of certain provisions contained in the new *Education Act* (also known as Bill 107).[150] This reference underscores the province's right to determine school boards' scope of application, or put differently, their territorial scope. Bill 107 was passed by the National Assembly, first in 1988 and then in 1990[151] and sought to redraw the organizational lines of the school boards, in order to pass from denominational (Catholic/Protestant) to linguistic (English/French). The Québec government asked whether the impugned provisions of the new *Educational Act* prejudicially affected the rights and privileges as set out under section 93 of the *Constitutional Act of 1867*. In creating these new school boards, the Québec government was not, however, envisioning the total dismantlement of the old ones, but rather a slow, 'natural' death through their general disuse. The old school boards, thus rendered 'inoperative', would enable the Québec government to intercede and therefore implement (indirect) territorial change to the public school system. Beyond this legislated inactivity, however, denominational boards would remain in certain areas and be known as

[148] *Re: An Act to Amend the Education Act,* supra note 140*,* 1196.
[149] Ibid, 1198 (thereby not following *Tiny Separate School Trustees v. The King*, [1928] A.C. 363). On the continual evolution of this compromise, see 1176.
[150] *Reference re Education Act (Que.),* [1993] 2 SCR 511 **[*Education Reference*]**. The constitutional questions are set out at pages 523-525 of the reference.
[151] S.Q. 1990, c 78. It is this final amendment to the *Education Act* which is at the source of the 1993 Supreme Court ruling. Other new statutes were also passed by the National Assembly in 1990: see SQ 1990, c 8 & SQ 1990, c 28.

'dissentient school boards' (found both in and outside of the metropolitan areas in Québec). Interestingly, this arrangement was found to be constitutional by the Supreme Court, since if the provinces have the power to create linguistic schools boards, they must also have the power to determine their territorial application.[152] Despite the Québec government's objective – namely to reorient school boards from religion to language – the *Education Act* still sought to grant privileges to Protestant and Catholic committees of the Conseil superieur de l'éducation the right to modulate the students' moral and religious education. After careful review, Justice Gonthier, writing for the Court, ultimately found that Bill 107 did not cause prejudice to the rights and privileges provided for under section 93 of the *Constitutional Act of 1867.*

A further layer is added to this picture by way of section 93A of the *Constitution Act 1867*, which subtracts Québec from this particular educational regime as of 1997. Although this point will be discussed at length further on in this chapter (see section 4), Québec eschewed the denominational distinction in favor of a linguistic one.[153] This shift, from religion to language, points towards a new hierarchy in personal identifiers, but also, in socialization patterns. Roderick A. Macdonald suggests that religion as marker of identity has resulted in its migration from a 'national' to 'particular' identity marker.[154] This State-sanctioned shift, however, raises

[152] *Education Reference, supra* note 150, 552.

[153] See *Constitution Amendment, 1997 (Quebec)* (SI/97-141). Alternative versions of s. 93 of the *Constitution Act 1867* were enacted in Manitoba (s. 22 of the *Manitoba Act, 1870*, 33 Vict., c. 3 (confirmed by the *Constitution Act, 1871*, 34-35 Vict., c. 28 (U.K.))); Alberta (s. 17 of the *Alberta Act*, 1905, 4-5 Edw. VII, c. 3); Saskatchewan (s. 17 of the *Saskatchewan Act*, 1905, 4-5 Edw. VII, c. 42); and Newfoundland and Labrador (Term 17 of the Terms of Union of Newfoundland with Canada (confirmed by the *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.)), as amended by the *Constitution Amendment, 1998 (Newfoundland Act)* (SI/98-25) and the *Constitution Amendment, 2001 (Newfoundland and Labrador)* (SI/2001-117)).

[154] Roderick A. Macdonald, "The Legal Mediation of Social Diversity" in Alain-G. Gagnon, Montserrat Guibernau & François Rocher (eds.), *The Conditions of Diversity in Multinational Democracies* (Montreal, Institute for Research in Public Policy, 2003), p. 85 at p. 93 **[Macdonald, "Legal Mediation of Social Diversity"]**.

serious questions about who gets to decide which identity markers are primed, according to Macdonald.[155] Deconfessionalization of the education system, as a vehicle of change, conveys a foundational shift of identity markers and sets the stage for redefining how individuals and communities engage with the educational system.

In conclusion, retracing the history of religious privilege presents a further understanding of how the domain of education has been managed, articulated and re-asserted in the Canadian constitutional setting. Section 93 of the *Constitution Act 1867* therefore sets the stage for a rich constitutional discussion on the place of religion in education in Canada. I have argued that territorial scope emerges as a foundational point in this exploration of the "compact of Confederation":[156] section 93 of the *Constitution Act 1867* represents a particular type of social contract, which draws its strength from the context from which it emerged. The language used to discern 'scope' is also illustrative, for example: "the province is master of its own house"[157] and "if the province has the power to create linguistic school boards, it is proper that it should also have the power to determine their territories."[158] As demonstrated in the following section, the intersection of education and religion under the *Canadian Charter* presents new dimensions to this already complex relationship, namely in the form of freedom of religion and discrimination, and further highlight the importance of context and territorial scope.

[155] Macdonald, "Legal Mediation of Social Diversity", *supra* note 154, pp. 96-97.
[156] *Supra* note 140.
[157] *Supra* note 149.
[158] *Supra* note 152

2.3.2 As engendered by the Canadian Charter

The previous section underscored the importance of minority education rights under the *Constitution Act 1867*. Yet this "compact of Confederation" also finds its footing in the *Canadian Charter*, over one hundred years later. As such, the latter solidifies the constitutional standing of the former, and more specifically, the continued presence and legal (and non-discriminatory) standing of denominational schools. This is reflected in section 29 of the *Canadian Charter of Rights and Freedoms*, which stipulates that "[n]othing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools."[159] Yet the discussions and legal exchanges that have occurred on religion and education under the auspices of the *Canadian Charter* have been articulated through claims to freedom of religion and equality on the grounds of religion. As such, the focus is no longer on recognition and protection of historical difference, but rather on the grounds of equal respect for religious difference, under sections 2(a) and 15 of the *Canadian Charter*. The review of cases in this section is not meant to be exhaustive, but rather act as signposts to the discussion that is to occur in subsequent chapters of this thesis.

In *The Queen v. Jones*,[160] a pastor of a fundamentalist Church in Alberta began a schooling program entitled "Western Baptist Academy" in his church basement. Jones refused to send his

[159] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.)) **[*Canadian Charter*]**.
[160] *R. v. Jones*, [1986] 2 SCR 284 **[*Jones*]**.

children to public school (and thus contrary to the Alberta *School Act*[161]) or obtain an exemption, as provided for under same school act. As a result, the pastor was charged with three counts of truancy under s. 180(1) of the Alberta *School Act*. At trial, Jones invoked to his right to freedom of religion and principles of fundamental justice under sections 2(a) and 7 of the *Canadian Charter* to argue that he could educate his children in accordance with his religious beliefs and as a result, that God be the ultimate decider, not the State, with respect to the content of his school program.[162] The trial judge upheld the pastor's defense on the basis of the fundamental principles of justice, but dismissed his argument on freedom of religion. On appeal, the Court of Appeal found the pastor guilty of all truancy charges.[163] The majority of the Supreme Court dismissed the appeal. As put by La Forest J. (writing on behalf of himself and Dickson C.J.),

> **If the appellant has an interest in, and a religious conviction that he must himself provide for the education of his children, it should not be forgotten that the state, too, has an interest in the education of its citizens.** Whether one views it from an economic, social, cultural or civic point of view, the education of the young is critically important in our society. From an early period, the provinces have responded to this interest by developing schemes for compulsory education. Education is today a matter of prime concern to government everywhere. Activities in this area account for a very significant part of every provincial budget. Indeed, in modern society, education has far-reaching implications beyond the province, not only at the national, but at the international level.[164]

Jones underscores the limits of a parent to educate their children in line with their religious beliefs, but also, the State's genuine interest in bolstering education.[165]

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[161] *School Act*, R.S.A. 1980, c. S‑ 3.
[162] *Jones*, *supra* note 160, ¶ 3-12.
[163] Ibid, ¶ 13.
[164] Ibid, ¶ 22 [emphasis added].
[165] *Young v. Young*, *supra* note 78, at 38 underscores that the best interests' of the child, encapsulated in the duty held by the custodial parent extends to everyday decision-making as well as more significant decisions, such as "education, religion health and well-being. " (L'Heureux-Dubé J., dissenting in result)

The question of the State's interest in educating its citizens, to paraphrase La Forest J. in *Jones*, comes back repeatedly in the following years in Canada. This takes different forms, however, as evidenced in cases where parents opposed the opening or closing of school days with a prayer, on the basis of their right to freedom of religion and conscience.[166] For instance, in *Zylberberg*, the school day began with the singing of the national anthem and the recitation of the Lord's Prayer, which was led by the classroom teacher or done over the public announcement system. Parents of three students (of Muslim, Jewish and non-practicing Christian origins) objected to these religious exercises and did not ask for exemptions, since they were concerned that this would further single out their children. Although an exemption was built into the Ontario *School Act*,[167] where students could be excused from participating, it was not taken for granted that students could leave the classroom; if an exempted student stays in the classroom, she is expected to stand, just like a student who observes and participates in the religious exercises. Hence, the Sudbury School provided no alternative religious exercises and thus presented only a Christian option to students (or face exemption options). The Ontario Court of Appeal points to the Toronto Board of Education, which did develop a multifaith approach to religious exercises.[168]As such, the exemption fell far short of actually respecting minority students' rights. The majority of the Ontario Appeal Court (Lacourcière J. dissenting) stated that

> While the majoritarian view may be that s. 28 confers freedom of choice on the minority, the reality is that it imposes on religious minorities a compulsion to conform to the religious practices of the majority. The evidence in this case supports this view. The three appellants chose not to seek an exemption from religious exercises because of their concern about differentiating their children from other pupils. **The peer pressure and the class-room norms to which children are acutely sensitive, in our opinion, are real and pervasive**

[166] As was the case in *Zylberberg v. Sudbury Board of Education (Director)*, [1988] O.J. No. 1488 **[*Zylberberg*]**; *Russow v. British Columbia (Attorney General)*, (1989) 62 DLR (4th) 98 **[*Russow*]**; *Manitoba Association for Rights and Liberties v. Manitoba*, (1992), 94 D.L.R. (4th) 678 (Q.B.) **[*Manitoba Association*]**.
[167] *Education Act*, R.S.O. 1980, c. 129, s. 50; R.R.O. 1980, Reg. 262 (Education Act), s. 28 (am. O. Reg. 617/81, s. 21).
[168] Ibid, pp. 10-11.

> **and operate to compel members of religious minorities to conform with majority religious practices. […]** We consider that s. 28(1) also infringes freedom of conscience and religion in a broader sense. The requirement that pupils attend religious exercises, unless exempt, compels students and parents to make a religious statement.[169]

Underscoring not only the violation of constitutional rights of freedom of religion and conscience, *Zylberberg* also highlights the importance of the student makeup and the effects on the organizational politics of the classroom. This case, I argue, can also be understood as an example of legal pluralism before the courts, where classroom norms interact (or some would say 'contrast') with religious norms.

Handed down a few years later, *Adler v. Ontario*[170] represents the culmination of Ontario cases on the subject of funding of private schools.[171] This case challenged the funding of private religious schools by parents of Jewish and independent Christian schools – and thus, not Roman Catholic (as protected and provided for under the *Constitution Act 1867*). Iacobucci J., writing for the majority, reiterates the Supreme Court's understanding of section 93 of the *Constitution Act 1867* as a "child born of historical exigency".[172] Accordingly, it should be understood as a "comprehensive code with respect to denominational school rights".[173] The majority of the Supreme Court drew a parallel between section 93 *of the Constitution Act 1867* and section 23 of the *Canadian Charter*, since both are the result of "political compromise" and both offer "special

[169] *Zylberberg*, *supra* note 166, pp. 14, 15 [emphasis added].
[170] *Adler v. Ontario*, [1996] 3 SCR 609 **[*Adler*]**.
[171] Namely: *Zylberberg*, *supra* note 166; *Canadian Civil Liberties Association v. Ontario (Minister of Education)*, (1990) 71 O.R. (2d) 341; *Bal v. Ontario*, (1994) 21 O.R. (3d) 681; *Bal v. Ontario*, (1997) 34 O.R. (3d) 484; *Bal v. Ontario*, [1997] S.C.C.A. No. 547 (Application for leave to appeal dismissed, 28.10.1997)
[172] *Adler, supra* note 170, ¶ 30.
[173] Ibid, ¶ 35.

status to particular classes of people".[174] This analogy draws the eye to the distinction between political context and the guarantee of fundamental freedoms. The majority in *Adler* suggests that the Ontario government has the *ability* to pass legislation that would enable the protection of other minority groups with regards to education, but does not have the *obligation* to do so:

> "The province remains free to exercise its plenary power with regard to education in whatever way it sees fit, subject to the restrictions relating to separate schools imposed by s. 93(1). Section 93 grants to the province of Ontario the power to legislate with regard to public schools and separate schools. However, nothing in these reasons should be taken to mean that the province's legislative power is limited to these two school systems. In other words, the province could, if it so chose, pass legislation extending funding to denominational schools other than Roman Catholic schools without infringing the rights guaranteed to Roman Catholic separate schools under s. 93(1)."[175]

Adler can be contrasted with *Waldman v. Canada,* a case brought before the UN Human Rights Committee in the late 1990s.[176] Mr. Waldman claimed that Ontario's power to provide funding to Roman Catholic schools, as set out by section 93 of the *Constitution Act 1867*, violated his rights to articles 26, and articles 18(1), 18(4) and 27 taken in conjunction with article 2(1) of the *International Covenant on Civil and Political Rights*. Mr. Waldman's children were attending a private Jewish day school that was not funded by the Ontario government. The Human Rights Committee found in favor of Mr. Waldman, since the simple presence of a distinction in the Constitution, under section 93 of the *Constitution Act 1867*, could not be equated with objectivity, nor should it be understood as synonymous with public funding of Roman Catholic schools.[177] *Adler* and *Waldman* point to a disjunction between the Canadian constitutional context and international obligations with regards to education and religion.

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[174] *Adler, supra* note 170, ¶ 30.
[175] Ibid, ¶ 48.
[176] *Waldman v. Canada,* (3 November 1999) (Communication No. 694/ 1996), CCPR/C/67/D/694/1996) **[*Waldman*]**.
[177] Ibid, 10.4-10.6.

This short incursion under the *Canadian Charter* reveals further challenges to how religion is managed in the school setting. No longer a question of historic compromise, conflicts of religion and education are articulated as questions of freedom of religion and equality claims. A few points can be pulled from this incursion. First, a parent's right to freedom of religion does not provide *carte blanche* to how their children are educated; as such, this becomes a shared responsibility between concerned parties, namely parents and the State as seen in *Jones*. Alternatively, a student's right to freedom of religion may be recognized, if appropriate, in a school setting, as seen in *Multani v. Commission scolaire Marguerie-Bourgeoys*[178] - which will be the subject of further discussion later on in this thesis – a case about whether a Sikh student could carry his kirpan on school premises. Second, although the provinces have the ability to pass legislation that would protect other minority groups, they do not have the obligation to do so: *Adler* distinguishes between constitutional obligation and legislative discretion – a distinction that falls flat on the international scale, as seen in *Waldman*. Third, providing an exemption to school religious exercises cannot be tantamount to respect of another person's beliefs, as seen in *Zylberberg.* Indeed, the context of the classroom emerged as a central element in the determination of how majority-minority relations are addressed. In a related manner, this case also challenged the so-called 'secular nature' of the religious exercise regulation.[179] Albeit not discussed here, the insistence of the British Columbia's *School Act*'s on

[178] *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256.
[179] *Zylberberg*, *supra* note 166, p. 19. A similar challenge was made on the secular nature of the British Columbia *School Act*, which resulted a modification of the section on the conduct of public schools: see John Long & Romulo Magsino, "Religion in Canadian Education: Whither Goest Thou?" in Michael Manley-Casimir & Kirsten Manley-Casimir (eds.), *The Courts, the Charter, and the Schools: The Impact of the Charter of Rights and Freedoms on Educational Policy and Practice 1982-2007* (Toronto, University of Toronto Press, 2009), p. 109 at p. 116. See also note 208.

secularism and non-discrimination in *Chamberlain v. Surrey School District No. 36*[180] - which challenged the school board's refusal to approve a teacher's request of additional books destined to kindergarten and grade one students that depicted same-sex parented families – underlines the foundational way that school boards should govern themselves.[181] This case will be the subject of deeper discussion later on in this thesis. Fourth, the question of conduct is central to understanding what is permissible behavior by those employed in schools – as was the case in *Ross v. New Brunswick School District No. 15,*[182] where a Jewish parent lodged a complaint before the New Brunswick Human Rights Commission against the school board because Ross, a teacher (and therefore an employee of the school board), was known for making anti-Semitic comments in his off-time. Ross was reprimanded and challenged the orders under his rights to freedom of religion and opinion.[183] The Supreme Court, reiterated the teacher's responsibilities and obligations vis-à-vis the student population, or put differently, their 'relational' impact:

> Teachers are inextricably linked to the integrity of the school system. Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions. The conduct of a teacher bears directly upon the community's perception of the ability of the teacher to fulfill such a position of trust and influence, and upon the community's confidence in the public school system as a whole.[184]

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[180] *Chamberlain v. Surrey School District No. 36*, [2002] 4 SCR 710 **[*Chamberlain*]**.

[181] *Chamberlain, supra* note 180, ¶ 19: "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 boardroom door. What secularism does rule out, however, is any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community. A requirement of secularism implies that, although the 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. Religious views that deny equal recognition and respect to the members of a minority group cannot be used to exclude the concerns of the minority group. This is fair to both groups, as it ensures that each group is given as much recognition as it can consistently demand while giving the same recognition to others.**"**

[182] *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825 **[*Ross*]**.

[183] Ibid, ¶ 9.

[184] Ibid, ¶ 43.

Hence, the conversation on religion and education, as engendered under the *Canadian Charter*, has transformed the discourse into one of rights, rather than privileges. As the next section will explore how the relationship between education and religion is addressed under provincial human rights codes and charters.

2.3.3 Under provincial human rights codes and charters

In addition to these constitutional provisions, education and religion is addressed in other legal documents, which highlight the parents' right in directing their children's education on these issues, but also, in other cases, where the constitutional provisions are reaffirmed.[185] Two particular examples stand out here.[186] The *Québec Charter of Rights and Freedoms*, a quasi-constitutional document, provides the right of the parent to ensure moral or religious education their child in accordance with their beliefs, but also in line with the interests of the child.[187] Section 41 of the *Québec Charter* was modified in 2005[188] to reflect the "alignment […] with Québec's international commitments."[189] This was accomplished as part of Québec's progressive deconfessionalization of the public school system. Alternatively, in Alberta, the

[185] This is notably the case in Ontario, where section 19 of the Ontario *Human Rights Code*, RSO 1990, c H-19, states that separate school rights are preserved, as are the duties of the teachers operating in those schools.
[186] Many human rights codes also address the right of religious institutions to have practices that enable them to distinguish on the basis of aptitudes. See, for example: *Charter of Human Rights and Freedoms,* LRQ, c C-12 **[*Québec Charter*]**, s. 20; Human Rights Code, RSBC 1996, c 210, s. 41; The Saskatchewan Human Rights Code, SS 1979, c S-24.1, s. 16(5); Human Rights Code, RSO 1990, c H.19, s. 24(1)(a); Human Rights Act, RSNB 2011, c 171, s. 4(5); Human Rights Act, RSNS 1989, c 214, s. 6(c)(ii); Human Rights Act, RSPEI 1988, c H-12, 6(4)(c); Human Rights Act, SNL 2010, c H-13.1, s. 14(8)(a); Human Rights Act, RSY 2002, c 116, s. 11(1); Human Rights Act, SNWT 2002, c 18, 7(5)(b)(i); Human Rights Act, SNu 2003, c 12, s. 9(6)(b)(i) & (ii).
[187] *Québec Charter*, *supra* note 186, art. 41.
[188] *Act to amend various legislative provisions of a confessional nature in the education field*, S.Q., 2005, c. 20.
[189] *Journal des débats*, 37th Leg, 1st Sess, Standing Committee on Education, Cahier 61, June 2, 2005 at 1 to 25, as reproduced in *Commission des droits de la personne et des droits de la jeunesse c. Centre à la petite enfance Gros Bec*, 2008 QCTDP 14, ¶ 138.

right of parents to educate their children in accordance with their beliefs is framed as one of exclusion or exemption, rather than premised on (welcomed) difference. Section 11 of the Alberta *Human Rights Act* states that a school board must notify parents, in accordance with the Alberta *School Act*, "where courses of study, educational programs or instructional materials, or instruction or exercises, prescribed under that Act include subject-matter that deals primarily and explicitly with religion, human sexuality or sexual orientation."[190] With a signed request from the parent, the student will either be allowed to leave the classroom where the instruction is taking place, or stay in the classroom but not participate in stated instruction.[191] The Albertan and Québécois examples highlight the different approaches that can be espoused when education and religion intersect: although both examples share the parent's right to discretion with regards to their religious beliefs, and what they may choose to pass on to their children, the Albertan example is premised on exclusion whereas *Québec Charter* insists on taking such a decision in line with a child's best interests. These examples also demonstrate the extended scope of these provisions, which can conflict with the rights and duties of school boards, as discussed in the following section. As such, the parents' rights to educate their children in line with their religious beliefs are not impregnable. More interestingly, perhaps, is the fact that these visions of religion and education are located in quasi-constitutional (in Québec's case) and statutory documents, rather than in provincial education or school acts.[192]

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[190] *Human Rights Act*, RSA 2000, c A-25.1 **[*Alberta Human Rights Act*]**, s. 11(1). Section 11(3) of the Act states that Section 11(1) does not apply in cases of "incidental or indirect references" to the aforementioned subjects.
[191] *Human Rights Act*, RSA 2000, c A-25.1, s. 11(2)(a), (b).
[192] Ontario's *Education Act* clearly states at the outset that it does not, in any way, infringe upon any of the rights or privileges contained in section 93 of the Constitution Act 1867. See *Education Act,* RSO 1990, c E.2, ss. 1.(4) & 1.(4.1):

In situating education within the domain of the provinces (albeit mediated by the role of the Governor General), under section 93(4) of the *Constitution Act 1867* – as will be discussed in the following section (2.4) – the field of education emerges as a contested constitutional terrain. It also bears witness to the constitutional amendments that have been made in the years following initial unification. In short, education is framed here as an active (legislative) concern and a source of contested territory.

2.4 An interpretation of education: provincial jurisdiction and (administrative) responsibility

As outlined in the previous section, education is within the provinces' jurisdiction. Each province enacts an education or school act, to which are affixed a certain number of regulations and associated legislation. These statutes set out how – or if – religion is addressed within the curriculum, and therefore, what role religion is given within the confines of the school.

In the following pages, education and religion will be explored through the vector of provincial legislation. The following questions can be thought of as framing the reader in this pan-Canadian educational journey across school and education acts: how do provinces regulate religion in schools? In light of this, how do schools "do" religion? Is there religious instruction?

"1(4) This Act does not adversely affect any right or privilege guaranteed by section 93 of the *Constitution Act, 1867* or by section 23 of the *Canadian Charter of Rights and Freedoms*.

1(4.1) Every authority given by this Act, including but not limited to every authority to make a regulation, decision or order and every authority to issue a directive or guideline, shall be exercised in a manner consistent with and respectful of the rights and privileges guaranteed by section 93 of the *Constitution Act, 1867* and by section 23 of the *Canadian Charter of Rights and Freedoms*."

Is it compulsory? Is it possible to opt-out? Is religion taught as part of another subject? Are there textbooks, and if so, how are they regulated, and by whom? These questions will be answered according to the following scale, and in line with earlier spatial considerations: the student, teacher, school, school board and the Ministry of Education.

The student

The language of attendance, exemption, opinion and respect dominate how the student's role differs across provinces when religion arises in schools. Control, permission and exchange highlight the types of interactions students can have when faced with questions of religion. Some of the references to religion in the school and education acts concern everyday events, such as attendance, and exemption thereof on the basis of a student's observance of a religious holiday.[193] Ontario sets out two exemptions for students with regards to religious education, which acknowledge the place of denominational school boards within its provincial boundaries. First, a student may be excused from attending religious education if over the age of sixteen;[194] this represents an acknowledgement of a student's development and increasing capacity for autonomy. Second, a student may also be allowed to be exempt from religious education

[193] *Education Act*, SNu 2008, c 15, s. 34(3)(d); *School Act*, RSA 2000, c S-3, s. 13(5)(b); *Education Act,* 1995, SS 1995, c E-0.2, s. 157(1)(j); *Education Act*, SNB, c E-1.12, s. 16(1)(c); *School Act*, RSPEI 1988, c S-2.1, s. 70; *Education Act*, RSO 1990, c E.2, s. 21(2)(g).

[194] *Education Act*, RSO 1990, c E.2, s. 21(7). A student may also be exempted from religious instruction or taking part in religious exercises: see s. 51 of the act, which provides the following on religious instruction:
"51.(1) Subject to the regulations, a pupil shall be allowed to receive such religious instruction as the pupil's parent or guardian desires or, where the pupil is an adult, as the pupil desires.
(2) No pupil in a public school shall be required to read or study in or from a religious book, or to join in an exercise of devotion or religion, objected to by the pupil's parent or guardian, or by the pupil, where the pupil is an adult."

classes if coming from a different school board in Ontario.[195] In addition to the exemption provided if coming from a different school board, the *Education Act* elaborates a release from religious education classes if the student has withdrawn from parental control.[196] Such a dispensation demonstrates that parental control is not absolute in the realm of religious education and that religious autonomy is provided to the emancipated student. The types of exemption that articulated in the Ontario *Education Act* signal some sensitivity to difference and personal experience – whether based on age or religious upbringing.

Ontario's position on student exemptions can be contrasted with Saskatchewan's *Education Act*, where a student who attends a public high school or a separate high school, must abide by

> "all policies of the board of education of the school division in which that high school is situated, including any policies relating to religious instruction, religious activities and other programs conducted by the high school."[197]

This suggests that students have limited capacity to express dissent when faced with religious instruction. As such, the positions in Ontario and Saskatchewan point to diverging opinions on how teenage students should assert themselves with regards to religious education and religious instruction.

Alternatively, in the Yukon, a student's freedom of opinion, including religious beliefs, is protected under its *School Act*.[198] In the Northwest Territories, students are also expected to be

[195] *Education Act*, RSO 1990, c E.2, s. 42(11), 42(12) & 42(13).
[196] Ibid, s. 42(13).
[197] *Education Act*, 1995, SS 1995, c E-0.2, s. 145(5). A separate school is established by a minority of electors in an electoral school district, either Protestant or Catholic: see s. 49.
[198] *Education Act*, RSY 2002, c 61, s. 35.

respectful of religious difference while on school premises;[199] they are also allowed to be exempt from attending a religious program that doesn't reflect their upbringing.[200] This latter illustration is noteworthy, I argue, since a different standard of behavior is expected while on school grounds; this lends credence to the scope of application and the public/private distinction that is favored here. This can be contrasted with Ontario's approach to religious discrimination as experienced on school grounds, constituting grounds for suspension.[201] Perhaps most interesting is that only the Yukon and Northwest Territories speak about the *student's* beliefs and opinions and how she is to engage with religion (her or another's) on school premises. This points to a more foundational question that is not asked by most provinces: how are students to interact and manage religious difference, within the confines of a classroom or as a result of student interactions?

This short foray into the student's rights and responsibilities with regards to religion in their schools suggests that students are allowed to miss school for religious holidays; sometimes have their opinions on their religious beliefs recognized and translated into non-attendance of religious education; and occasionally, be expected to espouse a different standard of behavior while on school premises with regards to student religious diversity.

[199] *Education Act,* SNWT 1995, c 28, s. 22(1)(d).
[200] Ibid, s. 27(4).
[201] *Education Act*, RSO 1990, c E.2, s. 310(7.2).

The teacher

The teacher can be understood as the conduit between the student and the school. In this way, a teacher must walk a fine line between imparting knowledge and being a role model[202] to and for students. This plays out in different – and sometimes contradictory – ways across the country. First, an education act can directly address the teacher's religious morals of the teacher, where the educator is expected

> … to inculcate by precept and example respect for religion and the principles of Judaeo-Christian morality and the highest regard for truth, justice, loyalty, love of country, humanity, benevolence, sobriety, industry, frugality, purity, temperance and all other virtues[203]

This framing requires not only an espoused form of behaviour, but also, an obligation of results in Ontario with regards to the teachings that are imparted to the students, with an overt expectation of embodying the Judeo-Christian ethic. Second, a teacher can have the duty to maintain respect towards religion, as is the case in Nova Scotia.[204] In other jurisdictions, a teacher is expected to encourage respect for a student's spiritual and/or religious values.[205] Some jurisdictions will favor an approach that would have a teacher inculcate respect for the

[202] As seen in *Caldwell v. Stuart*, [1984] 2 SCR 603, where the teacher, a Roman Catholic, had married a divorced man in a civil ceremony and was not hired back the following school year by her Roman Catholic school on the grounds that her union contravened canon law. At issue was whether her marital status could be considered ground for a *bona fide* qualification for employment. McIntyre J., writing for the Supreme Court, found that "In failing to renew the contract of Mrs. Caldwell, the school authorities were exercising a preference for the benefit of the members of the community served by the school and forming the identifiable group by preserving a teaching staff whose Catholic members all accepted and practised the doctrines of the Church. In my opinion then, the dismissal of Mrs. Caldwell may not be considered as a contravention of the *Code* and the appeal must fail. It follows then, that the conflict between the two legal positions asserted by the parties is resolved in favour of the respondent School." (at 628).
[203] *Education Act*, RSO 1990, c E.2, s. 264(1)(c).
[204] *Education Act*, SNS 1995-6, c 1, s. 26(1)(m).
[205] *Education Act,* SNWT 1995, c 28, s. 45(1)(c)(ii).

religious values of others.[206] Interestingly, both of these examples speak of the teacher's duty toward the student. Finally, the Nunavut and Northwest Territories' education acts enable teachers to make statements about religious values, if done within a greater worldview and in respect with the majority of student's beliefs.[207]

The teacher is broadly expected to promote respect of and between students with regards to their religious beliefs. In enabling teachers to comment on religion and religious values in certain settings, education statutes are acknowledging situations where a religious majority exists. Perhaps most intriguing in this category is Ontario's understanding of a teacher's duties as discussed above as including those that embody and convey a certain religious worldview. More broadly, however, these illustrations speak of the tenuous relationship between the teacher and student, but also between teacher and the educational hierarchy, notably: the school as source of employment, the school board as engine or mechanism of placement and the finally, the Ministry of Education for establishing and certifying teaching standards.

The school

Perhaps a starting point here is the school's mission, in order to explore *how* or *if* religion is understood as part of education's mandate. For instance, the *School Act* in British Columbia currently discusses the place of religion under 'conduct', and bears reproduction in full:

> (1) All schools and Provincial schools must be conducted on strictly secular and non-sectarian principles.

[206] *Education Act,* SNu 2008, c 15, s 98(d).
[207] *Education Act,* SNWT 1995, c 28, s. 77(1); *Education Act,* SNu 2008, c 15, s. 99.

> (2) The highest morality must be inculcated, but no religious dogma or creed is to be taught in a school or Provincial school.[208]

This represents the only time religion is addressed within the *School Act* and as such, invites us to look back on education and religion in British Columbia in order to understand their genesis.[209] Alternatively, Alberta's *School Act* begins from the premise of "diversity in shared values"[210] and as such, does not exclude religion, but embraces it, as will be seen further on. Québec's *Education Act* provides a sort of middle ground between the first two examples, where the school's education project must be in line with freedom of religion.[211] Crafting the school's relationship to religion through its 'legislated' mission also highlights substantial differences between the provinces on this very subject.

A second point of interest here is whether schools, through their school and education acts, allow or provide religion education and/or religious instruction. Religious education can be understood as general education about religion, whereas religious instruction can be understood as teaching on a particular faith, with an expectation that students share (and foster) that faith. An additional caveat can be made on this subject within the province of Ontario, where religious instruction is permitted, subject to regulations, as is religious education; whereas religious education and instruction can occur in public schools,[212] only

[208] *School Act*, RSBC 1996, c 412, s. 76.
[209] For an early discussion of religion in public schools in British Columbia, see BC Civil Liberties Association, "Religion in Public Schools" (April 11, 1969), online: http://bccla.org/our_work/religion-in-public-schools/.
[210] *School Act*, RSA 2000, c S-3, s. 3.
[211] *Education Act,* RSQ, c I-13.3, s. 37.
[212] *Education Act*, RSO 1990, c E.2, s. 20, 51.

religious instruction exists within the purview of Roman Catholic schools.[213] Since Roman Catholic schools are denominational schools, it is unsurprising that they will only teach catechism to their students.

And yet, many provinces – such as Saskatchewan, Ontario and Newfoundland and Labrador – do provide religious instruction in schools.[214] In Saskatchewan, for instance, religious instruction "may be given in that school division for a period not exceeding two and one-half hours per week"[215] in separate and Fransaskois schools. This is the only statutory instance where religious instruction is articulated in terms of teachable hours and raises an important point about how this field is regulated or perhaps left up to the discretion of individual school councils[216] or boards.

As discussed earlier, a student may also receive an exemption from religious instruction or exercise.[217] The earlier Albertan example illustrates that students exempted from participating will either be allowed to leave the classroom during the period of instruction, or remain in the classroom during the period of instruction, but not take part in said instruction. No alternative education is provided for in cases of opt-outs: I argue here that this underscores an essential point in terms of equity of educational services with regards to religious instruction in Alberta.

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[213] *Education Act*, RSO 1990, c E.2, s. 52. See Saskatchewan's *Education Act* and the Northwest Territories' *Education Act*, which allow for religious instruction in other schools. See *Education Act*, 1995, SS 1995, c E-0.2, s. 183 (for fransaskois schools); *Education Act*, SNWT 1995, c 28, s. 77(3) (in public denomination schools).
[214] *School Act*, RSA 2000, c S-3, s. 50; *School Act*, 1997, SNL, c S-12.2, s. 10; *Education Act*, RSO 1990, c E.2, s. 20, 51;
[215] *Education Act*, 1995, SS 1995, c E-0.2, s. 182(1). A similar provision exists for the aforementioned fransaskois schools, at s. 183(1) (see also 134.2(5)(g)).
[216] A school council may recommend to the principal that religious observance should be provided in schools in Newfoundland and Labrador: *School Act*, SNL 1997, c S-12.2, s. 26(5).
[217] *School Act*, RSA 2000, c S-3, s. 50(2);

A third point about schools and religion are the private schools, which are able to offer a wider array of religious content. In Nova Scotia, for instance, a private school can offer a religious-based curriculum.[218] Elsewhere, private schools can take religious denomination into account.[219] In contrast – and as will be seen in the last section of this chapter – the Ethics and Religious Culture Program in Québec applies to all schools, but a distinction is made between public secular schools and private religious schools.[220]

A final point of contention with regards to schools and religion is that in certain provinces, 'religious workers' or persons allowed to teach religious education are brought from outside of the school system.[221] This denotes that religion can be taught by individuals who are not members of the school staff and as such, do not have to abide by the same rules and codes of conduct. The 'importing' of religious workers, I suggest, constitutes an important challenge to socialization practices for both the student and the teacher.

In surveying the school's engagement with religious education and religious instruction, I have demonstrated that no clear rules exist with regards to whether or how students can be exempted from religious education and religious instruction, as well as if an alternative course

[218] *Education Act*, SNS 1995-6, c 1, s. 131(3).
[219] For example: *Education Act*, RSY 2002, c 61, ss. 29(1), 29(3).
[220] In Loyola, a private Anglophone Jesuit boys school in Montréal asked to teach an equivalent version of the ERC, rather than the state-mandated one, arguing that teaching Catholicism from a neutral perspective would be impracticable in the context of their school's mission and identity. The Court found that the Minister of Education's requirement to teach the class from a religiously neutral perspective was unduly restricted, given the aims: see *Loyola*, *supra* note 9. For case genesis, see *Loyola High School c. Courchesne*, 2010 QCCS 2631 **[Loyola 1]**; *Québec (Procureur général) c. Loyola High School*, 2012 QCCA 2139 **[Loyola 2]**.
[221] *Education Act,* RSO 1990, c E.2, s. 49(7)(e)(iii); *Education Act*, SNS 1995-6, c 1, s. 64(3)(d); *Education Act*, 1995, SS 1995, c E-0.2, s. 87(1)(t).

is provided in the case of the latter. I suggest that the mission contained in the education act can reveal how religion is addressed (or not) in schools. Moreover, private schools can offer more religious content, and even a religious-based curriculum, which can have much broader implications for the rest of the subjects students must engage with – one can think here of biology, history and sexual education classes, just to name a few. Finally, serious concerns can be raised about contracting religion out to non-members of the school, insofar as it is related to the duties of the teacher, as set out in the education and school acts. In turning our attention to the school board and the Ministry of Education, I discuss the challenges of this interdependent relationship with regards to religious content.

The school board and Ministry of Education

School boards and their Ministry of Education are treated hand in hand in this section, given that the responsibilities of one are at the discretion of another. Indeed, although both are established according to the education or school act in that province, school boards are, by their very nature, "creatures of statute",[222] where decisions must be taken in accordance with their established (legislative) purpose. By extension, school and school boards must abide by provincial human rights codes, including relevant provisions on freedom of religion, non-discrimination on the basis of religion and the concept of reasonable accommodation. Nevertheless, decisions rendered by school board members can deviate from their established purpose, or overstep their legislated bounds of action and inquiry, particularly when it comes to

[222] *Chamberlain, supra* note 180, at ¶ 27-28; see Wayne Mackay, "Comparative Role of Courts and Administrative Agencies: Applying Constitutional Principles of Diversity in Canada" (2011) 29 National Journal of Constitutional Law 33, 57 **[Mackay, "Comparative Roles"]**.

questions of religious diversity, which blur the lines between personal opinion and professional stance. This interrelationship, or 'statutory complicity' between the Ministry of Education and the school board, can be illustrated in different ways when it comes to the governance of religion in schools. For instance, in some provinces, school boards can insure that religious education classes use approved materials.[223] Alternatively, in Québec, the *Education Act* also sets out the establishment, composition and mission of a religious affairs committee by the Ministry of Education, where the former shall be consulted on matters pertaining to the Ethics and Religious Culture program.[224] Although this point is further discussed in the fourth section of this chapter on secularization and spatialization processes, I contend here that the Ministry of Education retains strong control over *how* and *what* religion is present in the classrooms. In other provinces, such as Alberta, the Ministry of Education retains broad discretion in this subject, and as such, can disallow the form and the content of religious instruction.[225] The Yukon Ministry of Education also holds discretionary power when it comes to the combination of schools, and more specifically, in not allowing a religious school to be combined with a non-religious one.[226] Finally, the Ministry of Education can establish separate schools that reflect minority faiths (whether Roman Catholic or Protestant) in Saskatchewan.[227]

Hence, as the previous examples illustrate, the interrelationship between the school boards and the Ministry of Education is underscored by the discretionary power of the latter when it is question of modulating the place of religion. This can be highlighted by its power to disallow

[223] *School Act*, 1997, SNL 1997, c S-12.2, s. 75(1)(m).
[224] *Education Act,* RSQ, c I-13.3, ss. 477.18.1, 477.18.2, 477.18.3, 461.
[225] *School Act*, RSA 2000, c S-3, s. 39(1)(e).
[226] *Education Act,* RSY 2002, c 61, s. 76(2).
[227] *Education Act*, 1995, SS 1995, c E-0.2, ss. 49(5)(b), 49(5)(d), 49(7)(a), 49(7)(c) & 53.

classroom materials on religion (whereas in some provinces, schools boards hold the right to allow content), which can supplant the espoused role of schools boards. The Ministry of Education also retains broad control over what kind of schools can be amalgamated – and particularly the ability to prevent the consolidation of religious and non-religious schools, and also, the power to establish new schools according the faith of electors[228] in that school division.

Conclusion

In returning to the etymology of "school", as employed at the outset of this section, it is clear that schools represent a historically complex, multi-layered, and politically charged field of analysis. This section contended that the school constituted as a distinct scale of analysis. It draws its strength from two poles of analysis. First, in challenging the 'mapping' of education, drawing on a law and geography approach, I put forth an understanding of education which exemplifies the nexus between relationships and space. As such, I argued that the school emerges as territory of analysis. Second, I developed a complex portrait by engaging with education's constitutional terrain in Canada. This was accomplished through an examination of section 93 of the *Constitution Act 1867*, which emerged as a "compact of Confederation". I argued that this demonstrates early historical compromise and the subsequently, a challenge to modern-day constitutional adaptation to population differences. Some provinces, such as

[228] School board districts can also facilitate polling the electorate on religious matters (*Education Act*, 1995, SS 1995, c E-0.2, s. 50(2)(b); *Education Act,* SNWT 1995, c 28, ss. 97(1), 97(2), 98(2), 98(4), 98(6)) or determining districting (*Education Act,* RSY 2002, c 61, s. 62(2), 82(3)).

Québec, have chosen to opt-out entirely and develop school boards according to other (social) categories, as discussed earlier. I asserted that the constitutional challenges under the Canadian *Charter* revealed a transformation in this discourse, from one based in (historical) privilege to one founded in (constitutional) rights. I then examined how education is addressed under provincial jurisdiction, dressing a multifaceted picture, where student, teacher, school, school board and Ministry of Education must coalesce, sometimes in harmony and other times at odds, over the subject of religion. Indeed, it appears clear that no province or territory addresses religion in education in the same way, as illustrated through my recourse to an analysis of scales. I propose that it therefore becomes necessary to find other approaches through which to discuss this intersection. In the following section, and building on the school as a distinct space of analysis, I argue that schools constitute a specific space for legal analysis.

3. Schools as a specific space for legal analysis

The previous section proposed that schools should be understood as constituting a distinct scale of analysis. The objective of this section is to establish that schools embody a specific space for legal analysis. This will be accomplished in two parts: first, by analyzing how courts have understood the mandate and duties of schools; and second, by considering how codes of conduct, as found in schools, are sites of legal pluralism.

Schools are central to fulfilling education's mandate. One way to discern the importance of schools, in order to buttress their claim as a space for legal analysis, is through the courts'

understanding of schools' mission. The court's understanding of a school's mission is filtered through the various applications and arguments presented before them. Some stated it very plainly: "A school is a body of students organized for the purpose of their education."[229] This type of statement, however, does not allow the reader to glean much from the environment of the school or its potential relationships; it speaks, rather, to its organizational politics. Another court framed its understanding of a school in terms of security concerns: "[u]nlike an airplane or courtroom, a school is a "highly circumscribed environment".[230] This points to the school being understood as a 'bounded'[231] space. At issue in this case was whether wearing a kirpan should be allowed within the school premises. In justifying the right to the kirpan, the court point to the ongoing relationship between the students and staff as "a meaningful opportunity to assess the circumstances of the individual seeking the accommodation".[232] The intimate and ongoing relationship between students, teachers and administration creates, therefore, a privileged ground of communication. This is reflected in the school and teachers' duties, as articulated within the courts and is illustrated in two ways. First, schools can foster the growth of minority groups, as was the case in *Mahe v. Alberta*,[233] where parents sought to determine the education system in Edmonton responded to the needs of the French linguistic minority. In speaking about the importance of language as a form of cultural transmission, Dickson C.J. (writing for a unanimous court) stated:

[229] Toronto District School Board v. Ontario Secondary School Teachers' Federation, O.S.S.T.F. District 12, 2003 CanLII 40342 (ON LRB), ¶ 25.
[230] Pandori v. Peel Board of Education (1990), 12 C.H.R.R. D/364, ¶ 197 **[*Pandori*]**.
[231] *Supra* note 131.
[232] *Pandori*, *supra* note 230, ¶ 197.
[233] *Mahe v. Alberta*, [1990] 1 SCR 342 **[*Mahe*]**.

> In addition, it is worth noting that minority schools themselves provide community centres where the promotion and preservation of minority language culture can occur; they provide needed locations where the minority community can meet and facilities which they can use to express their culture.[234]

Although linguistic minority groups benefit from explicit constitutional protection, they are especially vulnerable if faced with inertia on the part of the government: as such, there is a timely imperative to fulfilling constitutional obligations,[235] in order to protect linguistic specificity.

Second, schools also speak about the importance of cultivating respect and therefore, of leading by example:

> [S]chools have a duty to foster the respect of their students for the constitutional rights of all members of society. Learning respect for those rights is essential to our democratic society and should be part of the education of all students. These values are best taught by example and may be undermined if the students' rights are ignored by those in authority.[236]

I argue that schools, as conceived by the courts, emerge here as sites of protection, but also as (potential) yet highly desirable vehicles of change.

Nevertheless, the students and staff relationship within the school is uncontestably built on a power dynamic. The presence of this power dynamic can shape and shift the ways in which spaces are perceived and attributed as well as the responsibilities that are assigned to various entities, including schools. In *Ross v. New Brunswick School District No. 15*, a teacher was accused of making discriminatory and anti-Semitic comments during his 'off-duty time' – understood as the time when he not acting as a teacher but during the time he was being paid

[234] Mahe, supra note 233, 363.
[235] *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, [2015] 2 SCR 139, ¶ 28 **[Rose-des-vents]**.
[236] R. v. M. (M.R.), [1998] 3 SCR 393, ¶ 3.

as one. This case was about the "obligation imposed upon a public school board pursuant to provincial human rights legislation to provide discrimination-free educational services."[237] The school, as place of employment but also site of relationships, was understood as follows by the Supreme Court of Canada:

> "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. As the Board of Inquiry stated, a school board has a duty to maintain a positive school environment for all persons served by it."[238]

I suggest here that seeing schools through the courts' eyes draws out the following four points for the purposes of this discussion. First, schools are seen as places where ongoing relationships occur; in this way, space and time are subjected to a different continuum to the one found in an airplane – where one is considered as 'temporary' and in a state of transit from A to B to perhaps C – or a courtroom – where one is appears before a judge with specific purpose, such as to plead a particular motion. The relationship between air steward and passenger or between judge and litigant can be understood as qualitatively different that the one experienced between student and staff. Whereas a flight might last a few hours and a trial a few days, a school-based relationship can last at least half a decade. The difference resides therefore in the quality of the relationship and the time in which one can come to a principled decision. Second, schools are sites of power dynamics and where there are figures of authority. This point speaks to the significance of understanding the organizational politics that shape these spaces. Third – and returning to my opening statement – education acts here as both

[237] Ross, *supra* note 182, ¶ 1 (La Forest J.).
[238] Ibid, ¶ 42 (La Forest J.). See also: Morin v. Regional Administration Unit #3 (P.E.I.), 2002 PESCAD 9 (CanLII), ¶ 231. On teachers as a medium of transmission of values, see Trinity Western University v. British Columbia College of Teachers, [2001] 1 SCR 772, ¶ 13.

medium and message, where schools and teachers are identified as 'centres' or 'medium' of communication. Finally, in envisaging the aforementioned as sites of communication, there also emerges a duty to provide a 'positive school environment' to all those who engage within this specific site.

Establishing the school as a specific space for legal analysis is also drawn from the courts' interpretation of arguments submitted by lawyers, in the form of facts, their clients' affidavits or expert reports. However, I suggest that the actual constituting documents of the school can also help shape the courts' understanding. School values are often enshrined in their codes of conduct. The concept of a code is understood as "regulating dispositions, identities and practices, as these are formed in official and local pedagogizing agencies (school, family)".[239] Specific rules are therefore set out to govern relationships, in terms of the respect afforded to each party. A code of conduct will often include a zero-tolerance policy on weapons and violence on school property. This uncompromising application of the law does not allow room for nuance, which can result in complicated situations, as seen, for example, in the case of the kirpan on school premises.[240] A code of conduct can become a more explicit contract between the school and the student, by getting them to sign on when entering the school. As such, the

[239] Bernstein, *supra* note 137, 3. Bernstein's code could be contrasted with Pierre Bourdieu's habitus, where the latter refers to "the habitual, patterned ways of understanding, judging, and acting which arise from our particular position as members of one or several social "fields," and from our particular trajectory in the social structure *(e.g.,* whether our group is emerging or declining; whether our own position within it is becoming stronger or weaker)." See Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (1986-1987) 38 Hastings L.J. 805, 811). Brighenti, "On Territory as Relationship", *supra* note 134, 76 (fn 32) suggests that "Bourdieu's concept of *habitus* can be useful to appreciate the fixation of territorial relationships in action."

[240] Multani, *supra* note 178. The school's code of conduct contained a blanket prohibition on weapons, which was at the root of the initial dispute between Gurbaj Multani and the school board. Many affidavits provided by school officials and administration spoke about 'security incidents' involving knives, scissors, exactos and letter openers, but never a kirpan.

code of conduct becomes enshrined as another document detailing the rights and duties of the parties and their tacit or overt acceptance to these rules.[241] This code of life can also include student behavior outside of the school walls, such as the promise (one can also read duty) to uphold their Catholic education and particular way of life.[242] As such, the school's mission transcends the particular institution and creates an impetus for its broader application. Hence, the rights and duties of each actor within the school are set out within a particular code of conduct, or code of student life. This document can detail how the student is to conduct him/herself within the school. And while many of these details concern how students can act or dress, it also speaks to how the school sees and situates itself within the greater society.

At this point, it is important to distinguish the role of the school as an institution: while schools organize students' (and very often parents') lives in terms of schedules, it cannot be considered a 'total institution' as understood by Erving Goffman, referring to a self-contained space, regulating all behavior, activities and more generally, schedules.[243] Put differently, Goffman's total institutions require a closed space: examples range from prisons, to asylums, to children's homes and youth rehabilitation centres.[244] Instead, schools provide a start and finish time, but expect the school body to vacate the premises at the end of the school day. Using codes of

[241] As seen in the evidentiary record in Loyola v. A-G Québec, 2010 QCCS 2631, ¶ 15 (Exhibit 15), which requires students and parents/tutors to comply with the rules and regulations of the school concerning academics, sports as well as religious identity. This last point is further discussed under section 2.4.
[242] Ibid.
[243] Erving Goffman, *Asylums: Essays on the Social Situations of Mental Patients and Other Inmates* (Chicago, Aldine Publishing, 1961).
[244] For a Goffmanian analysis of codes of conduct in youth rehabilitation centres, see Julie Desrosiers, "The Rigidity and Density of Discipline in Youth Rehabilitation Centres … Or Rules that Counter Rights" in René Provost & Colleen Sheppard (eds.), *Dialogues on Human Rights and Legal Pluralism* (Dortrecht, Springer, 2013), 165-185 **[Desrosiers, "The Rigidity and Density of Discipline"]**

conduct also points to the presence an internal order, namely one that is regulated by the school board or the school's governing body. Codes of conduct therefore establish a new set of rules into an existing life. Nevertheless, codes of conduct can also illustrate dissonance between their actual application and their fundamental purposes.[245] These codes of conduct, as secondary forms of socialization – as seen earlier (section 1) – can also be in contradiction with a child's primary form of socialization, the family.

In conclusion, while education and schools have been accorded a prominent place of study within the realm of geography and urban studies, there is a dearth of attention in this area on the part of jurists. This is not to say that authors have not explored school conflicts as they became litigated,[246] but rather, that particular attention has not been placed on the importance of space when analyzing these claims. It is in this vein that I explore the spaces that are used to shape governmental policies in the following section. The deconfessionalization process of schools in Québec will serve as illustration here (4).

[245] As argued by Desrosiers, "The Rigidity and Density of Discipline", *supra* note 244, at 185.

[246] For instance, Martha Minow, *In Brown's wake: legacies of America's educational landmark* (Oxford, Oxford University Press, 2010). In Canada, Wayne MacKay has done extensive work on education and law. See most recently on teachers and the law: Wayne MacKay, Lyle Sutherland & Kimberley A. Pochini, *Teachers and the Law: Diverse Roles and New Challenges* (3rd ed., Toronto, Edmond Montgomery Publications, 2013). On schools under the Canadian Charter, see: Michael Manley-Casimir & Kirsten Manley-Casimir (eds.), *The Courts, the Charter, and the Schools: the impact of the Charter of Rights and Freedoms on Educational Policy and Practice 1982-2007* (Toronto, University of Toronto Press, 2009).

4. Deconfessionalization of schools in Québec: the interrelationship between spatializing methods and secularization

In this section, the deconfessionalization of schools in Québec is employed as a precursor to the litigation stories (examined in subsequent chapters), in order to demonstrate how space can be re-appropriated and illustrate the effect of shaping of individuals' beliefs and practices. More particularly, the deconfessionalization process will frame the discussion on how 'spatializing processes can promote the reproduction of secularization.'[247] In order to achieve this objective, one must first understand the de-coupling of Church and State with regards to education in order to then discuss the spatial effects of this separation. The story of state and religion in Québec is particularly rich and provides a concrete Canadian example of how understandings of space and secularization practices are connected.

In 2008, the Québec government introduced a mandatory Ethics and Religious Culture (ECR) program. The ECR program was to replace existing classes, which had been, until then, split between moral and religious instruction. This new curriculum was premised on students developing three sets of skills: first, reflecting on ethical questions; second, demonstrating an understanding of religious phenomena; and third, practising dialogue.[248] However, in order to understand how this ECR program emerged, it must be understood that the process of decoupling Church from State occurred incrementally in Québec. Until the early 1960s, Churches (specifically, the Catholic Church) held strong interests in both hospitals and

[247] Dwyer & Parutis, "Faith in the system", *supra* note 118, 267.
[248] Ministère de l'éducation, du loisir et du sport, Programme de formation de l'école québécoise, « Éthique et culture religieuse : présentation de la discipline » (June 21 2011), online : http://www.mels.gouv.qc.ca/progression/secondaire/pdf/progrApprSec_ECR_fr.pdf.

educational settings and until the Quiet Revolution, discussions about the State and education were sparse. One could therefore extrapolate that the discussions about children – outside of the purview of the Church – were also minimal until then. Between 1963 and 1966, the Parent Commission produced reports on the state of education in Québec. Known as the Parent Report,[249] it can be considered as the beginning of this process of separation between Church and State. Most notably, the Parent Report advocated for further public spending in the school system, thereby circumventing the role and power of the Church with the school apparatus. But this separation between church and state produced some unexpected results. Among them, while the Catholic and Protestant school boards divided children along religious lines, the linguistic lines were "bifurcated", according to Harold Troper, resulting in English-speaking Catholic children falling under the purview of the (predominantly French) Roman Catholic school board.[250] Another unanticipated product of the split between Catholic/Protestant school boards was that Jewish children were subsumed under the jurisdiction of the Protestant school board. They were considered, for all intents and purposes, Protestant, for fiscal reasons. This was accomplished through a "legislative sleight of hand" on the part of the Québec government according to Troper,[251] speaking about the *Act to amend the law concerning education with respect to persons professing the Jewish religion.*[252] The Supreme Court of Canada addressed the educational system on the island of Montreal and more particularly, Jewish children's rights to education in *Reference in re Educational System in Island of Montreal / Hirsch v. Protestant*

[249] On the history of the Parent Commission, see Claude Corbo, *L'éducation pour tous – une anthologie du rapport Parent* (Montréal, Presses de l'Université de Montréal, 2002).
[250] Harold Troper, *The Defining Decade: Identity, Politics, and the Canadian Jewish Community* (Toronto, University of Toronto Press, 2010), pp. 47-48.
[251] Ibid, p. 49.
[252] *Act to amend the law concerning education with respect to persons professing the Jewish religion* (1903, 3 Edw. VII, c. 16).

Board of School Commrs.[253]. Indeed, while Jewish children could attend the Protestant school board and hold the same rights as Protestant children, Jews could not sit on the Protestant school board as members – only Protestants could sit as board members. The Supreme Court held that one could not infer that treating children alike resulted in enabling all to sit on the Protestant School board as a member. The Privy Council confirmed the Supreme Court's ruling on who could sit on school boards, but opened the door to the creation of schools for those who were neither Catholic nor Protestant.[254] While these are but two examples of deviations from the Protestant/Catholic school boards, these illustrations highlight the challenge of labelling children in pre-fabricated religious/linguistic boxes.

As previously discussed (in section 2.2.1), a reference submitted to the Supreme Court some thirty years later on the constitutionality of certain provisions contained in the new *Education Act* (also known as Bill 107), underlined the importance of drawing jurisdictional lines between school boards, moving from religious to linguistic considerations (but keeping dissentient school boards as need be). [255] Perhaps most important within our discussion on the deconfessionalization of schools is that the new version of the *Education Act* still sought to grant privileges to Protestant and Catholic committees of the Conseil supérieur de l'éducation the right to modulate the students' moral and religious education. Although the new *Education Act* heralded a change from religious to linguistic school boards, it will be suggested that this

[253] *Reference in re Educational System in Island of Montreal / Hirsch v. Protestant Board of School Commrs.*, [1926] SCR 246.
[254] *Reference in re Educational System in Island of Montreal / Hirsch v. Protestant Board of School Commrs.,* [1928] AC 200.
[255] *Education Reference*, *supra* note 152. The constitutional questions are set out at pages 523-525 of the reference.

did not signify the end of the religious committees' (and therefore religious groups') jurisdictional authority within the Conseil supérieur de l'éducation.[256]

The review of the educational system in Québec had not yet reached its peak. In 1995, the legislative process to review the Québec education system was triggered by the creation of the Commission for the Estates on General Education.[257] A 'direct offshoot' of the Commission was the Task Force on the Place of Religion in Schools, which released its report in 1999.[258] The invitation to revamp the educational system also gave way to a constitutional amendment in 1997,[259] as discussed earlier, which removed the constitutional protections that had been set out in the *Constitutional Act of 1867* to provide funding for Catholics and Protestants. The constitutional amendment could be understood as the logical extension of the conversation initiated by the Québec government through the 1993 reference to the Supreme Court of Canada. This amendment facilitated the deconfessionalization of public schools the following year, in 1998: schools were no longer organized according to Catholic and Protestant school boards, but rather on the basis of language (French and English). Yet (religious) diversity in school settings was taken into account in other ways in the years following. As such, the responsibility for developing mechanisms to safeguard diversity and promote accommodation in schools moved from not only the school boards but also, to what the Fleury report called

[256] The Religious Affairs Committee, as established by the *Education Act* in 2000, is to advise the Minister of Education on any matter relating to religion in the educational system: see s. 477.18.3 of the *Education Act*.
[257] Commission scolaire des chênes, *supra* note 9, ¶ 12.
[258] Government of Québec, Minister of Education, *Religion in Secular Schools: A New Perspective for Québec* (1999, Abridged version), online: http://www.mels.gouv.qc.ca/REFORME/religion/Abre-an.pdf.
[259] *Constitution Amendment, 1997 (Quebec)*, SI/97-141). Newfoundland has a similar exemption: see *Constitutional Amendment, 1998 (Newfoundland)*, SI/98-25.

"school networks".[260] As such, the Fleury report advocated for a greater sensitization of the school population (administrators, teachers, student teachers and parents alike) to the sociocultural diversity that already inhabited their school spaces. Indeed, as attention to social context in schools mounted, the place of religion, as an object of teaching, was also in the process of shifting.

The decoupling process of religion in the educational system can be understood as culminating through the adoption and implementation of the ECR Program in 2008, which promoted that religions be studied from a 'cultural perspective', in all schools, both public and private.[261] The ECR program attributed varied frequencies of teaching and engagement with various religions and belief systems, as taught in both primary and secondary school. For instance, in primary school, Christianity (encompassing Catholicism and Protestantism) is to be treated throughout each year of a teaching cycle; alternatively, Judaism and Aboriginal spiritualities are to be addressed many times, within each year of a teaching cycle; Islam, Hinduism and Buddhism are to be discussed many times within a particular teaching cycle.[262] Other religions would be addressed according to the particular context. Finally, non-religious and humanist beliefs would

[260] Ministère de l'éducation, du loisir et du sport, *Comité consultatif sur l'intégration et l'accommodement raisonnable en milieu scolaire: une école québécoise inclusive: dialogue, valeurs et repères communs* (Québec, 2007), online: www.mels.qc.ca/fileadmin/site_web/documents/dpse/formation_jeunes/RapportAccRaisonnable.pdf at p. 45.

[261] A policy paper by the Minister of Education set out the principles upon which the ERC program was to be based: see *Establishment of an ethics and religious culture program: Providing future direction for all Québec Youth* (Publications du Québec, Québec, 2005), online: http://www.education.gouv.qc.ca/fileadmin/site_web/documents/PSG/aff_religieuses/prog_ethique_cult_reli_a.pdf; Commission scolaire des chênes, *supra* note 257, ¶ 16.

[262] Ministère de l'éducation, du loisir et du sport, Programme de formation de l'école québécoise, « Éthique et culture religieuse : progression des apprentissages au primaire » (June 21 2011), online : www1.mels.gouv.qc.ca/progressionPrimaire/ethiqueCultureReligieuse/index.asp ?page=comptence_02.

be addressed within another specific teaching cycle. [263] The parcelling up of religions and belief systems under the ECR program – although more egalitarian than no apportioning at all – still demonstrates the presence, I argue, of a majority-minority relations approach to religion (albeit culturally). In other words, while Christianity was still given a predominant role in the teaching cycle, its focus is diminished by the presence of other religions and strong beliefs. Each of these steps towards the process or reproduction of secularization can be understood as generating separate places yet dovetailing religious processes at the same time.

So how does a brief legal history of the deconfessionalization of schools in Québec lead to a deeper understanding of the interrelationship between spatializing processes and secularization and a potential for the former to promote the reproduction of the latter? I argue that the deconfessionalization of schools in Québec has turned the focus away from religious identity (in terms of school boards) and turned it towards the place of religion in schools. The deconfessionalization of schools has not led to the disappearance or abolition of religion or private religious schools in Québec. If anything, I suggest that the ECR program has demonstrated a willingness to retain the *status quo* – namely the presence of a Christian (Catholic) majority, with multiple minority groups – in its teaching format. Perhaps more importantly, however, the ECR program has challenged how schools and teachers teach: I argue that this shifts this conversation back to one about the importance of territory and boundaries.

[263] Ministère de l'éducation, du loisir et du sport, Programme de formation de l'école québécoise, « Éthique et culture religieuse : présentation de la discipline » (June 21 2011), online : http://www.mels.gouv.qc.ca/progression/secondaire/pdf/progrApprSec_ECR_fr.pdf, p. 11.

The works of Banu Gökariksel and Nicolas Howe,[264] amongst others, are particularly helpful in understanding the interrelationship between spatializing processes and secularization, building on the legal geography approach espoused earlier on in this chapter. Elizabeth Shakman Hurd's understanding of secularism is particularly constructive in this setting, where she notes that

> "Rather than take secularism to be a neutral or natural space for politics to emerges once religion has been privatized, displaced, or diminished, it takes shape here as a contingent series of legal and political claims and projects that are deeply implicated in the definition and management of religion, religious freedom, toleration, diversity and so on. Secularism is not the absence of religion, but enacts a particular kind of presence. It appropriates religion: defining, shaping and even transforming it"[265]

Drawing on these authors, I posit that the deconfessionalization of schools in Québec has not resulted in the evaporation of religion, but rather, in its transformation, thereby reshaping the contours of religion, and therefore, belonging.

Secularism is understood here as not the negation of religion, or its opposite, but rather, and drawing on Gökariksel, "its redefinition and reorganization".[266] Indeed, in looking at veiling practices in Turkey, Gökariksel proposes that the processes of secularization – as both a tool of social engineering and modernization policies – can shape how bodies and urban spaces are seen and felt.[267] Religion and religious bodies are therefore not removed from public space, but re-shaped within the imperative of secularization.[268] Howe also discusses the temptation of

[264] Banu Gökariksel, "Beyond the officially sacred: religion, secularism, and the body in the production of subjectivity" (2009) 10(6) Social & Cultural Geography 657-674 **[Gökariksel, "Beyond the officially sacred"]**; Nicolas Howe, "Secular iconoclasm: purifying, privatizing, and profaning public faith" (2009) 10(6) Social & Cultural Geography 639-656 **[Howe, "Secular iconoclasm"]**.
[265] Elizabeth Shakman Hurd, "International politics after secularism" (2012) 38 *Review of International Studies* 943, 955.
[266] Gökariksel, "Beyond the officially sacred", supra note 264, 659.
[267] Ibid, at 662 & 666.
[268] Gökariksel notes, however, that "religion, like secularism, is lived as part of everyday life in a variety of spaces and scales.": Gökariksel, supra, 669.

some within the American setting to oust religion from the public place – which he refers here to as "secular iconoclasts" – but argues that "this means attending to different forms of secular place making, not the production of 'secular space'."[269] These authors belong to a particular subset of literature, known as geography of religion, and place particular attention on the 'secular': they argue that this means "taking secularization, as a sociospatial theoretical framework, seriously"[270].

Within the scope of my chapter, however, it requires examining how the deconfessionalization process has changed how school spaces are understood.[271] Indeed, deconfessionalization symbolizes a time of transition for the State, as well as for the relevant actors. This could be understood, in Talal Asad's terms, as a change in "historical epoch": "[f]or representations of "the secular" and "the religious" in modern and modernizing states mediates people's identities, help shape their sensibilities, and guarantee their experiences."[272] While it is beyond the scope of this section to discuss the growth of the secularization literature, particularly in the last decade,[273] I emphasize the multiplicity of experiences – both secular and religious[274] – in an

[269] Howe, "Secular iconoclasm", *supra* note 264, 641.
[270] Justin Wilford, "Sacred Archipelagos: Geographies of Secularization" (2010) 34(3) Progress in Human Geography 328, 329 **[Wilford, "Sacred Archipelagos"]**. As put forth by Wilford at the same page, the secularization paradigm "sketches out a picture in which we can see that religious organizations face a different set of limitations and opportunities in advanced, post-industrial milieu than their industrial and pre-industrial counterparts did."
[271] On this point, see Christian Smith, "Introduction: rethinking the secularization of American public life" in Christian Smith (ed.), *The secular revolution: power, interests, and conflict in the secularization of American public life* (Berkeley, University of California Press, 2003), vii (cited in Wilford, "Sacred Archipelagos, *supra* note 270, 338).
[272] Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, Stanford University Press, 2003), p. 14.
[273] For sample readings on this subject, see Asad, *supra* note 272; Jane Jackobsen & Ann Pelligrini (eds.), *Secularisms* (Durham, Duke University Press, 2008); Linell E. Cady & Elizabeth Shakman Hurd (eds.), *Comparative Secularisms in a Global Age* (New York, Palgrave Macmillan, 2010); Jürgen Habermas, "Religion in the Public Sphere" (2006) 14(1) *European Journal of Philosophy* 1; Karel Dobblelare, *Secularization: An Analysis at Three Levels* (Brussels, Peter Lang, 2002). For a recent discussion of secularization and its intersection with geography of

effort to demonstrate that the presence of one does not preclude the existence of the other.

In returning to the main point of this section, namely the deconfessionalization of schools in Québec as an illustration of the interrelationship between spatializing processes and secularism, I submit that law, school and religion are unified here through the vector of geography. This is exemplified through the fields of legal geography, geography of education and geography of religion. Whereas the first focuses on space as both structuring and transforming our experience, application and effect of the law,[275] the second emphasizes the importance of a particular "educational space" and therefore a particular site of analysis; [276] the final field underscores the intersection between place and practice.[277]

This section has sought to provide a brief legal history of the deconfessionalization of schools in Québec in order to illustrate how policies can affect how spaces are perceived and how secularization processes are understood in turn. Confessional or denominational schools can

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religion, see Amélie Barras, "Sacred Laïcité and the Politics of Religious Resurgence in France: Whither Religious Pluralism?" (2013) 18(2) *Mediterranean Politics* 276.

[274] Howe, "Secular iconoclasm", *supra* note 264, 641; Kim Knott, "Theoretical and methodological resources for breaking open the secular and exploring the boundary between religion and non-religion" (2010) 2 *Historia Religionum* 115, 120. See more generally Kim Knott, *The Location of Religion: A Spatial Analysis* (London, Equinox Publishing, 2005).

[275] Desmond Manderson, "Interstices: New Work on Legal Spaces" (2005) 9 *Law, Text and Culture* 1, at 1.

[276] See Chris Taylor, "Towards a geography of education" (2009) 35(5) *Oxford Review of Education* 651; Sarah L. Holloway, Gavin Brown & Helena Pimlott-Wilson, "Editorial Introduction: Geographies of education and aspiration" (2011) 9(1) *Children's Geographies* 1. Susan L. Robertson cautions against "fetishiz[ing] space" in order to avoid importing language without sufficient attunement to the theoretical baggage engendered by a particular discipline or sub-discipline in "'Spatializing' the sociology of education: Stand-points, entry-points, vantage-points" in Michael W. Apple, Stephen J. Ball & Luis Armando Gandin (eds.), *The International Handbook of the Sociology of Education* (London, Routledge, 2010), 15-26, at 15.

[277] See Gökariksel, "Beyond the officially sacred", *supra* note 264; Howe, "Secular iconoclasm", *supra* note 264; Wilford, "Sacred Archipelagos, *supra* note 270; Kim Knott, *The Location of Religion: A Spatial Analysis* (London, Equinox, 2005); Kim Knott, "From locality to location and back again: A spatial journey in the study of religion" (2009) 39 *Religion* 154; Roger W. Stump, *The geography of religion: faith, place, and space* (Lanham, Rowman & Littlefield Publishers, 2008).

therefore be thought of as belonging to our constitutional memory; the subsequent redirection of schools' mandates on this point suggests a reinterpretation of not only religion's role, but also that of the State. Furthermore, the attempts at decoupling religion and school as pursued in the 1990s and 2000s in Québec, intimates that more attention needs to be placed on how secular space is produced, to echo Howe, and how religion is preserved, as seen through the construction of the ECR program.

Conclusion

This chapter has argued that schools constitute a distinct scale of analysis and specific space for legal analysis.[278] In first exploring the particular mandate and or mission of schools, I suggested that the school represents an important and undeniable form of socialization: formative education acts as an unstated source of common experience and also a form of citizen building. The school as distinct scale of analysis represented the second point of interest here: the school, as territory, becomes a form of social relations. The framework for this thesis was also addressed through a law and geography approach, one that lends credence to the analytical weight of space and place. This was evidenced, first by retracing the constitutional origins of education through the *Constitution Act 1867* and its political compromise, the effects of which are still being negotiated in today's world. I continued this analysis with a review of *Canadian*

[278] As set out in the general introduction to my thesis, this approach to both space and scale was further evidenced in my case selection and methodological considerations, where I situated my case studies in terms of attention to both small and large-scale analyses. This approach will enable me to achieve a deeper understanding of the evidentiary record and the story that it tells.

Charter-based claims, which have transformed the language of 'privileges' to one of 'rights'. I concluded this analysis through an exploration of how various provincial and territorial education and school statutes address religion within the confines of their realm, which revealed a complex and multilayered portrait of how education and religion interact.

Having established the school as constituting a distinct scale of analysis, I then turned to arguing for schools as constituting a specific space for legal analysis. In seeing schools through the courts' eyes, four points were of particular note, which reinforced my theoretical framing and site of inquiry: first, schools are seen as places where ongoing relationships occur; second, schools are sites of power dynamics; third, education acts both here as medium and message, since schools and teachers are identified as 'centres' or 'medium' of communication; finally, schools also have a duty to provide a 'positive school environment' to all those who engage within this specific site. Moreover, the use of codes of conduct by the schools are instituted in order to shape their students but also create a plurality of legal orders within the child's sphere of existence. In framing the school's mandate, I then addressed, in this chapter, that spaces that are used to shape these governmental policies, employing the deconfessionalization process of schools in Québec as an illustration. The deconfessionalization of schools in Québec highlighted that in order to understand the effects of secularization, as a socio-spatial theoretical framework, one must also be aware of the spatializing processes. I argued that further legal awareness is needed to understand the relationship between space and secularization in the school context. Within the context of deconfessionalization of schools in Québec, this referred to the repositioning of the Church and State and hence, religion. This required understanding

the spatial consequences of secularization policies. More particularly, attention to this (secularization) process has impelled exploring how school spaces are understood when faced with deconfessionalization. In conclusion, this chapter has sought to engage in a deeper socio-legal discussion about the place and space that religion and education occupy. It has demonstrated the presence of extensive legal regulation within public schools' realm, from both constitutional and statutory legal regimes. It has also highlighted the presence of informal law that exists within this framing, a discussion I take up further within Chapter 3 of my thesis. In closing, perhaps, it is necessary to ask, within this multi-regulated site that is the school, where can we find children's voices when talking about religious diversity? One such place is in the litigation stories, which I turn to in the following Chapter.

Chapter 2. Children's Voices in Litigation about Religion and Education

Introduction

In this chapter, I argue that legal storytelling can provide an important vehicle by which to discuss nuanced stories about religion and education. By "legal storytelling", I focus particularly on the litigation stories told in court, and thus rely on the evidentiary record: this includes the stories told by the parties, either directly or indirectly via their lawyers as well as the judge's rendering of the stories, not to mention expert reports and testimony, as well as court transcripts. Legal storytelling, as demonstrated in this chapter, offers a much more detailed examination of the various perspectives involved in any case than that which results from a more straightforward doctrinal analysis.

Some may argue, however, that in employing the same archival materials as the ones available to the judges and by not interviewing the children, families and communities involved, my analysis may not provide a substantially different turn than the one provided in the Supreme Court decision. My research challenges these concerns in three ways. First, the creation of a documentary archive in litigated cases should be recognized as a practice and as such, are deserving of attention beyond the written decision that was rendered. As Annelise Riles notes, "documents are paradigmatic artifacts of modern knowledge practices. […] Documents thus provide a ready-made ground for experimentation with how to apprehend modernity

ethnographically."[279] Engaging with the documentary archive, therefore, does not replicate the legal decision that was rendered; rather, it nuances how the story is told as well as how the legal record is accepted by and through the legal community. Second, legal storytelling constitutes a valid source of, and contributes to, a different form of legal knowledge.[280] This point has been made evocatively by the same author more recently in the context of religion and schools, where she notes that "[s]tories, whether within school or in the highest courts of appeal in liberal democracies, provide us with the illustrations and models we need for acknowledging the particular mix of fierce autonomy that we find in the relationship between religion and the state."[281] My approach to storytelling does not seek to turn those who share their stories into stronger legal agents,[282] but rather, a more humble objective: to develop a thicker understanding of what it means to be a school litigant within the intersecting framework of law and religion. Finally, I also argue that legal storytelling seeks to challenge some of the assumptions that law makes when addressing questions involving children, education and religion.

By going beyond the appellate court treatment in *Chamberlain*, *Multani* and *Commission scolaire des chênes*, and concurrently, by recovering trial court materials, this dissertation is able to uncover the 'stories' that reside at the source of these cases. These arguments rejoin my main thesis argument, namely that formal law fails to adequately engage with religious

[279] Annelise Riles, "Introduction: In Response" in Annelise Riles (ed.), *Documents : artifacts of modern knowledge* (Ann Arbor, University of Michigan Press, 2006), 1 at 2.
[280] Shauna Van Praagh, "Stories in Law School: An Essay on Language, Participation, and the Power of Legal Education" (1992) 2(1) *Columbia J. Gender & L.* 111, 116 **[Van Praagh, "Stories in Law School"]**.
[281] Van Praagh, "From secondary schools", *supra* note 104, 118.
[282] See, on this point, Van Praagh, "Stories in Law School", *supra* note 280, at 132: "Listening to unheard voices can provide the necessary empowerment to transform specific institutions in law."

diversity in public schools, and more specifically, that children's voices are constrained, and oftentimes absent, within the context of these legal disputes.

Turning to litigation about children's communities of faith in the context of schools revealed a challenge to my thesis and grounding in narrative theory. Even when children are considered the central actors of the litigation, there is little or no window of opportunity for them to be the teller of their own tale. As noted elsewhere, children's experiences are 'curated' through the judicial system, which ultimately has a dampening effect on their voice.[283] Although one may argue that all participants in the litigation system face such an issue, it is particularly detrimental in the case of children because their legal agency is often discredited in the context of being 'too young', 'too inarticulate' or 'too vulnerable' before the judicial system. This is not to say that children's voices don't reach and colour judicial decisions: rather, their voices are carefully 'modulated' through official court mechanisms, such as affidavits and examinations or cross-examinations, which can distort their actual voices.[284] Despite this, however, I chose to access those narratives and reconstitute children's experiences where possible, by drawing on primary materials from *Chamberlain*, *Multani* and *Commission scolaire des chênes*, and specifically, on the actors who share the children's stories in their stead, most notably family members and legal counsel. The caveat should not be seen as discrediting my use of narrative theory, but rather, an acknowledgment that we need to think critically about how, when and

[283] Daniel Monk notes this in "Children's rights in education – making sense of contradictions" (2002) 14 *Child & Fam. L. Q.* 45, 48 **[Monk, "Children's rights in education"]**.
[284] Tara Ney, Kim Blank & Acia Blank, "Affidavits in Conflict Culture: A Discursive Analysis of a Custody and Access Case" (2007) 24(3) *Conflict resolution quarterly* 305 **[Ney *et al.*, "Affidavits in Conflict Culture"]**.

whether, the state's apparatus for decision-making about children provides enough possibilities for children themselves to occupy space and share their firsthand knowledge.

A precursor therefore to understanding these litigation stories resides in how children's voices are articulated, modulated, and filtered in law and particularly, in the setting of the courtroom (1). I suggest that these evidentiary tools shape our legal storytelling. I investigate what is meant when talking about "children's voices" through the various modes of legal participation, as well as the areas of law that make place for these voices.

In a second part of this Chapter, I propose using litigation stories as the starting point for discussing how legal narratives are shaped with regard to children and religion (2). In situating discourses in law (2.1), we engage in a mutually constitutive – and foundational – relationship with law,[285] in which individuals are understood as active participants in the production and reproduction of legal norms. This relationship is further explored through the three case studies – Chamberlain (2.2), Multani (2.3) and Commission scolaire des chênes (2.4).

It is not my objective to take an oppositional stance on storytelling and voice in this Chapter. Rather, I investigate the different ways in which children can participate and intervene: as such, this Chapter seeks to further legal storytelling and voice in the context of children and religion in public schools in Canada.

[285] See Roderick Alexander Macdonald, *Lessons of Everyday Law* (Montreal, McGill-Queen's University Press, 2002).

1. Discerning Children's Voices through Evidentiary Tools

How are children heard in the courtroom? What do their voices sound like in this particular legal context? Can children express their views, for instance, on religious matters? As jurists, we take for granted the assertion that courtrooms are subject to precise rules about process, motions and participation that constructs the discourse occurring in that same space. The courtroom is truly itself a social and legal microcosm, complete with its own internal legal structuring – as exemplified through its rules and procedures. Judges have been characterized as architects, "because they build structures that shape people's lives and their social practices".[286] Indeed, certain areas of law have created space for hearing children within legal proceedings, resulting in the construction of a modified relationship between the triad of child-parent-judge in the legal process. Yet, more often that not, children's voices (and opinions) are filtered through and delivered by an intermediary, such as their parents and legal advocates.

In researching how children's voices are heard in the courtroom, I became acquainted with a wide swath of literature on evidence and the role of children as witnesses. In this context, I sought to not only hear what the child had to say, but also, tried to "[be] attentive to what it is that we hear the child say."[287] Carol Smart calls this "part of a cultural shift around our understanding of childhood." [288] The purpose of this section is not to create agency for children in courtrooms; rather, it is to consider how religion appears when children take part in the adjudication process, to demonstrate one's competency or potentially, to testify, and under

[286] Kim Lane Scheppele, "Judges as Architects" (2012) 24(1) *Yale Journal of Law and the Humanities* 345, 347-348.
[287] Carol Smart, "From Children's Shoes to Children's Voices" (2002) 40(3) *Family Court Review* 307, 309.
[288] Ibid.

what circumstances these interventions occur. As such, this section is exploratory, rather than prescriptive, in nature.

Criminal and family law contexts have developed different participatory mechanisms to include children's perspectives and experiences. Children are called upon to bear witness when they have been victims of abuse in criminal law proceedings;[289] they are also asked to be witnesses in cases of family law proceedings, usually involving the negotiation of separation measures.[290]

[289] The *Canada Evidence Act*, which applies in scope to all criminal and civil proceedings and other matters falling under Parliament's jurisdiction (*Canada Evidence Act*, RSC 1985, c C-5, s. 2.), includes a section on competency inquiries for a person under the age of fourteen seeking to be a witness in court. In its prior incarnation, section 16 of the *Canada Evidence Act*[289] stated that a competency inquiry must be launched when a proposed witness under the age of fourteen or whose mental capacity is challenged when seeking to provide an oath or a solemn affirmation. This prior version had two distinct consequences. First, children were judged in the same category as those with disabilities, which legally constructed and engendered a particular vision of a 'vulnerable' witness. Second, this also resulted in judges asking children what they understood to be the "moral significance" of their testimony in legal proceedings (see Nicholas Bala, Kang Lee, Rod Lindsay & Victoria Talwar, "A Legal & Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses" (2000) 38 *Osgoode Hall L.J.* 409, 416 **[Bala *et al.*, "Legal and Psychological Critique"]**). It should be noted that children and those with developmental disabilities are now treated in separate sections of the *Canada Evidence Act*: see ss. 16 & 16.1, S.C. 2005, c. 32, s. 27. As noted by authors, historically, judges routinely asked the children under the age of fourteen about their religious beliefs and practices in competency hearings. This was done in order to establish their understanding of their responsibility as witnesses: see Bala *et al.*, "Legal and Psychological Critique", supra). An overview of competency inquiries in Canada (and Ontario more specifically), conducted by Nicholas Bala and co-authors revealed that in the first half of the twentieth century, it was common for judges to ask children under the age of fourteen about their religious beliefs if seeking to provide sworn testimony in court (Nicholas Bala, Kang Lee, R.C.L. Lindsay & Victoria Talwar, "The Competency of Children to Testify: Psychological Research Informing Canadian Law Reform" (2010) 18 *Int'l J. Child. Rts.* 53, 55-59; see also see Bala *et al.*, "Legal & Psychological Critique, *supra*, at 411-416). Authors suggest that latter half of the twentieth century has seen judges shy away from asking such questions, but with certain (re)lapses (Bala *et al.*, "Legal & Psychological Critique, *supra*, at 416-422). Despite law's advances on this subject, most notably via the consultation paper released by the Department of Justice on *Canada Victims and the Criminal Justice System in* 1999, the results of a survey conducted in the late 1990s found that 86% of judges polled acknowledged still asking children questions about their religious beliefs and observances in order to evaluate their competency inquiry (see Bala *et al.*, "Legal & Psychological Critique", *supra*, 417 and 418 for a discussion of the presumptions of a child's religious background). Crown prosecutors also asked children questions regarding their religious beliefs and their understanding of the weight of their promise – as such, this examination is not limited to those sitting on the bench (see Bala *et al.*, "Legal & Psychological Critique", *supra*, at 417.). The authors of this survey suggest that exploring a child's religious understanding and beliefs – "questions that would confound religious scholars" – as a way to assess their comprehension of an oath actually gets judges and prosecutors further away from determining whether the child makes a credible witness (see Bala *et al.*, "Legal & Psychological Critique", *supra*, 447).

[290] In the context of family law, there appears to be more opportunities for children to be included in the legal process, particularly when faced with cases of separation and custody questions. Indeed, children's views can be

Both of these settings can offer a glimpse of children's understandings about their beliefs and their sense of community or belonging; however, these "glimpses" must be tempered in terms of their wider worth, given that there may be age restrictions, as with the *Evidence Act,* concerning only children fourteen and under, thereby leaving out an important tranche of voices belonging to older adolescents. The criminal law context, as some authors point out, faces the difficult task of balancing the rights of the accused with ascertaining the truth, when hearing children's voices.[291] A similarly delicate balance is seen in the context of family law,

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helpful in determining where they will live and with whom. Perhaps more tricky, however, is determining what constitutes the proper balance between hearing children's voices in these circumstances and their potential misuse. Identified pitfalls of listening to children's voices in family dispute settings have been discussed in the British context, which include the possibility that children may be placed in the middle of their parents' conflict; the risk of unduly influencing a child's views; children may be given decision-making authority that the parents need to exercise; children's voices may provide an excuse for adults to avoid hard decisions; and finally, the risk that children's voices will be used to facilitate irresponsible adult decisions (see Patrick Parkinson & Judy Cashmore, *The Voice of the Child in Family Law Disputes* (Oxford, Oxford University Press, 2008) at pages 13-18, discuss the various pitfalls of listening to children in family disputes settings). Current mechanisms to incorporate children's voices into family law proceedings include: a report prepared by a court-appointment mental health professional after a series of interviews with the child; a report (or affidavit) prepared by a neutral lawyer or mental health professional after a single interview with the child; testimony of a mental health professional who has interviewed the child and is retained by the parent; having a lawyer for the child; having the child testify in court; having the judge interview the child in chambers; allowing parties (i.e., parents) to testify about what the child has told them (i.e., hearsay evidence) through their oral testimony or by calling other witnesses; and allowing the child (or parent) to submit a letter, email or videotaped statement (See Joanne J. Paetsch, Lorne D. Bertrand, Jan Walker, Leslie D. MacRae & Nicholas Bala, *Consultation on the Voice of the Child at the 5th World Congress on Family Law and Children's Rights* (National Judicial Institute and the Canadian Research Institute for Law and the Family, for the Department of Justice, 2009), online: http://site.ebrary.com/lib/mcgill/docDetail.action?docID=10385278, at pages vii-viii, 44-45. See also Dominique Goubeau, "L'enfant devant les tribunaux en matières familiales: un mal parfois nécessaire" in Benoît Moore, Cécile Bideau-Cayre & Violaine Lemay (eds.), *La representation de l'enfant devant les tribunaux* (Montréal, Éditions Thémis, 2009), esp. pp. 119-138. See also s. 34 of the *Civil Code*, LRQ, c-C1991: "The court shall, in every application brought before it affecting the interest of a child, give the child an opportunity to be heard if his age and power of discernment permit it."). Indeed, as highlighted by Paetsch and co-authors, a child's right to participate in family law proceedings should be encouraged, but without further endangering the family's relationship (Paetsch et al., *supra*, p. x).

[291] Nicholas Bala, Angela Evans & Emily Bala, "Hearing the voices of children in Canada's criminal justice system: recognising capacity and facilitating testimony" (2010) 22 *Child & Fam*. L. 21, 44 **[Bala et al., "Hearing the voices"]**. This has resulted in the development of certain mechanisms to enable child testimony and render admissible their out-of-court statements (ibid, at 21). Hence, the *Criminal Code* provides mechanisms, to facilitate testimony, which include: the presence of a support person for the witness; the use of close circuit television and screens; that the accused not be able to personally cross-examine a vulnerable witness; the exclusion of the public; and the practice of video-recording evidence (see *Criminal Code*, RSC 1985, c C-46, ss. 486.1, 486.2, 486.3, 486(1) and 715.1; see also discussion by Bala et al., "Hearing the voices", *supra*, 31-39). Indeed, while it is far beyond our scope to delve

where a child's right to participate in family law proceedings should be encouraged, but without further endangering the family's relationship.[292] It is rare to find children's voices in courtroom settings other than the ones mentioned above. Granted, certain international measures have also strengthened children's participation in the legal process,[293] but on the whole, children's contributions to this field remain on the margins.

The methods and mechanisms available to include children's opinions and voices into the courtroom vary depending on the nature of the rights that are at stake. However, the criminal and family law contexts should give us pause for thought in turning our attention to the framing of freedom of religion cases. In the context of these latter cases, the test developed to determine the sincerity of one's religious beliefs does not invite parties to expand on their sincere religious beliefs. The simple fact of having these sincere beliefs is usually enough, so long as a nexus is established with religion.[294] As cautioned in *Amselem*, courts should not judicially interpret the content of these religious beliefs, since doing so would make them into 'arbiter[s] of religious dogma'.[295] Oftentimes, it is proven via a sworn affidavit, which details how a provision encroaches in a non-trivial and objective manner on their right to exercise their

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into the particular means to addressing child witnesses, it remains clear that testifying about child abuse poses a particular challenge of articulation for both the child and the court apparatus.

[292] Paetsch et al., *supra* note 290, p. x.

[293] Article 12 of the UN Convention of the Rights of the Child sets out participatory mechanisms: see UN Convention on the Rights of the Child (1989) UN Doc A/44/25; UN Committee on the Rights of the Child, General Comment No 12 (2009), *The Right of the Child to Be Heard* (UN Doc CRC/C/GC/12 (20 July 2009)); UN Committee on the Rights of the Child, General Comment No 14 (2013), *The Right of the child to have his or her best interests taken as a primary consideration* (UN Doc CRC/C/GC/14 (29 May 2013)). Parkinson & Cashmore, *supra* note 290, at 10 note that "Article 12 does not specify *how* it is that children's voices should be heard in proceedings that affect them. It does not dictate that children should give evidence, nor that they be separately represented – although those are possible ways in which Article 12 may be given effect."

[294] *A contra* in *Bruker*, *supra* note 84, at ¶ 78-79, where the Supreme Court found that the husband's beliefs were not sincere.

[295] *Amselem*, *supra* note 84, ¶ 50.

sincere beliefs.[296] The author of the affidavit may be subject to questioning via examination and cross-examination. Furthermore, expert witness testimony may buttress the claims made by the parties in this regard, but the Supreme Court of Canada has also cautioned against over-reliance on these authorities.[297] No additional measures are offered in the context of children involved in freedom of religion litigation – as the established model of affidavit and examination/cross-examination is applied across the board. It is useful to keep these limitations in mind as litigation stories are examined in the following section, and reflect upon whether we hear children's voices adequately in the context of *Chamberlain, Multani* and *Commission scolaire des chênes.*

2. Litigation Stories as the Starting Point

Introduction

The first part of this Chapter suggested that the evidentiary mechanisms available to children are context specific. However, the framework available to litigants in freedom of religion cases applies equally to all participants, but may be seen as less flexible in the context of non-adult participants, which can limit the manner in which opinions about religious beliefs are advanced. This section seeks to employ litigation stories as the catalyst, in order to prod the stories that

[296] See *Amselem*, *supra* note 84, ¶ 46, 56-59; *Multani, supra* note 3, ¶ 34; *Hutterian Brethren of Wilson Colony, supra* note 84, ¶ 32; *Commission scolaire des chênes*, *supra* note 9, ¶ 23-24; *R. v. N.S.*, *supra* note 84, ¶ 87; *Whatcott*, *supra* note 84, ¶ 155.

[297] *Amselem*, *supra* note 84, ¶ 54. In Multani, non-expert sources were used to present what was considered to be Sikhism's religious teachings: see *Multani, supra* note 3, ¶ 36. Heavy reliance on expert witness testimony returned in *Bruker, supra* note 84, ¶ 33.

are shared through the evidentiary record. In a first part, it will be proposed that different litigation stories can ask diverging questions of what really is at stake here; these are referred to "litigation stories" or "legal storytelling" (2.1). In a second part, I engage with my three case studies through their litigation stories (2.2, 2.3, 2.4).

2.1 Litigation stories and narrative in law: situating discourses in law

"Each time we let in a new excluded group,
each time we listen to a new way of knowing,
we learn more about the limits of our current way of seeing."[298]

"Dominant narratives are not called stories. They are called reality."[299]

Whereas the first quote speaks about layers of knowledge, the second one speaks about the importance of power. Carrie Menkel-Meadow speaks about attunement to knowledge: knowledge about the 'other' but also, knowledge about oneself. Catherine MacKinnon, on the other hand, distinguishes between the stories we call 'stories' and the narratives we call 'reality', pointing to an inherent power dynamic in this area. Both of these distinguished authors, however, point to the importance of understanding *who* gets to tell the story. Within

[298] Carrie Menkel-Meadow, "Excluded voices: New Voices in the Legal Profession Making New Voices in the Law" (1987) 42 *University of Miami Law Review* 29, 52 **[Menkel-Meadow, "Excluded voices"]**. On the essential nature of experiential knowledge within the setting of law, see Van Praagh, "Stories in Law School", *supra* note 280, at 113-114. This point in also echoed by Toni M. Masaro: "[c]ases like *Brown v. Board of Education,* it is argued, should be seen as a simple truth about the harm in segregation that any ten-year old black child understands. Lawyers should argue this simple truth. Judges should respect it. Law should enforce it. That is, legal cases should be approached as concrete human stories that take into account our different human voices. These two terms -"story" and "voice" - are important new words in this area of legal writing.": Toni M. Massaro, "Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?" (1988-1989) 87 Mich. L. Rev. 2099, 2102 [references omitted] **[Massaro, "Empathy"].**

[299] Catharine MacKinnon, "Law's Stories as Reality and Politics" in Peter Brooks & Paul Gerwirtz (eds.), *Law's Stories: Narrative and Rhetoric in the Law* (New Haven, Yale University Press, 1996), p. 232 at p. 235 as cited in Steve Cammiss, "Stories in Law: Providing Space for 'Oppositionists' ?" in Michael Freeman & Fiona Smith (eds.), *Law and Language* (Oxford, Oxford University Press, 2013), pp. 221-245, at p. 243.

the legal setting, storytelling acquires a different importance, since it can emerge as a powerful tool to engage with those whose voices have been traditionally muted, excluded or marginalized.

Within the framing of my thesis, children are often understood as a 'vulnerable'[300] or excluded group, particularly within the legal setting – this was also exemplified in section 1 of this chapter, where children under fourteen were treated in the same breath as those whose competency was issue under the *Canada Evidence Act*.[301] It is unusual for children to participate fully as litigants in cases about religion and education, since they are underage. Often, it is their parents who speak on their behalf, or literally, *for* them.[302] Exploring how children are 'talked about' within these cases is therefore crucial to understanding the legal story that is then told. Moreover, discussing difference, or exclusion, however, can arise in different manners: lessons from storytelling can be drawn from actual books,[303] paintings[304] or types of narrative.[305] This is

[300] *Canadian Foundation for Children, Youth and the Law* v. *Canada (A-G)*, [2004] 1 SCR 76, ¶ 53, 56.
[301] *Supra* note 289.
[302] As such, it is unlikely that children will employ other children's stories to further buttress their claims or challenge the current legal order unlike other 'outsider' groups. See Martha-Marie Kleinhans, "Rewriting Outsider Narrative: A Renaissance of Revolutionary Subjectivities" (2007-2008) 2 *Charleston L. Rev.* 185, 187.
[303] See, for example: Desmond Manderson, "From Hunger to Love: Myths of the Source, Interpretation and Constitution of Law in Children's Literature" (2003) 15 *Cardozo L.R.* 87.
[304] See, for example: Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca, Cornell University Press, 1990), p. 101 (speaking about *pentimento*. This term is employed by art restorers to refer to the process of a canvas having been used for more than one painting. More particularly, it speaks to the effect of the first painting showing through the second. Minow argues that this process acts as "reminders of the past in legal arguments".) See also Kirsten Anker, "The Truth in Painting: Cultural Artifacts as Proof of Native Title" (2005) 9 *Law Text Culture* 91-124.
[305] On discourse analysis, see: Dorothy E. Smith, *Texts, Facts and Femininity* (London, Routledge, 1990); James Paul Gee & Michael Handford (eds.), *The Routledge Handbook of Discourse Analysis* (London, Routledge, 2012. On critical discourse analysis, see most recently: Norman Fairclough, 'Critical Discourse Analysis' in James Paul Gee & Michael Handford (eds.), *The Routledge Handbook of Discourse Analysis* (London, Routledge 2012), pp. 9-20. On law and language, see Michael Freeman & Fiona Smith (eds.), *Law and Language* (Oxford, Oxford University Press, 2013).

also illustrated in my introductory chapter, where I draw not only from legal stories, but also from those of my parents, as well as my own, to build my arguments.

Nevertheless, storytelling, as a form of legal narrative, has been both applauded and criticized by authors. Within the framing of this chapter, storytelling allows a glimpse into children's lives from a different point of view, that of the storytellers. I employ legal narratives (or stories) here, as told by the parties to the Court in order to illustrate that children's voices are often excluded from the legal process when questions of freedom of religion arise. Moreover, despite a re-apportioning of power between the State and the parents in such cases, it is rare that children gain more place in law's arena: recall, on this point, Minow's argument on the inevitability of State intervention in this context.[72] This discussion should be seen as a precursor to the recent litigation stories on education and religion in Canada, as will be discussed in the following sections (2.2, 2.3 & 2.4). Stories and storytelling therefore speak about the importance of perspective, or points of view. On the one hand, it acknowledges a mutually constitutive relationship between the storyteller and recipient(s). On the other, however, it encapsulates who gets to tell (or recast) the story, the actors portrayed and the roles (and spaces) attributed to each. Storytelling is imbued with a certain sense of performativity, where stories articulate spaces where characters are included or excluded. They are frequently multi-layered and speak to historicity but also question authenticity and challenge labeling. Taken collectively, stories can foster a groundswell, or narrative, a point to which I now turn.

The very construction of the narrative – the "facts" – can lead to the inclusion or exclusion of points of view, and actors, according to Dorothy Smith: it becomes the 'definitional privilege' of the 'teller of the tale'.[306] Reporting "facts" has other consequences as well. John M. Conley and William M. O'Barr suggest that the manner in which "facts" are reported in legal cases colours "the reader of the report with the decisions of the reporter, however unwittingly made."[307] The sequencing or combination of "facts", can also result in a different "narrative glue": Peter Brooks argues that "the way incidents and events are made to combine in a meaningful story, one that can be called "consensual sex" on the one hand or "rape" on the other. The "facts" take on their meaning only within and by way of a thoroughly perspectival narrative." [308] Hence, facts participate in the construction of the narrative but do not occupy a neutral place. "Facts" are therefore in the eye of the beholder. The discussion about "facts" raises an important point about how we curate stories and narratives and relatedly, how we understand these terms. Some would argue that 'story' and 'narrative' are related concepts, but not interchangeable.[309] Hence, where the story speaks to a unique, circumscribed event, a narrative refers to a

[306] Dorothy Smith, "K is Mentally Ill: The Anatomy of a Factual Account" (1978) 12 *Sociology* 23, 37-38. See also Lori Beaman's discussion of Smith's ethnography in *Defining Harm: Religious Freedom and the Limits of the Law* (Vancouver, UBC Press, 2008), pp. 112-117.

[307] John M. Conley & William M. O'Barr in *Rules versus Relationships: The Ethnography of Legal Discourse* (Chicago, University of Chicago Press, 1990), p. 4.

[308] Peter Brooks, "Narrative Transactions—Does the Law Need a Narratology?" (2006) 18(1) *Yale J. L. & Hum.* 1, 10. *A fortiori* at 11: "The substance of what I call narrative glue - it might be better to think of the electromagnetic charges given to narrative incidents, which determine how they will combine and line up -depends in large part on the judges' view of standard human behavior, on what words and gestures are held to provoke fear, for instance."

[309] Moshe Simon-Shoshan discusses this in *Stories of the Law: Narrative Discourse and the Construction of Authority in the Mishnah* (Oxford, Oxford University Press, 2012). "Story", according to this author, refers to "any representation of a sequence of at least two interrelated events that occurred once and only once in the past." (p. 20) "Narrative", on the other hand, has three minimal requirements: "(1) narratives are representations of events; (2) narratives present two or more events in sequence; (3) these events must be inherently interrelated in such a way as to portray some change in the world represented by the text." (p. 18)

sequence of events in view of applying a rule (*if….then*[310]). By contrast, others suggest that "story" and "narrative" can be addressed as comparable.[311] I draw on Colleen Sheppard and Sarah Westphal's *narrative continuum*, which, "most simply, […] conveys the notion that narratives are told in multiple ways."[312] As such, I do not place story and narrative in opposition, but rather, in relationship. A narrative continuum, Sheppard and Westphal argue, enables multiple types of narratives to engage in a discussion – they refer here to literary narratives, legal narratives such as witness narratives, as well as the narratives told by legal actors, not to mention through multiple forms of media – and build on common materials.[313]

Hence, in returning to stories, I suggest that stories also articulate spaces where characters are included or excluded. Stories teach us that background and context are important as well. In this manner, storytelling, as a tool, enables us to question how the story is told, by whom and for what purpose. Storytelling provides a venue beyond that of the established normative discourse and weaves narratives, though perhaps not in a seamless (or entirely transparent) manner. Similarly, the sociology of storytelling teaches us that it "may be an especially effective way to communicate ambiguous meanings."[314]

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[310] See Monika Fludernik, "A Narratology of the Law? Narratives in Legal Discourse" (2014) 1(1) *Critical Analysis of Law* 87, 92-98 **[Fludernik, "A Narratology of the Law"]**, discussing Meir Sternberg's "If-Plots : Narrativity and the Law Code" in John Pier & José Àngel Garcia Landa (eds.), *Theorizing Narrativity (Narratologia)* (Berlin, Walter de Gruyter, 2008), pp. 29-108. See also Simon-Shoshan, *supra* note 309.

[311] For example: Fludernik is critical of Jane B. Baron & Julia Epstein's separation of story and narrative, arguing that the authors conflate the two in the illustrative section of their article "Is Law Narrative? (1997) 45 *Buff. L. Rev*. 141: see Fludernik, "A Narratology of the Law", *supra* note 310, at 99.

[312] Sheppard & Westphal, *supra* note 61 336.

[313] Ibid, 336-343.

[314] Francesca Polletta, Pang Ching Bobby Chen, Beth Gharrity Gardner & Alice Motes, "The Sociology of Storytelling" (2011) 37 *Annu. Rev. Sociol.* 109, 122 **[Polletta et al., "Sociology of Storytelling"]**.

But how then do we start talking about storytelling in law – and how do we appreciate its weight within the greater legal picture? By favoring one version of the story over another, we make a "self-conscious choice" according to James Boyd White.[315] Repercussions can be felt, not only in the language that is privileged, but also in the public nature of this decision-making process. Public records in these litigation cases, are, by their very nature, public. This seemingly innocuous point raises fundamental questions about legal storytelling: who gets to decide when 'it' started? Do we start at the 'beginning', like any other story or book? Do we start in the middle …or at the end? What type of (legal) language is employed to buttress a claim? What is the scope of the story? Do we start by the story that is kept by the courts or the one that initiated the dispute? Do we get to change the story or its context? [316] What is included in this story and what is excluded (and by whom)? Alternatively, must we deconstruct the story before telling it[317] in order to truly understand it?

If one is to start a story at the 'beginning' (however contested a term), one may as well start with what has been referred to as the first story, that of the Bible. As intimated by Robert

[315] James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago, University of Chicago Press, 1990), p. 24: "the law offers a particularly interesting form of life, for at its central moment, the legal hearing, it works by testing one version of its language against another, one way of telling a story and thinking about it against another, and then by making a self-conscious choice between them. It is an institution that remakes its own language and it does this under conditions of regularity and publicity that render the process subject to scrutiny of an extraordinary kind." White discusses the challenges of speaking about religion similarly, though outside of the context of the law. He suggests that a "certain kind of thought" needs to be adopted which would take into account the impossibility of translation, the uniqueness of religious experience and the audience with whom we are having this conversation. He calls this a "legal poem": see James Boyd White, "How Should we talk about Religion? Inwardness, Particularity, and Translation" (February 25 2009) Occasional Papers of the Eramus Institue (Notre Dame), pp. 1-28, 2001; U of Michigan Public Law Working Paper No. 140. Available at SSRN: http://ssrn.com/abstract=1349313 .

[316] Desmond Manderson, *Kangaroo Courts and the Rule of Law: The Legacy of Modernism* (New York, Routledge, 2012), p. 163.

[317] On this point, see Cammiss, "Stories in Law", *supra* note 299 (positing that narratives are interpreted in a manner consonant with the "schema of the interpreter" and are therefore not neutral).

Cover, while biblical stories predate the official (written) stories of Deuteronomy, accepted narratives are already implanted when the law embeds itself:[318] one must therefore endeavor to understand the context or normative universe (*nomos*) in which law exists. Stories can also frame each other and in this way, build on necessary context.[319] Context teaches us therefore that relationships engage in a mutually constitutive – and foundational – relationship with law, to echo Rod Macdonald, as employed at the outset of this chapter.[320] Context also invites us to not take these stories as isolated events, but rather, as argued by Sheppard and Westphal, should be understood as 'situated lessons of literature':[321] legal narratives inscribe themselves within the *narrative continuum*. This refers to the multiplicity of ways in which the narratives are told but also the relational importance between actor and event.[322]

Kim Lane Scheppele's cautionary tale about legal storytelling warns against this technique being used to replay, retell and repeat, the same patterns that led to individuals' exclusion in the first place.[323] These same stories, which can counter exclusion due to legal habits, can also distort

[318] Robert Cover, "The Supreme Court, 1982 Term – Foreword: Nomos and Narrative" (1983-1984) 97 *Harv. L. Rev.* 4, 20 **[Cover, "Nomos & Narrative"]**.

[319] See in this way, Martha Minow's discussion in "Stories in Law" in Peter Brooks & Paul Gerwirtz (eds.), *Law's Stories: Narrative and Rhetoric in the Law* (New Haven, Yale University Press, 1996), pp. 24-36 **[Minow, "Stories in Law"]**.

[320] See Macdonald, *supra* note 285 (arguing that relationships constitute the backbone of law).

[321] Sheppard & Westphal, "Narratives, Law", *supra* note 61, 340-341. Sheppard and Westphal posit that the *fabula*, or the common material, provides a unifying thread but not an identical narrative.

[322] Sheppard & Westphal, "Narratives, Law", *supra* note 61, 336.

[323] Kim Lane Scheppele, "Telling Stories" (1989) 87(8) Mich. L. Rev. 2073 **[Scheppele, "Telling Stories"]**. Indeed, while storytelling has been lauded as a technique to bringing in 'outsider voices', thereby creating space for 'outsider jurisprudence' (One can think here of Mari Matsuda's works on outsider jurisprudence: Mari J. Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations" (1987) 22 Harv. C.R.-C.L. L. Rev. 323; Mari Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 Mich. L. Rev. 2320, 2323-26 as cited in Scheppele, "Telling Stories", *supra,* 2084. For an early review of legal narrative, see Daniel A. Farber & Suzanna Sherry, "Telling Stories out of School: An Essay on Legal Narratives" (1993) 45(4) Stan. L. Rev. 807 (suggesting that legal storytelling has a place in legal scholarship, but needs to focus on articulating more coherent and analytical narratives). Farber & Sherry's approach to legal storytelling has been critiqued by many, including Harlon L. Dalton,

how we pay attention to particular events and general rules. This critique of legal storytelling relates to its potential in provoking "emotional flooding" on the part the story listener, which raises the possibility of becoming inundated by the particulars of a case and a subsequent inability "to see it as only one sample of a wider universe of events to which the rule we develop will be applied."[324] A final contention is that not all narratives are cut of the same cloth: this points to the potential of narratives simply reiterating the current situation whereas others actually have the power to transform it.[325] Yet legal storytelling's critiques and supporters suggest that it can be understood as a process of contextualization, amongst many others. Notes Massaro, our ability to engage with storytelling as children in terms of patterns of socialization generally establishes "our ability to "empathize" in later life."[326]

In returning to the construction of storytelling, it comes as no surprise that there is usually a moral accompanying a fable, or put differently, a lesson behind a tale. What lessons can therefore be drawn from storytelling as a form of legal narrative, before moving to the case studies in the following sections? First, if storytelling is understood to be a tool that can incorporate under-heard voices, underscore uncertainties and considered to predates legal rules, then legal storytelling should also be comprehended as a tool that can also shape the language of exclusion, rely too intensely on individualized accounts and potentially be

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who contends that their approach would force us to work within the established legal categories: see "Storytelling in its Own Terms" in Peter Brooks & Paul Gerwirtz (eds.), *Law's Stories: Narrative and Rhetoric in the Law* (New Haven, Yale University Press, 1996), p. 57-59), others have questioned the impetus behind storytelling (e.g., Scheppele, "Telling Stories", *supra* note 323, 2073). It has ultimately been critiqued for leaving the outsiders, well, outside (Scheppele, "Telling Stories", *supra* note 323, 2084).

[324] Mark Tushnet, "The Degradation of Constitutional Discourse" (1992-1993) 81 Geo. L.J. 251, 254 **[Tushnet, "Degradation"]**.

[325] Sheppard & Westphal, "Narratives, Law", *supra* note 61, 351-365.

[326] Massaro, "Empathy", *supra* note 298, 2102.

understood as predicating legal rules. Either way, however, storytelling can be understood, echoing Massaro,[327] as a form of socialization. Within the context of law, legal storytelling can therefore be understood as form of (legal) socialization. Second, one must be attentive to the context in which the story unfolds; this requires both situated learning and situating understanding within the storytelling spaces. This suggests that storytelling, as a tool of legal narrative, should be used in conjunction with, rather than in isolation of, other forms of legal analysis.[328] Finally, legal storytelling, as a device, should not be used to repeat the same patterns that have led to individuals' exclusion in the first place. This comes back to the second point about storytelling: one must be attentive to the context in which the story or narrative unfolds, in order to truly appreciate it. This point underscores the need to explore not only the construction of narratives, but also, their subsequent *re*constructions.

In the following stories about children and religious education (2.2, 2.3 & 2.4), particular attention will be paid to how these stories are cast in law's arena. As argued in this work, exploring legal storytelling enables a deeper discussion the existing tensions that are created by these framings or forms of narration. The following sections will explore the litigation stories contained in *Chamberlain*, *Multani* and *Commission scolaire des chênes*.

[327] Massaro, "Empathy", *supra* note 298, 2102.
[328] See Cammiss, "Stories in Law", *supra* note 299.

2.2 Chamberlain v. Surrey School District no. 36

The British Columbia Ministry of Education introduced a new curriculum called "Personal Planning" to primary school students in the fall of 1995, which included a section on family life education. In elucidating the purpose of the new curriculum, the program set out the following vis-à-vis the role of families:

> **Family life education.** To develop students' understanding of the role of the family and capacity for responsible decision-making in their personal relations. […] The family is the primary educator in the development of children's attitudes and values. […] All learning resources used in the school must either have Recommended or Authorized designation or be approved through district evaluations and approval policies.[329]

The guidelines indicate that the family occupies the top of the education hierarchy in what concerns their children's development of standards and morals. Furthermore, "resource materials", as they are referred to in the Personal Planning curriculum, required approval from the School Board: in other words, resource materials needed to be on a sanctioned list.[330] James Chamberlain, a teacher employed by the Surrey School District and also member of GALE (Gay and Lesbian Educators of B.C.), whose mandate is described as "an unincorporated organization or educators who advocate change in the school system to create a positive environment for homosexual and bisexual persons",[331] sought to introduce new resource materials to the kindergarten and grade 1 curriculum, based on the GALE list, as of December

[329] Chamberlain v. The Board of Trustees of School District # 36 (Surrey), 1996 CanLII 6723 (BCSC), ¶ 40 **[Chamberlain 1]** [emphasis in original].
[330] Ibid, ¶ 41.
[331] Ibid, ¶ 31.

1996.[332] Titles included *Asha's Mums*, *Belinda's Bouquet* and *One Dad, Two Dads, Brown Dad, Blue Dads*. Mr. Chamberlain requested that these books about same-sex parents be approved as resource materials, and were reviewed at three levels, all of whom determined that these books to contain material too sensitive for young students.[333] The last review, completed by the Deputy Superintendent and the Superintendent of Schools for the Surrey School District, resulted in the books being referred to the School Board and placed on the agenda for the April 24th 1997 meeting.[334] In March 1997, the BC Teachers Federation (known as BCTF), passed a resolution endorsing the "appointment of a Committee to "develop recommendations on strategies for achieving the elimination of homophobia and heterosexism in the public school system.""[335] Much public criticism stemmed from the BCTF resolution, which fed into the adoption of two resolutions by the Surrey School Board at their April 1997 meeting, known respectively as the "GALE Resolution" and the "Books Resolution". Both bear full reproduction in here, in order to glean the extent of these actions.

GALE Resolution	THAT WHEREAS the parents delegate their authority to us as trustees of public education; and WHEREAS parents have voiced their concern over the use of Gay and Lesbian Educators of British Columbia (GALE BC) resources in the classroom; and WHEREAS the Gay and Lesbian Educators of British Columbia (GALE BC) resources or

[332] Chamberlain 1, *supra* note 329, ¶ 43-44.
[333] Ibid, ¶ 45-46: "The books were reviewed by a Helping Teacher and District Principal, by another District Principal and Education Services Committee comprised of four District Principals and four District Assistant Superintendents. […] The Deputy Superintendent and Superintendent of Schools for the School District also reviewed the books."
[334] Ibid, ¶ 46.
[335] Ibid, ¶ 46.

	resource lists have not been approved for use in School District # 36 (Surrey). THEREFORE BE IT RESOLVED THAT all administration, teaching and counselling staff be informed that resources from gay and lesbian groups such as GALE or their related resource lists are not approved for use of redistribution in the Surrey School District.[336]
Books Resolution	THAT the Board under Policy #8800 – Recommended Learning Resources and Library Resources, not approve the use of the following three (3) learning resources: Grade Level K-1 Personal Planning Elwin, R. & Paules, M. (1990). Asha's Mums. Newman, L. (1991). Belinda's Bouquet. Valentine, J. (1994). One Dad, Two Dads, Brown Dad, Blue Dads.[337]

Whereas the first resolution targeted the GALE book list as constituting non-approved school materials, the second disallowed the three books as resource materials for students in kindergarten and grade 1. The latter resolution also challenged the secular nature of the school board (and trustees' mandate), as set out in the BC *School Act*, which frames the secular nature and purpose of the school system in that province, requiring that

(1) All schools and Provincial schools must be conducted on **strictly secular** and **non-sectarian principles**.
(2) The highest morality must be inculcated, but **no religious dogma or creed is to be taught** in a school or Provincial school.[338]

The two resolutions were subsequently appealed before the courts on the argument that the School Board Trustees had overstepped the bounds of their mandate and the secular nature of schools in British Columbia, as set out by the *School Act*.[339]

[336] Chamberlain 1, *supra* note 329, ¶ 48.
[337] Ibid, ¶ 52.
[338] *Education Act,* R.S.B.C. 1996, c.412, s. 76, as cited in Chamberlain 1, *supra* note 329, ¶ 71 [emphasis added].
[339] *Education Act,* R.S.B.C. 1996, c.412, s. 85(2)b), as cited in Chamberlain 1, *supra* note 329, ¶ 54.

Before the British Columbia Supreme Court

> As people of conscience we face such a challenge today right here in Surrey Last fall the citizens of this city elected a school board with strongly conservative views led by a provocative man who appears to enjoy controversy. In the last few weeks we have sat by watching as this school board aggressively rejected a BC Teacher's Federation resolution to introduce anti-homophobia curriculum into our schools, and last week this School Board in an acrimonious session voted to ban three children's books, one of which you have heard read this morning. [340]
>
> - Sermon on "The Actions of Fear", preached by Reverend Brian James Kiely, Minister for the South Fraser Unitarian Church in Surrey, B.C.

Both the Gale Resolution and the Books Resolution were challenged before the BC Supreme Court. As noted by Madam Justice Saunders in her opening, this case generated much public commentary, submitted before the court in the form of affidavits. Madam Justice Saunders reminds readers that this case should be decided on the basis of long-standing provisions and constitutional protections, rather than the court of public opinion.[341] Of the one hundred and eighty-one affidavits submitted in the context of this case, many were considered inadmissible by the judge, on the basis that they constituted hearsay.[342] Aside from petitioner James Chamberlain, another teacher (Murray Warren) also member of GALE, was part of this case, as was a mother of two students who attended primary school in the Surrey School District (Diane Willcott), as well as a secondary student attending school in the Surrey School District (Blaine Cook), not to mention the author of *Asha's Mums*, one of the books targeted by the Books Resolution, Rosamund Elwin; finally, the BC Civil Liberties Association (BCCLA) was granted

[340] Brian James Kiely (Affidavit) (July 23 1997) and Exhibit A (reprint of sermon given on May 4 1997) in *Chamberlain v. Board of Trustees of School District #36 (Surrey),* BC Court of Appeal Book, Vol. IV at 635, at 635, 638.
[341] Chamberlain 1, *supra* note 329, ¶ 4.
[342] For discussion on admissibility, see Chamberlain 1, *supra* note 329, ¶ 4-29 and Appendix 1.

intervenor status in this case.[343] The petitioners argued that the school board trustees overstepped the bounds of their mandate and demonstrated conduct inappropriate of their position as trustees.[344] The School Board, on the other hand, argued

> the resolutions were consistent with the school act and were motivated by considerations of the we-being of children and their families. […] relies on evidence that many in the community hold strong religious and moral views against homosexuality, and says that introduction of the three books would infringe the parents' right to give moral guidance to their children and abridge the parents' freedom of religion. […] its corporate decision was made in the best interest of the children, and that introduction of the books into the classroom would raise a subject inappropriate for young children.[345]

Indeed, while children's rights and interests are indubitably at play in this case, they are not represented as direct actors in this case. Blaine Cook, an adolescent attending a secondary school in the Surrey district, is represented by his mother, as his legal guardian; albeit evident, it should also be pointed out that he is not a child in kindergarten or grade 1, and is therefore not affected directly by the school board's decisions. Rather, he appears as a young student who has experienced discrimination on the basis of sexual orientation; the introduction of books like *Asha's mums* and others would undoubtedly provide more context to students growing up, and hopefully, reducing incidences of this nature. Children (or their voices) are not present in *Chamberlain*: this work suggests instead that their voices and projected concerns are filtered through their parents' or guardians' legal representations before the court, as well as interveners in this case, as further examined below.

[343] Summarizing the petitioners' list in Chamberlain 1, *supra* note 329, at ¶ 31-35.
[344] Chamberlain 1, *supra* note 329, ¶ 54.
[345] Ibid, ¶ 55.

In reviewing the two resolutions, Madam Justice Saunders centers her criticism on the School Board's transgression of jurisdiction. First, the GALE resolution is found to be *ultra vires*, since the materials targeted do not fall under the jurisdiction of the School Board, nor does the *School Act* enjoin them to act under this heading.[346] Furthermore, she criticizes the GALE resolution as being "unclear" and not properly taking into account the educational value that the GALE resource list might have.[347] Second, the School Board, "as a delegated level of government, derives its authority from the *School Act*."[348] As such, it should not differ in position from the mission and mandate of public education in British Columbia: this includes, amongst others, respecting the longstanding secular mandate of public schools, as established under the *School Act* and its previous legislative iterations.[349]

Interestingly, the Court refers considerably to the submissions made by the School Board in their attempt to justify the adoption of the Books Resolution.[350] Seen through this lens, the resolution aimed at protecting students' and parents' right to freedom of religion. Yet the excerpts demonstrate that the parents' right to educate their children in accordance with their religious beliefs would be breached, rather than the direct rights of the children to exercise their right to freedom of religion. Sample excerpts include:

> "…**I am opposed** to the introduction of the Three Books into Kindergarten and Grade One classrooms for the following reasons:

[346] Chamberlain 1, *supra* note 329, ¶ 59.
[347] Ibid, ¶ 59.
[348] Ibid, ¶ 62.
[349] Ibid, ¶ 63-74 & 102.
[350] Ibid, ¶ 89.

> **(a)** the Three Books portray same-sex couples … **in a manner contrary to my personal religious beliefs."**
>
> […]
>
> "My concern is that I and my wife be able to teach our children according to our religious beliefs **without having the school teaching them something, at an early age, which runs counter to what we believe**"
>
> […]
>
> "I wish to teach my children **according to my own religious beliefs** and **oppose lessons at school which contradict what I am attempting to teach my children**"[351]

These excerpts suggest that it is the parents' right to freedom of religion that is at stake, rather than that of their children. Their concerns reside in a clash of their values, and educational content. These excerpts speak little about how these books would affect their children directly, in their day-to-day lives, and better yet, *what* and *how* the children will feel about the introduction of these books. This point is made most clearly in Pat Loberg's affidavit, homemaker and mother of three children, who supported the school board resolutions. She states:

> "I have read the Three Books **from the perspective of my six year old daughter**. **Based on my experience as her parent**, it is my view that she would be puzzled and confused by the issues of same-sex couples and homosexuality as depicted in the Three Books. **These are issues significantly beyond the maturity level of my daughter.**
>
> If the Three Books were used as learning resources in my daughter's classroom and she advised us of such, I would be compelled to discuss these issues with her. This could lead to direct conflict between what her teacher has told her with respect to these issues and what I communicate to her based on my family values. This would cause conflict which I know she would have difficulty resolving. **In any event I do not wish to discuss these issues with my children until they are mature enough to handle such. These are not mature enough at five and six years of age.**[352]

[351] Chamberlain 1, *supra* note 329, ¶ 89 (Affidavit evidence from points (i), (vi) and (ix)) [emphasis added].
[352] Pat Loberg (Affidavit) (February 17 1998) in *Chamberlain v. Board of Trustees of School District #36 (Surrey),* BC Court of Appeal Book, Vol. XII, page 2186 at 2187 (at ¶ 4-5) [emphasis added].

Indeed, while one parent might find these books confusing for her six year old – folding in her own point of view along the way, as seen in the second paragraph excerpted from her affidavit – this says little about seeing these books from a child's perspective, or through a child's eyes. Put bluntly, at stake here are the communicated parental views, not those of the daughter.[353] Trying to see through a child's eyes requires that we suspend our identity as adults (or parents), our lived experience and our personal leanings. For a parent, this is close to impossible, since there is the additional dimension to this equation, that of a relational approach. Seeing like one's child (without our adult leanings and learnings) would require removing a too-important part of one's identity.

Another affidavit excerpt used by Madam Justice Saunders points to the relational issue, and the concern of losing one's preferred place in their child's cosmology:

> "If the Three Books were used in either of our sons' classes, **our children would be confused at the challenge to their own faith and family values**."

Again, this excerpt shifts the focus in a subtle manner from the children, and places it instead on their surroundings. This approach is further illustrated by the various affidavits submitted by religious leaders – excerpted again by the Court[354] – as employed by the School Board to further the legitimacy of their resolutions. The affidavit excerpts, as well as the excerpts

[353] Indeed, the issue of the retroactive approach is also raised by Justice Iacobucci, as noted in the Supreme Court transcripts: "I find these questions immensely difficult because we are using the lens of adults to go back almost retroactively to when we were younger and – and try to identify these kinds of issues." See *Chamberlain v. Board of Trustees of School District #36 (Surrey)*, SCC transcript (June 12 2002), p. 28 (Arvay).
[354] Chamberlain 1, *supra* note 329, ¶ 92.

themselves, do not actively engage with the content of the books, except for a leader from the Sikh community, who states having read the books and found them wanting.[355]

Madam Justice Saunders also notes, in her closing paragraphs, that "there is direct evidence that *One Dad, Two Dads* and *Asha's Mums* have been used in the classroom elsewhere in British Columbia, and *One Dad, Two Dads* in the State of Washington, without ill effect."[356] While Madam Justice Saunders employs the affidavits submitted in support of the School Board's position to discredit the argument, she does not draw considerably on the evidence submitted by the petitioners to strengthen their claim.[357] The Court ultimately concludes that the School Board, by way of its trustees, had made its decision on the basis of religious,[358] rather than secular, considerations.[359]

Before the Court of Appeal of British Columbia

> "The experiential dimension of religion is powerful. It may change lives. But law is concerned with the mundane world and its normative rules. Experiential religion is far beyond its terms of reference."[360]

> "Ultimately this litigation has a certain *Alice in Wonderland* quality. Like the *Cheshire Cat,* the issues slowly vanish on close examination."[361]

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[355] Chamberlain 1, *supra* note 329, ¶ 92 (Affidavit evidence from point (v)).
[356] Ibid, ¶ 97 & 105.
[357] Although Madam Justice Saunders refers in passing to Dr. Kagan's opinion on 'dissonance', she does so only in the closing paragraphs of the decision. See Chamberlain 1, *supra* note 329, ¶ 104-105.
[358] Madam Justice Saunders points to one trustee in particular, who had actively campaigned for a number of years to increase the place of religion in schools: Chamberlain 1, *supra* note 329, ¶ 94.
[359] Chamberlain 1, *supra* note 329, ¶ 75-78. See ¶ 80, noting "Section 76 has the effect of distinguishing religious influence from issues of morality, precluding the first while requiring the second." See ¶ 83 *in fine.* Because of this finding, Madam Justice Saunders did not proceed to review the arguments under the right to freedom of religion, association or discrimination, see ¶ 106.
[360] Chamberlain v. The Board of Trustees of School District # 36 (Surrey), 2000 BCCA 519 (CanLII), ¶ 17 (Mackenzie J.) [Chamberlain 2].
[361] Ibid, ¶ 63.

The School Board challenged the decision of first instance before the BC Court of Appeal, contesting the interpretation of the secular school provision in the *School Act*. While the BC Supreme Court decision rested on an administrative law approach, the perspective embraced by the BC Court of Appeals reveals one deeply shaped by religious freedom, as intimated through the quotes above. This decision, in contrast with the one of the lower court, ultimately finds that the School Board resolutions fell within their jurisdictional purview.

Justice Mackenzie, writing for the bench (Justices Esson and Proudfoot concurring) distinguishes his understanding of "strictly secular" from the one employed by Madam Justice Saunders in her opinion at first instance on two grounds: first, through his interpretation of "strictly secular", and second, through his understanding of the type of education targeted by the aforementioned provision of the *School Act,* which he ascribed to 'moral' rather than 'religious' education. [362]

Justice Mackenzie found that the "strictly secular", mentioned in the *School Act*, "can only mean pluralist in the sense that moral positions are to be accorded standing in the public square irrespective of whether this position flows out of a conscience that is religiously informed or not. The meaning of strictly secular is thus pluralist or inclusive in its widest sense."[363] This approach to defining the secular is at once informative and problematic. It is informative, since it shies away from the secular/religious divide, and suggests instead that no

[362] As noted by Justice Mackenzie, "[m]embers of school boards as well as teachers and school officials must carry their duties mindful of these legal obligations arising from the combination of the *School Act* and the *Charter.*": Chamberlain 2, *supra* note 360, ¶ 40.
[363] Chamberlain 2, *supra* note 360, ¶ 33.

"bright line" exists between these concepts. However, Justice Mackenzie's interpretation is also problematic because it distorts the historical *raison d'être* of this section of the *School Act*, which had been constructed to detach religious education influences from education's realm. This interpretation of the *School Act*'s "strictly secular" also has ramifications for determining the jurisdiction of the School Board, since the rules and roles of delegation are different. As noted by Justice Mackenzie, the ministerial orders […] clearly place the primary responsibility for the selection of educational resource materials in the hands of the Ministry and assign an ancillary jurisdiction to local boards in relation to individual students or groups of students."[364] Justice Mackenzie's main concern revolved around the commonality of the proposed books, insofar as they all propelled the same family model to young students, rather than presenting different types of non-nuclear families.[365] Moreover,

> "**[i]t is hard to resist the thought that K-1 children may have a better appreciation of that value [loving and caring family relationships] than any of the contending adults.** Alternative family arrangements must now be a fact of life for virtually every child in public schools in Surrey either as a result of personal circumstances or the circumstances of friends and classmates well-known to them. **K-1 children for the most part are too young to form critical normative judgments.** They simply accept the variety around them as a fact and welcome all the love and care they receive."[366]

As such, the conflict is not found amongst the children, but rather in the parents'[367] perspectives about education: much, however, is revealed in the manner in which children are discussed within this context. Just as all three books are painted with a broad brush, so too are children's opinion and perspectives on their local familial environment, and relatedly, their

[364] Chamberlain 2, *supra* note 360, ¶ 45. See also 48-49.
[365] Ibid, ¶ 56.
[366] Ibid, ¶ 58.
[367] Ibid, ¶ 61, 62.

positions of acceptance. Justice Mackenzie opines, in closing, that the politics of sexual orientation should not be within the classroom walls and concludes by finding that the Books Resolution falls within the School Board's jurisdiction.[368] Drawing on the works of Lewis Caroll, Justice Mackenzie notes that this case has a Cheshire cat quality to it, appearing and disappearing upon careful analysis.[369] While the reference to *Alice in Wonderland* is appropriate, perhaps more revealing is the presence of the looking glass within this setting, which changes how a child's sense of belonging is understood along the way.

Before the Supreme Court of Canada

"I've addressed you as "Justices", as I ought, but, given the nature of this case, I would like to suggest that I read to you a book because, to some extent, this is a book for children of all ages:

"So children, come and listen as Father's Day approaches: *'One Dad, Two Dads, Brown Dads, Blue Dads'."*

"Blue Dads? Blue Dads? I don't know who has Dads that are blue."
"I do. My name is Lou; I have two Dads who are both blue;
They both have blue hair, the colour it grows; Blue arms and blue fingers, blue legs and blue toes."

"Well, what is it like to have blue Dads? the little girl said:
"Do they talk? Do they sing and eat cookies in bed? Do they work? Do they play? Do they cook? Do they cough?
If they hug you too hard, does the colour rub off?"

"Of course, blue Dads work and they play and they laugh. They do all of those things," says Lou. "Did you think that they simply would stop being Dads because they are blue?"

It's important that I read that book to you and to describe a little about the other two books because the critical issue in this case is what the message of these books are – or the message of this book is, because my friends are going to suggest that the message is something which no fair reading of this book will reveal."[370]

- Joseph Arvay, counsel for the Appellants

[368] Chamberlain 2, *supra* note 360, ¶ 63.
[369] Ibid.
[370] Supreme Court of Canada, audio transcript of Chamberlain v. The Board of Trustees of School District # 36 (Surrey) (Wednesday June 12 2002), at 2-3 (Arvay) [emphasis added].

"Where were […] these books?
Were they in the school?
Were they in the library?
Were they somewhere?"[371]

- Justice Claire L'Heureux-Dubé

While reference is made to Alice in Wonderland-like qualities of the case at the BC Court of Appeal, this work suggests that the discussions before the Supreme Court of Canada take on characteristics of a Dr. Seuss account, replete with hidden lessons and idiosyncratic verses, as intimated in the quotes above. Before the Supreme Court, children's books are read out loud, and Justices are referred to as children; *Chamberlain* is not simply a case about the applicable standard of administrative review. It is a story of living together within – and outside of – school walls.

The opinions in this case reveal a bench divided, not on the applicable standard of review vis-à-vis the School Board's decisions, but rather, whether the decisions were *intra vires* to the School Board's jurisdiction and mandate. Compelling lessons emerge from the Court on how difference should be dealt within the context of the school, and repercussions on our dealings in wider society. Indeed, analysis of the petitioners' factums reveals the importance of relationships and emerges the central issue in this case. It is worth underscoring that many affiants were not directly touched by this case, but submitted their stories of persecution growing up and the need for these types of educational resources to counter the discrimination they faced – the example of a dentist in Vancouver and high school students coming out

[371] Supreme Court of Canada, audio transcript of Chamberlain v. The Board of Trustees of School District # 36 (Surrey) (Wednesday June 12 2002), at 2 (L'Heureux-Dubé J.).

(including Blaine Cook, named in this case). Analysis of the case file in this work suggests that engaging with the 'three books' dilemma was as a form of collective catharsis for those who went through a difficult period of coming out; concurrently, it could also be seen as a form of emotional release for parents in favor of the book ban. More broadly, however, affiants on both sides understood that this was an opportunity to share their understanding of the place of education and governance of public schools in this context.

Chief Justice McLachlin (writing for herself and on behalf of L'Heureux-Dubé, Iacobucci, Major, Binnie and Arbour JJ.),[372] found that the resolutions approved by the School Board demonstrated that it had overstepped the bounds of its mandate, as set out by the *School Act.* McLachlin C.J. determines that reasonableness represents the relevant standard of review for the School Board's decisions.[373] Drawing on the pragmatic and functional approach, she notes that the *School Act* contains no privative clause that allows the courts to defer to the school boards' decisions.[374] Second, although the School Board retains a certain expertise in school matters, its level of expertise is moderated when faced with a decision that has a human rights component, as is the case here.[375] Put differently, the School Board's very expertise is put under scrutiny in this portion of the analysis, having to balance competing rights on the one

[372] LeBel J. concurring, argues that many affidavits were filed by parents in favor of the books ban. He notes: "I have no doubt that the affiants are good, nurturing parents who deserve credit for the care that they are taking to impart religious and moral values to their children. But their children go to school in a system in which no one doctrine (religious or otherwise) can be imposed so as to condemn a lifestyle that does not fit with its values, or to preclude the discussion of any other point of view. In such a system, they will not be shielded from lessons that may contradict what their parents teach them." Chamberlain, *supra* note 4, ¶ 213 (LeBel J.) In dissent, Justices Gonthier and Bastarache, agreed on the applicable standard of review but argued instead that the decision to evaluate and review books clearly fell under the School Board's mandate and that the decision taken on the aforementioned books was reasonable. See Chamberlain, *supra* note 4, ¶ 76 *in fine* (Gonthier J.).
[373] Chamberlain, *supra* note 4, ¶ 14 (McLachlin C.J.).
[374] Ibid, ¶ 8 (McLachlin C.J.).
[375] Ibid, ¶ 9-11 (McLachlin C.J.).

hand, and a human rights perspective, on the other. Third, upon closer examination of the deference offered to the School Board within the perspective of the *School Act,* McLachlin C.J. states that although school boards have a better grasp of the communities over which they preside, they cannot undermine the "norms of tolerance, respect for diversity, mutual understanding, and acceptance of all the family models found in British Columbian society and its schools."[376] If school boards circumvent the aforementioned norms, the courts are given a higher level of supervision over the administrative body.[377] Finally, given the nature of the problem, the court cannot defer to the School Board and thus suggests a higher level of judicial scrutiny is required.[378]

McLachlin C.J. also nuances the normative role of the School Board, insofar as it cannot be thought of as analogous to other administrative entities, such as municipalities.[379] In this regard, schools and school boards represent distinct places from other delegated and/or elected bodies, since they are not considered as autonomous sites of authority.[380] This represents a fundamental divergence from Gonthier J.'s understanding of schools, privileging an approach that endorsed latitude to different groups' moral views, in the name of 'community living'.[381] Albeit not mentioned by McLachlin C.J., schools also represent sites where administrative authorities are dealing with a vulnerable population, namely children,

[376] Chamberlain, *supra* note 4, ¶ 12 (McLachlin C.J.). See also ¶ 20, 25.
[377] Ibid, ¶ 12 (McLachlin C.J.).
[378] Ibid, ¶ 13 (McLachlin C.J.).
[379] Ibid, ¶ 28 (McLachlin C.J.).
[380] Ibid, ¶ 28 (McLachlin C.J.).
[381] Ibid, ¶ 137 (Gonthier J.): "The key is that people will disagree about important issues, and such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of modern pluralism."

reinforcing the obligation to act within the legal boundaries of the relevant statute. In a similar vein, she does note that parents' views "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."[382]

In McLachlin C.J.'s opinion, the School Board's resolution was made without making sufficient inquiries into the relationship between the books and the curriculum, as well as an inadequate appreciation of the student population.[383] The intervener Families in Partnership also underscores this point before the Supreme Court:

> As a resolution expressing Board policy and practice, it is either deliberately ignorant of, or careless of, the harm that it causes to the families of gay and lesbian parents, and particularly – and in particular, the children. Notably absent from all of the discussions below is the impact on the children of gay and lesbian parents:
>
> - We've heard from the children of religious minorities;
> - We've heard from the teachers who support those views;
> - We've heard from educators;
> - We've heard from theoreticians;
> - We've heard from academics; but
> - **We have not heard about what happens to children of gays and lesbians when they enter the public school system and they're faced with the reality that their families don't looks like everyone else's.**
>
> […]
>
> **They're [the children of gay and lesbian parents] – for them, there is no appropriate age to talk about their families because they are always in those families.**[384]

[382] Chamberlain, *supra* note 4, ¶ 33 (McLachlin C.J.). McLachlin C.J. also argues that parents' can only contest materials once they have been approved; the parents' argument is significantly weakened by the fact that the books did not reach this step: Chamberlain, *supra* note 4, ¶ 34-41 (McLachlin C.J.).

[383] Ibid, ¶ 55 (McLachlin C.J.).

[384] Supreme Court of Canada, audio transcript of Chamberlain v. The Board of Trustees of School District # 36 (Surrey) (Wednesday June 12 2002), at 64-65 (Ursel) [emphasis added]. While the intervener argued that the school board had heard from children of religious minorities in this legal process, no evidence of this was found in the evidentiary record.

The arguments made by both McLachlin C.J. and the intervener point to the School Board having erred by not fully taking its population into account in its decision-making process and relatedly, for having violated the principles the *School Act.*[385] This error was compounded a further one, notably a misunderstanding of the Ministerial Order on supplementary materials,[386] insofar as the needs of children of same-sex families:

> It is true that the Board is not obliged to approve every supplementary resource that it is presented with. It can reject supplementary materials — even supplementary materials that are relevant to the curriculum — if it does so on valid grounds, such as excessive level of difficulty, discriminatory content, inaccuracy, ineffectiveness, or availability of other materials to achieve the same goals. **Had the Board proceeded as required by the Act, the curriculum and its own general regulation, its decision might have been unassailable. The difficulty is that the Board did not do so here.**[387]

However, the linchpin argument in favour of an inclusive family matrix comes from McLachlin C.J.'s understanding of 'cognitive dissonance', insofar as it represents a the school as a necessary space for engagement with difference, rather than a threat to students' own understandings of family and, by extension, their religious leanings. Particular emphasis is placed on the importance of these everyday encounters and the significance of engaging with these experiences in a manner that is context-specific (i.e., age-appropriate).[388] She notes,

> 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

[385] Chamberlain, *supra* note 4, ¶ 58 (McLachlin C.J.).
[386] Ibid, ¶ 60 (McLachlin C.J.). McLachlin C.J. raises another point, namely that the School board had misinterpreted the learning outcomes of the curriculum: see Chamberlain, *supra* note 4, ¶ 60 (McLachlin C.J.).
[387] Ibid, ¶ 70 (McLachlin C.J.) [Emphasis added].
[388] Ibid, ¶ 69 (McLachlin C.J.): "tolerance is always age-specific".

> 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, 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**.[389]

McLachlin C.J. underscores the importance of students encountering difference in their public school setting, but also, and perhaps most importantly, the need to have these exchanges as members of the student body. Put differently, the need for cognitive dissonance, as McLachlin C.J. puts it in *Chamberlain*, simply confirms the place of a child's innate curiosity with regard to difference. A school, by its very nature, is a place of learning, sparking interests and cultivating thicker understandings about oneself and each other.

A passage from Justice LeBel's opinion is most revealing in the context of religious diversity and shifts the paradigm of reference to religiously different families:

> The incompatibility of the views expressed in the affidavits with the principles of secularism and non-sectarianism would perhaps be even more apparent if the parents had objected to the portrayal of families of a particular religious background — Muslim families, for example. No doubt the practices of Muslims are contrary to the teachings of some other religions; indeed, their beliefs are deeply opposed to those of some other religions. **But Christian or Hindu parents could not object (unless they renounced any claim that their objections were non-sectarian) to the mere presence of a Muslim family in a story book, or the mere intimation that happy, likeable Muslim families exist, on the basis that Muslims do and believe some things with which they do not agree, or that encountering these stories might bring children face to face with the reality that not everyone shares their parents' beliefs.** Parents who raised such objections would demonstrate their outright rejection of the principles of pluralism and tolerance enshrined in the *School Act* and, indeed, at the very heart of the Canadian society in which young schoolchildren are learning to participate.[390]

[389] Chamberlain, *supra* note 4, ¶ 65-66 (McLachlin C.J.) [emphasis added].
[390] Ibid, ¶ 214 (LeBel J.) [emphasis added].

Justice LeBel's characterization of difference – and reaction to difference – is particularly apt if one looks forward in the discussion on religious diversity and the important place that Muslim individuals occupy in the public discourse. Here, as portrayed by LeBel J., Muslim families are "likeable" and "happy": to refute their place at the multicultural table would be akin to rejecting the very foundations of Canadian society. LeBel's argument on social conscience connects with the one put forth by McLachlin C.J. on the 'lawfulness' of same-sex couples and families,[391] insofar as they both invoke, each in their own, the terms of recognition within the Canadian constitutional context. Christopher J. Evans has called McLachlin's technique of invoking lawful behaviour a "gatekeeping" function "on the sort of beliefs and practices that deserve recognition."[392]

As the first panel on religion and public education comes to a close, *Chamberlain* presents mixed results. Albeit considered a 'win' in terms of enshrining the need for cognitive dissonance on the one hand, it was considered a "loss" on the claims of religion, on the other.[393] *Chamberlain* also highlights that religion is worn on one's sleeve, that it is difficult to dissociate

[391] Chamberlain, *supra* note 4, ¶ 19-20 (McLachlin C.J.).

[392] Christopher J. Evans, "Adjudicating Contested Values: Freedom of Religion and the Oakes Test" (2013) 10 *JL & Equality* 5 (QL) at footnote 32. The legalistic call to order (lawfulness) creates a recognizable pattern of behaviour for religion claims, according to Benjamin Berger, who argues that "[t] o the extent that religion can be contained within the structural commitments of the rule of law, interpreted as comporting with its values, and read as consistent with its understanding of religion, tolerance is the mode of cross-cultural engagement. The grant of tolerance is based on the implicit judgment that the cultural differences found in the "tolerated" really ought not to bother the law. The point at which religion transgresses these commitments and defies these conceptions is the point at which tolerance gives way to the forceful imposition of the culture of Canadian constitutionalism." Benjamin L. Berger, "The Cultural Limits of Legal Tolerance" (2008) 21 *Can. J.L. & Juris.* 245 (QL), ¶ 37 **[Berger, "The Cultural Limits of Legal Tolerance"]**.

[393] Berger, "The Cultural Limits of Legal Tolerance", *supra* note 392, ¶ 36. On religion's "loss", David Schneiderman notes that "[p]erhaps the majority justices would better have accommodated religion in the public square if they had distinguished between deliberation, where religious sensibilities enter into the public discourse, and justification, where secular considerations will be expected to prevail." See David Schneiderman, "Associational Rights, Religion, and the *Charter*" in Richard Moon (ed.), *Law and Religious Pluralism in Canada* (Vancouver, UBC Press, 2008), 65 at 79.

or suspend in times of decision-making.[394] Following the Supreme Court decision, *Asha's Mums*, *Belinda's Bouquet* and *One Dad, Two Dad, Green Dad, Blue Dads* were re-evaluated by the Surrey School District, following the Court's guidance,[395] and ultimately, rejected. The later rejection was grounded on religious considerations, but rather, on grammatical ones.[396] It should be noted that the same school board later adopted that same year, other books depicting same-sex families.[397] *Chamberlain* is seminal moment in the discourse on religion and education, but remains a difficult case to square for the reasons intimated above, but also, for the fuzzy divide left between public and private spheres.

2.3 Multani v. Commission Scolaire Marguerite-Bourgeoys

A twelve-year old Sikh boy drops his kirpan, a ceremonial dagger, in the school's courtyard, in November 2001. A controversy ensues as to whether the boy is allowed to keep on wearing the kirpan at school. At that time, Gurbaj Singh Multani was in a secondary one (grade 7) welcome class for new immigrants at École Ste-Catherine Labouré, in LaSalle, a Montreal neighbourhood. These classes, known as *classes d'accueil*, are designed to encourage new students to Quebec to integrate into the public school system later on, both in terms of French language skills and

[394] As noted by McLachlin C.J., "[r]eligion is an integral aspect of people's lives, and cannot be left at the boardroom door." (Chamberlain, *supra* note 4, ¶ 19).
[395] Chamberlain, *supra* note 4, ¶ 70 (McLachlin C.J.).
[396] Bruce J. Macdougall & Paul T. Clarke, "Teaching Tolerance, Mirroring Diversity, Understanding Difference: The effects and Implications of the *Chamberlain* Case" in James McNinch & Mary Cronin (eds.), *I could not speak my heart: education and social justice for gay and lesbian youth* (Regina, University of Regina Press, 2004), 193, at 213; Collins, "Culture, religion and curriculum*", supra* note 105, 353.
[397] Ibid.

general appreciation of local culture.[398] School authorities worried that the presence of a kirpan on school grounds constituted a security concern for other students, as well as school personnel.[399] Despite the (expected) cultural diversity of incoming immigrants at the École Ste-Catherine Labouré, the kirpan was interpreted as a 'weapon' in the context of the school's code of conduct. In February 2002, an agreement was reached between the school principal and the interested parties (including lawyers for both sides) on how Gurbaj could carry the kirpan in school.[400] Yet the governing body of the school board refused to endorse this initial agreement, proposing instead that the boy wear a symbolic kirpan as a pendant, made of a non-dangerous material. Moreover, the governing body of the school board also passed, in February 2002, a resolution on the nature of the initial proposal, stating "[t]he fair arrangement proposed by the commission scolaire Marguerite-Bourgeoys on December 21st, 2001, is unacceptable and it goes against Section 5 of our Rules and regulations: dangerous and forbidden objects."[401] The council of commissioners of the Marguerite-Bourgeoys school board confirmed the governing body of the school board's suggestion of a symbolic kirpan in a March 2002 decision,[402] and added its own resolution:

- That the decision of the administration of École Sainte-Catherine-Labouré to prohibit G.S.M. from wearing the kirpan at school in accordance with the school's Code of Conduct be upheld;
- That the proposal for accommodation formulated by Mtre Grey on behalf of Mr.

[398] First instituted in 1969, the "classe d'accueil" welcomes students who have been living in Quebec for less than five years. As described by the Minister of Education in 2003, in most cases, students in these classes are newly arrived in Quebec and have different ethnic and linguistic background. In addition, the students' sociocultural level of acceptance, as the Minister of Education puts it, as well as their level of education, differs greatly upon their arrival. Their perception of school is also often different from ours. See Ministère de l'éducation, *Français, classe d'accueil, classe de francization: formation générale* (Québec, Direction générale des programmes, Direction de la formation générale, 2003), online: http://collections.banq.qc.ca/ark:/52327/bs43786, at 9.
[399] Multani (tuteur de) c. Commission scolaire Marguerite-Bourgeoys, [2002] J.Q. 619 (QL), ¶ 6 [Multani 1].
[400] Ibid, ¶ 9.
[401] Commission scolaire Marguerite-Bourgeoys v. Multani, 2004 CanLII 31405 (QCCA), ¶ 10 [Multani 3].
[402] Multani 1, *supra* note 399, ¶ 10.

Multani, father of G.S.M., regarding the wearing of the kirpan in school not be upheld;
- That the Commission scolaire accept the wearing of the symbolic kirpan as a pendant or in any other form and of a material that would make it harmless.[403]

The latter decisions made Gurbaj's presence at school tenuous, since he could not wear his kirpan. Moreover, Gurbaj Singh Multani had been receiving home schooling, provided by the Commission scolaire Marguerite-Bourgeoys, but it had ceased as of mid-March 2002. The decisions by both the governing body and the council of commissioners of the Marguerite-Bourgeoys school board were appealed to the court because the Multani family argued that this proposal (a symbolic kirpan) substantially infringed the student's right to freedom of religion, not to mention, his right to public education.

Before the Quebec Superior Court

The Multani case found itself before the Quebec Superior Court on two separate yet related occasions: first, as an interlocutory order and later as a declaratory judgment. Both of these decisions will be treated below.

An interlocutory order in April 2002 before the Quebec Superior Court sought that Gurbaj Singh Multani return to his class at the École Ste-Catherine Labouré, with a "provisional permission to wear his wrapped kirpan until a final decision is rendered on the motion for Declaratory Judgment, [or] that the [Commission scolaire Marguerite-Bourgeoys] provide him with home

[403] Multani 3, *supra* note 401, ¶ 12.

schooling until final judgment".[404] The discussion on religious diversity in public schools finds itself in a variety of documents submitted to the Superior Court, but perhaps most important is Gurbaj Singh Multani's affidavit, conferring him with a strong voice as a claimant:

> My parents think as I do, but it is my decision to insist on the right to wear the kirpan in school.
>
> […]
>
> I offered to doublewrap the kirpan: this was done with some reluctance because some of our spiritual leaders disapprove.
>
> […]
>
> I believe that I will suffer irreparable harm if I cannot return to school or get home schooling until the final decision and either alternative causes no irreparable harm to the school board.[405]

Gurbaj Singh Multani, through the curated narrative of his affidavit, displays a strong presence as a young adolescent claiming his religious rights, and relatedly, his right to public education. The affidavit excerpts point to his relationship with his family, as well as his individual choice in exercising his religious beliefs. They also suggest agency on Multani's part, as an individual legal actor, in offering a modified illustration of his sincere religious beliefs, supported by his lawyer's arguments. The affidavit also speaks the harm that Multani would suffer if his rights were not upheld: as underscored in the affidavit, the lack of legal finality precludes him from continuing his education. Although not addressed explicitly in the affidavit, leaving Multani in a legal in-between, would prejudice his right to free public education, as provided for in the Quebec

[404] Multani 1, *supra* note 399, ¶ 14.
[405] Gurbaj Singh Multani (Affidavit) (March 25, 2002), Appellant's Application for Leave to Appeal to the Supreme Court of Canada, Vol. 1, 63-65 (at ¶ 6, 22 & 32).

Charter of Human Rights and Freedoms.[406] While these excerpts speaks to Multani's beliefs and place as a child claimant, they are conveyed through a legal and formalized language of the affidavit, one that is likely not his own. The consequence is the production and reinforcement of the law through the "regulated "talk" of the affidavit".[407] Indeed, the affidavit, like any other piece of technology in a legal, is not neutral, but rather, shapes discourses and imparts a specialized message.[408] Judge Claude Tellier, in his oral judgment, found that Gurbaj Singh Multani suffered an obvious prejudice, since prolonged exclusion from the school setting could compromise his school year.[409] Alternatively, the judge found that the school board would not any major drawbacks if the kirpan was allowed, with the necessary precautions.[410] Home schooling, the Court noted, albeit a recognized form of education, does not provide the necessary socialization that students can expect to engage in through the course of their studies.[411] On the basis of these findings, the Court granted the interlocutory order,

> requiring that the kirpan be placed in a scabbard with a flap sown securely shut to ensure that it could not be either voluntarily or accidentally removed from the scabbard and be used as an offensive or defensive weapon. School authorities could make checks at any time to ensure that these conditions were being respected.[412]

The Multani case returned before the Quebec Superior Court in May 2002. The respondents asked, by way of declaratory judgment, that Gurbaj be allowed to wear his kirpan during school

[406] *Charter of Human Rights and Freedoms,* RSQ c C-12, s. 40 ["*Charter of Human Rights and Freedoms*"]: "Every person has a right, to the extent and according to the standards provided for by law, to free public education."
[407] Ney *et al.*, "Affidavits in Conflict Culture", *supra* note 284, 323.
[408] Ibid.
[409] Multani 1, *supra* note 399, ¶ 25.
[410] Ibid, ¶ 28.
[411] Ibid, ¶ 33.
[412] Multani 3, *supra* note 401, ¶ 9.

hours and on school grounds,[413] in conformity with his right to freedom of religion, as protected under the *Canadian Charter of Rights and Freedoms*, as well as the Quebec *Charter of Human Rights and Freedoms*. This judicial decision reflects that much time was spent discussing the type of kirpan accommodation that could be deemed acceptable by both parties. This also included the very sheath that housed the kirpan. In this case, it was cloth-wrapped: according the school board's lawyer, even the sheath could be considered a blunt object and therefore a danger in and of itself.[414] The discussion between the lawyers for both the Multani family and the school board reflects a certain level of openness between the parties, insofar as an alternative solution was discussed and therefore not deemed as being outside of the realm of the impossible. This judicialised discussion on the kirpan, in terms of the place and space it occupied, as discussed by counsel for both the Multanis and the school board, suggests the manner in which it presents itself is more problematic that the actual religious belief in the kirpan. On this point, counsel for the Multanis proposed that the kirpan be housed in a wooden sheath – instead of cloth-wrapped – to which the school board's lawyer agreed.[415] This position should be actively contrasted with that of the lawyer for Quebec's Attorney General, who did not take part in the file, but did appear in court after hearing the submission of the parties. Without further elaboration on his position, the representative for the Attorney General stated: "[p]our le Procureur général, en ce qui concerne les armes blanches dans les écoles, c'est tolérance zéro, ce qui inclut les kirpans. C'est la seule representation que j'ai à vous faire."[416] In making such a blanket statement on bladed weapons, this work suggests that the

[413] Multani (tuteur de) c. Commission scolaire Marguerite-Bourgeoys, [2002] J.Q. no 1131 (QL), ¶ 1 [Multani 2].
[414] Ibid, ¶ 3.
[415] Ibid, ¶ 3-4.
[416] Ibid, ¶ 5, 6.

representative for the Attorney General effectively – and consciously – removed himself from a vital conversation on the place of religious diversity in public schools. Notes one author,

> "en se cantonnant dans cette position, le Procureur général a envoyé un bien triste message quant à la conception qu'il se fait de la tolérance au sein de la société québécoise libre, démocratique, mais aussi plurielle. En fait, on reste avec l'impression que l'idéologie aveugle a triomphé de la rationalité, pavant ainsi la voie à une forte regrettable réduction des significations que peut porter le *kirpan.*"[417]

In her oral decision, Judge Danielle Grenier granted the Multanis' request for declaratory judgment, stating a light of a lack of evidence that kirpans were the source of any violence in Quebec schools and in consideration of the state of law in Canada and Quebec on this subject. Gurbaj Multani was allowed to return to his school and wear his kirpan, so long as the following conditions were met and respected:

- that the kirpan be worn under his clothes;
- that the kirpan be carried in a scabbard made of wood and not metal, to prevent it from causing injury;
- that the kirpan be placed in its scabbard and wrapped and sewn in a sturdy fabric pouch, and that this pouch be sewn to the guthra;
- that school personnel be authorized to verify, in a reasonable fashion, that these conditions were being followed;
- that the petitioner be required to keep the kirpan in his possession at all times, and that its disappearance be reported to school authorities immediately; that if the present judgment were not respected, the petitioner would definitively lose the right to wear his kirpan at school.[418]

[417] Jean-François Gaudreault-DesBiens, « Du crucifix au kirpan : quelques remarques sur l'exercice de la liberté de religion dans les établissements scolaires » in Barreau du Québec, *Développements récents en droit de l'éducation* (Cowansville, Éditions Yvon Blais, 2002), 89, 101-102.

[418] Multani 3, *supra* note 401, ¶ 17 (in unofficial English translation of judgment); Multani 2, *supra* note 413, ¶ 7 (original, in French).

Before the Quebec Court of Appeal

The Quebec Court of Appeal was soon faced with the Multani case, since the Marguerite-Bourgeoys school board "dispute[d] the existence of an agreement or transaction regarding the accommodation upheld at first instance."[419] The school board also argued that making decisions in favor of school security would enable them to fulfill their institutional mandate; this line of argumentation signaled a shift from the original litigation strategy, to one based on the appropriate standard of administrative law review. Moreover, the school board put forth that the proposal of a symbolic kirpan, *in lieu* of a traditional one, represented a reasonable measure, given the circumstances.[420] The World Sikh Organization (WSO) was given intervener status before the Court of Appeal, arguing mainly that the kirpan constitutes one of the five religious requirements that should be respected by orthodox Sikhs.[421]

Lemelin J.A. (on behalf of François Pelletier and André Rochon, J.A.) stated that the initial interlocutory decision by Tellier J. was met with noted parental criticism and provocative newspaper headlines.[422] A substantial portion of the judgment by the Court of Appeal revolved around the acceptable standard of review, given that the decision-making bodies in this case, namely the decision by the council of commissioners (and later confirmed by the governing body of the school board), detained a form of relational authority vis-à-vis the other educational actors. Lemelin J.A., writing for the bench, reminds the reader that

[419] Multani 3, *supra* note 401, ¶ 21.
[420] Ibid, ¶ 21-23.
[421] Ibid, ¶ 26.
[422] Ibid, ¶ 14.

> "as an education institution, the "mission of a school is to impart knowledge to students, foster their social development and give them qualifications, while enabling them to undertake and achieve success in a course of study." The school works in collaboration with the students, parents, principal and other school staff, as well as representatives of the community and school board."[423]

Indeed, administrative school structures afford the individual actors a certain amount of institutional independence; this is particularly the case of the council of commissioners and the governing body of the school board, who are recognized as having a degree of expertise (and therefore legislated deference) in the area of school conduct.[424] However, decisions by these bodies are curtailed if they concern individual human rights, as is the case here.[425] The Appeal Court highlights the web of institutional actors – school administrators and inverveners – who have submitted affidavits detailing the rise in violence in schools and the necessity of adopting stringent rules regarding weapons. Moreover, the Appeal Court acknowledges that although no instances of violence can be attributed to the kirpan, "[t]he presence of kirpans at schools increases the feeling of insecurity, even if no incidents have occurred yet."[426] The Court relies greatly on what is termed a 'socio-educational study' of the environment of fourteen secondary schools under the umbrella of the Marguerite-Bourgeoys school board,[427] and particularly on the affidavit of Denis Leclerc, a psychoeducator who collaborated on this study. The latter distinguishes the kirpan from other potential circumstances inviting weapons in schools:

> The situation is different when it involves the kirpan for Sikhs or knives for other children, because these objects are not visible to the supervisors. Although supervisors are generally not aware that these weapons are at or near schools, the children are much more likely to know who is armed.

[423] Multani 3, *supra* note 401, ¶ 43 [references omitted].
[424] Ibid, ¶ 44-46.
[425] Ibid, ¶ 47, 48.
[426] Ibid, ¶ 61.
[427] Ibid, ¶ 60-61.

> […]
>
> This means that a student may believe it is necessary to bring a knife to school to defend himself from other students in case of a fight, since he knows that because some students have the right to carry one, other students have also decided to carry one without telling anyone about it.[428]

While some students may have deeper knowledge and friendships with some of their classmates, it is unlikely that they will be more aware than school supervisors of whether their classmates are carrying something that is considered a weapon. Children do not possess any special training (or equipment) to detect the presence of potentially harmful elements in school settings. Moreover, children's reflections or interrogations on the presence of these elements might be different than those held by the supervisors. Indeed, while the kirpans may not be in plain sight to the supervisors, they are not hidden,[429] but the child's ethnicity and religious belonging are discernable to the supervisors. As such, it becomes difficult to set this visibility aside and not be conscious of a child's upbringing, since the two are interrelated. The school board's argument is further complicated by its acknowledgment of its multicultural student population and duty of tolerance.[430] In this manner, it becomes impossible to deny the invisibility of race[431] within the context of this school board. Orthodox Sikhs, according to the Court, are recognizable through their adherence to the five Ks of Sikhism, as established in affidavits submitted by the Multanis as well as Chaplain Manjit Singh.[432] These include: "the

[428] Multani 3, *supra* note 401, ¶ 97.
[429] As argued by the Multanis' legal counsel before the Supreme Court: *Multani v. Commission scolaire Marguerite-Bourgeoys, Supreme Court of Canada transcript* (Tuesday April 12 2005), 11 (Grey).
[430] Multani 3, *supra* note 401, ¶ 91.
[431] On this point, see Sonia Lawrence, "Book review: Michael Manley-Casimir & Kirsten Manley-Casimir (eds.), *The Courts, the Charter, and the Schools: The Impact of the Charter Rights and Freedoms on Educational Policy and Practice, 1982-2007"* (2011) 26 *Can. J.L. & Soc.* 205, 213 (fn 6) **[Lawrence, "Book review"]**.
[432] Multani 3, *supra* note 401, ¶ 53.

kesh (uncut hair), the kara (steel bracelet worn on the wrist), the kirpan (dagger, with metal blade), the kachh (specific type of underclothing) and the kangha (a wooden comb)."[433] At no point in these proceedings is the sincerity of these five Ks challenged. Lemelin J.A. also notes that beliefs within a particular community of faith can also differ, making compromise solutions untenable for some and acceptable to others: "[w]e must recognize that people who profess the same religion may adhere to the dogma and practices of that religion to varying degrees of rigour."[434]

The public security concern remains the cornerstone justification of the decisions by both the governing body and council of commissioners of the Marguerite-Bourgeoys school board. This is reflected in Lemelin J.A.'s judgment, noting "I am unable to convince myself that the safety imperatives should be less stringent at school than in courts of justice or in airplanes."[435] She adds: "[s]tripped of its symbolic religious significance, the kirpan has all the physical characteristics of an edged weapon: "*hand-held weapon with a metal section used of its effects (dagger for example)*."[436] Although this point can be made from an intellectual standpoint, it is very difficult to distinguish where religious symbolism – as put by Lemelin J.A. – ends, and physical characteristics begin.[437] The initial measures proposed to dissuade the potential use of the kirpan as a weapon, notably to double-wrap it in order to impede unfettered access, only

[433] Multani 3, *supra* note 401, ¶ 53.
[434] Ibid, ¶ 68.
[435] Ibid, ¶ 84.
[436] Ibid, ¶ 89 [references omitted, emphasis in original].
[437] This neutralization or "stripping" of symbolism has also been made in the context of the hijab, where, if divested of its 'religious symbolism', it can be considered only as a piece of fabric.

slows down contact but does not convincingly eliminate the risk, according to the Court.[438] Moreover, these measures of accommodation would lead to undue hardship for the school board, since it would downgrade overall effectiveness of the security measures taken in favor of the Marguerite-Bourgeoys school board community.[439] In conclusion, the Quebec Court of Appeal finds that the council of commissioners' reversal of the school board's initial decision and further resolution was reasonable within its jurisdictional sphere and institutional mandate.[440]

Before the Supreme Court of Canada

> "This is an article of faith," the 17-year-old said. "We do not use it (the kirpan), we do not take it out. That's a restriction."[441]
>
> - Gurbaj Singh Multani, after the Supreme Court decision

Multani was heard before the Supreme Court of Canada in April 2005; the judgment was handed down in March 2006.[442] The place of the administrative standard of review and its relationship with the alleged breach of individual human rights divided the opinions of the bench. On the one hand, Justice Charron (writing for herself and on behalf of McLachlin C.J. and Bastarache, Binnie and Fish JJ.), argued that relying primarily on the principles of administrative law, rather than the "principles of constitutional justification", could create confusion and

[438] Multani 3, *supra* note 401, ¶ 95.
[439] Ibid, ¶ 99-100.
[440] Ibid, ¶ 101.
[441] CBC News, "Ban on Sikh kirpan overturned by Supreme Court" (March 02 2006) online: http://www.cbc.ca/news/canada/ban-on-sikh-kirpan-overturned-by-supreme-court-1.618238.
[442] Major J. did not take part in the judgment.

potentially reduce the scope of constitutional rights.[443] On the other hand, Justices Abella and Deschamps, although arriving at the same conclusion as their colleague Charron J., do so on the basis of an administrative law review, given the administrative body's decision under review in this case as well as circumvents the pitfalls related to the distinction between principles of constitutional justification and principles of administrative law.[444] According to Abella and Deschamps JJ., the values involved in administrative law and constitutional law decisions are different, and should be treated in kind.[445] Although LeBel J. (writing for himself) ultimately agreed with the outcome reached by his colleagues, he provided certain methodological clarifications on the content and related effects of the legal cross-pollination of this claim.[446]

Charron J., writing for the majority, argues that it is the constitutionality of the decision taken by the administrative bodies, rather than the standard of review, that is central to this case. She notes:

> With respect, it is of little importance to Gurbaj Singh — who wants to exercise his freedom of religion — whether the absolute prohibition against wearing a kirpan in his school derives from the actual wording of a normative rule or merely from the application of such a rule. In either case, any limit on his freedom of religion must meet the same requirements if it is to be found to be constitutional.[447]

In focusing her analysis solely on Gurbaj Singh Multani's right to freedom of religion, Charron J. engages with the kirpan as an expression of his faith – a "religious object that resembles a

[443] Multani, *supra* note 3, ¶ 15-17 (Charron J.).
[444] Ibid, ¶ 84-85 (Abella & Deschamps JJ.)
[445] Ibid, ¶ 132 (Abella & Deschamps JJ.)
[446] Ibid, ¶ 140 and ff (LeBell J.).
[447] Ibid, ¶ 21 (Charron J.).

dagger and must be made of metal"[448] – rather than a "weapon designed to kill", as argued by the Marguerite-Bourgeoys school board.[449] This approach to the visibility of minority beliefs is presented as being as important as other representations of faiths.[450] This approach privileges a rebranding of the kirpan in the public sphere.[451] It also requires a further understanding of other practices, through the privileged space of the educational institution. Notes Julius Grey in his oral arguments before the Supreme Court of Canada,

> The idea that Quebec students cannot be taught the difference between a kippa and an illegal hat or baseball hat worn by students, that they cannot be taught the difference between a kirpan and a knife, that they can't be taught the difference between a scarf worn by a Muslim girl and an illegal violation of the school uniform is terrible and it's very close to the views now discredited that if an RCMP man wore a turban then, somehow, Canadians would not have respect for him. This is an educational institution and it is not a concealed weapon, it's an object whose presence would be announced in advance and everybody would know about it. There's no danger that somebody would be wearing a kirpan unknown to the educators. [452]

Grey's argument suggests that this confrontation should be a 'teachable moment', one that others should learn from, rather than rail against. This line of argumentation also suggests that the perceived danger is not found in the kirpan, but rather, in a state of religious illiteracy about articles of faith, and faith more generally. The language employed in this representation before the court rests in the exercise of *distinction*, rather than *opposition*: put differently, counsel's arguments here emphasise the importance of knowledge and nuance (and discretion) rather

[448] Multani, *supra* note 3, ¶ 3 (Charron J.).
[449] Ibid, ¶ 37 (Charron J.).
[450] *Multani v. Commission scolaire Marguerite-Bourgeoys, Supreme Court of Canada transcript* (Tuesday April 12 2005), 6 (Grey).
[451] Howard Kislowicz, *Social Processes in Canadian Religious Freedom Litigation: Plural Laws, Multicultural Communications, and Civic Belonging* (S.J.D. Thesis, Faculty of Law, University of Toronto, 2013), at 212, suggests that Multani participants saw the Supreme Court as a translator to the general public.
[452] *Multani v. Commission scolaire Marguerite-Bourgeoys, Supreme Court of Canada transcript* (Tuesday April 12 2005), p. 11 (Grey).

than stark conflict between what is 'acceptable' and 'unacceptable' expressions of faith. Focusing on better knowledge about religious faith is a legal strategy that is also shared by counsel for the WSO, who characterises Gurbaj Singh Multani as having

> "chosen not to be involved in gangs or gang violence […] an exemplary student who has gotten his strength and faith [and] has allowed him to be an individual that is able to stand apart from the rest of the world and say, I choose to look and be different and despite choosing to look and be different, I have gain[ed] from my own teachings, my own beliefs system an inner strength, a sense of being that I am not fall by the wayside"[453]

The WSO's depiction of Gurbaj Singh Multani as a model student represents one of the few occasions in the legal proceedings where he is understood as a legal agent in his own regard. This depiction, also endorsed by Charron J. in her opinion,[454] shapes him as an agent of free choice, both in terms of his faith and his general beliefs as a member of the student community. The WSO portrayal underscores, however, that it too had its own mandate and agenda before the courts – namely one emphasizing Sikhism's peaceful nature and the kirpan as a religious symbol, drawing on language that resonates with all parties.[455]

Situating the kirpan as an article of faith strengthens the court's understanding of the place of this artifact within the scope of religious adherence, as well as its conjunction with its school environment. Although arguments were not made directly by the parties on the level of safety sought by the governing board, Charron J. notes that reasonable safety should be the espoused

[453] *Multani v. Commission scolaire Marguerite-Bourgeoys, Supreme Court of Canada transcript* (Tuesday April 12 2005), p. 45 (Shergill).
[454] Multani, *supra* note 3, ¶ 57 (Charron J.).
[455] For a discussion of this point, see Valerie Stoker, "Zero Tolerance ? Sikh Swords, School Safety, and Secularism in Québec" (2007) 75(4) *Journal of the American Academy of Religion* 814, 819 *in fine*.

level of care in schools, since an absolute standard of safety would be unrealistic and ultimately, compromise the universal right to education.[456]

Within the confines of Charron J.'s majority opinion, the sincerity of Gurbaj Singh Multani's belief is a focal point.[457] As such, emphasis is on whether the school board's prohibition of the kirpan substantially infringed Gurbaj Singh Multani's right to freedom of religion. Charron J. addressed the proportionality test in conjunction with the duty to accommodation, since, in her opinion, "the correspondence between the legal principles is logical. […] the analogy with the duty of reasonable accommodation seems to me to be helpful to explain the burden resulting from the minimal impairment test with respect to a particular individual, as in the case at bar."[458] Gurbaj Singh Multani's position, as a legal agent, is reaffirmed within the context of this discussion, where Charron J. underscores that "[i]t is important to note that Gurbaj Singh has never claimed a right to wear his kirpan to school without restriction. Rather, he says that he is prepared to wear his kirpan under the above-mentioned conditions imposed by Grenier J. of the Superior Court."[459] This work suggests that two micro-representations of Gurbaj Singh Multani emerge from Charron J.'s framing. First, he is seen as a 'mediator' in this context, modulating the expression of his beliefs according to the specific context in which he finds himself, namely that of the school. Second, he is understood as an active 'enforcer' of established guidelines (as stipulated by the Court), whereby Gurbaj Singh Multani would

[456] Multani, *supra* note 3, ¶ 44-48 (Charron J.).
[457] Ibid, ¶ 37-40 (Charron J.).
[458] Ibid, ¶ 53 (Charron J.).
[459] Ibid, ¶ 54 (Charron J.).

physically intercede to stop someone from abruptly removing his kirpan.[460] If abiding by the court-set conditions, Gurbaj Singh Multani's kirpan becomes a deterrent, rather than an invitation, to violence. Indeed, as noted by Charron J., other common school objects at the students' disposal can more readily serve as weapons, if the student is so inclined.[461] Reliance on newspaper articles, as submitted by the parties, further bolsters the lack of school-related incidents involving kirpans.[462] Reliance on case law from the rest of Canada, notably *Pandori v. Peel Board of Education,*[463] affirmed in *Peel Board of Education v. Ontario Human Rights Commission,*[464] strengthen that kirpans worn under strict conditions do not constitute a danger in school settings. Indeed, Charron J. notes that the school environment is unlike that of a courtroom or airplane setting, since it "is a unique one that permits relationships to develop among students and staff. These relationships make it possible to better control the different types of situations that arise in schools."[465] Student relationships, as well as those between student and staff are qualitatively different than those within a courtroom or airplane setting and thus result in varying safety standards.[466] The proliferation of weapons on school property, as a result of an individual student wearing the kirpan, is interpreted as "purely speculative" by the majority opinion.[467] As such, the presence of kirpans shouldn't contribute to what Charron J. termed "the poisoning of school environment": in this regard, the majority opinion rejects

[460] Multani, *supra* note 3, ¶ 58 (Charron J.).
[461] Ibid, ¶ 58 (Charron J.).
[462] Ibid, ¶ 61 (Charron J.).
[463] *Pandori, supra* note 230, as cited in Multani, *supra* note 3, ¶ 60 (Charron J.).
[464] *Peel Board of Education v. Ontario Human Rights Commission,* (1991) 3 O.R. (3d) 531, as cited in Multani, *supra* note 3, ¶ 60 (Charron J.).
[465] Multani, *supra* note 3, ¶ 65 (Charron J.).
[466] Ibid, ¶ 66 (Charron J.).
[467] Ibid, ¶ 69 (Charron J.).

Denis Leclerc's affidavit (previously addressed in this Chapter's discussion of the Quebec Court of Appeal's decision in *Multani*) and characterization as an expert witness:

> With respect for the view of the Court of Appeal, I cannot accept Denis Leclerc's position. Among other concerns, the example he presents concerning the chador is particularly revealing. To equate a religious obligation such as wearing the chador with the desire of certain students to wear caps is indicative of a simplistic view of freedom of religion that is incompatible with the Canadian Charter. Moreover, his opinion seems to be based on the firm belief that the kirpan is, by its true nature, a weapon.[468]

This passage is particularly revealing to the reader on two different, yet interrelated levels. First, the socio-educational study did not focus on kirpans in particular, and thus, any conclusions drawn emerge from generalizations about religious and religious beliefs.[469] Second, the "stripping" of the kirpan, down to "its true nature", to borrow from the excerpt above, suggests a deep misunderstanding about the place of the kirpan in the spectre of a Sikh's religious beliefs, and more broadly a misinterpretation of Canadian multiculturalism.[470] As noted by Charron J.,

> A total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others. On the other hand, accommodating Gurbaj Singh and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities. The deleterious effects of a total prohibition thus outweigh its salutary effects.[471]

Justice Charron's closing remarks leave us with two important points. First, the majority opinion underscores that a hierarchy of acceptable beliefs within the school setting will not be

[468] Multani, *supra* note 3, ¶ 74 (Charron J.).
[469] Howard Kislowicz also raises this point in regards to Robert Brousseau's affidavit, a police officer in school settings, as an example of failure in cross-cultural communication, since Brousseau never sought out Sikh students in the discussion on the potential for violence in the school setting: Kislowicz, *supra* note 451, at 207.
[470] Multani, *supra* note 3, ¶ 76 (Charron J.).
[471] Ibid, ¶ 79 (Charron J.).

tolerated, since it does not promote a sense of religious equality within the student body. Second, and flowing from the first point, appropriate accommodation of religious minorities' beliefs illustrate the significance that Canadian society attaches to the protection of its minorities, as well as to the fundamental right to freedom of religion. Gurbaj Singh Multani reflects both the importance of an equal student body, as well as a success in religious accommodation and Canadian values of multiculturalism. Finally, given that Gurbaj Singh Multani no longer attended Ste-Catherine-Labouré, the Superior Court judgment was not restored, but rather, Charron J. declared the decision prohibiting the kirpan to be null.[472] It bears mention that in the intervening years between the initial decision prohibiting the kirpan and the Supreme Court decision (ie, a span of four year) Gurbaj Singh Multani left the French public school system in favor of attending a private school, in this case a Seventh-Day Adventist English school, which allowed him to keep wearing his kirpan to school.[473] As noted by one author, the irony shouldn't be lost on readers that Gurbaj Singh Multani found a private Christian school more accommodating of his religious beliefs than the welcome class designed to integrate new students into Quebec society,[474] both in terms of language and general culture. Perhaps more poignant, however, is that Gurbaj Singh Multani had completed the very experience meant to bond students, namely high school, by the time the court case was over. In this regard, the public school system fell short in terms of adequate and successful integration of new immigrants to the province.

[472] Multani, *supra* note 3, ¶ 82 (Charron J.).
[473] Kislowicz, *supra* note 451, 237 (fn 26).
[474] Ibid.

Although Justices Abella and Deschamps ultimately agree with Charron J.'s majority opinion, namely that the decision prohibiting the kirpan was null, their analysis of the decision-making process takes a different path, one that considers the principles of administrative law as central to their opinion, and "prevents the impairment of the analytical tools developed specifically for each of these fields."[475] As noted by Abella and Deschamps JJ., the Court of Appeal first engaged with the issue of the applicable standard of review (lower instances had not dealt with this argument) and found that the standard of reasonableness constituted the appropriate level review, since although the prohibition of the kirpan constrained Gurbaj Singh Multani's right to freedom of religion, it was reasonable given the school board's mandate of school safety.[476] As such, the standard of review focused on the school board's decision, rather than the school's code of conduct.[477] A wide berth was given to the council of commissioners in terms of decision making-authority, as noted by Justices Abella and Deschamps in their opinion; moreover, this corresponded with the approach chosen in two other recent cases involving school decisions.[478] In the case at bar, the *Education Act* specifically established an internal appeal mechanism, in order for the council of commissioners to revise the school board's decisions.[479] Abella and Deschamps JJ. underscore that school boards are better equipped that judicial decision-making bodies when questions of school safety arise, *a fortiori* in situations involving a particular set of circumstances, as illustrated in the case at bar.[480] The concurring opinion, in moving onto the espoused reasonableness of the decision, provide a conflicted portrait of the kirpan, referring

[475] Multani, *supra* note 3, ¶ 85 (Abella & Deschamps JJ.).
[476] Ibid, ¶ 90 (Abella & Deschamps JJ.).
[477] Ibid, ¶ 92-94 (Abella & Deschamps JJ.).
[478] Ibid, ¶ 94 (Abella & Deschamps JJ.), referring to *Trinity Western University v. British Columbia College of Teachers* [2001] 1 SCR 772 **[TWU]** and Chamberlain, *supra* note 4.
[479] Multani, *supra* note 3, ¶ 96 (Abella & Deschamps JJ.), citing ss. 12 & 76 of the *Education Act*, R.S.Q. c I-13.3.
[480] Ibid, ¶ 96 (Abella & Deschamps JJ.).

to it first as "a 20-cm knife with a metal blade",[481] but later on, "while a kind of "knife", is above all a religious object whose dangerous nature is neutralized by the many coverings required by the Superior Court."[482] Indeed, while substantive efforts are made by the justices to explain the nature of a kirpan, they are made in abstraction of the actual student wearing it, a deep criticism levied at the school board:

> In the case at bar, the school board did not sufficiently consider either the right to freedom of religion or the accommodation measure proposed by the father and the student. **It merely applied the Code de vie literally. By disregarding the right to freedom of religion, and by invoking the safety of the school community without considering the possibility of a solution that posed little or no risk, the school board made an unreasonable decision.**[483]

A verbatim application of the code of conduct furthermore negates the discretionary decision-making authority and jurisdiction that is specifically allotted to the school board and governing bodies, by which they could take into account the particular student and school involved in a dispute. Focusing on the specific decisions made by the school board also strengthens the approach chosen by Justices Abella and Deschamps, privileging an administrative law review rather than a constitutional law approach, since, in their words,

> the administrative law approach must be retained for reviewing decisions and orders made by administrative bodies. A constitutional justification analysis must, on the other hand, be carried out when reviewing the validity or enforceability of a norm such as a law, regulation, or other similar rule of general application.[484]

[481] Multani, *supra* note 3, ¶ 87 (Abella & Deschamps JJ.).
[482] Ibid, ¶ 98 (Abella & Deschamps JJ.).
[483] Ibid, ¶ 99 (Abella & Deschamps JJ.) [emphasis added].
[484] Ibid, ¶ 103 (Abella & Deschamps JJ.).

While these Justices do not exclude the importance and relevance of a constitutional law approach, they underscore that administrative bodies already have the obligation to take constitutional values into account in their decision-making process, and furthermore, that a review of such decisions by judicial bodies should not occur first under section 1 of the *Canadian Charter*.[485] Enforcing such a split between administrative and constitutional law review, according to Abella and Deschamps JJ., further reinforces the analytical separation between minimal impairment and reasonable accommodation.[486] Indeed, as noted by Abella and Deschamps JJ., "the values involved [in each of these decision-making processes] *may be* different,"[487] given the divergent public/private obligations contained in each of these approaches. While differences in the values between administrative and constitutional law reviews are intimated, this work suggests that they could have benefitted from a deeper and more extensive discussion by Abella and Deschamps JJ., especially given the particular context of public schools, where we speak of students, teachers and school administrators. A different discussion occurs here as opposed to the one that is shaped in the context of employee-employer relations. Furthermore, the role of students, as children, and *nuanced* rights-holders,[488] is not given sufficient breadth in this judicial discussion. The conversation on undue hardship within the context of a reasonable accommodation approach undeniably holds a

[485] See Multani, *supra* note 3, ¶ 107 & 110 (Abella & Deschamps JJ.). On the discussion between rules (and rule of law) and norms, see Multani, *supra* note 3, ¶ 112-125, 128 (Abella & Deschamps JJ.).
[486] Multani, *supra* note 3, ¶ 129, 134 (Abella & Deschamps JJ.). *A contra*, Charron J. at ¶ 53 (*supra* note 458).
[487] Ibid, ¶ 132 (Abella & Deschamps JJ.) [emphasis added].
[488] This dissertation employs *nuanced* rights-holders in this context to underscore that although children are considered to be rights-holders, their right to universal public education (as provided for under the Quebec Charter) would be considerably undermined by a reasonable accommodation analysis. LeBel J., in his reasons, underscores this point. See Multani, *supra* note 3, ¶ 145, 147 (LeBel J.).

different connotation with school walls.[489] This work notes that there is an undeniably different claim being made within this context, given the targeted population, ie, students. Some sparks of this discussion are present, however, in Abella and Deschamps JJ.'s opinion, namely in the shaping of the analytical context, where "[a]n administrative law analysis is microcosmic, whereas a constitutional analysis is generally macrocosmic."[490] While this point will benefit from further discussion in Chapter 3 of this dissertation, it is sufficient here to note that that an administrative law review relies on an approach that is at once contextual and reliant on one's particular environment, and also, emblematic of a broader social setting. Schools *do* represent, at the same time, a unique space, but also, a small-scale representation of one's society and governmental institutions.[491] In their concluding remarks, Justices Abella and Deschamps reiterate again that it was not the school's code of conduct while was under review, but rather, the decisions taken by the school board: in this context, they proposed to set aside the Appeal Court decision and allow the appeal.[492]

As the second panel on religion and education comes to a close, few cases have polarized the Canadian society and the legal community as did *Multani*. Not only did it question the administrative/constitutional law divide, but in Quebec, also pushed our legal imagination *in extremis* in terms of our understanding of religious diversity, and our celebration thereof. In the

[489] On this subject, see Jean-François Gaudreault-DesBiens, « Quelques angles mort du débat sur l'accommodement raisonnable à la lumière de la question du port de signes religieux à l'école publique : réflexions en forme de points d'interrogation » in Myriam Jézéquel (ed.), *Les accommodements raisonnables. Quoi, comment, jusqu'où ? Des outils pour tous* (Cowansville, Éditions Yvon Blais, 2007) **[Gaudreault-DesBiens, « Quelques angles mort »]**.
[490] Multani, *supra* note 3, ¶ 132 (Abella & Deschamps JJ.).
[491] *Supra* notes 98-101.
[492] Multani, *supra* note 3, ¶ 139 (Abella & Deschamps JJ.). LeBel J. argues this point similarly at ¶ 152.

context of public schools, this case challenged its very mandate. In other words, *Multani* picked at the very weave of the Canadian constitutional fabric.[493] *Multani* has been framed as a case where "religion wins"[494] and cited as an example of successful cross-cultural communication.[495] In reference to the former, "[s]heathed, sealed, and tucked away inside the folds of young Multani's clothing, religion does not threaten any of the values or structural commitments of the rule of law."[496] Letting religious beliefs 'win' in *Multani*, in other words, did not jeopardize the established legal order. Religious accommodation in this key, however positive, can also perpetuate asymmetrical relations, according to some.[497] This portrayal of the kirpan, and its observance, albeit compelling, represents a choice in how to frame this belief for the legal apparatus.[498] More foundationally, however, *Multani* propelled the legal community into a broader conversation on the intersection of constitutional and administrative law values.[499]

[493] The following paragraph is an excerpt from my article entitled "Constitutional (mis)Adventures: Revisiting the proposed Quebec Charter of Values" (2015) 71 *Supreme Court Law Review* (2d) 353, at 364 (footnotes and cross-referencing have been adapted for the purposes of my thesis) **[Dabby, "Constitutional (mis)Adventures"]**.

[494] Berger, "The Cultural Limits of Legal Tolerance", *supra* note 392, ¶ 33.

[495] Howard Kislowicz, "Faithfull Translations? Cross-Cultural Communication in Canadian Religious Freedom Litigation" (2014) 52 *Osgoode Hall L.J.* 141 (QL), ¶ 77 **[Kislowicz, "Faithful Translations"]**.

[496] Berger, "Cultural Limits", *supra* note 494, ¶ 33. See also Avigail Eisenberg, "Rights in the Age of Identity Politics" (2013) 50 *Osgoode Hall L.J.* 609 (QL) **[Eisenberg, "Identity Politics"]**.

[497] Colleen Sheppard, "Inclusion, Voice, and Process-Based Constitutionalism" (2013) 50 *Osgoode Hall L.J.* 547, 572 **[Sheppard, "Process-Based Constitutionalism"]**. See also Eisenberg, "Identity Politics", *supra* note 496, at ¶ 15-16 (fn 37).

[498] See, in this way, Howard Kislowicz, "Sacred Laws in Earthly Courts: Legal Pluralism in Canadian Religious Freedom Litigation" (2013), 39 Queen's L.J. 175 (QL), ¶ 67 **[Kislowicz, "Sacred Laws"]**; Shauna Van Praagh, "Open House – "Portes ouvertes": Classrooms as Sites of Interfaith Interface" in Benjamin Berger & Richard Moon (eds.), *Religion and Public Authority in Canada* (London, Hart Publishing) (forthcoming 2016) **[Van Praagh, "Open House"]**.

[499] See in this way: Gaudreault-DesBiens, « Quelques angles mort », *supra* note 489; Paul Daly & Angela Cameron, "Furthering Substantive Equality through Administrative Law: Charter Values in Education" (2013) 63 *Supreme Court Law Review* 169 **[Cameron & Daly, "Furthering Substantive Equality"]**. See also *Commission scolaire des chênes, supra* note 9; *Doré v. Barreau du Québec*, [2012] 1 SCR 395 **[*Doré*]** and *Loyola*, *supra* note 9.

2.4 S.L. v. Commission scolaire des chênes

Following years of consultation, reports and proposals,[500] a new compulsory course was introduced to Quebec students in the fall of 2008, aimed at replacing the catechism and moral education courses that had populated the education landscape until then. This course, known as the Ethics and Religious Culture program (ERC), became the target of parents seeking exemptions from this course, which had been broadened to include other religious perspectives. Newspapers reported that in September 2008, the Minister of Education had received close to 1000 requests for exemption.[501] The claimants in *Commission scolaire des chênes* were part of this wave, submitting their request to their school board in May 2008, in preparation for the upcoming 2008-2009 school year.[502] This exemption was based on article 222 of the *Education Act*,[503] which held that a release could be granted on humanitarian grounds or in an effort to avoid serious harm to a student. The appellants were parents of Catholic faith and argued that the ERC was harmful to their children's upbringing. The school

[500] See Chapter 1 of this Thesis for a general discussion of this educational process.

[501] Daphnée Dion-Viens, « Le cours d'éthique et culture religieuse devant la Cour suprême », *Le Soleil* (15 May 2011) online: http://www.lapresse.ca/le-soleil/actualites/education/201105/15/01-4399680-le-cours-dethique-et-culture-religieuse-devant-la-cour-supreme.php.

[502] Commission scolaire des chênes, *supra* note 9, ¶ 5.

[503] L.R.Q. c. 1-13.3, art. 222: "Every school board shall ensure that the basic school regulation established by the Government is implemented in accordance with the gradual implementation procedure established by the Minister under section 459.

For humanitarian reasons or to avoid serious harm to a student, the school board may, following a request, with reasons, made by the parents of the student, by the student, if of full age, or by the school principal, exempt the student from the application of a provision of the basic school regulation. In the case of an exemption from the rules governing certification of studies referred to in section 460, the school board must apply therefor to the Minister.

The school board may also, subject to the rules governing certification of studies prescribed by the basic school regulation, permit a departure from a provision of the basic school regulation so that a special school project applicable to a group of students may be carried out. However, a departure from the list of subjects may only be permitted in the cases and on the conditions determined by a regulation of the Minister made under section 457.2 or with the authorization of the Minister given in accordance with section 459."

board denied their request for exemption board that same month; this decision was appealed before the Commission scolaire des chênes' council of commissioners, where the initial decision was upheld. The appellants then sought to take their case before Dubois J. of the Superior Court, on the basis of two arguments: first, they argued for a declaratory judgment on the basis that the ECR program infringed their right (and that of their children) to freedom of religion and conscience (under article 2 of the *Canadian Charter of Rights and Freedoms* and article 3 of the *Québec Charter*); second, the appellants argued for judicial review of decisions issued by both the school board and its council of commissioners, since they maintained that the school board and commissioners were unduly pressured into making a decision in line with the ERC program.

Before the Quebec Superior Court

At trial, Dubois J. retained Father Gilles Routhier's expert opinion (Faculty of the Theology and Religious sciences at Université Laval) on the teachings of the Catholic Church (not on the specifics of the ERC Program). According to Dubois J.'s interpretation of Father Routhier's testimony, even the leaders of the Catholic Church admit to the validity of an objective presentation of other religions.[504] Yet a transcript exchange between a student (known as "X", then in his last year of high school) and the defendant's lawyer in 2009 provides an example of how certain students may perceive the ERC program to be 'uncomfortable', despite the Catholic leaders' purported openness to other religions. This excerpt is also telling, since it is one of the few illustrations of children's voices in the legal arena (and included in the trial

[504] Commission scolaire des chênes, *supra* note 9, ¶ 64.

decision) – albeit modulated by a lawyer's questions at cross-examination. It is reproduced here to illustrate this point:

> Q. Pourquoi vous vouliez être exempté?
> R. Bien, quand j'avais suivi... le cours que j'avais suivi j'étais pas vraiment à l'aise à suivre ça, là. On avait eu des examens sur toutes les autres religions puis j'étais pas bien là-dedans, là.
> Q. Pourquoi vous étiez pas bien?
> R. Bien, moi je trouve que ça m'a comme.., ça m'a comme mis un doute, là, sur...
> Q. O.K.
> R. **Tout présenter sur un pied d'égalité toutes les autres dieux et tout ça. Pour moi, t'sais, j'ai mon Dieu puis là tout ça, ç'a...**
> Q. Ç'a créé un doute?
> R. J'étais pas à l'aise là-dedans. Oui.
> Q. Actuellement vous pratiquez encore la religion catholique, vous...?
> R. Actuellement, oui. [505]

The discomfort in Student X's testimony is palpable. Student X speaks about feeling awkward about the introduction of "other" religions, and the equalizing effect between religions. More revealing, however, is Student X's deep unease with the line of questioning undertaken by the lawyer and the challenge at adequately articulating his own opinion about his religious beliefs. The lack of eloquence in Student X's testimony also reminds the readers of his adolescence, where rebellion and affirmation coexist uncomfortably. The trial court judge reproduced this excerpt in his judgment as a demonstration of the sincerity of their beliefs and as confirmation of their status as practising Catholics.[506] From this excerpt, Student X also appeared concerned about being tested on other religions, which constituted the basis for requesting the exemption from the ERC program. Furthermore, it is interesting to note that Student X spoke about the fear/concern about learning about other religions and not the fear/concern of losing his own

[505] D.L. c. Commission scolaire des Chênes, 2009 QCCS 3875, ¶ 42 [emphasis added] **[D.L.]**.
[506] Ibid, ¶ 40.

religion. This is demonstrated in the later exchange between Student X and the defendant's lawyer, where Student X confirms having received all the sacraments required to considered a practising Catholic:

Q. Oui. Depuis votre naissance quels sacrements avez-vous reçus?
R. Je les ai tous reçus.
Q. C'est-à-dire?
R. Baptisé, communion...
Q. D'autres sacrements, non?
R. Non.
Q. Pas de confirmation?
R. Ah oui, confirmation.
Q. Confession?
R. Oui.
Q. Oui. Quelle est la paroisse que vous fréquentez, monsieur X?
R. Bien, pas une en particulier. L'église vous voulez dire que...?
Q. Oui?
R. Pas une en particulier, là.
Q. Allez-vous à la messe?
R. Oui. [507]

This work suggests that the exchange can be understood as a checklist of religious 'milestones', anchored in usual and recognized religious practices. It does not, however, engage substantially in the sincerity of Student X's religious beliefs. Although this exchange is by no means indicative or illustrative of all persons seeking exemptions to the ERC program, Student X raises a palpable concern about the "Other", cloaked in the notion of harm. This excerpt also demonstrates the importance of 'landmarks' in a religious upbringing and the corresponding correlate with sincere beliefs. Once again, however, Student X comes off as hesitant about his own religious upbringing and responds only fully when prompted by the lawyer.

[507] D.L., *supra* note 505, ¶ 42 *in fine*.

In conclusion at trial, however, the ERC Program could not be construed as coercive nor did it place students in an obligatory situation.[508] According to the Superior Court judge, the school board therefore validly rejected the exemptions sought by the parents on their children's behalf.[509] Flowing from these two conclusions, the request for judicial review on the basis of the independence of the school board and the council of commissioners was also dismissed.[510]

Before the Quebec Court of Appeal

The Québec Court of Appeal also agreed with Dubois J.'s findings on both motions. Justice Morissette (writing on behalf of Giroux J.; Beauregard J. agreeing with Justice Morissette's conclusions), emphasised that the facts in this case rendered the case moot – the children at the centre of this controversy were no longer required to take this class since one had already graduated from high school and the other was currently attending a private school[511] - therefore rendering the appeal theoretical in nature. Furthermore, the reasoning invoked by the parents – namely that the very existence of their beliefs as constitutive of the exemption mentioned in article 222 of the *Education Act*, would allow any parent, in the name of an honest and sincere religious belief to invoke this article and request that their child be exempted of any part of this program – was deeply flawed. According to Morissette J., such an interpretation would go against the very nature of the exemption found in the *Education Act*

[508] D.L., *supra* note 505, ¶ 66; Commission scolaire des chênes, *supra* note 9, ¶ 5.
[509] D.L., *supra* note 505, ¶ 122.
[510] Ibid, ¶ 123, 125.
[511] S.L. c. Commission scolaire des Chênes, 2010 QCCA 346, ¶ 10, 13 **[S.L.]**.

and its respect of freedom of conscience and religion.[512] While this position was not extensively elaborated, it is clear that a distinction must be made between beliefs deserving of exemptions and those that simply go against a parent's sincerely held religious beliefs. Such an understanding of the exemption under the *Education Act* would effectively denature the statute, as well as the right to freedom of conscience. While this judgment is brief in length, it is worth re-emphasizing the fundamental tension that the Court highlighted: although parents can hold sincere religious beliefs and choose to educate their children accordingly, they may not justify legal action under the law.[513] In closing, and flowing from the previous findings, the Court of Appeal suggested that the parties did not have the requisite interest to demonstrate standing in this case and thus were engaged in what Justice Morissette called a "theoretical debate", resulting in the Court upholding the trial judge's decision.

Before the Supreme Court

At the Supreme Court of Canada, Deschamps J. delivered the majority decision (on behalf of (McLachlin C.J. and Binnie, Abella, Charron, Rothstein and Cromwell JJ.), whilst LeBel J. (on behalf of Fish J.) rendered a concurring judgment. Justice Deschamps began with a contextual analysis of the case, foreshadowing the ultimate conclusion reached by the justices: "[g]iven the religious diversity of present-day Quebec, the state can no longer promote a vision of society in public schools that is based on historically dominant religions."[514] In reviewing the

[512] S.L., *supra* note 511, ¶ 14.
[513] S.L., *supra* note 511, ¶ 14.
[514] Commission scolaire des chênes, *supra* note 9, ¶ 1 (Deschamps J.).

two issues at hand – namely whether the ERC Program had infringed on the appellants' right to freedom of religion and conscience and whether the trial judge had erred in determining that the school board's decision had been made or not according to the dictates of a third party[515] - Deschamps J. found that the appellants had failed to prove the alleged interference. The secularization of public institutions, particularly of schools, indicated a willingness on the part of the body politic to allow for "free space",[516] or space that is not dominated by any one religion.

Deschamps J. argued that it was not enough to simply state that the appellants' right to freedom of religion and conscience had been infringed. Rather, they also needed to prove this infringement objectively, by "an analysis of the rules, events or acts that interfere with the exercise of the freedom."[517] The appellants did not do this, nor did they seek to annul the ERC program.[518] This affected the type of evidence on which the justices could rest their opinions: since the course was never taught to the appellants' children, judges at all levels in this case were limited to the content of this program rather than actual effects on the ground.[519] Instead, the appellants chose to argue that their right to pass on their religious beliefs to their children had been infringed upon by the ERC program. This also speaks to a shift in the type of argument put forth by appellants, relying on increased recognition of parental rights in law's domain over religion rather than emphasizing the child's right to freedom of religion.[520] The appellants

[515] Commission scolaire des chênes, *supra* note 9, ¶ 8-9 (Deschamps J.).
[516] Ibid, ¶ 10 (Deschamps J.)
[517] Ibid, ¶ 23-24, 27 (Deschamps J.).
[518] Ibid, ¶ 47 (LeBel J.).
[519] Ibid, ¶ 33 (Deschamps J.), ¶ 44-45 (LeBel J.).
[520] The parents' memo before the Supreme Court illustrate the shift in litigation strategy, namely to the mother's faith rather than the child's. See Respondents' factum in *S.L. v. Commission scolaire des Chênes* (SCC case no. 33678).

further disputed the religious neutrality of the ERC program, suggesting that it presented a relativistic form of religion.[521] While Deschamps J. acknowledged the inherent difficulty in "achiev[ing] religious neutrality in the public sphere"[522], she noted that absolute neutrality (just as an absolute right) in law is impracticable. Moreover, 'cognitive dissonance', as discussed in *Chamberlain v. Surrey School District No. 36,* which referred to the different interactions that students may have during the course of a school day – interactions that might not warrant deep reflection at first, but come to make-up necessary, valued and valuable differences, such as food habits, behaviours, dress – was welcomed by the Supreme Court of Canada. This "cognitive dissonance" was posited as simply being a necessary "fact of life in society" in order for children to understand the make-up of a tolerant society.[523] The contrary, according to Deschamps J., would "amoun[t] to a rejection of the multicultural reality of Canadian society and ignores the Québec government's obligations with regard to public education."[524] Deschamps J. consequently dismissed the appeal.

In his concurring opinion, LeBel J. focused on the trial judge's adherence to the analytical approach set out in the sincerity of belief test in *Syndicat Northcrest* v. *Amselem*.[525] At issue here was Dubois J.'s reliance on Father Routhier's expert opinion on the teachings of the Catholic Church, rather than an in-depth analysis of the ERC program and its effects: "the courts

[521] Commission scolaire des chênes, *supra* note 9, ¶ 29 (Deschamps J.).
[522] Ibid, ¶ 30 (Deschamps J.).
[523] Chamberlain, *supra* note 4, ¶ 65-66 as cited at ¶ 39-40 of Commission scolaire des chênes, *supra* note 9 (Deschamps J.).
[524] Commission scolaire des chênes, *supra* note 9, ¶ 40 (Deschamps J.).
[525] *Amselem, supra* note 84, ¶ 42-43, 58-60.

do not search an applicant's soul or conscience and do not seek to become theologians."[526] While Deschamps J. also raised this point, LeBel J.'s opinion drew particular attention to the displaced nature of this claim, insofar as the identity of those suffering the infringement in question (parents or children?) as well as discharging the requisite burden of proof. On this latter point, LeBel J. raises many important questions about the ERC Program which are not sufficiently addressed due to the appellants' espoused legal strategy:

> "In other words, is it a program that will provide all students with better knowledge of society's diversity and them to be open to difference? Or is it an educational tool designed to get religion out of children's heads by taking an essentially agnostic or atheistic approach that denies any theoretical validity to the religious experience and religious values? Is the program consistent with the notion of secularism that has gradually been developed in constitutional cases, particularly in the field of education? **The state of the record makes it impossible to answer these questions with confidence**."[527]
>
> […]
>
> "does the content of the Christmas-related exercises for six-year-old students encourage the transformation of an experience and tradition into a form of folklore consisting merely of stories about mice or surprising neighbours?"[528]

Although unanswered, what remains more interesting in this line of questioning is that Justice LeBel was attempting to infuse a child's perspective into an actual line of questioning on the mandate and tangible effects of the ERC program. It is interesting to note that this hypothetical situation represents one of the few occasions where children are vested with voice, albeit theoretical. What does the ERC program mean in practice? What lessons are being imparted to children? What are the effects of this program outside of the classroom? Does the ERC program change the way children feel about or understand religions and religious beliefs? Or

[526] Commission scolaire des chênes, *supra* note 9, ¶ 49 (LeBel J.). See also ¶ 51-52.
[527] Ibid, ¶ 53 (LeBel J.) [emphasis added]. LeBel J. also added that the rules of civil evidence precluded a thorough assessment of the ERC Program and described the evidence regarding the teaching methods and spirit of the ERC program as "sketchy" (see ¶ 56-57).
[528] Ibid, ¶ 58 (LeBel J.).

alternatively, does it simply promote identity confusion? In conclusion, LeBel J. underscored that the door remained open to future challenges to the ERC program[529] and dismissed the appeal.

Commission scolaire des chênes constitutes the third and final panel to our *narrative continuum* on religion and education. If *Chamberlain* is considered as a 'loss' for religious freedom, and *Multani* a 'win' – continuing with a binary approach to the adjudication of freedom of religion – then *Commission scolaire des chênes* can be considered as middling ground. As noted earlier, this case did not rest on a strong evidentiary file, and as such, "is not terribly consequential on as a matter of legal doctrine."[530] This might go to some lengths in explaining why there is a relative paucity of academic commentary on this case, as compared to others, such as *Multani* or *Loyola*. Furthermore, The judgment in *Commission scolaire des chênes* also left the nuancing of the constitutionality of the ERC program to their later, as seen in *Loyola*.[531]

Nevertheless, important points can be drawn from this case. The Court provides significant guidance on the subject of social diversity, reinforcing its celebration of – and necessity for – difference. Perhaps more noteworthy, *Commission scolaire des chênes* clarifies that parental rights to religious freedom should not be understood as *carte blanche*: instead, such rights must

[529] Commission scolaire des chênes, *supra* note 9, ¶ 58 (LeBel J.). On this point, Loyola High School has successfully challenged the ERC Program, as taught in private confessional schools, before the courts: see Loyola, *supra* note 9.
[530] Berger, "Religious Diversity, Education", *supra* note 120, 113.
[531] Loyola, *supra* note 9.

be able to stand up to an objective analysis.[532] This approach feeds into the Court's further shaping of State neutrality, as a mechanism of exposure to – and regulation of – social and religious diversity. The concept of 'trust' runs through the Court's judgment, both in terms of trust in the State (as noted above) and trust in the children. Through the vector of this judgment, the Court places trust in the children of the ERC program and in their ability to engage positively with religious difference.[533] Shauna Van Praagh takes this further:

> "[t]he [*Commission*] *des chênes* judgment reminds us that the precise contours of the policy and the Ethics and Religious Culture course it has generated will change and evolve. The voices of teachers, administrators, parents and children – including individual members of religious communities – contribute to the ongoing shaping of the substance and significance of the institutions, including ERC, that form the fabric of our collective experience."[534]

The ERC program takes on jurisgenerative[535] capacity or process through Van Praagh's analysis – one that uncovers the reflexive nature of this program, but also, more importantly, the individuals and communities that give it meaning. Indeed, it could be argued that the ERC

[532] Commission scolaire des chênes, *supra* note 9, ¶ 24 (Deschamps J.).The Quebec Court of Appeal also touched on this point, though framed as whether these beliefs are 'actionable' before the courts, rather than an objective standard within the sincerity test: *supra* note 513. Yves-Marie Morissette JA, who penned the Appeal Court decision, also spoke about the Quebec Court of Appeal's decision being eclipsed by that of the Supreme Court in "Aspects historiques et analytiques de l'appel en matière civile" (2014) 59(3) *RD McGill* 481 (QL), ¶ 114: "Il n'est guère original de soutenir que, dans l'état actuel des choses, les cours d'appel intermédiaires évoluant dans des pays de droit anglo-américain exercent un important ascendant sur le droit positif. Certes, les cours d'appel de dernier niveau prononcent dans presque tous les pourvois dont elles sont saisies des décisions de principe dont la portée à la fois normative et symbolique dépasse, et souvent de très loin, celle de la production quotidienne ou ordinaire, des cours intermédiaires. Et lorsque ces cours intermédiaires, comme c'est habituellement le cas, voient transiter par chez elles une affaire promise à un dénouement retentissant devant une cour suprême, le jugement rendu à l'échelon intermédiaire a de bonnes chances de passer inaperçu ou d'être vite oublié par la suite." [references omitted]

[533] Berger, "Religious Diversity, Education", *supra* note 120, 113.

[534] Van Praagh, "From secondary schools", *supra* note 104, 116-117.

[535] I understand jurisgenerative in the sense ascribed by Seyla Benhabib, in *Another Cosmopolitanism* (Oxford, Oxford University Press, 2006), 49, at 70: "Jurisgenerative politics, at their best, are cases of legal and political contestation in which the meaning of rights and other fundamental principles are reposited, resignified, and reappropriated by new and excluded groups, or by the citizenry in the face of new and unprecedented hermeneutic challenges and meaning constellations."

program reproduces the *status quo* in Québec society – with a predominantly Christian (Catholic) emphasis with minority religions. The two contestations of the ERC program, which still give a predominant view of Christianity in its cyclical analysis as noted above, were brought forth by Catholic families (and in *Loyola*, an institution) seeking to protect their religious heritage. This work questions whether the Court's decisions would have been qualitatively different if, *instead of* Commission scolaire des chênes, the appeal would have come from a Muslim family challenging their son or daughter's place in the ERC program in another public school, or if, *instead of* Loyola, the appeal would have come from a private Jewish girls' school, indubitably challenging the established order and narrative about religious heritage. Indeed, while the lessons from *Commission scolaire des chênes* revolve around the importance of engaging with religious diversity, the child's place at the center of the controversy fades in the face of bigger societal conversations on school governance.

Conclusion

If litigation stories are used here as the starting point, what lessons can be drawn?

First, litigation stories indicate a different perspective, in terms of who gets to tell (and re-tell) the story. As such, attention to detail is key to understanding these tales and formulating context. One should also be recognizant of the limits of storytelling, to echo Tushnet,[536] where the particulars of a case should not result in omitting the application of the general rule.

[536] *Supra* note 324.

Storytelling requires an exchange between the teller and the receiver of the story – in this way, in can be also drawn upon as a form of socialization. I engaged with legal narratives (or stories) here – as told by the parties to the Court – in order to advance my argument, namely, that children's voices are often excluded from the legal process when questions of freedom of religion arise. In my three case studies, we can see that *Chamberlain* comports no traces of children's voices directly, but rather, curated by their parents, interveners and legal counsel. Multani, by virtue of his age and his positioning, does figure prominently in the legal process, and this, at all levels; his 'voice' appears through his affidavit and his characterization by various interveners. By contrast, in Commission scolaire des chênes, Student X, whose testimony makes it into the trial decision, disappears by the time the final judgment is rendered by the Supreme Court. His general awkwardness, his inarticulateness about his religious beliefs and demeanor are typical of adolescents and should not be discounted because of fuzziness. Our three case studies disclose, each in their own way, important stories about socialization and difference.

This leads us to the second lesson of litigation stories, which requires us to be aware of context in the telling of a story. Occurring in a similar time frame as sexual orientation being read in as grounds of discrimination[537] and the recognition of same-sex union questions,[538] *Chamberlain* brings the question of same-sex individuals and families out from the bedroom and into the public school classrooms. Tolerance, in this case, is always age-appropriate,[539] but always necessary. *Multani* relates the story of a young immigrant to Quebec and his struggle in

[537] *Vriend v. Alberta*, [1998] 1 SCR 493.
[538] As noted in the Introductory Chapter, the *Reference re Same-sex marriage* occurred in 2004, *supra* note 84; however, cases across Canada were launched earlier. See, for instance: *Hendricks c. Québec (Procureur général)*, 2002 CanLII 23808 (QC CS).
[539] *Supra* note 388.

integrating the public school system, in accordance with his identity and religious beliefs. *Multani* begins prior to, and develops in the legal setting at the same time as *l'affaire du foulard* in France, and the law banning of ostensible religious symbols in public schools.[540] *Multani,* in Quebec, becomes known as *l'affaire du kirpan*[541] and the focus of superlative media and public policy attention. Finally, *Commission scolaire des chênes* embodies the last steps of the deconfessionalization process in Quebec, encourages a further an examination of how school spaces are understood when faced with religious vestiges, and more importantly, how children understand themselves within these policy – and identity – processes. It is a deeply relational case, incorporating discussions about the transmission of beliefs and family structure. The ERC program therefore reconstructs how students, parents, teachers and communities interact with secular and religious spaces.[542] In the context of *Commission scolaire des chênes,* we learn that the Ethics and Religious Culture Program, envisaged as an instrument to providing a cultural understanding of religion in Québec, has put forward essential questions about how the State understands children within this context, and how these stories coexist, sometimes in harmony and other times at odds with each other. This also points to who gets to construct children's identities – and who holds a monopoly on the determinants of belonging, if anyone. Is it the parents? The State? The school? Or perhaps, by religious communities?

Herein lies the third and final lesson to be drawn from legal storytelling: it should not be used as the sole method of analysis, since this approach could repeat the patterns of exclusion,

[540] *Loi n^{o} 2004-228 du 15 mars 2004,* JO, 17 March 2004, 5190.
[541] This framing finds footing in the Bouchard-Taylor commission and later report as well: Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles, *Building the Future: A Time for Reconciliation* (Quebec City, Government of Quebec, 2008) **[Bouchard-Taylor report]**.
[542] Albeit not discussed in depth in this dissertation, *Loyola*, *supra* notes 9 & 529, also echoes this perspective.

which resulted in conflict to begin with; rather, legal storytelling should be used in conjunction with other tools of enquiry. I have addressed this caution by employing narrative as my theory, and discourse analysis as my method; my research has also been buttressed, to a great extent, by insights from legal geography lens as well as careful constitutional consideration of the governance of religion in public schools. I argued in this Chapter that children's voices are often excluded from the adjudication process when it is questions of religion and public education. This is in part due to the way that we understand the sincerity of religious beliefs on the one hand, and on the other, how the evidentiary tools are structured in the Canadian context. However, this also points to the inherent complexity of these cases: they are are not single-issue stories, but rather, multifaceted narratives in which exclusion and inclusion cohabitate uncomfortably. The case studies have provided ample food for thought in this area: in *Chamberlain*, we 'hear' children, but through the eyes of parents, school administrators and experts, to say nothing of literary critics; in *Commission scolaire des chênes*, we are introduced to Student X, only for this opinion to fade away by the time it reaches the Supreme Court. Gurbaj Singh Multani is the teller of his tale in his case; the adjudicative process led to his exclusion from the public school system,[543] despite winning his legal battle. Despite being empowered by the legal system,[544] Multani was let down by the public school system.

[543] See discussion in Chapter 3.

[544] Martha Minow, in speaking of *Brown v. Board of Education*'s unintended legacy, suggests that this judgment "enshrined equal opportunity as the aspiration, if not the given, for students whose primary language is not English, for students who are immigrants, for girls, for students with disabilities, for gay or lesbian or transgendered students, and for religious students. The racial-justice initiative expanded to include all these students so that today, American public schools are preoccupied with the aspiration of equality and the language of inclusion." Martha Minow, "Surprising Legacies of Brown v. Board" (2004) 16 *Washington University Journal of Law and Policy* 11, 18 as cited in Perry-Hazan, "Court-led educational reforms", *supra* note 120, 718.

Litigation stories, as those of *Chamberlain*, *Multani* and *Commission scolaire des chênes* proffer lessons of perspective, context and method. However, these stories should not be taken in isolation from other tools of analysis to discuss the governance of religion in public schools, or identity politics.

Conclusion

In conclusion, this Chapter has sought to bring attention to children's voices and how they are often excluded from the legal process when questions of freedom of religion arise in the context of public schools. In a first section, I suggested that we need to reflect critically on the evidentiary tools that are made available to children who are to participate in the litigation process, and the effect that this can have in the context of freedom of religion litigation. The individualistic and subjective approach to freedom of religion, as favored by the Courts, leaves little place for a discussion on what beliefs a child might truly have, and even less about what children really think about their beliefs.[545] On the whole, children's participation in legal proceedings appears to be highly circumscribed. This can be attributed to wanting to avoid further deterioration of family relations in the case of family law proceedings, or, as is in the case of criminal law proceedings, an attempt to maintain the balance with the rights of the accused to a fair trial.

In a second section, I argued that legal storytelling provides a compelling vehicle by which to

[545] A similar argument could be made for adults as well. This stems, in large part, from the crafting of the sincerity of beliefs test in *Amselem*, *supra* note 84, ¶ 50, where the Court avoids becoming the "arbiter of religious dogma". See Dabby, "If not "arbiter of religious dogma", *supra* note 77.

discuss these nuanced stories about religion and education. In then turning to the stories in *Chamberlain, Multani* and *Commission scolaire des chênes*, I endeavored to locate children's voices. A careful analysis of the cases underscored that children's voices are often excluded from the litigation process – as a result of being too young or (too) inarticulate for the purposes of getting one's argument across. *Multani* remains the exception to my small case study, illustrating both presence and voice. Moreover, these cases highlight the challenge of public and private space through the vector of education. Perry-Hazan has called this danger of the "third rail", namely "policy issues that, by touching them, risk political electrocution".[546] This provokes a reorientation of what is considered part of the public and private spheres: by passing from one sphere to the other, according to one author, there is *encroachment*, or boundary passing.[547] Through a careful elaboration of narratives, I sought to underscore how children, parents, and institutions shape, contest and reify the shared spaces of public schools. Adjudicative processes undoubtedly curate children's narratives, through the prescribed rules of court procedure. While this analysis brings certain elements to light within the discussion on the governance of religion and public schools, it remains vital to examine other spaces of engagement.

[546] Perry-Hazan, "Court-led educational reforms", *supra* note 120, 714. Perry-Hazan speaks of "third rail" in the context her study of court-led educational reforms in Israel Haredi schools at the same page.
[547] Nicholas Blomley, "Flowers in the bathtub: boundary crossings at the public–private divide" (2005) 36 *Geoforum* 281, 284.

Chapter 3. The Administrative Governance of Religious Diversity: Schools as 'Complex Constitutions'

Introduction

The previous Chapter argued that children's voices and narratives are only heard in specific settings once the dispute has entered the legal arena. Indeed, the formalized context of the court generally precludes so-called 'spontaneous' exchanges – instead, each act is prescribed, each document endowed with a legal purpose.[548] I argued that court disputes produce judicial stories that can be qualified as the 'legal curation' of children's narratives, through the use of affidavits and examination/cross-examination.[549]

In this Chapter, I maintain that within the context of religious claims, children's narratives have the potential to be less constrained in the context of educational institutional spaces and are more likely to heard and taken into consideration in everyday decision-making processes. I suggest that internal decision-making processes, such as the ones available within the school's structure, are more likely to allow for a better understanding of children's belonging and

[548] Mariana Valverde has discussed this phenomenon recently in *Chronotopes of law: jurisdiction, scale and governance* (New York, Routledge, 2015), 6: "We can add that legal systems are noted for developing highly complex formal written rules to standardize the evaluation and judging of one discourse with the tools of another (e.g. assessing the credibility of witnesses or the authenticity of a contract." Valverde borrows 'chronotope' from Mikhail Bakhtin, which she describes as enabling the "precise purpose of analyzing how the temporal and the spatial dimensions of life and governance affect each other." See Valverde, *supra*, 9. On the importance of legal documents as constitutive sources of authority, see Annelise Riles, *Documents: Artefacts of Modern Knowledge* (Michigan, University of Michigan Press, 2006).

[549] On affidavits, see in this way Ney *et al.*, "Affidavits in Conflict Culture", *supra* note 284.

narratives and therefore, of relationships.[550] Focusing on the institutional framing, rather than the formal judicial processes, emphasizes the importance of law playing a preventive role in safeguarding children's religious freedoms rather than merely a retroactive approach in the wake of violations. In this context, I suggest that an institutional lens allows us to understand issues without framing them in the language of an adversarial 'legal' dispute. As such, institutional problems and dilemmas arise in specific contexts that may best be resolved by taking into account individual differences and concrete needs, and in this way, encouraging a culture of inclusion and diversity. Put differently, in this chapter, I explore the possibility that the educational institutional framing, in its everyday application, advances a framework of inclusion and pragmatic problem solving, rather than one of rights-violation and formal legal standards.

I focus on the institutional lens in this Chapter to shift the attention away from the individual stories told in the judicial setting to the space in which these administrative decisions are initially made. Institutional design, governance and administrative law speak to the everyday practices in which individuals engage[551] and concurrently highlight the importance of everyday life, decision-making and experiences in the realm of religious diversity.[552] The purpose for this shift is threefold: first, this approach nuances the caution of following the 'single story', since it

[550] Lorne Sossin has argued for a more intimate approach to fairness in the administrative process: "viewing our administrative relationships as an important and complex form of personal relationship […] is the first step to more genuine and meaningful forms of fairness, impartiality and reasonableness in administrative decision-making. " See "An Intimate Approach to Fairness, Impartiality and Reasonableness in Administrative Law" (2002) 27 *Queen's L.J.* 809, 858.
[551] Macdonald, *supra* note 285.
[552] Beaman, "Deep Equality", *supra* note 96.

can reproduce the very patterns that led to an individual's exclusion in the first place.[553] The 'single story', albeit compelling, presents one story amongst a multitude: the argument raised in the previous chapter underscores that focusing too closely on one individual's story within the context of judicial decisions can alter our consideration of particular events and general rules. Within the realm of administrative decisions, however, the single story holds more sway, since internal decisions are made on a case-by-case basis. Furthermore, framing of religious diversity as a legal claim, also feeds into a broader discussion on the "fetishization of religious diversity", which, as noted by Lori G. Beaman, has "created a particular framework within which religion, its expression, its lack of expression, and religious difference must be framed."[554] Fetishizing a particular object, person or concept – as is the case here – infers an unhealthy and pedestal-inducing fixation, which can potentially blind us to other solutions, as noted by Beaman, referring here to the positive and quotidian resolution of differences of religious diversity.[555] This argument can seem radical to some, especially those in law, since Beaman actively challenges law's authority over religious diversity: in fact, Beaman is arguing for religion to cease being approached as a societal conundrum in need of an expert (legal) solution. Beaman's concern feeds into my second justification for this shift, insofar as it provides necessary space in which to consider how institutional contexts and decision-making structures engage with democratic governance and participation when questions of religious diversity are

[553] Scheppele, "Telling Stories", *supra* note 323, at 2084. See also Bethany Hastie's discussion of the danger of the single narrative, as noted in her dissertation, *Migrant Labour and the Making of Unfreedom: How the law facilitates exclusion and exploitation under Canada's Temporary Foreign Worker Program* (D.C.L. thesis, Faculty of Law, McGill University, 2015), at pages 3-12.

[554] Beaman, "Deep Equality", *supra* note 96, 91. Beaman's argument also includes a strong critique about law's exclusivity in shaping the concept of equality, where she notes that it is "watering it down and displacing it with concepts like 'reasonable accommodation' and tolerance" (at 92). Both aspects of her argument feed into my discussion in this Chapter.

[555] Ibid, 92.

raised. Indeed, institutional structures can be considered the linchpin in determining what constitutes the determinants of belonging and democratic citizenship – "[w]ho counts as a citizen of the university, profession, corporation, trade union, school board, family?"[556] Institutional design highlights the relevance of individual and/or group actors, and their inclusion and/or exclusion: "[g]overnance begins and ends with membership, and membership is defined by both statute and practice."[557] In other words, a bottoms-up approach to challenges to religious diversity is favored in this Chapter. The third justification for this shift is that it facilitates reflection on the place of families and communities in this discussion about religious governance in schools. Although parents and children's interests are often in sync,[558] there is also a risk of conflict between these parties. As will be discussed below, the institutional considerations taken up in this Chapter are irrevocably linked to the field of administrative law, since the latter enables the values enshrined in the structures and decision-making bodies that we are examining.

In addition, the shift to the institutional lens enables us to examine the policy options that structure and color students' school experiences. The three cases studies employed in my thesis all speak to different facets of the notion of tolerance and indirectly, to different models of policy integration that are favored in the Canadian context, notably multiculturalism[559] and

[556] Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal, MQUP, 2010), 122.
[557] Macdonald, "Legislation and Governance", *supra* note 101, at 292.
[558] See, in this way, Shauna Van Praagh's works on this point, including: "Education of Religious Children", *supra* note 2; "'Our' Children", *supra* note 46.
[559] *Canadian Charter of Rights and Freedoms*, *supra* note 159; *Canadian Multiculturalism Act*, RSC 1985, c. 24 (4th Supp.).

interculturalism.[560] These models feed into what we understand to determinants of belonging. This is particularly relevant in the context of schools, as already mentioned, since they are vehicles and sites of socialization *par excellence*. These models nourish my broader discussion on relationships across difference in schools and public spaces. Much has been written about these models, with multiculturalism being generally portrayed as a Canadian policy phenomenon, whereas interculturalism has been branded as a Quebec-specific policy instrument.[561] Some have argued that this dichotomy needs to be rejected, since both can coexist within the same space, with different registers.[562] Nevertheless, others have recently maintained that intercultural education provides a better backdrop for engaging with both practical matters of integration and also considerations on belonging in broader society:

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[560] Ministre d'État au développement culturel et scientifique, *Autant de façons d'être Québécois*: *plan d'action du gouvernement du Québec à l'intention des communautés culturelles* (Développement culturel et scientifique, Québec, 1981); Ministère des Communautés culturelles et de l'Immigration du Québec, *Au Québec : pour bâtir ensemble. Énoncé de politique en matière d'immigration et d'intégration*, online: http://www.midi.gouv.qc.ca/publications/fr/ministere/Enonce-politique-immigration-integration-Quebec1991.pdf. According to the Bouchard-Taylor report, *supra* note 541 at 116-117, earlier documents, did not employ the term 'interculturalism', but developed indicative elements of this policy, such as the presence of a majoritarian group and (minority) cultural communities (as seen in the *Quebec Charter of human rights and freedoms*, as well as the famed Bill 101).

[561] The literature (and debate) on the multiculturalism-interculturalism divide in Canada/Quebec is vast and many articles and books have been devoted to this discussion. For an indicative sampling, see Bouchard-Taylor report, *supra* note 541; Gérard Bouchard, *L'interculturalisme : Un point de vue québécois* (Montréal, Éditions Boréal, 2012); Gérard Bouchard, "What is Interculturalism?" (2012) 56(2) *McGill Law Journal* 435-468; Alain-G. Gagnon, "Plaidoyer pour l'interculturalisme" (2000) 24(4) *Possibles* 11-25; Alain-G. Gagnon & Rafaele Iacovino, "Le projet interculturel québécois et l'élargissement des frontiers de la citoyenneté" in Alain-G. Gagnon (ed.), *Québec: État et société* (Montreal, Éditions Québec/Amérique, 2003), 413-438; Alain-G. Gagnon, "Multiculturalisme canadien, interculturalisme québécois et fédéralisme multinational" in Jorge Cagiao y Conde & Alfredo Gómez-Muller (eds.), *Multiculturalisme et la reconfiguration de l'unité et de la diversité dans les démocraties contemporaines* (Brussels, Peter Lang, 2014), 59-72; Daniel Weinstock, "Interculturalism and Multiculturalism in Quebec: Situating the Debate" in Peter Balint & Sophie Guérard de Latour (eds.), *Liberal Multiculturalism and the Fair Terms of Integration* (New York, Palgrave Macmillan, 2013), 91-108; Will Kymlicka, "Defending Diversity in an Era of Populism: Multiculturalism and Interculturalism Compared" in Nasar Meer, Tariq Modood and Ricard Zapata-Barrero (eds), *International Perspectives on Interculturalism and Multiculturalism: Bridging European and North American Divides* (Edinburgh University Press), forthcoming (currently available online: https://www.academia.edu/11038453/Defending_Diversity_in_an_Era_of_Populism_Multiculturalism_and_Interculturalism_Compared_2015_).

[562] See, in this way, Shauna Van Praagh, who argues for coexistence within the *Commission scolaire des chênes* decision before the Supreme Court of Canada: "You say 'Multi', I say 'Inter'; but don't call the whole thing off!" (2012) 21 *Canadian Diversity* 21-23.

"[i]ntercultural education is also about how groups perceive and interact when confronted with each other in a school environment. From a policy perspective, this means it is important to not only measure the presence of cultural diversity, but to examine what policies are in place to promote the type of interaction necessary for the development of intercultural attitudes."[563] As this Chapter unfolds, it is evident that multi/intercultural policy considerations are woven through, and embedded in, the institutional framing of schools. A question running throughout this analysis is how one engages with these policy considerations within the specific setting of schools.

This Chapter also seeks to push the examination of schools as singular sites of law-making further. Educational institutions have an enduring and adapting role in demonstrating how theory is turned into practice.[564] Although a judicial lens provides some key ideas about the mission, mandate and student population in the school, the first section of this chapter suggests that in order to fully appreciate schools as intricate places of law-making in the context of religious questions, it is necessary to (re)turn to the school's institutional framing. Schools represent microsystems worthy of their own consideration, and constitutive of their own rules and relationships. Accordingly, we can understand and engage with schools in terms of what I have referred to as 'complex constitutions'. Within this framing, understanding

[563] Allison Harell, "Measuring outcomes: youth and interculturalism in the classroom" in Ricard Zapata-Barrero (ed.), *Interculturalism in Cities: Concept, Policy and Implementation* (Cheltenham, UK, Edward Elgar Publishing, 2015) 166, 167.

[564] Susan Sturm argues more specifically that "they are an important location for cultural meaning-making and for producing sustainable change." See Susan Sturm, "The Architecture of Inclusion: Advancing Workplace Equity in Higher Education" (2006) 29 *Harvard Journal of Law & Gender* 247, at 249 **[Sturm, "Architecture of Inclusion"]**. It can be easily argued that educational institutions more broadly – ie, primary and secondary schools – also fill this same role.

schools as 'complex constitutions' provides a deeply relational approach to rule- and decision-making, built on the power of relationships. Arguing that schools constitute complex constitutions underscores the idea that the issue of diversity in schools needs to be taken more seriously as sites of decision-making rather than spaces of accommodation. This argument also fosters inclusion based on a project of common understanding, namely that of schools. Important linkages can be made here between my argument of schools as complex constitutions and Colleen Sheppard's discussion on relations of solidarity, since the latter

> "emphasizes the possibility of a shared community identity across our differences. […] One particular way of creating a sense of common identity, therefore, lies in nurturing and insisting on relations of solidarity. A commitment to solidarity provides a pathway to respecting and promoting group-based identities, and ensuring that no one group is accorded primacy in determining public policy, community action, or national identity. Diversity can then be acknowledged as a positive attribute of modern society rather than a threat to social cohesiveness or the cultural survival of any particular group."[565]

Schools as complex constitutions enables us to reflect on the broader discussion on constitutions being regarded as not only written texts, but also, as active practices by which individuals and communities debate, compromise, and conciliate their positions and conduct under the law.[566] Indeed, constitutions represent situations of "incremental recognition" within society's broader structure and highlight the content of "context and practices". [567] Continual reshaping of the constitutional bounds points to a constant state of re-negotiation of the

[565] Sheppard, *supra* note 556, 141.

[566] The living tree metaphor, developed in *Edwards v. Canada (Attorney General)*, [1930] A.C. 124, 136 (known as the 'Persons case'), speaks to the developmental potential of the *British North American Act,* "capable of growth and expansion within its natural limits." As put recently – and rather poetically – by one author, its understanding is deeply contextual and holistic: "our constitution is a living tree, and that includes the roots, bark, sapwood, heartwood, branches, leaves, and burls." See Richard Haigh, *A Burl on the Living Tree: Freedom of Conscience in Section 2(a) of the Canadian Charter of Rights and Freedoms* (S.J.D. thesis, Faculty of Law, University of Toronto, 2012), 275.

[567] Roderick A. Macdonald, "The Design of Constitutions to Accommodate Linguistic, Cultural and Ethnic Diversity: the Canadian Experiment" in Kálmán Kulcsar & Denis Szabo (eds.), *Dual Images: Multiculturalism on Two Sides of the Atlantic* (Budapest, Hungarian Academy of the Sciences, 1996), 52 at 55, 60-61.

constitution, underscoring their democratic appeal and continued relevance.[568] As such, this section examines the governance of schools, through both their unofficial law as well as their administrative processes, in view of elaborating the argument put forward in this thesis, namely, that schools are complex constitutions.

Building on Section 1, which proposes that schools should be examined through an institutional lens, Section 2 maintains that insights into the institutional context are provided by the documentation of the pre-litigation decisions. Decisions made by school administrators and school boards, often represent a better avenue through which to understand the weight of children's stories of belonging, and contestations (than formal legal processes). This section therefore engages in an in-depth and sustained analysis of the pre-litigation decisions. All three cases highlight a checkered track record in regards to the internal decisions, but each in their own way: these subtle nuances fuel our site of inquiry. Whereas *Multani* underscores the importance of unofficial law and administrative decision-making structures, both *Chamberlain* and *Commission scolaire des chênes* illustrate how children are almost entirely absent from decision-making processes – and how the focus shifts to conflict resolution between the schools, school boards and parents. Thus, the focus on these three cases reveals a deeper tension that runs throughout my thesis, namely that it is not only a question of situating children's voices in disputes on religious diversity in the setting of schools, but also, an inquiry into *how* we include parents and religious minorities in school discussions on governance, democracy and school boards. Indeed, the recently introduced reform of the school boards in

[568] Grégoire C.N. Webber, *The Negotiable Constitution: The Limitation of Rights* (Cambridge, Cambridge University Press, 2009), at 22.

Quebec[569] reinforces community and parental engagement and reiterates the deeper line of questioning: at the same time, however, this kind of reform underscores the risks of this form of governance, as clearly exemplified in *Chamberlain*.[570]

Section 2, which demonstrated that internal decision-making mechanisms are ultimately forms of unofficial law[571] worthy of protection and further recognition within the context of religious claims in school settings, is further elaborated in Section 3 which argues that internal dispute mechanisms, as evidenced through the roles of each of the actors in the school and school board decisions, can be sites of deep(er) equality. A first sub-section examines and evaluates the criticisms that have been developed within the context of schools and student participation (3.1). I then consider Angela Cameron and Paul Daly's argument that substantive equality can be furthered through administrative law when discussing Charter values in education (3.2). I engage with their argument and frame it within the broader discussion on the responsibilities that school administrators have to take *Charter* values into account in their decision-making

[569] Bill 86, *An Act to modify the organization and governance of school boards to give schools a greater say in decision-making and ensure parents' presence within each school board's decision-making body,* 1st Sess, 41th Leg, Quebec, 2015 [***Bill 86***]. The Quebec Commission on Human Rights released a memoradum on Bill 86, which argued that certain proposed provisions would be discriminatory to already vulnerable student populations. See Commission des droits de la personne et droits de la jeunesse, *Mémoire à la Commission de la Culture et de l'éducation de l'Assemblée nationale: Projet de loi no 86, Loi modifiant l'organisation et la gouvernance des commissions scolaires en vue de rapprocher l'école des lieux de decision et d'assurer la présence des parents au sein de l'instance décisionnelle de la commission scolaire* (Février 2016, Cat. 2.412.84.4), online: http://www.cdpdj.qc.ca/Publications/memoire_PL_86_gouvernance_com_scolaires.pdf.

[570] Recall, in *Chamberlain*, that many of the school board trustees were also parents of children attending schools in the Surrey district. The lines between the official roles as administrators and those of parental concern were greatly blurred within this context.

[571] See, in this way, Van Praagh, "Open House", *supra* note 498; Berger, "Religious Diversity, Education", *supra* note 120. On legal pluralism and unofficial law more broadly, see: Brian Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30 *Sydney Law Review* 375 **[Tamanaha, "Understanding Legal Pluralism"]**; Macdonald, *supra* note 285.

process. I close this Chapter by pushing Cameron and Daly's argument further, in light of the particular challenges related to religion in the everyday setting of schools (3.3).

1. From courts back to educational institutional spaces: an investigation of schools as complex constitutions

In this section, I propose that to fully appreciate schools as intricate sites of law-making in the context of religious questions and sites of complex constitutions, it is necessary to (re)turn to their institutional framing. As developed in the previous chapters of this dissertation, schools have their own enabling laws, codes of conduct, governance structures, and internal decision-making bodies. Schools are, in their own way, microcosms. Students going through the school system would likely use the education system as a self-referential point, since they are dependent on, and defined by, this educational structure. The various decisions that I have engaged with throughout this thesis – *Chamberlain*, *Multani* and *Commission scolaire des chênes* – do suggest that these internal structures, or microcosms, provide a series of checks and balances before engaging with broader society through the legal arena. This thesis does not purport to suggest, however, that these safeguard mechanisms promote a binary approach to students' engagement with the law. In this sense, I draw inspiration from Thomas McMorrow's argument of the characterization of legal subjectivity among students, which challenges the legal positivistic manner in which students are usually seen, either as obeying or contravening education's rules.[572] This section therefore has two objectives: first, to understand schools as

[572] See Thomas McMorrow, "*Critical to what? Legal for whom?" Examining the Implications of a Critical Legal Pluralism for Re-imagining the Role of High School Students in Education Law* (D.C.L. Thesis, Faculty of Law, McGill University, 2012), 25.

microsystems in their own regard, and second, to demonstrate that schools (and internal school decisions) constitute microlegal systems, which "focuses on those shared expectations that contain norms or rules and are enforced by sanctions"[573]. This idea furthers the overarching argument contained in this Chapter, namely, that schools constitute complex constitutions.

1.1 Schools as microsystems

Microsystems are described as informal communities of belonging, which validate and replicate patterns of behavior.[574] Microsystems are essentially built on shared experiences; these experiences occur as part of everyday life and elude the scope of formal regulation. Innocuous experiences, such as waiting in a line,[575] for instance, reveal a microsystem since social interactions produce informal relationships. Relatedly, sanctions are enacted if the 'rules' are not followed.[576]

The constitution of these "micro-experiences" is based on social interactions, which last for an indeterminate period of time. Indeed, some microsystems run their course quickly, whereas others engage in a longer (but not necessarily deeper) shared experience. The function of time, however, does not change the nature of the interaction, nor does it take away from the

[573] I borrow 'microlegal systems' from Michael Reisman: see Michael Reisman, "Lining Up: The Microlegal System of Queues" (1985-1986) 54 *U. Cin. L. Rev.* 417, 419 **[Reisman, "Lining Up"]**.
[574] Michael Reisman, "Looking, Staring and Glaring: Microlegal Systems and World Public Order" (1982-1983) 12 *Denver J. Int'l L. & Pol'y* 165 **["Reisman, "Looking, Staring"]**; Reisman, "Lining Up", *supra* note 573.
[575] Reisman, "Lining Up", *supra* note 573.
[576] Reisman refers to the latter as microlegal systems: see Reisman, "Lining Up", *supra* note 573, 444.

anticipated patterns of behavior. As such, social cues can be replicated or modified in the case of future interactions, but foundationally, draw on a shared or common experience.

School relationships constitute an admittedly less 'innocuous' experience than lining up, but schools still represent an important microsystem within a young person's social environment. This social experience is undoubtedly a more structured one, but it can still be understood as a microsystem as well, if one looks at the interactions prior to 'official' engagement. As such, schools differ from most other microsystems since they have enabling laws or statutes (such as the various *School* and *Education Acts*), as well as delegated powers of review. Nevertheless, they can be included in the more general category of microsystems, given their focus on shared relationships within a particular environment. Within the context of youth development, microsystems (including those of schools) have been employed to describe "a pattern of activities, roles, and interpersonal relations experiences by the developing person in a given setting."[577]

Microsystems are spaces that are not regulated by 'official' interests; rather, they exist and evolve next to the official state apparatus. I have suggested, in this sub-section, that schools can be understood as microsystems in their own regard, since they exist and build on their shared experiences. As such, there are patterns of behavior which are accepted, and others, informally rebuffed. Either way, the functional nature of schools inevitably shapes the

[577] Urie Bronfenbrenner, *The ecology of human development: Experiments by nature and design* (Cambridge, Harvard University Press, 1979), 22 as cited in Elizabeth M.Z. Farmer & Thomas W. Farmer, "The Role of Schools in Outcomes for Youth: Implications for Children's Mental Health Services Research" (1997) 8(4) *Journal of Child and Family* Studies 377, 379 [Farmer & Farmer, "The Role of Schools"].

relationships that occur within this privileged space of interaction. Schools as microsystems reveal, however, an important (yet oftentimes) overlooked element in the determination of a child's sense of belonging. They are "nested"[578] – in the image of colorful Russian nesting dolls – together with other microsystems (such as the family), in a child's environment, to illustrate the different levels of attachment and determinants of social belonging. The "nested" image suggests re-thinking how children's spheres of interaction are conceived, but also, the interrelatedness between the various social interaction systems. Nesting, in this way, speaks to the relational aspect of children's microsystems, as well as the link between patterns of behavior and expected social reactions (or sanctions, if deviating from the accepted informal norms). In the following sub-section, I pursue my argument that schools can be understood as microlegal systems and that ultimately, this understanding can be helpful within the framing of religious claims.

1.2 Schools as microlegal systems

Microlegal systems are understood as sharing a microsystem insofar as the patterns of behavior, but also, an expectation that is articulated through a set of norms that, if infringed,

[578] Bronfenbrenner uses this term to describe the place of microsystems in his youth ecology model. Other systems in his model include *mesosystem* (which "comprises the interrelations among two or more settings in which the developing person actively participates (such as, for a child, the relations among home, school, and neighborhood peer group; for an adult, among family, work, and social life"), *exosystem* (which "refers to one or more settings that do not involve the developing person as an active participant, but in which events occur that affect, or are affected by, what happens in the setting containing the developing person") and *macrosystem* (described as "the complex of nested, interconnected systems is viewed as manifestation of overarching patters of ideology and organization of the social institutions common to a particular culture or subculture"): see Bronfenbrenner, *supra* note 577, at 25, 8.

are enforced by sanctions.[579] Schools, if understood as microsystems, can also be engaged with as microlegal systems, since they too have their own set of social expectations, rules, customs and sanctions. A school, as a microlegal system, can be observed prior to 'official' intervention in the context of a school conflict. Perceived injustice can find a place in the everyday spheres of existence, including that of the school.[580] Decisions therefore made within the school's arena underscore the importance of schools, as a place of citizenship-making – or put differently, agency-producing legal actors. Sonia Lawrence highlights the importance of schools as spaces of transformation; she calls this "school "exceptionalism"", which

> allows us to both recognize the critical nature of schools as a site where citizens are created and nurtured and then to turn those sites over almost casually to (at worst) managers and bureaucrats or (at best) caring and thoughtful educators. It is the very importance of schools as sites where citizens are produced that requires a more engaged approach.[581]

Reflecting on schools as important sites of decision-making provides a pathway forward to Lawrence's call for a more engaged approach, but also, allows us to take notice of the caution that she imposes, namely, on the place of decision-makers in this institutional discussion.

Furthermore, the place of decision-making reveals itself to be central to engaging with the framework of schools as microlegal sites. Brian Tamanaha includes schools in what he has described as "functional normative systems", which

> are organised and arranged in connection with the pursuit of a particular function, purpose or activity that goes beyond purely commercial pursuits. Universities, school

[579] *Supra* note 573.
[580] Walter E. Weyrauch & Maureen Anne Bell, "Autonomous Lawmaking: the Case of the "Gypsies"" in Walter E. Weyrauch (ed.), *Gypsy Law: Romani Legal Traditions and Culture* (Berkeley, University of California Press, 2001), 11 at 16 (fn 10).
[581] Lawrence, "Book review", *supra* note 431, 214.

> systems, hospitals, museums, sports leagues, and the internet (as a network) are examples of functionally oriented normative systems, some operating locally, some nationally, and some transnational in reach. **All possess some degree of autonomy and self-governance aimed at achieving the purpose for which they are constituted, all have regulatory capacities, all have internal ordering mechanisms, and all interact with official legal systems at various junctures.** Often they have commercial aspects, and they can give rise to communities, **but their particular functional orientation makes them distinctive and shapes their nature**.[582]

Put differently, educational institutional spaces can therefore be understood as "direcrete legal regimes", where "each agency has its own mix of explicit and implicit constitutive law as well as its own mix of explicit and implicit agency law." [583] A school's positioning, between internal and external orders and norms, reinforces the importance of reflecting on how schools engage in their own decision-making process. This in-between stance is also reminiscent of Sally Falk Moore's understanding of "semi-autonomous social fields", given "the fact that it can generate rules and customs internally, by that it is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded."[584] This positioning is therefore vital to understanding how it affects its decision making-process with outside or 'official' systems of governance and lawmaking. Tamanaha's categorization of schools as 'functional normative systems' also lends credence to their place as complex spaces, governed by multiple orders in which a multitude of interests must be balanced. Nevertheless, the internal decision-making processes in schools – through the choices made by students, to the decisions made by

[582] Tamanaha, "Understanding Legal Pluralism", *supra* note 571, 399 [emphasis added]. See also, in this way: Colleen Sheppard, "Equality Rights and Institutional Change: Insights from Canada and the United States" (1998) 15(1) *Arizona Journal of International and Comparative Law* 143, 147-148.

[583] Macdonald, "Legislation and Governance", note 101, 283. See also Roderick A. Macdonald, "Legal Republicanism and Legal Pluralism: Two Takes on Identity and Diversity" in Mauro Bussani, Michele Graziadei & Xavier Blanc-Jouvan (eds.), *Human Diversity and the Law* (Berne, Stämpfli, 2005), 43-70 **[Macdonald, "Legal Republicanism"]**.

[584] Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (1972-1973) 7 *Law & Soc'y Rev.* 719, 721.

teachers, principals and administrative staff, not to mention the school boards' understanding and voting of resolutions (and endorsement or rejection by the council of commissioners) – suggest that the internal decisions effectively validate the process (ie, microlegal system) – and therefore the microsystem – instead of breaking it down.[585]

So what does a microlegal system 'look like' in a school – and relatedly, how does it intersect with religious considerations? Where do we draw our social cues in this setting? If we draw on the three cases addressed in depth in this thesis, we can think about the social conventions around playing, and whether the introduction of a *kirpan* into the confines of a school yard would change the expected patterns of behavior, and potentially, the sanctions that would be meted out, not only by teachers in informal discussions, but also, those of his peers. In light of this, how would this microlegal system change the right to play in a schoolyard, for instance, or the interactions in the *classe d'accueil*? In a similar vein, we can also ponder how the attempted introduction of new resources books – following the prescribed rules for the presentation of new course materials – can alter the classroom dynamics and what is seen as 'acceptable' family patterns. Again, how would this microlegal system shift how families are engaged with, within the context of K-1 classes, and how children relate to different forms of families? Relatedly, how would this approach (re)shape the social behaviors that may be exhibited as a result of not conforming to the presented (and school approved) family idea(l)? Finally, in considering the effects of an exemption request on compassionate or humanitarian grounds to a newly minted mandatory ethics and religious course – would students be treated differently

[585] Reisman, "Lining Up", *supra* note 573, 444.

by both the teachers teaching this course, as well as by their peers? How would this microlegal system engage with students' personal (religious) affinities and manage their social patterns of behavior?

Schools constitute not only microsystems but also microlegal systems, in their own regard. As such, it is not sufficient to engage with the legal decisions (or how the courts understand the interactions at the school level). I have underscored, instead, that we need to look at the 'mini-decisions' articulated within the privileged space of the school, to better understand the substance of these decisions. The shift from the legal to the institutional lens, as developed in this section, sets the stage for section 2 of this Chapter, which engages with the pre-judicial decisions, namely those made by school administrators and school boards as well as other actors in the administrative school structure.

2. 'Pre-judicial' decisions

As noted in the introduction to this Chapter, my three case studies represent different levels of interaction with the school structure and the State. Certain authors employed the language of 'inside out' and 'outside in' to engage with the types of decision-making and influence on groups. Indeed, Shauna Van Praagh has engaged with decisions made from the 'inside out' and 'outside in' in the context of a discussion on a judgment on who is considered Jewish for the purposes of a denominational school and a governmental policy on religion in early education

settings on the interrelationship between state and religion.[586] More recently, Levi Cooper and Maoz Kahana have drawn on Mary Douglas' work on enclave culture to discuss legal pluralism in a Hasidic community.[587] In the context of my analysis, both *Chamberlain* and *Commission scolaire des chênes* encapsulate examples of how children are precluded from formal court processes or litigation, either by the exclusion of their testimony or by process-based exclusion, given their young age: I consider these to be decisions from the 'outside in' (2.2). *Multani,* on the other hand, highlights the significance dialogue and exchange through the administrative decision-making structures, or from the 'inside out' (2.1). Whereas *Chamberlain* and *Commission scolaire des chênes* speak to policy level decision-making, *Multani* speaks instead to the internal policy level, as explained in part through the school's code of conduct. Each of these case studies, however, is part of a broader narrative on how religious freedom should be taken into account in the particular context of schools. This section therefore engages with the pre-litigation decisions in order to elucidate different types (or levels) of decision-making in administrative law.

[586] Shauna Van Praagh, "'Inside Out/Outside In': Co-existence and Cross-Pollination of Religion and State" in René Provost (ed.), *Mapping the Legal Boundaries of Belonging: Religion and Multiculturalism from Israel to Canada* (Oxford, Oxford University Press, 2014), 121-142.

[587] Levi Cooper & Maoz Kahana, "The legal pluralism of an enclave society: the case of Munkatch Hasidim" (2016) *The Journal of Legal Pluralism and Unofficial Law* DOI: 10.1080/07329113.2015.1125748.

2.1 Decisions from the inside out

> the principal came up to me, and she was like, she called me out of the class, uh, and my teacher, we were sitting together and she started asking me if I have a knife on me. I was like I don't have any knife you know, and she was like you have weapon or a knife on you? No I don't. She's like, you have something under your clothes? I'm like, yeah, I have kirpan.[588]
>
> - Gurbaj Singh Multani

> "[Le Code de Vie] n'inclut pas le kirpan sécurisé puisque ce n'est plus une arme, ce n'est pas porté comme une arme."[589]
>
> - Julius Grey, at trial

And so, here begins the long exchange between Gurbaj Singh Multani and his school on the subject of his kirpan. In this sub-section, I seek to unravel the decisions made within the direct realm of the school (i.e., through the principal's decision-making). While *Multani* is the main focus of this sub-section, I draw on other cases, where relevant, which add to the context of internal decision-making in schools. More specifically, I focus on the initial agreement reached by the Multanis with the school principal, and the subsequent reversals by the School Board and the Council of Commissioners, in an effort to tease out the spaces of unofficial law and administrative decision-making processes.

An initial agreement was reached between the Multani family and the school principal on how Gurbaj could continue wearing his kirpan, provided that certain conditions were met, including its sheathing as well as the possibility of having it inspected by school personnel.[590] A further

[588] Gurbaj Singh Multani, cited as Litigant 1 Interview in Kislowicz, *supra* note 451, at 204.
[589] Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 128, Respondent's Record before SCC at 130, as cited in Kislowicz, *supra* note 451, 204 (fn 76).
[590] Multani 1, *supra* note 399, ¶ 7. See discussion in Chapter 2.

compromise to this discussion was that the school board and council of commissioners had to also agree to this arrangement. A letter dated December 21st 2001 between the school board and the Multanis' legal counsel demonstrates an attempt at reaching a new compromise outside of the court setting: this 'reasonable accommodation' would have enabled Gurbaj Singh Multani to re-integrate into his school setting as of January 2002. Readers may recall that the initial 'incident' that led to the disclosure of the kirpan occurred at the end of November 2001. The reintegration in the New Year, as requested in the December letter, would have curtailed his exclusion from his *classe d'accueil* and insured continuation of his studies.[591] In this same letter, the School Board proposed the following accommodation:

> "L'élève concerné pourrait se présenter à l'école Sainte-Catherine-Labouré le 7 janvier 2002 si les conditions suivantes sont respectées :
> - le kirpan devra être logé dans un fourreau avec rabat;
> - le rabat devra être scellé à l'aide d'une couture solide afin qu'il ne puisse être sorti de son fourreau;
> - le tout devra être très bien fixé à l'élève afin que le kirpan ne soit pas, ni accidentellement, ni volontairement sorti du fourreau et être utilisé comme une arme offensive ou défensive;
> - de plus la direction de l'établissement pourra vérifier le tout à l'arrivée de l'élève le 7 janvier 2002 et à l'occasion ensuite, afin de s'assurer que les conditions ci-haut mentionnées sont respectées;[592]

Indeed, the December 21st 2001 letter proposes a compromise that strongly resembles the one presented before the Superior Court the following year. Special emphasis is placed on the need

[591] Up until his reintegration, the school board had committed to provide him with a home school teacher, as noted in Gurbaj Singh Multani's affidavit: Gurbaj Singh Multani (Affidavit) (March 25, 2002), Appellant's Application for Leave to Appeal to the Supreme Court of Canada, Vol. 1, 63 at 65 (¶ 30 *in fine*). As noted earlier, *supra* note 398, the welcome class serves a dual purpose of integration: first, on the basis of language, but also, for purposes of socialization into ways of doing and being within Quebec culture. Exclusion from the welcome class – while initially replaced with a home school teacher – removes a vital component of the student's path to socialization and integration into Quebec culture more broadly, and specifically, the perception of school culture.

[592] Letter from the CSMB Secrétariat général to Julius Grey (December 21 2001) in Appellant's Application for Leave to Appeal to the Supreme Court of Canada, Vol. 1, at 117-118 [emphasis in original].

for the casing of the kirpan to be closed with an external flap, sealed and firmly attached. In other words, the kirpan's casing had to be impenetrable. The kirpan's new sheathing was put to the test, as recounted by Julius Grey, acting on behalf of the Multanis, in his argumentation at trial, where he met with the school principal and the Multani family. At that meeting, they attempted to unsheathe the kirpan together, but to no avail:

> "A compromise had been reached with the school principal. The principal – you will see her testimony afterwards – she came to my office and we (she and I), together, couldn't tear it – we were unable to get the kirpan out of its sheath."[593]

This was also conveyed by Gurbaj Singh Multani in his affidavit, where he stated that he "met with the school principal and a school attorney at our lawyer's office on or about February 8, 2002 and showed them my Kirpan; they could not open the wrapping".[594] This informal exchange, meant primarily to test the kirpan's protective covering, also points to another form of discussion, notably one of openness, between the Multanis' lawyer and the school principal on whether the espoused compromise actually met its goal. This latter exchange suggests a tangible – and candid – effort in arriving at a practical solution between the concerned parties; indeed, while lawyers were already involved at this stage, this exchange occurred outside of the official setting of the judicial forum. While it remains questionable to qualify this exchange as an informal decision, the physical location in which the decision was made should be taken into consideration.

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[593] Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 36, Respondent's Record before SCC at 130 [Translated by author]. Original, in French: "[i]l y avait un compromis qui a été fait avec la directrice de l'école. La directrice – et vous allez voir son témoignage par la suite – elle est venue à mon bureau et elle et moi, ensemble, nous n'avons pas pu déchirer – nous n'avons pas réussi à sortir le kirpan de son fourreau."

[594] Gurbaj Singh Multani (Affidavit) (March 25, 2002), Appellant's Application for Leave to Appeal to the Supreme Court of Canada, Vol 1, 63 at 64 (¶ 17).

Despite this initial (and internal) site of compromise – i.e., between the principal and the Multanis – the proposal was rejected by the governing body of the school at a special meeting on February 12th 2002. In this letter, the principal stated that a new "fair arrangement" was required, as the previously proposed compromise was no longer seen as acceptable by the school, given that it contravened the school's code of conduct.[595] In the absence of a new "fair arrangement" and "having the safety of all those in our school", the principal asked that Gurbaj stay at home until a tolerable new compromise could be achieved. [596] This letter departs in two interrelated ways from the initial compromise found in the December 21st letter. First, this represented an important reversal by the principal, who had been, until then, seemingly open to a reasonable compromise. The discussion and decision about wearing the kirpan had been one grounded in 'common sense' and practicality. The shift towards new language (i.e., "fair arrangement") as well as outwards looking (now focused on everyone's safety) rather than that of Gurbaj's well being, hint at a new discourse between the Multanis and school administration. Second, no mention was made in the initial letter or exchange about the student code of conduct. As discussed in Chapter 1, within the school's context, a code of conduct spells out the rights and obligations of individuals. Some may consider that the administrative oversight is puzzling since this document should reflexively be part of any conversation about rules and relationships on school grounds. The departures from the initial letter suggest a shift in the discourse on the place of religion in public schools.

[595] Letter to the parents of Gurbaj Multani Singh (dated February 18 2002) in Appellant's Application for Leave to Appeal to the Supreme Court of Canada, Vol 1, at 120.
[596] Ibid.

Nevertheless, the February letter exchange offered scant information about how a new arrangement would be reached or whether the Multani family (or their legal counsel) would be contacted to become part of the new discussion.[597] In response to the principal's letter, the Multanis' legal counsel appealed the decision to not only set aside the earlier arrangement, but also, to keep Gurbaj out of school during this time (although a home school teacher was provided during this time). The review board submitted its report before the Council of Commissioners of the Marguerite-Bourgeoys school board for final consideration. At that meeting, Gurbaj Singh Multani and his legal counsel made representations before the Council of Commissioners to offer to double wrap his kirpan as an additional security measure, done at some personal cost, as Sikh religious leaders did not unanimously approve of this measure.[598] The Council of Commissioners chose to stand by the principal's decision to prohibit the wearing of the kirpan in school (and therefore to keep Gurbaj out of the classroom), as well as refusing the Multanis' request for accommodation on March 18, 2002.[599] In addition, the Council of Commissioners proposed its own "fair arrangement" (without apparent consultation), whereby they would accept, in lieu of the real kirpan, a symbolic one in the shape of a pendant or

[597] As discussed further on, both the family and legal counsel do appear before the review board. Howard Kislowicz notes, in his dissertation, *supra* note 451, at page 205, "communication problems continued after the *Multani* litigants retained a lawyer. Indeed, the *Multani* litigant participant perceived that the school officials did not listen to what he, his family, and their lawyer had to say. In the litigant's recollection, school officials were dismissive of his family's concerns:

> And then, I think, [our lawyer] set up a meeting with the school board, they wanted to meet with the whole school… We sat together, tried to talk to them, they didn't listen, there were parents, there were schools, at the school board there were about 20 to 30 members… So we were there explaining them, but they kept laughing, and uh, they just didn't listen to us."

[598] Gurbaj Singh Multani (Affidavit) (March 25 2002), Appellant's Application for Leave to Appeal to the Supreme Court of Canada, Vol 1, 63 at 64 (¶22).

[599] Décision du conseil des commissionnaires, Commission scolaire Marguerite-Bourgeoys (letter 19 March 2002) in in Appellant's Application for Leave to Appeal to the Supreme Court of Canada, Vol 1, at 122-123.

another model that would be made of a material that would render it inoffensive.[600] The Council of Commissioners, in effect, proposed a third option to the two that were already presented, namely the introduction of a figurative kirpan, shrunken in size and transformed in substance. Taming the kirpan through its symbolic version would render it innocuous in the school's eyes, but distil its significance, I argue, to the point of religious irrelevance. Reconfiguring the bounds of belief in such a manner underscores the power that administrative law decision-making processes can have on everyday religious identity and possibly the need for judicial review as check.

A further complication to the Council of Commissioners' decision is that it relied on security reports which had focused on violence in schools *writ large* rather than the particular (and small) phenomena of observant Sikh students in school settings. Put differently, the particular question of *kirpans in schools* was never the focal subject of previously mentioned reports: this point is noted both by legal counsel for the Multanis as well as in the literature following this decision, and cited as a failure of cross-communication.[601] As noted by Julius Grey at trial:

> But what is interesting for Mr. Brousseau [Robert Brousseau, author of the security report], is that he didn't try to speak with the Sikh students. He didn't try to speak with … to reconcile, he didn't say to others that they had to understand, **he simply said "Wait for the trial"**.[602]

[600] Ibid (translated by author). The original, in French: "d'accepter au lieu du vrai kirpan, un kirpan symbolique soit sous la forme d'un pendentif, soit un autre model qui serait fabriqué dans un matériau qui le rendrai inoffensif."
[601] Kislowicz, *supra* note 451, at 207, citing Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 50-51, Appellant's Record before SCC Vol 2 at 297-298). See also Julius Grey, Oral Argument on behalf of Multani before Superior Court at 141, Respondent's Record before SCC at 143.
[602] Julius Grey, Oral Argument on behalf of Multani before Superior Court, at 51, Appellant's Record before SCC Vol 2 at 298 (translated by author) [emphasis added]. Original in French: "Mais ce qui est intéressant pour monsieur

This quote suggests not only a failure in cross-communication, as noted above by Howard Kislowicz, but also, I argue, a failure in the administrative school process. My argument is premised here on two points. First, Robert Brousseau, in focusing only on violence in schools *writ large* missed the very interactions with students that could have nuanced his report but also, refused to engage more deeply in his role within the administrative school process. By deferring to the court process as the 'real' place of encounter (rather than that of the school board and council of commissioners), he undermined the legitimacy of the internal decision-making process and structure available to schools to address, redress and potentially diffuse situations of difference. In addition, the Council of Commissioners, by taking his report seriously, exacerbated this view. Put differently, Brousseau's "wait for the trial", equated to a dilution and de-contextualization of the internal school decision-making process. Second, in escalating the conflict between the newly arrived immigrant student and the school to the level of the courts, the school integration process (i.e., *classe d'accueil*) failed miserably at its own project. The very program focused on student integration misses an important occasion to look at what is going on in everyday student experiences in Quebec[603] and engage with them as

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Brousseau, c'est qu'il n'a pas essayé de parler avec les étudiants sikhs. Il n'a pas essayer de parler avec…. de concilier, il n'a pas dit aux autres qu'il faut comprendre, il a dit tout simplement: "Attendez le procès".

[603] This echoes Marie McAndrews' argument on the tentative inclusion of intercultural education in the setting of welcome classes. She notes "[e]n ce qui concerne les pratiques dans les classes [d'accueil], bien que beaucoup d'enseignants abordent des questions relatives aux droits et aux relations interculturelles, des recherches révèlent qu'il existe encore, chez nombre d'entre eux, des résistances à inclure pleinement une perspective interculturelle dans le curriculum. Ainsi selon une étude menée auprès d'un large échantillon de répondants francophones à Montréal, Vancouver et Toronto, l'objectif prioritaire des enseignants serait l'intégration des élèves à la culture de l'école et de la société afin d'assurer leur réussite scolaire. Les différences sont souvent reconnues de façon implicite par les enseignants qui adaptent leurs stratégies pédagogiques aux caractéristiques des élèves, mais plus rarement de manière explicite, par un changement des programmes et des contenus d'enseignement. **Quant aux interventions antiracistes, elles seraient essentiellement de l'ordre de la gestion de crise et de la résolution ponctuelle des conflits. De plus, l'accent est souvent mis sur ce qui se passe ailleurs dans le monde et non sur les dynamiques vécues au Québec ou à l'école.** Plusieurs de ces constats pourraient s'appliquer à toutes les sociétés

lived, 'teachable moments'. Hence, the breakdown in the administrative school process dilutes not only the rationale behind a *classe d'accueil*, but also the very decision-making process available within the school's administrative structure.

Following the Council of Commissioners' decision, Gurbaj Singh Multani repeated his offer of compromise in the form of double wrapping his kirpan after he rejected of the figurative kirpan option. As noted in his affidavit, "I reiterate my offer to abide by the entire compromise agreed to before, plus the double wrapping and I understand that any failure to follow this would mean I could no longer bring my Kirpan to school"[604] This last offer was likely put on the table due to a further consequence of the decision by the Council of Commissioners' to revoke Gurbaj Singh Multani's home school teacher, seriously impacting his right to education. This latter issue undoubtedly propelled this issue from the confines of the school administrative to the legal review even more rapidly. More foundationally, however, this "last-ditch" attempt at (un)official compromise reveals a further effort at discussing this arrangement outside of law's official purview.

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pluriethniques. Mais d'autres enquêtes ont illustré une spécificité minoritaire, ou de *majorité fragile,* dans le discours des enseignants québécois. **Ainsi, l'adaptation à la diversité est vécue comme une menace à l'identité québécoise traditionnelle chez une minorité d'intervenants, même si ceux-ci invoquent également souvent un discours civique qui met l'accent sur la défense de valeurs comme l'égalité des sexes ou la démocratie**." See Marie McAndrews, "L'éducation au Québec contribute-t-elle au développement d'une société pluraliste et inclusive?" (Contribution au Chapitre 5: Pratiques interculturelles en éducation), *Symposium international sur l'interculturalisme: dialogue Québec-Europe* (25-27 mai 2011, Montréal), online: http://www.symposium-interculturalisme.com/pdf/actes/Chap5_1Marie_McAndrew.pdf (accessed on 19.12.2015), at 21 **[McAndrews, « L'éducation au Québec »]**. [references omitted]

[604] Gurbaj Singh Multani (Affidavit) (March 25 2002), Appellant's Application for Leave to Appeal to the Supreme Court of Canada, Vol 1, 63 at 64 (¶ 22).

Focusing on smaller experiences, such as the exchanges during the kirpan controversy highlight the level of analysis that is focused upon, namely, 'microscosmic'[605] as well as contextual (for the most part). It is 'contextual', because we are not speaking about the problem of violence in schools in a broad setting, but rather, the particular situation of one observant Sikh student. And it is 'microscosmic' since the "values" and the "needs of individual parties",[606] like Gurbaj Singh Multani, are different from broader societal requirements. Minute decisions are needed for individual situations. Indeed, incremental exchanges on religious beliefs in this administrative setting are revealing: no fewer than four options were on the table at one time or another during the administrative decision-making process.[607] These include (1) the initial proposal by the secrétariat général of the school; (2) the initial offer to double wrap the kirpan; (3) the Council of Commissioners' counter-proposal of a figurative kirpan; and (4) the reiterated option to double wrap the kirpan with additional security caveats. And yet, before this multiplicity of offers and de-constructed understandings of religion in the context of schools, none served immediately to resolve the conflict.

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[605] Multani, *supra* note 3, ¶ 132 (Deschamps & Charron JJ.).

[606] Ibid.

[607] This excludes, however, two further options made during hearings before the Superior Court: (1) the discussion on whether the double-wrapping of the kirpan in cotton is enough or whether it should be made of wood (as highlighted in Julius Grey, Oral Argument before Superior Court, at 132-134 in Appellant's Record before the Supreme Court of Canada, vol. 2 at 379-381); and (2) the agreement found in the Superior Court decision, which detailed the *entente* as follows (see: Multani, *supra* note 3, ¶ 8.)

- that the kirpan be worn under his clothes;
- that the kirpan be carried in a sheath made of wood, not metal, to prevent it from causing injury;
- that the kirpan be placed in its sheath and wrapped and sewn securely in a sturdy cloth envelope, and that this envelope be sewn to the guthra;
- that school personnel be authorized to verify, in a reasonable fashion, that these conditions were being complied with;
- that the petitioner be required to keep the kirpan in his possession at all times, and that its disappearance be reported to school authorities immediately; and
- that in the event of a failure to comply with the terms of the judgment, the petitioner would definitively lose the right to wear his kirpan at school.

Moreover, the focus on smaller experiences and big(ger) violations of the school's code of conduct highlight another significant point in this discussion on internal decision-making: reference is made to the school's disciplinary code in order to bring students back into line with the school's environment, but only after the principal's initial decision was found to be outside of it. This is evidenced in *Multani*, through the belated use of the code of conduct to pull back on the initial arrangement, but also in other cases, where the code of conduct was used as a safeguard mechanism for membership within the collective.[608]

The focus in this sub-section on micro-decisions and minute sites of decision-making reinforces the existence of spaces of unofficial law and administrative decision-making processes. Indeed, incremental arrangements, negotiation and exchange demonstrate that fruitful discussions are possible outside of the realm of the formal court setting and reinforce that discussions about religion can occur in school settings.[609] 'Incremental arrangements' can reached, or at least discussed, outside of the adjudicative setting; while these decisions may not be complete, they leave place (both in the physical and intellectural senses) for other discussions to occur – a

[608] In *Loyola 1, supra* note 220, ¶ 15, the signing of the code of conduct is understood, at least at the trial level, as tacit acceptance of Loyola's mission as a private English Jesuit high school. Within Loyola's walls, this meant both student and parent (or tutor) signing the code of conduct once admission had been granted to the school: "**I acknowledge that I have read, understand, and will adhere to the Rules and Regulations regarding** Academics, Discipline, Dress Code, **Religious Identity**, Sports and all other Guidelines as outlined in the Loyola High School Handbook." [Emphasis added] Adherence to the student code of conduct is considered an obligatory step to belonging to the community of Loyola High School; it is questionable whether signing the commitment actually constitutes an expression of an individual's will. It is submitted here that signing the student code of conduct is akin to a contract of adhesion, where one party solely dictates the terms; students (and parents/tutors) had to sign this upon admission to the school, to complete their acceptance. Membership, therefore, takes on a different meaning since its adherence is not entirely voluntary.

[609] Drawing on the *Multani* case, Lori Beaman underscores the negotiation strategies set out in the Bouchard-Taylor report dichotomize the possible avenues of resolution, namely the "legal" and "non-legal" or "citizen" route and challenges that accommodation can only occur within the formal legal system. Furthermore, she rightly notes that the people who turn to the legal system to settle the conflict have usually attempted informal negotiation prior to this choice. See Beaman, *supra* note 96, at 133, citing the Bouchard-Taylor report*, supra* note 541, at 19.

point which less feasible if only in law's appreciation of religion. While these situations are not resolved exclusively through the school decision-making venue, I submit that deeper institutional engagement on the subject of religion can be sparked within this setting, leading to more fruitful encounters, and attenuating, at the same time, recourse to the courts.[610] In the following sub-section of this Chapter, I address the policy level concerns elaborated by school boards in *Chamberlain* and *Commission scolaire des chênes*.

2.2 Decisions from the outside in

> I suggest to your Lordships and Ladyships that, if these books were about inter-racial couples, we wouldn't be here. We wouldn't be spending a moment debating this question. And – and – and, just as the issue of inter-racial couples was a controversial one in the community in the 1950s, it – there is no possible way that books about inter-racial couples could be kept out of the classroom just because somebody says that it interfered with their teaching their children something contrary, religious or moral message.[611]
>
> - Joseph Arvay

> Il nous [Gérard Bouchard & Charles Taylor, co-présidents de la Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles] est arrivé de dire, et je le pense encore profondément, que si il y avait eu dans les écoles du Québec, au début des années '80 un cours comme celui-là [éthique et culture religieuse], **il n'y aurait jamais eu de crise des accommodements**.[612]

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[610] One could argue that the court setting did not settle this question either, since: (1) Gurbaj Singh Multani never reintegrated the public school system, "due to", according to Kislowicz, "protests led by other parents of students in the school." (Kislowicz, *supra* note 451, at 95 (fn 104)); (2) he attended instead a Seventh Day Adventist private school for the remainder of his secondary education where he could wear his kirpan (Kislowicz, *supra* note 451, at 232 (fn 8)); and (3) the Supreme Court decision was handed down as he was finishing high school in any case (Kislowicz, *supra* note 451, at 232 (fn 8)). The argument related to the time of delay associated with litigation can be extended to other cases as well in this context, for instance, *Commission scolaire des chênes* as well as in the case of a high school student wishing to bring his boyfriend to his Catholic school prom: *Hall (Litigation guardian of) v. Powers*, 2002 CanLII 49475 (ON SC) and *Hall v. Durham Catholic District School Board*, 2005 CanLII 23121 (ON SC).

[611] *Chamberlain v. Board of Trustees of School District #36 (Surrey)*, Supreme Court of Canada transcript (June 12 2002), at 40 (Arvay).

[612] Testimony of Gérard Bouchard (May 12 2009), D.A., vol. III, p. 378-382 as cited in Attorney General of Québec Factum for *Commission scolaire des chênes* (SCC case no. 33678) at page 29 (fn 80) [emphasis added].

- Gérard Bouchard

This sub-section takes a different starting point that than of the previous one, which had looked at internal discussions and decisions (ie, the initial exchange between Gurbaj Singh Multani and his school principal about his kirpan): instead, I examine the policy discussions embedded in the administrative decision-making process. Both the *Chamberlain* and *Commission scolaire des chênes* excerpts have retrospective considerations: both engage in questions of jurisdiction and policy setting, and together, speak to the broader challenges of managing diversity in school settings. In *Commission scolaire des chênes*, the co-author of the Bouchard-Taylor report on reasonable accommodation advances that the introduction of an ethics and religious course decades earlier would have averted the entire "accommodation crisis"[613] faced by Quebecers. In *Chamberlain*, Joseph Arvay, counsel for the appellants, reminds the Supreme Court justices that as a matter of constitutional law, there is no question that minorities (including gays and lesbians, and their families) are entitled to respect.[614] These excerpts both speak to 'if…then' scenarios examined in the context of the previous Chapter on narratives in the legal discourse, speaking to both story and narrative.[615] In the context of this Chapter, 'if…then' speaks to sequence of events in view of applying a rule; put differently, it is a series of facts in view of an administrative actor making a policy-based decision (rather than a legislative rule). Both of

[613] Bouchard's re-visioning of history (or revisionist history) in such a manner sets aside the fact that at the time, Quebec still had a confessional school system that would have made the introduction of such a course impracticable (see discussion in Chapter 1). It is also questionable whether there wouldn't have been the same opposition from Catholic parents to this type of program.
[614] *Supra* note 611.
[615] The distinction between narrative and story is discussed in Chapter 2 of my dissertation, where I focus instead on Sheppard and Westphal's 'narrative continuum', *supra* note 61, where stories are understood as one form of narrative.

these excerpts underscore the need to examine the broader policy backdrop in these cases and how they feed into the administrative decision-making process (and to a later extent, the court cases). As such, in this sub-section, I engage with these decisions from 'outside in'.

Chamberlain and *Commission scolaire des chênes* are already encapsulated, in the context of my dissertation, as cases where children fade out of the decision-making process. This has been considered extensively in Chapter 2, through the progressive exclusion of their testimony (as seen in *Commission scolaire des chênes*) as well as by process-based exclusion, given their young age (as illustrated in *Chamberlain*). Less addressed, thus far, are how central the policy considerations are to these school discussions: I argue that they are not simply questions about school settings, but much more about how parents, children and religious communities interact in the context of school decisions. Moreover, they are not really questions about harm to children, but rather, asserting jurisdiction over information by the parents and subsequent enforcement by the school bodies.[616] Indeed, these cases engage with a variety of legal and policy documents that shape how the members of school boards are supposed to make decisions, and relatedly, how members of the community understand these assessments. The interpretations of these instruments in the broader legal discourse demonstrate how these discourses shape each other.

[616] Jerome Kagan (Affidavit) (April 2 1998) in *Chamberlain v. Board of Trustees of School District #36 (Surrey),* BC Court of Appeal Book, Vol. XIX 3651, at 3656 (¶ 21): "Rather than harm the children, the key issue in the Affidavits I have reviewed [all expert witnesses acting for the Surrey School Board] seems to be whether parents have a legal right to control the knowledge that is presented to their young children. **If a minority or even a majority of families in the community believes that gay families violate their ethical standards, does the school have the right to present children with information inconsistent with those values? That is a legal and ethical question that lies outside of science. It has to be decided by the community or by the courts.**" [Emphasis added]

As noted earlier, both *Chamberlain* and *Commission scolaire des chênes* have broader policy concerns and implications, since they focus not only on individual redress, but rather, on community (one can read: policy) understandings (including that of various teachers, staff, parents, religious communities) on the place of beliefs in schools. Those who participate in school board activities might do so for personal reasons (for instance, because their child attends one of the schools in the relevant district) or professional interests; either way, these are elected positions that encompass a certain level of public accountability and speak to the importance of institutional governance.

Some have argued that those participating in school board decisions have a vested interest in their resolutions and decisions, one that can mix the personal with the professional. [617] This is not always the case, as some school boards have discretionary power in their decision-making process, giving them more maneuvering room and being able to withstand a higher level of judicial scrutiny. Nevertheless, with regard to the former, Shaheen Shariff refers to the school board trustees in *Chamberlain* as *stakeholders*: "when school boards make policy decisions, they employ a "goal based" approach to reasoning rather than one that is rights based. In the Surrey Case [*Chamberlain*], it is evident that the decision by the Surrey School Board to ban the *Three Books*, involved a *goal based* rather than a *rights based* approach."[618] The Commission scolaire des chênes' decision, on the other hand, rests on an appropriate use of discretionary power.

[617] Shaheen Shariff, *Managing the Dilemma of Competing Rights: The Case of the Three Books* (M.A, Faculty of Education, Simon Fraser University, 1999), at 31. I draw on certain examples later on in this sub-section.
[618] Ibid.

Recall, that in *Chamberlain,* the foundational documents that guided the initial decision-making process rested on the interpretation of section 76 of the *Schools Act* (which states that schools should operate in a "strictly secular" and "non-sectarian" basis, devoid of teaching of religious dogma or creed), which has long been understood as the backbone of the public education system in British Columbia; section 85 of the *School Act* elaborates the school board's powers and capacities.[619] Notes one author, "[a]s texts, statutes function primarily to direct attention to the practices and usages that make regulation possible, and to provide moral benchmarks for the ongoing implicit evaluation of such practices."[620] As such, section 76 should suffuse all choices that are taken by the School Board and its trustees, as active and accountable participants in the decision-making process; nevertheless, the legal conflict in *Chamberlain* suggests that the 'moral benchmarks' deserve to be revisited. Particular documents, such as the Career and Personal Planning curriculum,[621] as well as the BC Ministry's PPK-7 Integrated Resource Package (IRP) and Surrey's School District's *Multiculturalism, Racism and Human Rights* Policy,[622] frame the teachers' obligations with regards to student development and student understanding of the family matrix (in all its variations, including same-sex households). These documents not only frame the teachers' duties – which are further contained in the BC

[619] *School Act*, R.S.B.C. 1996, *supra* note 338, s. 85 [emphasis added]:
85 (1) For the purposes of carrying out its powers, functions and duties under this Act and the regulations, a board has the power and capacity of a natural person of full capacity.
(2) Without limiting subsection (1), **a board may, subject to this Act and the regulations, do all or any of the following:**
(a) determine local policy for the effective and efficient operation of schools in the school district;
(b) subject to the orders of the minister, approve educational resource materials and other supplies and services for use by students;

[620] Macdonald, "Legislation and Governance", *supra* note 101, 293.

[621] School District No. 36 (Surrey) Policy 8425 (known as CAPP).

[622] Board Regulation 10900.1, Multicultural, Anti-Racist and Human Rights, s. 3 (curriculum) (approved 1982-11-22).

Teachers' Federation's Code of Ethics – but also provide guidance to school administrators on what is expected in interpreting British Columbia's educational vision.

Apart from the two resolutions adopted by the Surrey School Board trustees, which refer of "parents having voiced their concerns" and a blanket prohibition on "resources from gay and lesbian groups such as GALE or their related resource lists are not approved for use of redistribution in the Surrey School District",[623] many other documents in the *Chamberlain* evidentiary file suggest that the school board trustees' decision was made on the basis of personal beliefs, rather than professional leanings. Central among these is the letter sent by Mary Polak, then chairwoman of the School Board, in the days prior to the Board decision on the books, where she said "And make no mistake. These story books clearly instruct children that homosexual behaviour is morally right."[624] This *prise de position* prior to the official release of the Board decision demonstrates her leanings even before the decision was issued. As such, it is unlikely that she engaged with the issue before the Board with an open mind (to say nothing of secular leanings, as required under section 76 of the *School Act*, in her role as chairwoman). A connected passage in her cross-examination by Joseph Arvay, in response to her letter to the editor, furthers this insight (now adding the perspective of a young child in addition to that of someone of faith before this decision):

> Q: Do you want to point to anything in there [speaking of *One Dad, Two Dads*] that clearly instructs children that homosexual behaviour is morally right?

[623] Chamberlain 1, *supra* note 329, ¶ 48.
[624] Cross-examination of Mary Polak (May 23 1998) in *Chamberlain v. Board of Trustees of School District #36 (Surrey)* in BC Court of Appeal Book, Vol. XXIII, p. 4257 (at paragraphs 245-247).

> A: I believe I've already answered that from a five and six year old's point of view to look at the overall theme of the books is to see a portrayal that does not in any way accept the idea that there's any question with regard to the values that someone might hold as far as homosexual behaviour.[625]

Mary Polak's characterization of the books in question underscores a central challenge in this case, namely, whether a school board can make a decision that doesn't discriminate against any specific person or groups of persons, but simultaneously, doesn't endorse specific orientations.[626] Furthermore, it points to the singular vision that the school board had of its student population (and their families) as being homogeneously heterosexual (nuclear) families. Indeed, same-sex families are characterised as being a statistical "rarity" by one of the school board's expert[627] in support of their decision not to disallow same-sex family models in early education in British Columbia.

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[625] Ibid, p. 4259 (at paragraph 251).

[626] Cross-examination of Mary Polak (May 23 1998) in *Chamberlain v. Board of Trustees of School District #36 (Surrey)* in BC Court of Appeal Book, Vol. XXIII, p. 4267 (at paragraph 276): Question by Mr. Arvay: "Well, this goes back to this sin/sinner distinction doesn't it, Ms. Polak? Are you saying that it's okay to teach children that it's morally right to be homosexual but it's not okay to teach children that it's morally right to act on one's homosexual orientation?"

[627] See Claudio Violato, *Report on Asha's Mums, One Dad, Two Dads, Brown Dad, Blue Dad, Belinda's Bouquet: Surrey School District Report* (March 2 1998) in *Chamberlain v. Board of Trustees of School District #36 (Surrey)* in BC Court of Appeal Book, Vol. XVI, p. 2922 at 2932: "How many Canadian families consist of same-sex parents? While there is no research on this question in Canada, some preliminary work has been done in the United States. Actual estimates of these numbers vary widely as demographic information is limited by varying definitions of sexual orientation and the closed nature of the population in question (Laird, 1995). Nevertheless, Flaks, Fischer, Materpasqua and Joseph (1995) have estimated that only a fraction of 1% of American families consist of same-sex parents. In short, these are very rare. This is also true in Canada. Since the number of families in Canada that consist of same-sex parents are so rare, it is very likely that most Canadian children will never have direct experience or knowledge of such family configurations." Claudio Violato brings up the issue of cognitive dissonance in his report when he states "introducing the complexity of same-sex parents during the preoperational period [children who are 5-6 and "may have bits of information about family, its functions and biological reproduction" is likely to confuse children and create cognitive dissonance (conflict of cognitive structures)": See *supra* at pages 2927-2928.

Other documents also speak to the discriminating (and discriminatory) approach taken by the school board trustees in *Chamberlain*. This includes notably the 'Declaration of Family Rights', produced by the Citizens Research Institute, characterised by the latter as a "positive instrument for parents to use to defend their values and protect their children", and notably used a replacement tool to refuse teachings that engage in any way with discussions or portrayals of same-sex individuals or families or an endorsement of their 'lifestyle'. As noted in the 'Declaration of Family Rights', non-compliance with this declaration warns of legal action against the teacher and/or school administrators.[628] However, the weight of this Declaration is legally dubious, since it does not create binding effects between the family signing the declaration and the school and/or teacher at the receiving end of this letter. Further conflicts arise from the fact that one of the school trustees was described as a director at the Citizens Research Institute, which further obviated the line between one's duties as a school board administrator and personal affiliations.[629] The inclusion of such documents (like the 'Declaration of Family Rights') to prohibit exposure to difference could be considered inflammatory and at the same time, demonstrate deep distrust in the educational system as a whole, and more pointedly, teachers who are meant to educate British Columbia's students in the public school system. Furthermore, it illustrates noteworthy contempt of the public school system in British Columbia as a whole and its governance of diversity in particular. From an institutional standpoint, the concerns highlighted here speak both to concerns of form and substance: *form*, in the manner that is appropriate to arrive at decisions (and appropriate resolutions), and

[628] See *Chamberlain v. Board of Trustees of School District #36 (Surrey),* BC Court of Appeal Book, Vol. III at pages 558-560.
[629] Diane Wilcott (Affidavit, August 1 1997) in *Chamberlain v. Board of Trustees of School District #36 (Surrey)* in BC Court of Appeal Book, Vol. VI 950, at 959.

substance, in terms of actual conflicts of interest that the school board trustees have while holding their elected positions.

From the 'outside in', *Chamberlain* raises serious questions about not only the meaning of public education, but also, the missed opportunities for deeper conversations on the place of religious beliefs in school curriculum. For instance, the escalation of procedures and administrative processes surrounding the mere evaluation – not even approval – of these books suggests the need for a different – and far more efficient – mechanism by which to have this conversation about school resources.

In *Commission scolaire des chênes* we find a process-based narrative that can be distinguished from the one in *Chamberlain*. Recall that in this case, a parent had requested an exemption for her two children from the newly minted Ethics and Religious Culture (ERC) course on humanitarian grounds, an exemption that is provided for in the *Education Act*. However, in analyzing the documentary evidence, it becomes apparent that this case also represents not a breakdown in the administrative decision-making process, but clearly, a non-engagement with the institutional school structure. More specifically, the parent trying to obtain the exemption for her child to attend the ERC course did so without proper knowledge or awareness of the content of the ERC program and, in addition, without adequate engagement or exchange with the school administrators to discuss the exemption. As noted in the appellants' factum, the mother, known as S.L., attended a colloquium organized by the Coalition pour la liberté en éducation (CLÉ), an association of people concerned by the new ERC program, prior to its entry

into Quebec's classrooms. The ERC program was explained and criticized by a series of speakers. It should be noted that S.L. admitted never having read the ERC program that she chose to contest, relying instead on the exposé and information by CLÉ, at the time that she filed the initial request for exemption.[630] In addition, the association offered ways to request exemptions from this program, thereby setting the scene for thinking about – and engaging with – strategic litigation to counter the program.[631] The request for exemption was based, as already noted, on article 222 of the *Education Act*, which provided for a release on humanitarian grounds or would cause 'grave injury' to the student if attending the course, in addition the CLÉ justification form on grounds for exemption to the ERC program.[632] Article 222 of the *Education Act* bears reproduction here in full:

> Every school board shall ensure that the basic school regulation established by the Government is implemented in accordance with the gradual implementation procedure established by the Minister under section 459.
>
> For humanitarian reasons or to avoid serious harm to a student, the **school board may**, following a request, with reasons, made by the parents of the student, by the student, if of full age, or by the school

[630] This was still the case, by S.L.'s own admission, when she chose to submit a request for review of the initial decision. See Respondents' factum in *S.L. v. Commission scolaire des Chênes* (SCC case no. 33678), ¶ 30, citing S.L.'s examination, March 18 2009, Appellants' dossier, vol. II, page 191.

[631] Appellants' factum S.L. & D.J. in *S.L. v. Commission scolaire des Chênes* (SCC case no. 33678), ¶ 12-14. It is also noted at paragraph 14, that the then-Minister of Education, Michelle Courschene, stated that no compromise would be given in favor of those asking to have their children exempted from the ERC program.

[632] Appellants' factum S.L. & D.J. in *S.L. v. Commission scolaire des Chênes* (SCC case no. 33678), ¶ 16. The CLÉ justification reads: "The contents of the course and the method of instruction imposed upon our child are likely to cause serious harm, namely: 1. Loss of the right to choose an education that reflects one's own moral principles and religion; it interferes with constitutionally protected freedom of religion, conscience, and expression of the child and the parent(s) by obliging the child to take a course which does not correspond to the religious and philosophical convictions in which the parent(s) have a right and duty to educate their child. 2. Finding one's self in a learning context presided over by a teacher inadequately prepared and who has, herself or himself, been stripped of the capacity to object to teaching the course. 3. It exposes the child too soon to convictions and beliefs different from those of his (or her) parents. 4. Being exposed to a course on the phenomenon of religion which pretends to be "neutral" 5. Being exposed, in the course of this obligatory subject matter, to a philosophical position imposed by the state, i.e. the doctrine of "relativism". 6. It threatens the religious faith of the child." (English version retrieved from the CLÉ website, online: http://coalition-cle.org/media/exemptions/EXEMPTION_EN_PUB.pdf. The CLÉ website offers interested parties not only the exemption form for the ERC program, but also, a handy elaboration of the various steps to follow if requesting a review of the decision in the public school setting: see http://coalition-cle.org/exemption.php.

> principal, exempt the student from the application of a provision of the basic school regulation. In the case of an exemption from the rules governing certification of studies referred to in section 460, the school board must apply therefore to the Minister.
>
> The school board may also, subject to the rules governing certification of studies prescribed by the basic school regulation, permit a departure from a provision of the basic school regulation so that a special school project applicable to a group of students may be carried out. However, a departure from the list of subjects may only be permitted in the cases and on the conditions determined by a regulation of the Minister made under section 457.2 or with the authorization of the Minister given in accordance with section 459.[633]

As such, exemptions are granted subject to the school board's discretionary power, as illustrated in the language of this provision;[634] it is not a right, but rather, a privilege, accorded by the administrative school body, developed to facilitate and simplify the management of this process by the school board.[635] As noted by the Attorney General of Quebec, article 222 should not be understood as the codification of the duty of reasonable accommodation.[636] Furthermore, it is not only a chance for a parent to ask for an exemption, but also, a student, if of full age.[637] S.L., along with other parents, submitted a request for exemption following this model. It bears mention that S.L. requested the exemption, in her view,

> "Pour tout le monde, pour mes enfants et pour moi, cas de conscience, devoir parental. **J'espère de tout cœur que mes enfants n 'auront pas à suivre ce cours-là puis pour mes enfants, <u>parce que je suis leur guide</u>, mais aussi que je veux protéger leur cheminement spirituel**."[638]

[633] *Education Act,* RSQ, c I-13.3*,* s. 222 [emphasis added].
[634] Respondents' factum in *S.L. v. Commission scolaire des Chênes* (SCC case no. 33678), pp. 12-14.
[635] Quebec, National Assembly, Journal des débats – Commission permanente de l'éducation – Étude détaillée du projet de loi 107 – *Loi sur l'instruction publique* (10), 37th Leg. 1st Sess, No. 38 (2 december 1988) at 3 (Pâquerette Gagnon) in Respondents' factum in *S.L. v. Commission scolaire des Chênes* (SCC case no. 33678) at page 88.
[636] Respondents' factum in *S.L. v. Commission scolaire des Chênes* (SCC case no. 33678), ¶ 68, 79.
[637] It is worth noting that as a strategy, S.L.'s older child could have requested the exemption under his own stead.
[638] As noted during the examination on discovery, led by counsel for the school board: Appellants' factum S.L. & D.J. in *S.L. v. Commission scolaire des Chênes* (SCC case no. 33678), ¶ 46, citing Transcript (May 11 2009), dossier des appelants, Volume II, pages 300-301 [emphasis added].

Shortly thereafter, the school board denied the requests for exemption.[639] S.L. demanded a review of both applications for exemption before the Council of Commissioners, which occurred less than a month after the request for review. During the Council of Commissioners' meeting (which had been preceded by an expert meeting the same day), S.L., along with others who had requested the same exemption, expressed their opinions before the Council.[640] On June 25th 2008, the Council of Commissioners rejected all exemption requests.[641] Notes the Council of Commissioners, in their resolution on these requests for exemption:

> CONSIDÉRANT qu'il n'appartient pas au comité d'étude et au conseil des commissaires d'évaluer la validité de l'argumentaire juridique qui leur a été présenté, ce qui constitue un rôle qui revient aux tribunaux;[642]

In crafting their resolution, the Council of Commissioners drew a practical line between what they can rule on (namely, a request for exemption) and what they considered to be outside of their jurisdiction, notably, the decision on the infringement to the petitioners' right to freedom of religion. This resolution excerpt can be distinguished from that of Robert Brousseau's *prise de position* (author of the security report for the Council of commissioners at the Marguerite-Bourgeoys school board in *Multani*), since he took an individual decision, lest we say, value judgment on the situation, prior to the administrative decision making-body.

[639] As noted in the Appellants' factum S.L. & D.J. in *S.L. v. Commission scolaire des Chênes* (SCC case no. 33678), ¶ 18, where they underscored that the school board had used the same template as other school boards to refuse the exemption.
[640] This is in conformity with article 11(3) of the *Education Act*, which enables interested parties present at the hearing to express their views: see Appellants' factum S.L. & D.J. in *S.L. v. Commission scolaire des Chênes* (SCC case no. 33678), ¶ 22.
[641] Appellants' factum S.L. & D.J. in *S.L. v. Commission scolaire des Chênes* (SCC case no. 33678), ¶ 23.
[642] Ibid, ¶ 24.

Both *Chamberlain* and *Commission scolaire des chênes* reveal broader lessons on administrative governance through the outside in. As noted at the outset, both cases have a retrospective element ('if…then'), which echoes in the sphere of administrative decision-making because it refers to a sequence of events of in view of applying a rule, much like the narratives discussed in Chapter 2.[643] This approach to the cases also shapes the manner in which we engage with their institutional framing and consequently, how we understand the speaks to a series of facts that need to be taken into account in view of an administrative actor making a policy-based decision (rather than a legislative rule). Whereas the previous sub-section suggested that *Multani* emphasised unofficial spaces of decision-making, both *Chamberlain* and *Commission scolaire des chênes* bring to the fore the missed opportunities of unofficial decision-making. Lacking from the latter cases were incremental arrangements and healthy discussions – suggesting that these cases challenge whether discussions on religion can truly arise within school settings. One could argue that further institutional engagement would have de-escalated these cases: however, this would have required more guidance from broader structures, such as the Ministry of Education, to eschew the initiation of legal proceedings. I have noted elsewhere, school boards have already voiced their concerns about having to shoulder the costs of the regulation of religious diversity in schools and before the courts, in light of both the *Multani* and *Commission scolaire des chênes* cases.[644] This suggests concerns that are both

[643] *Supra* note 310.

[644] As noted in a recent article on the proposed Quebec *Charter of Values*, before National Assembly hearings. See Dabby, "Constitutional (mis)Adventures", *supra* note 493, at 368.

pragmatic and financial in nature; they require deeper conversations on the meaning of religious diversity in schools, as well as its management.[645]

Chamberlain and *Commission scolaire des chênes* underscore where discretion is appropriate in the context of administrative decision-making. They also reveal where more sustained exchanges could have preempted legal proceedings (or at least, substantially reduced recourse to the courts). Engaging with *Chamberlain* and *Commission scolaire des chênes* from the outside in enables us to see more clearly the challenges related to inclusive agendas in the realm of education. It equally reveals promises and perils of process-based decision-making.[646] Indeed, while the procedural turn in constitutional law resonates with "constitutionalism as a dialogic and conversational process"[647], Colleen Sheppard cautions that "process based entitlements may not be sufficient to challenge an inequitable institutional or political status quo."[648]

This section has analysed the pre-litigation decisions in order to elucidate different types (or levels) of decision-making in administrative law present in the narrative continuum on how

[645] This is addressed further in the context of section 3.3 of this Chapter.
[646] As explicitly discussed by Colleen Sheppard in "Process-Based Constitutionalism", *supra* note 497. She argues at 573-574 "To summarize, the risks of a procedural turn include making process rights a substitute for, rather than a supplement to, substantive rights or ignoring the integral connection between process and substance; delegating responsibilities for rights and freedoms to inequitable institutional or social contexts; reinforcing privatized power and privilege; deferring the ffective realization of the promise of constitutional rights and freedoms indefinitely, despite the rhetoric of social transformation; and legitimizing constitutional law as progressive despite its failure to attain significant substantive results. Despite these risks, we should not reject the procedural turn in constitutional law. We cannot expect judges to have the knowledge, political will, or institutional capacity to elaborate the substantive outcomes necessary for greater effective freedom and equality. It is critical to seek equitable and inclusive processes of contemporary constitutionalism that reinforce participatory democracy in our social, economic, and political institutitions, and empower those historically excluded from power and privilege as decision makers and change makers. Thus, while it is useful to recognize and celebrate [the] procedural turn, we need to be vigilant in ensuring that its promise outweighs its perils." [references omitted]
[647] Sheppard in "Process-Based Constitutionalism", *supra* note 497, at 550.
[648] Ibid, 573.

religious freedom should be taken into account in the particular context of schools. Indeed, while *Chamberlain* and *Commission scolaire des chênes* spoke to policy level decision-making (whether it be the introduction of a broader family matrix or a course on cultural religion), *Multani* spoke instead to the internal policy level, as illustrated through the incremental exchanges with the principal. In conclusion, my case studies underscore the different levels of interaction with the school structure, whether from the 'inside out' or the 'outside in'.

This section has exemplified that that schools provide a more flexible approach to managing religious claims than the legal system; nevertheless, this system is not without its shortcomings, as seen through the practicalities of my three case studies. However, internal school decisions enhance the diversity of sources available from a legal pluralist perspective,[649] which should be accorded further weight before and within the legal process. This has been evidenced in a variety of ways in this section, notably through schools as: *sites of deference*, where codes of conduct indicate an internal functioning of schools and school-based relationships; as *sites of discretion*, since schools have their own organizational politics, outside (one can read here legal) interference should only occur in cases of grave error; and finally, as *sites of governance*, since schools are understood as sites of deliberative democracy and process-based decision-making. Building on arguments of implict law,[650] I suggest that malleability is key in a school's institutional design. It represents a far more nuanced arena in which to engage in meaningful discussions (and hopefully, decisions about) religious claims. Nevertheless, these cases have

[649] See in this way, Van Praagh, "Open House", *supra* note 498, at 17.
[650] Lon Fuller, *Anatomy of the Law* (Westport, Greenwood Press, 1968); Macdonald, "Legislation and Governance", *supra* note 101.

highlighted some of the challenges of the current institutional structure, which I address and provide partial remedies for in the last section of this Chapter.

3. The context of school decisions and a closer look at its actors: administrative law as a game-changer?

This section of my Chapter seeks to bring a constructive, rather than a descriptive, component to my discussion on the place of children's religious rights and educational rights. It is in this lens that I engage and consider two pathways of inquiry to better include children in discussions about religion and schools. First, I examine and evaluate the criticisms that have been developed more broadly within the context of schools and student participation (3.1). This line of inquiry finds itself at the crossroads between children's education rights and their participatory rights. I borrow from the discussion on the child's right to participate in education, and more specifically, whether engaging children in decision-making structures furthers not only their right to participation, but also, likely solidifies their religious identity within this framework. The second avenue of inquiry engages with the ways in which administrative law structures and microsystems, such as schools, could function to better protect children's rights. This second pathway seeks to draw on existing administrative structures to better protect children's equality rights with regards to religious claims in the educational setting. More specifically, I draw on Cameron and Daly's argument on furthering substantive equality through administrative law in the particular context of charter values in school (3.2). I first set out their argument and then propose a modification, in light of my three case studies (3.3).

3.1 Putting children's participatory rights into practice

There is undoubtedly an appeal to increasing a child's participatory rights within their educational sphere. Proponents would argue that enhancing a child's place in discussions that affect her would lessen the perception one might have of a child as an 'object' of the institutional system.[651] In the context of the right to freedom of religion, this argument becomes all the more appealing because it would enable the student to voice her religious identity (and rights) as a legal agent. Concerns, however, reside in framing this claim solely in terms of autonomy rather than relationship on the one hand, and on the other, in appropriate consideration of the context in which these rights are asserted. The purpose of this sub-section is to engage with this line of reasoning.

The argument in developing a child's participatory rights is not a new one in the educational setting.[652] Indeed, this argument has taken more shape since the UNCRC's General Comment on the right of the child to be heard, where the Committee on the Rights of the Child notes

[651] A more nuanced view of children's participatory rights argues that "in itself, is not inherently subjugating, neo-liberal, middle class or western.": see Rebecca Raby, "Children's participation as neo-liberal governance?" (2014) 35(1) *Discourses: Studies in the Cultural Politics of Education* 77, 82.

[652] See, for example: Dominic Wyse, "Felt tip pens and school councils: children's participation rights in four English schools" (2006) 15(4) *Children & Society* 209; R. Brian Howe & Katherine Covell, "Schools and the participation rights of the child" (2000) 10(1) *Education and Law Journal* 107; Leanne Johnny, "UN Convention on the Rights of the Child: A Rationale for Implementing Participatory Rights in Schools" (2005) *Canadian Journal of Educational Administration and Policy*; Leanne Johnny, *Children's Right to Participate in Education: Ethical & Legal Implications of the United Nations Convention on the Rights of the Child for Canadian Schools* (Ph.D. Thesis, McGill University, Faculty of Education, Department of Integrated Studies in Education, 2012); Laura Lundy, "'Voice' is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child" (2007) 33(6) *British Educational Research Journal* 927 **[Lundy, "'Voice' is not enough"]**; Laura Lundy, "Children's rights and educational policy in Europe: the implementation of the United Nations Convention on the Rights of the Child" (2012) 38(4) *Oxford Review of Education* 393.

> Children's participation is indispensable for the creation of a social climate in the classroom, which stimulates cooperation and mutual support needed for child- centred interactive learning. **Giving children's views weight is particularly important in the elimination of discrimination, prevention of bullying and disciplinary measures.** The Committee welcomes the expansion of peer education and peer counselling.
>
> **Steady participation of children in decision-making processes should be achieved through, inter alia, class councils, student councils and student representation on school boards and committees, where they can freely express their views on the development and implementation of school policies and codes of behaviour. These rights need to be enshrined in legislation, rather than relying on the goodwill of authorities, schools and head teachers to implement them**.[653]

The right to be heard in the realm of education has a two-pronged mandate: one the one hand, the inclusion of children's views will have a preventative aspect, insofar as their additional perspectives will enable for further exposure to difference (and concomitantly, lessen misunderstanding based on perceived difference). On the other, the inclusion of children's views in what can be termed as "practice-driven" aspects, such as decision-making activities in the school setting, must not only occur, but also, be legally protected. By putting one's trust in legal instruments rather than administrative benevolence, the general comment underscores that enforceability is key for children to be heard. Nevertheless, upon closer reading of this general comment, the use of "freely express[ing] their views"[654] speaks to the obligation of *hearing* children's views. Indeed, "expressing" speaks to the articulation of opinions, rather than the duty of administrators to expressly take their views into account into the shaping of school policies. Formulated as the right to be heard, instead of the right to (deeply) contribute,

[653] UNCRC, *General Comment No. 12 (2009): The right of the child to be heard* (CRC/C/GC/12) (1 July 2009), ¶ 109-110 [emphasis added]. On the right to be heard in education and school more generally, see ¶ 105-114 **[UNCRC, *General Comment No. 12 (2009)*].**

[654] UNCRC, *General Comment No. 12 (2009)*, *supra* note 653, ¶ 110.

shapes a different conversation in terms of the legal expectation (and obligation) that may result from this conversation.[655]

Some have held out hope that the implementation of participatory rights in schools is indeed the right direction and that this avenue represents a bastion of future development. Leanne Johnny, for instance, argues that,

> … even when children do not possess the experience and knowledge required for self-determination, they nonetheless have an interest in participation because it helps them to develop their skills and confidence as decision-makers, build their competencies in deliberation, and form aspirations about their lives.[656]

This vision of participation suggests that even if participation for the sake of participation does not reach the requisite goal (ie, full engagement), their place at the table will enable them to develop other life-building – and autonomy-asserting – skills.[657] While this perspective of participation in school structures is no doubt commendable, this work questions whether it actually achieves tangible duties and obligations for children as participants in this timely discussion.[658] My line of questioning underscores a related argument by Rebecca Raby, who notes that democratic participation in schools can better equip students later on in life against

[655] Julia Köhler-Olsen formulates this argument with regards to children's religious beliefs and participation in the decision-making process in a much less generous manner: Julia Köhler-Olsen, "Contradictions in the Theory of the Child's Competence" in Farhad Malekian & Kerstin Nordlöf (eds.), *The Sovereignty of Children in Law* (Newcastle upon Tyne, Cambridge Scholars Publishing, 2012), 116 at 123. See Lundy, "'Voice' is not enough", *supra* note 652, in the same way.

[656] Johnny, *supra* note 652, 241.

[657] Ibid. Johnny's positioning has been characterised as one of 'partial citizenship' by Rebecca Raby in *School Rules: Obedience, Discipline, and Elusive Democracy* (Toronto, Toronto University Press, 2012), at 216.

[658] This can be highlighted within the recent Bill 86, *supra* note 569, which speaks of student participation at s. 74. The Commission des droits de la personne et droits de la jeunesse, in its recent memorandum before the National Assembly, cautions against the exclusion of certain groups of children within this participatory school scheme. See Commission des droits de la personne et droits de la jeunesse, *supra* note 569, 20-22.

apathy, and yet, she warns that the danger of disillusionment lingers.[659] As such, it is not only recognition of students' rights within the school scheme (as almost autonomous legal subjects), as noted by certain authors,[660] but also a question of their recognition of their relationships within those communities.[661] The relational perspective remains central to a clearer articulation of a student's rights and communities of belonging. More particularly, it has been argued "that viewing the child as developing within a network of interdependent social relationships allows for a recognition of her rights *and* obligations vis-à-vis the actors with whom she engages. Specifically, it recognises the child's ability to identify within her communities who may be affected, possibly adversely, by consciously chosen decisions and actions."[662] Raby's research also points in this direction, noting particularly that deep student participation depends on the support of other adults and especially parents.[663] This approach to children's agency is beneficial to the broader discussion on children's participation in institutional structures, since it not only takes into account the relational approach put forth at the outset of my thesis, but also, provides a pathway forward on discussing the importance of communities of belonging.

Within the context of my three case studies, increased student participation would no doubt create a richer space in which to engage in discussions of religious diversity in the context of

[659] Raby, *supra* note 657, at 241.
[660] Ibid, at 236 (Table 9.1 Degrees of democratic possibility within school rule design). Raby's table provides an overview of the types and intensity of student involvement. These range from 'organization of the rules and their presentation', to 'minimal, institutionalized student representation', to 'comprehensive student representation and participation' to finally, 'full student involvement'.
[661] Angela Campbell, Marissa Carnevale, Suzanne Jackson, Franco Carnevale, Delphine Collin-Vézina & Mary Ellen Macdonald, "Child citizenship and agency as shaped by legal obligations" (2011) 23 *Child & Fam. L. Q.* 489, 499 **[Campbell *et al.*, "Child citizenship and agency"]**. Campbell et al.'s understanding of relationships is predicated on the relational approach advanced by Jennifer Nedelsky in "Reconceiving rights as relationship" (1993) 1 *Review of Constitutional Studies* 1. See Campbell *et al.*, "Child citizenship and agency", *supra*, at 492.
[662] Campbell *et al.*, "Child citizenship and agency", *supra* note 661, 499.
[663] Raby, *supra* note 657, at 241.

public schools. Nevertheless, as noted above, increased student participation hinges, to a great extent, on adults (including parental) cooperation and support. Some have argued that this requires a "radical shift" in the understanding of education for genuine change to occur.[664] In the context of religious diversity, this goodwill is even more predicated on adults' understanding of and relationship with, difference. Indeed, Gurbaj Singh Multani's participation in both administrative and judicial proceedings provides an idea of what fuller engagement could look like – namely, participation in school board hearings and meetings with school administrators. Nevertheless, his engagement with the administrative structured occurred under duress, following an initial confrontation with the school administration. The prospect of legal proceedings, not to mention, losing one's right to public education, does not foster a healthy context of participation – this is to say nothing of young adolescents who might be daunted by the process and actors. Similar concerns can also be raised for the adolescent in *Commission scolaire des chênes.* The situation is perhaps more complicated in *Chamberlain*, since pre-kindergarten aged students would not be able to fully articulate their points of view, nor properly grasp all the issues, in a case as complex as this one. However, their participation shouldn't be discounted, but adapted to means and methods that would enable them to display *their* understanding of difference and belonging, including the use of drawings.[665]

[664] Monk, "Children's rights in education", *supra* note 283, 56.

[665] In Dorit Roer-Strier, Shalva Weil & Hila Adan, "The Unique and the unifying: Children's narratives of cultural difference" (2003) 11(1) *European Early Childhood Journal* 105, 116 [**Roer-Strier *et al.*, "The Unique and the unifying"**], young children (of a similar age to those in *Chamberlain*) who attend a school with both secular and religious pupils in Israel (a rarity), illustrates that while the school set out clear boundaries (between religious/secular categories), they translate into a much more nuanced application of this taxonomy as recounted by the children. The authors employed various research tools to create narratives about religious and secular identity. One such tool was the "draw-a-man" test, where children were asked to draw a religious boy/girl and a secular boy/girl, with a descriptive statement accompanying each of the drawings: secular children were identified as being more "different" and less (religiously) law abiding. Roer-Strier, Weil and Adan also employed other tools,

Participation, much like tolerance, should always be 'age-appropriate'.[666] Enhancing student participation within the wider education context, and within the space of exchange on religious diversity, would require broadening the terms of reference. As such, while the field of education rights has undoubtedly pushed for broader recognition and implementation of children's participatory rights, this analysis and focus on my case studies highlights that this is only a partial conversation. Missing, perhaps, from this discussion on children's participation into practice in the particular sphere of schools is how existing (institutional) structures can enhance children's rights, rather than hinder their existence. By this, I mean that it is not enough to simply augment the number of rights (and obligations) children recognized to them, and within their particular communities, but rather, that closer attention must be paid to the existing structure within the setting of administrative law. The following sub-section of this Chapter engages with this question.

3.2 Strengthening children's substantive rights through the administrative structure

Chapter 2 of my thesis provided an important thread in terms of the challenges of protecting religious diversity in the context of public schools through *Chamberlain*, *Multani* and *Commission scolaire des chênes*. These cases are also significant because they offer key insights into how school administrators – teachers, but also the administrative staff – take (or should take) *Charter* values into account in their decision-making process. Within the framing of cases on religious freedom, administrators' obligations vis-à-vis their student body become all the

including observations, interviews and questionnaires. It should be noted that Beaman also employs this article to underscore how religious difference can coexist in Israel: see Beaman, *supra* note 96, 43.

[666] *Chamberlain, supra* note 4, ¶ 69.

more relevant, given that their relationship is with a vulnerable population and require a sophisticated understanding of religions. Indeed, as already noted, MacKay argues that administrative boards are emerging as constitutional decision-makers.[667] Incumbent on these administrative actors, therefore, is a double obligation: to take *Charter* values into account in their decision making process, but also, to take into context the fact that their decisions are made in "power imbalances, [where] the consequences of failing to respect the dignity interests of one of the parties can be devastating."[668] Finally, these cases are also noteworthy because they are inscribed in the broader discussion on how administrative actors must take *Charter* values into account.[669]

Specific understandings of the duties of school staff (teachers, administrators) can be drawn from our three cases. Taken as a whole, these understandings enable us to develop a clearer image of the school as space of diversity, but also, site of tolerance. *Chamberlain* addresses the need for children to be exposed to cognitive dissonance – and thus the reciprocal obligation of the school and administrators to provide this backdrop in their everyday school lives – and the importance of learning about tolerance in a manner that is commensurate with their age.[670] *Multani* speaks to the duty of school administrators to engage in a 'common enterprise' – that of the school – as well as duty to cherish and disseminate the value of religious tolerance. Let us recall that *Multani*, drawing on *Pandori*, noted that "[s]chools on the other hand [as opposed

[667] MacKay, "Comparative Roles", *supra* note 222.
[668] Cameron & Daly, "Furthering Substantive Equality", *supra* note 499, 183. See also in this way Jennifer Koshan, "Redressing the Harms of Government (In)Action: A Section 7 versus Section 15 Charter Showdown" (2013) 22 *Const. F.* 31.
[669] See Abella and Deschamps JJ. opinion in *Multani, supra* note 3 (especially ¶ 100-111) as well as *Doré, supra* note 499 and *Loyola, supra* note 9.
[670] *Chamberlain*, *supra* note 4, ¶ 69.

to courts] are living communities which, while subject to some controls, **engage in the enterprise of education in which both teachers and students are partners**."[671] In keeping in line with this symbiotic relationship between teachers and students, Justice Charron also notes that "it is incumbent on the schools to discharge their obligation to instill in their students this value [religious tolerance] that is, […] at the very foundation of our democracy."[672] Lastly, *Commission scolaire des chênes* engages with the broader societal changes, reflective of our changing religious portrait in order to underscore the place of schools and schools administrators in conveying this changing landscape. These three cases speak of the importance of cognitive dissonance, religious tolerance and recognizing societal change. And yet, this 'common enterprise' could also be the site of deeper exchange, if only one scratches below the surface: this represents the sub-section's ambition.

In their article, Cameron and Daly argue "the obligation to pay attention to Charter values provides the lifeblood of substantive equality in every administrative law context."[673] Cameron and Daly use a three-layered fictitious example to complete their argument's *mise en scène.* A summary of their example can be understood as follows:[674] hints of *Chamberlain* are found in the illustration, insofar as an openly lesbian teacher decides to bring in same-sex families into class materials. Adding to this example is that the teacher's own son is in that same school and has suffered from bullying due to his own same-sex family. While recent legislation in

[671] *Multani*, *supra* note 3, ¶ 66, citing *Pandori*, *supra* note 230, ¶ 197 [emphasis added].
[672] *Multani*, *supra* note 3, ¶ 76 (Charron J.).
[673] Cameron & Daly, "Furthering Substantive Equality", *supra* note 499, 170-171.
[674] Ibid, 171-174.

Ontario[675] addresses bullying in schools, it does not engage with the preventative aspect of bullying, namely, exposure to difference before it becomes a source of tension. This latter piece finds resonance instead in the Ontario Ministry of Education's *Realizing the Promise of Diversity: Ontario's Equity and Inclusive Education Strategy*, which seeks to "eliminate[e] all forms of discrimination in education, including homophobia."[676] Much like *Chamberlain,* existing textbook materials do not include portrayals of same-sex families, which lead the teacher to use supplementary materials, after consultation with the school principal. The same-sex family materials are used in the class setting without seeking approval from the school board, relying on the common practice by other teachers, using similar materials. Complaints from some parents arise following an exercise where children are asked to draw pictures based on the basic structure of the teacher's family (ie, two mothers and a son), citing infringements to their right to freedom of religion and the right to educate their children in accordance with their religious beliefs.[677] Cameron and Daly argue that their example underscores the place of Charter values in the decision-making structure, drawing on recent Supreme Court decisions of *Commission scolaire des chênes and Doré*. More specifically,

> [a]ll 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 safeguarding physical and psychological integrity, are touchstones to guide the exercise of administrative powers.[678]

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[675] Cameron and Daly refer to the "*Accepting Schools Act*" (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 (*supra* note 668, 172 (fn 9).

[676] Ministry of Education, *Realizing the Promise of Diversity: Ontario's Equity and Inclusive Education Strategy* (Toronto, Queen's Printer for Ontario, 2009) as cited in Cameron & Daly, "Furthering Substantive Equality", *supra* note 499, 172.

[677] Cameron & Daly, "Furthering Substantive Equality", *supra* note 499, 174.

[678] Ibid, 174-175.

While Cameron and Daly navigate two forms of inquiry, I focus on their second line of inquiry, namely, an "exploration of how substantive equality can be achieved through the workings of the administrative law decision-making process".[679] I contend that it permits, on the one hand, a revitalized approach to the substantive/contextual equality rights discussion, which has, in recent years fallen prey to its own complexity[680] and on the other, a deeper engagement with the particular place of children in the school setting. The authors posit that five spaces exist and are permeated by substantive equality within the existing administrative law framework, namely: (1) the ostensible "importance accorded to general norms"; (2) "the Canadian definition of unreasonableness as having ample scope for furthering substantive equality claims"; (3) that "administrative actors must take Charter values into account in exercising their discretion"; (4) "when it comes to statutory values, a broad view should be taken of statutory purposes", to understand them as "institutional and social values"; and (5) ""soft law" can be adapted to the requirements of substantive equality."[681] While Cameron and Daly's spaces for the promotion of substantive equality still resonate strongly today, the notion of discretion has benefited from further jurisprudential refinement, which is beneficial to our framework. Discretion for the administrative decision-maker, as set out in *Doré*, has been reinforced by the Supreme Court in *Loyola High School*, accentuate that the "discretionary decision-maker is required to proportionately balance the *Charter* protections to ensure that they are limited no

[679] Ibid, 182. The other field of inquiry that fuels Cameron and Daly's analysis is the possibility of employing judicial review to further substantive equality. Similar to the reasons the authors mention at page 182, I am less compelled by *ex post* intervention. Rather, I seek to enhance the initial decision-making framework through the role of Charter values, in the privileged setting of school relationships. See in this way, Macdonald, "Legal republicanism", *supra* note 583, at 53-54.

[680] See Bruce Ryder & Taufiq Hashmani, "Managing Charter Equality Rights: The Supreme Court of Canada's Disposition to Leave to Appeal Applications in Section 15 Cases, 1989-2010" (2010) 51 *Supreme Court Law Review* 555; Sheppard, "Process-Based Constitutionalism", *supra* note 497.

[681] Cameron & Daly, "Furthering Substantive Equality", *supra* note 499, 186-189.

more than is necessary given the applicable statutory objectives that she or he is obliged to pursue."[682]

Cameron and Daly's argument about employing administrative law to buttress the claim of substantive equality is attractive. I argue that one could make a similar argument about freedom of religion being integrated as a value in administrative law as well. There is a noted overlap between non-discrimination on the basis of religion and the right to freedom of religion. But the authors also recognize the limits of what can be done in the context of administrative decision-making and legislative structures, and ultimately fall back on the need for increased sensitivity and understanding of equality by administrators.[683] Indeed, the concern that better training is needed for school administrators and teaching staff is also shared by the authors of the Bouchard-Taylor report; however, the need for stringent guidelines on religious accommodation (or voluntary adjustment, if employing the language used by the authors of the report) vacilates between school actors, ranging from calls for a "common frame of reference" to local harmonization committees in each educational establishment.[684] Cameron and Daly's own admission, at the end of their article, suggests that furthering substantive equality in the context of administrative law has its limits and is ultimately dependent on the good will and understanding of school administrators. In other

[682] *Loyola, supra* note 9, ¶ 4.
[683] Cameron & Daly, "Furthering Substantive Equality", *supra* note 499, 204.
[684] Bouchard-Taylor report, *supra* note 541, at 84. At the same page, the Maguerite-Bourgeoys school board – also at the root of the conflict with Gurbaj Singh Multani – was reported as having suggested that the provincial government legislate so that the spirit of interculturalism takes precedence over the spirit of multiculturalism in the management of ajustments. It is argued here that this suggestion would have significant constitution ramifications, as multiculturalism is protected through the *Canadian Charter of Rights and Freedoms*, and would not enhance legal clarity with regards to the management of accommodations.

words, they suggest that it comes down to common sense application. Their admission could be seen as ultimately detrimental to their argument but also, illustrate the potential limits of (administrative) law to engage deeply these issues. Yet Cameron and Daly's article, published in 2012, was ahead of the institutional curve: while the authors hinted at the place of administrators in the conversation on school inclusion and respect (but limited in part by their individual good will and common sense), the Ontario Ministry of Education published a follow-up guide on policy implementation in 2014.[685] This guide, discussed in further depth in the last sub-section of this Chapter, elaborates an institutional framework to reflect, and put into practice, deeper processes of inclusion. The concluding sub-section to this Chapter endeavors to engage with these sites of inclusion through my argument of schools constituting complex constitutions.

3.3 Schools as complex constitutions

As noted in the previous sub-section, substantive equality can be fostered through administrative law and *Charter* values more specifically. This focus also invites us to further reflect on the overlap between freedom of religion and non-discrimination on the basis of

[685] Ministry of Education, *Equity and Inclusive Education in Ontario Schools: Guidelines for Policy Development and Implementation* (Toronto, Queen's Printer for Ontario, 2014). Other provinces have also developed guidelines on inclusive education and non-discriminatory measures (including religion) to take into account when crafting school codes of conduct. See, for example: Ministry of Education, *Developing and Reviewing Codes of Conduct: A Companion to the Provincial Standards for Codes of Conduct Ministerial Order and Safe, Caring and Orderly Schools: A Guide (2004)* (British Columbia, August 2007), online: https://www.bced.gov.bc.ca/sco/resourcedocs/facilitators_companion.pdf; Ministry of Education and Advanced Learning, *Safe and Caring Schools: Provincial codes of conduct: Appropriate Interventions and Disciplinary Consequences* (Manitoba, January 2014), online: http://www.edu.gov.mb.ca/k12/safe_schools/pdf/code_conduct.pdf. Finally, in 2015, Nova Scotia introduced a school code of conduct that will be applied province-wide: Bill 105, *Education Act (amended),* 2nd Sess., 62 Leg., Nova Scotia, 2015 (assented May 11 2015), RSN 2015, c. 16.

religion.[686] Nevertheless, limitations are noted on the scope of what 'judicial decisions' can actually do to redress situations of inequality in school settings. Perhaps, then, this is the problem: we are speaking of redress, rather than a practical approach, in the context of school conflicts with religion. It is suggested here that although adjudication can provide clarity on individual remedy, policy implementation and good practices can provide a broader canvass on which to have conversations of process-based inclusion. It is through this lens that I pursue my concluding argument, notably that schools should be regarded as complex constitutions, rather than just "provincial creatures".[687] My argument therefore goes beyond that of Wayne Mackay's on administrative boards surfacing as constitutitonal decision-makers;[688] while this suggestion credits administrative actors with playing a constitutional role, it does not acknowledge the relations of mutual support that are fostered within the school setting and solidifying the grounds for understanding schools as complex constitutions. This dissertation argues that viewing schools as complex constitutions would enable us to shift our understanding of public education spaces as sites of decision-making, rather than spaces of accommodation, the latter having reflected a dominant narrative up until now.[689] Understanding schools as spaces of accommodation suggests that the initial site is only of passing importance, but not where the "real" decisions are made – we can think here of Robert Brousseau's "wait for the trial" in *Multani*. Refashioning schools instead, as sites of decision-

[686] Indeed, claims of religious discrimination have been dispatched without sufficient consideration in the judicial context. See, for example, *Hutterian Brethren of Wilson Colony*, *supra* note 84, ¶ 108.
[687] Cara Faith Zwibel, "Faith in the Public School System: Principles for Reconciliation" (2012) 21 *Canadian Diversity* 48, at 49 **[Zwibel, "Faith in the Public School System"]**.
[688] Mackay, "Comparative Roles", *supra* note 222, 210.
[689] See, for instance, Woehrling, "La place de la religion", *supra* note 51; Wayne MacKay, "Safe and Inclusive Schooling – Expensive … Quality Education – Priceless. For Everything Else, There are Lawyers!" (2008) 18(1) *Education Law Journal* 21 **[Mackay, "Safe and Inclusive Schooling"]**.

making, recognizes them as sites worthy of decision-making in their own stead. In focusing on their decision-making power, this sub-section of my Chapter seeks to tease out the heightened spaces of diversity in schools. Indeed, my review of *Multani*, *Chamberlain* and *Commission scolaire des chênes*, through the institutional lens, effectively demonstrate the challenge in adequately addressing the 'dilemmas' of diversity.[690] Furthermore, these cases allow us to glimpse into the promise of everyday interactions, through informal conversations and understandings. Unlike Beaman, who advocates looking at everyday experiences of religious pluralism without law's lens,[691] I do not consider it necessary to step outside of the domain of "law".[692] Beaman's argument rests on the point that law's discourse on religion not only overwhelms all other discourses but also focuses too much on the legalistic answer to a complex and multifaceted question of belonging. Her approach is predicated on the positive resolutions of religious difference, outside of law's lens on the one hand, and on the other, the need to shift the language of encounter from 'accommodation' (which denotes power relationships) to one grounded in 'deep equality'.[693] Despite this, she draws "surprisingly", in her words, on stories from law, like *Multani,* to illustrate the place of positive stories and notes,

[690] Beaman, "Deep Equality", *supra* note 96, 93: "[t]he rush to 'solve' the problem of diversity has produced a blindness to both the ways in which people resolve or work with difference as well as the needs of diverse groups themselves." See also Beaman, *supra* note 96, at 6-7.

[691] *Supra* note 552. Beaman's argument, as I already hinted, concerns a move away from the language of tolerance and accommodation, since they perpetuate both notions of majority-minority relationships and dominance of certain religious groups, as well as a cautionary argument to the manner in which diversity is addressed. Beaman is particularly critical of formal law, which she describes as "hav[ing] in part created the harmful and toxic environment in which equality often resides" (*supra* note 96, at 6) as well as legal processes, which have become a staple part of the discussion.

[692] I understand "law" here to be both formal and informal law. Shauna Van Praagh's work on the richness of daily encounters demonstrates this point extensively: *supra* notes 571, 586. See also "Sharing the Sidewalk Stories" (2010) 8(3) *Canadian Diversity* 6-9; "The Chutzpah of Chasidism" (1996) 11(2) *Canadian Journal of Law & Society* 193.

[693] Beaman notes that narratives of deep equality aren't tidy or always favorable: "Rather, they are, like life in general, complicated, complex narratives that offer traces or hints of how people work out difference in their daily

> … a closer examination of legal processes reveals myriad ways in which people attempt to work out solutions. Legal decisions leave traces of those attempts through discussion of the 'facts' and through the submissions of the parties. Rather than understanding legal decisions as wins and losses, it became important in this work to map the traces of agreement, respect, solutions and acknowledgment of similarities. By imagining legal cases as processes, rather than as merely reflective of decisions, it is possible to recover the positive narratives that are often embedded in them. Systematically recovering such positive narratives opens the possibility for understanding a model of individual, group, and institutional life that has at its core deep equality.[694]

Beaman's argument is thought provoking: she advocates looking at law's stories as processes rather than decisions, to engage with religious diversity. However, I consider, through my dissertation that it not necessary to evacuate law *tout court*. Notes Roderick Macdonald,

> "legal pluralists do not seek to label everything as law. The goal is neither taxonomic nor definitional. Rather it is to study why certain human endeavours are characterized as legal and others are not. And it is to study who does the characterization? in what circumstances? and to what end?"[695]

As illustrated in my work, I engage with stories as both processes and decisions, to underscore *why* we need to cast a new eye over religion in public schools. Furthermore, I encourage developing humility as legal scholars that the 'best' answer may not, in fact, reside in judicial decisions.[696] Furthermore, delving into case studies, as done in this dissertation, highlights that the presence of lawyers in these contexts does not often alleviate, facilitate or streamline issues of religious diversity in the school setting. Some commentators have advocated for

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lives. They may contain evidence of hurt, potential insult, stereotypes, and anger. They illuminate the fragility and precariousness of resolution, and sometimes reveal the potential for things to have gone or to go in a different direction." See Beaman, *supra* note 96, at 6.

[694] Beaman, *supra* note 96, at 6.

[695] Macdonald, "Legal Republicanism", *supra* note 583, at 52.

[696] Benjamin Berger goes in a similar direction in his recent book, when speaking of the various traditions (law, religion) that may pull at a judge when faced with making a decision. He puts forth an account of adjudication that rests on both fidelity and humility: "The humility arises from an appreciation of the role that religious culture can play in identity, belonging, and the narration of a meaningful and authentic story about one's life. At the same time, this ethic [of humility] is inspired by an awareness of the limits of adjudication, limits that are exposed by a cultural account of the interaction of law and religion." See Berger, *supra* note 20, 173.

lawyers' involvement in strengthening inclusive education, referring to them, along with teachers, as "risk prevention partners".[697] Wayne MacKay argues that "lawyers and educators work together as risk prevention partners, and adversarial combat in courts and tribunals is seen as a failure of administrative process and policy making. I am convinced that the blending of lawyers' values and educators values' has produced not only a more inclusive education system but also a higher quality one as well." [698] While the goal is no doubt laudable, Mackay, by his own admission, acknowledges that the presence of lawyers has increased the focus on process rights, at the expense of the actual issue before the schools.[699] More generally, Thomas McMorrow has indicated an increased propensity toward the use of in-house lawyers by school boards "because of an increasing portion of their budgets [go] to legal services also adds support for observations of this trend [education law commentators map[ping] a trend toward an increasingly legalistic ordering within school systems]."[700] Mackay's argument, no doubt appealing from a harm reduction perspective, focuses instead, on a risk-mitigation strategy. It does not, however, allow us get at the root of the robust discussion that we should be having on religious diversity in public schools.

The question remains, however, as to what constitutes the best vehicle through which to foster deeper conversations about religious diversity in public schools. This dissertation has examined the 'informal' and 'microscopic' decisions and discussions that take place within the school setting on the subject of religion through three case studies. This analysis suggests that internal

[697] Mackay, "Safe and Inclusive Schooling", *supra* note 689, at 55.
[698] Ibid.
[699] Ibid, at 31.
[700] Thomas McMorrow, "Questioning the "Law" in Education Law" (2014) 23 *Education and Law Journal* 209, 222.

decision making processes would have provided a pathway forward; however, the case studies denote ineffective engagement with the internal processes, either through over-reliance on the adjudicative process, or through improper use of school channels. There have also been quotidian resolutions to questions of religious diversity, drawing on first-hand experience from a school principal.[701] For instance, Emilio Panetta, a long-time school principal in a Montreal north high school, home to an extremely diverse and low-income student population, discussed the manner in which he addressed diversity issues in his high school. Some of the tools can be understood as *structural* in nature, such as releasing a clear and public statement on the school's mission and mandate, to ensuring the ethnocultural diversity of the school staff as well as establishing French as the common language of communication. Other tools speak instead to *practical* considerations, such as a mandatory school uniform for students and staff, as well as for physical education and swimming courses as well as a school calendar that takes into account religious holidays in view of the exam schedule. Lastly, other tools yet engage with the school's *participatory* and *aspirational* structure, as noted through the school's willingness of the school to act as a site for pilot programs as well as the strong implication of recently immigrated parents to the school and fostering a sense of the importance of the school in their child's integration and well-being and the active participation in all student activities without exclusion or ghettoization.[702] While Panetta's approach is vital to the resolution of religious differences, it remains difficult to obtain such experiential knowledge. Other approaches have also been pursued in recent years, to guide schools and school administrators in better diversity

[701] See Emilio Panetta, « Les accommodements culturels, religieux et socioscolaires à l'école Henri-Bourassa » in Marie McAndrews, Micheline Milot, Jean-Sébastien Imbeault & Paul Eid (eds.), *L'accommodement raisonnable et la diversité religieuse à l'école publique : normes et pratiques* (Montréal, Fides, 2008), 57, at 59-60.
[702] Ibid.

practices. These include, but are not limited to: the reshaping of the school's code of conduct to encompass certain religious practices; the elaboration of inclusive education guides, usually province-wide; and lastly, the amendment of education and school acts to counter bullying and nurture diversity.

Indeed, enhancing school codes to include specific 'nods' to certain religious practices that students may carry are attractive for a variety of reasons. First, they provide concrete acknowledgments of the religious diversity of the school population. Second, such a framing offers checks and balances to the exercise of the belief; as will be seen below, this can also circumvent the discussion on securitization taking over that of religious beliefs. Finally, enhancing a school's code of conduct in such a manner aligns it further with the inclusive education mandate. Examples such as the inclusion of a 'kirpan provision' in the Prince George School District poicy in British Columbia should give us pause for thought:

> 3. The following are specific expectations that the Board regards as essential for student success and for a positive, safe learning environment. Therefore, each school, in consultation with parents, students and staff, will develop a school code of student conduct that will establish clear standards based on these district expectations and mandate specific consequences for students in violation of the school's code of student conduct.
>
> […]
>
> 3.4. Sikh students may wear kirpans in school, provided they are compliant with the faith tenets of the Khalsa Sikh religion.
>
> […]
>
> 7.1.3. Students in possession of objects that could be used as weapons while under the school's jurisdiction shall be reported to the parent/guardians, and, depending on the student's intent, be reported or referred to the Student Conduct Review Committee. The Student Conduct Review Committee shall send a summary to the parent/guardians, the school administrator and the Superintendent of Schools or his designate.
>
> 7.1.3.1. Should a student use a kirpan as a weapon, he or she will forfeit the right to wear the

kirpan in school and will be subject to the consequences outlined in this policy.[703]

The inclusion of such a provision reflects the religious diversity in that particular school district in British Columbia. Indeed, the presence of such a provision would have protected Gurbaj Singh Multani from protracted adjudication and public policy fascination. Such a provision would have also provided a nod to the diversity of the school body – especially in the context of the *classe d'accueil* – as well as its local specificities. It would be unfeasible – and unrealistic – however, to add provisions into the school code of conduct to reflect all religious practices that may have an incidence on school life. Such an approach would also favor religious beliefs over other identity markers or considerations. A further issue with this approach is that it not only favors (and codifies) religious practice over beliefs thereby reifying the split between these two elements, but also, provides a subjective account of how Sikhism is to be practiced (or at least respected). [704] Schools and school boards are already held to respect provincial human rights codes since they are creatures of provincial delegation,[705] as well as the *Canadian Charter* though *Charter* values; the 'kirpan provision' spells out what common sense should dictate.

Similarly, there has been a development of guides on diversity and inclusiveness for front line decision makers (such as school administrators), including religious observances and practices. It has emerged as another technique of taking notice of religious diversity in the student body

[703] School District No. 57 (Prince George), Policy 5131 (revised 28.06.2011).
[704] See Lori G. Beaman, ""It was all slightly unreal": What's Wrong with Tolerance and Accommodation in the Adjudication of Religious Freedom?" (2011) 23(2) *Canadian Journal of Women and the Law* 442, at 461-462. See also Lori G. Beaman, "Defining Religion: The Promise and the Peril of Legal Interpretation" in Richard Moon (ed.), *Law and Religious Pluralism in Canada* (Vancouver, UBC Press, 2008), 192-216 **[Beaman, "Defining Religion"].**
[705] See Chapter 1 of this thesis for a discussion of this point. See also Zwibel, "Faith in the Public School System", *supra* note 687.

population. Some seek to reiterate their commitment to diversity and guide the reader through a discussion on approaches to diversity, both from above and below.[706] Other guides have directly addressed religious diversity in schools, as recently adopted in Manitoba, "seeking to respond to the needs of their religiously diverse students and community."[707] These strategies are often included in broader inclusive education strategies, as seen most recently within the Ontarian context.[708] Instances of successful recognition of religious diversity in the student body include an interfaith calendar to facilitate and encourage student and community participation.[709] The latter guide offers concrete implementation measures for inclusiveness, including checks and balances to ensure follow-up and reflection.[710] The Manitoban guide brings other considerations to the forefront, including how to engage with Aboriginal spiritual beliefs in the context of schools. It uses the tradition of smudging in a school environment as a concrete example, taking into account students' beliefs, curricular outcomes, allergy and scent-free policy and smoke-free environment legislation, as well as best practices in other school environments to resolve this scenario.[711] The risk of these guides, however, is that they stultify our understanding of religious diversity *and* difference, potentially reducing complex patterns

[706] For instance, the BC Ministry of Education has issued such a guide: Ministry of Education, *Diversity in BC Schools: A Framework* (British Columbia, Ministry of Education, Rev. ed. 2008), online: www.bced.gov.bc.ca/sco/.
[707] Minister of Education and Advanced Learning, *Responding to religious diversity in Manitoba schools: a guide for educators (draft 2015)* (Manitoba, Ministry of Education and Advanced Learning), online : http://www.edu.gov.mb.ca/k12/docs/support/religious_diversity/full_doc.pdf, at 1.
[708] *Supra* note 685.
[709] Ibid, at 29. The example from the Toronto Catholic District School Board, cited at the same page, is a little more difficult to square with respect for religious diversity, since Catholic public schools are provincially subsidized. As such, their mandate is explicitly Catholic; at the same time, they are bound to accept students of non-Catholic background. This latter example illustrates, perhaps, most clearly, the challenges of having publicly-sanctioned (not to mention, constitutionally protected) and funded schools that are also vested (and funded) with religious purpose.
[710] Ibid, at 28-29, 42.
[711] *Supra* note 707, at 172-174. Manitoba has developed specific guidelines on smudging in 2014. See Ministry of Education and Advanced Learning, *Smudging Protocol and Guidelines (2014)* (Manitoba, Ministry of Education and Advanced Learning), online: www.edu.gov.mb.ca/aed/publications/ pdf/smudging_guidelines.pdf, at 6.

of belonging to checklists, where only outside intervention is needed in cases of deviation from the 'established' religious touchstones.[712] As argued by one author, front line decision-makers, such as school principals don't enjoy the same latitude when they are confronted by requests on the basis of freedom of religion:

> "[i]ls n'ont ni l'autorité, ni les moyens, comme c'est le case des tribunaux, d'examiner en profondeur la sincérité des demandes d'accommodement. De leur point de vue, la meilleure solution consiste à établir d'avance, avec l'aide des autorités religieuses ou d'autres experts, la nature des croyances et pratiques religieuses considérées comme étant véritablement et objectivement dans les communautés de foi concernées et pouvant, le cas échéant, servir de fondement légitime à une demande d'accommodement."[713]

The position above reifies law's control over religion; it positions the courts as the only 'viable' decision-makers and reinforces Beaman's concern over the "fetishization of religious diversity".[714] This dissertation seeks to take a more nuanced path to the one above. It argues that school administrators do have better insight and knowledge than judges on one subject, namely, their student populations; more time should be given to try to engage with these questions from within the school setting. A training document on religious and cultural diversity in schools in Quebec, adopted in 1997, speaks to school principals' ability and tools to constructively address (and potentially resolve) what is called here "conflicts of norms and values". Ten elements are listed to render a strategy effective and bear reproduction in full here:

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[712] As suggested by José Woehrling in "Quelle place pour la religion dans les institutions publiques?" in Jean-François-Gaudreault-Desbiens (ed.), *Le Droit, La Religion et le « Raisonnable » : Le fait religieux entre monsime étatique et pluralisme juridique* (Montréal, Les Éditions Thémis, 2009), 115. Woehrling suggests recourse to the courts would be acceptable if frontline administrators were confronted with an 'unknown' practice or one that is 'purely personal'. On religion in public schools more broadly, see Woehrling, "La place de la religion", *supra* note 51. See also Howard Kislowicz, *supra* note *supra* note 451, at 95.

[713] Woehrling, "Quelle place", *supra* note 712, 163.

[714] Supra note 554.

1. Take the time you need to make an informed decision.
2. Do not confuse issues and personalities.
3. Be sensitive to the presence of cultural "blinkers" on either side.
4. Do not hesitate to consult other people, especially experts in education and resource persons from minority groups.
5. Clearly establish your room for manoeuvre and make it clear to those you are dealing with.
6. Use a win-win approach in negotiation and emphasize partnership between the school and the family.
7. Focus the discussion on the here and now and do not allow it to be sidetracked into areas over which you have no control.
8. Do not allow yourself to become obsessed with the specific demand, but encourage the parties to define the problem in terms of common parental or professional concerns with respect to the child.
9. Seek varied solutions that are consistent with parental and professional concerns and are within your room for manoeuvre.
10. Develop follow-up strategies for explaining your decision and having it accepted by those people who may not be happy with it.[715]

These elements speak essentially to the art of negotiation, namely: taking the necessary time to address the question; acknowledging potential biases on both sides; recourse to outside consultation; recentering the discussion to keep on point; the development of a common project; and finally, the importance of continual feedback following a decision, in an effort to keep lines of communication open. As such, the question of resources and authority wanes by comparison, since school administrators have the time – and space – in which to get to know and strengthen their relationship with their students and their parents, and through this, develop strategies that would benefit common concerns.[716] The 2007 Fleury report which argued for greater sensitivity to school populations, and discussed in the context of

[715] Ministère de l'éducation, *Accommodating religious and cultural diversity in the school: training unit for school principals* (No. 8, Intercultural Education, Direction des services aux communautés culturelles, Quebec, 1997), online: http://collections.banq.qc.ca/ark:/52327/bs64376, at Table 1.

[716] See, for example, Panetta, Panetta, « Les accommodements culturels, religieux et socioscolaires à l'école Henri-Bourassa », *supra* note 701. This also speaks to the school as a distinct space of relationships and legal analysis, to be differentiated from those in a courtroom or airplaine, as discussed in Chapter 1.

deconfessionalization of schools in Quebec in Chapter 1 of my dissertation, provides a follow-up to the Minister of Education's initial guide on the handling of religious and cultural diversity requests.[717] This latter report frames the management of diversity requests in legalistic terms – "reasonable accommodation" or " voluntary adjustment" – signalling a normative shift from the initial framing for school prinicipals in 1997.[718] The guidance provided in the Fleury report speaks more to frameworks of accommodation rather than common sense applications, which are treated under the section of "voluntary adjustment", relying instead on the good faith and exchange of the parties.

While it would be patently unreasonable to expect school administrators to know the ins and outs of all religious practices and beliefs, these guides should act as initial reference points, but should not be understood as the end result; experiential knowledge, like that shared by secondary school principal Emilio Panetta, is also vital to understanding the experience of diversity on the (school) ground. Cases such as *Chamberlain*, *Multani* and *Commission scolaire des chênes* invite us to think more deeply about what religious diversity means in the context of

[717] Ministère de l'éducation, du loisir et du sport, *Comité consultatif sur l'intégration et l'accommodement raisonnable en milieu scolaire: une école québécoise inclusive: dialogue, valeurs et repères communs, supra* note 260, at 39.

[718] Ibid. A diagram is developed at that same page, which details the steps and remedies available in cases of accommodation or adjustment and is summarized here. The same initial steps are followed by all parties, namely, gathering all relevant information in order to foster an informed analysis of the situation; clearly establish each parties' expectations; and determine if there is a violation to the right to equality or a fundamental freedom. Two scenarios are presented: first, in case of an acknowledgment of infringement, whether the accommodation request should be accepted or refused; and second, in the absence of any infringement, whether, in the absence of legal reasons, whether an adjustment should be granted. In case of refusal of a request for accommodation or voluntary adjustment, the decision must be explained. In case of granting of the accommodating or adjustment, the parties must commit to a dialogic approach and mutual understanding in order to determine the different pathways to a solution. Following this step, the parties need to agree upon the choice and parameters of application; specify the commitments and reciprocal duties of each party; implement the solution; and lastly, foresee monitoring and implementation of the solution, which constitutes a specific response to a particular request. See also Beaman, *supra* note 96, at 113 (fn 198).

public schools. Our reflex, as jurists, is to find a solution, either in the form of a judgment, a codification or administrative policy. Our instinct, as jurists *and* citizens, however, should be to reflect further and try to understand more deeply what it means to live together and how public schools can ultimately better serve to fulfill that function. The latter is undoubtedly more time consuming, is less orderly and offers a more uncertain result. Nevertheless, this approach invites us to consider, on the one hand, the everyday experiences of students, teachers, administrators and parents and on the other, the meaning – and place – of public schools. Together, the parts of this reflective (and reflexive) process inform – and shape – our understanding of both law and religion.

Within the context of my thesis and case studies, substantive equality requires to look not at the zones of conflict, but rather, the everyday exchanges (not always leading to resolutions, however) that occur in the school spaces. These latter spaces are already sites of microlegal systems, as evidenced through my case analyses. They reinforce this Chapter's argument, namely, that schools are "always already"[719] 'complex constitutions', which strengthen and further situate our relational web of belonging. The focus on the institutional framework and internal decision-making processes has allowed us a glimpse into discussions about difference in these microsystems of belonging. In taking Cameron and Daly's argument further, this work suggests that more attention needs to be given to everyday stories and exchanges in the setting of schools. It is only through these that we will develop a better understanding of religion, and

[719] "Always already" is drawn from Heidegger's work, to suggest that we are always already somewhere and should acknowledge this as our starting point: Martin Heidegger, *Being and Time* (translated by Joan Stambaugh) (Albany, State University of New York Press, 1996 reprint, original 1927), 140.

each other.

Conclusion

In this Chapter, I have argued that internal decision-making processes, such as the ones available within the school's institutional framing, are more likely to allow for a better understanding of children's belonging and narratives. This context accentuated the practical and to a different extent, preventive, aspect rather than a retroactive, adjudicative approach. The institutional framing (and that of administrative law), in its everyday application, advances a framework of inclusion and pragmatic problem solving, rather than one of rights-violation and formal legal standards. I argued for this shift on the basis of three premises: first, to nuance the 'single story'; second, to shift away from the language of rights to understand everyday exchanges over and through religious beliefs; and third, to focus on the broader questions of democratic governance, communities and religious diversity. These premises enabled me to favor what I have called a bottoms-up approach to challenges of religious diversity.

I furthered my analysis of schools as singular sites of law-making in this Chapter by engaging with the administrative decision-making bodies and structures that are unique to schools. I facilitated this discussion by engaging in a deeper understanding of microsystems and microlegal systems, which highlighted the need to look at incremental changes. I accomplished this by focusing on schools as 'complex constitutions'; I offered that schools as 'complex constitutions' provide a deeply relational approach to rule- and decision-making, built on the

power of relationships. I argued that schools, as complex constitutions, underscore the challenge of diversity in this setting and it is useful to take them more seriously as sites of decision-making rather than spaces of accommodation. Taken in this light, and drawing on Sheppard's work, questions of diversity in schools should foster "relations of solidarity".[720] I then argued that insights into the institutional context were provided by the documentation of the pre-judicial decisions. The 'inside out'/'outside in' dichotomy, used to discuss my case studies, enabled me to tease out policy discussions embedded in the administrative decision-making process on the one hand, and on the other, the broader policy backdrop and how they feed into the administrative decision-making process (and to a later extent, the court cases). Thus, the focus on *Multani*, *Chamberlain* and *Commission scolaire des chênes* uncovered a deeper tension running throughout my thesis: it is not only a question of situating children's voices in disputes on religious diversity in the setting of schools, but also, an inquiry into *how* we include parents and religious communities in school discussions on governance, democracy and school boards. This led me to examine how student participation could lead to an increased understanding of their voice in the setting of schools, but underscoring some of the challenges in doing so. I then reflected upon Angela Cameron and Paul Daly's argument on substantive equality being furthered through administrative law in when discussing Charter values in education and pushed their argument further to better take discussions about religion into account. Through this lens, a thicker understanding of belonging and equality was elaborated, through an examination of particular codes of conduct and guides on religious diversity in schools. Codes of conduct need not reproduce provincial human rights codes, since they are

[720] *Supra* note 565.

already subject to the latter's jurisdiction. Rather, it is a question of fostering deeper spaces of exchanges within school walls.

In conclusion, this Chapter has endeavored to step out of adjudication's limelight when it comes to questions of religious diversity in public schools. Instead, it sought to further engage with everyday exchanges to better understand the place and challenges of negotiating religious diversity in the setting of schools. Seeing schools as 'complex constitutions', rather than just initial sites of discord, allows us to better situate our discussion about religion in public schools.

General Thesis Conclusion

"I find these questions immensely difficult because we are using the lens of adults to go back almost retroactively to when we were younger and – and try to identify these kinds of issues."[721]

- Justice Iaccobucci

This thesis sought to engage with the complex stories embedded in litigation about religion in public schools in Canada, and to explore schools as sites of legal analysis. I argued that formal law fails to adequately engage with religious diversity in public schools, and more specifically, that children's voices are constrained, and oftentimes absent, within the context of these legal disputes. I maintained that internal decisions in school contexts also reveal a much thicker discussion about how we deal with religious diversity within this setting, since they are microsystems worthy of their own consideration, and constitutive of their own rules and relationships. Within this framing, I argued that schools should be understood as "complex constitutions", since they provide a deeply relational approach to rule- and decision-making, built on the power of relationships. Such a rethinking of constitutionalism in the everyday working of schools – an approach that resonates deeply with legal pluralism – has rarely been explored in the legal literature and my thesis thus aimed to fill this gap. This approach resonates deeply with legal pluralism. In understanding schools as "complex constitutions", this thesis underscores that schools need to be taken more seriously as sites of decision-making rather than as spaces of accommodation, in the context of claims of religious diversity. This latter argument also points to a shift away from the courts as the 'favored' space of religious

[721] *Chamberlain v. Board of Trustees of School District #36 (Surrey)*, SCC transcript (June 12 2002), p. 28 (Arvay).

resolution, towards making the ground processes in schools more welcoming of religious diversity.[722]

Justice Iaccobucci's quote above demonstrates the inherent challenge in 'seeing' the issues of diversity and religious beliefs from a child's perspective. This thesis aspired to investigate the conversations on religion and education prior to and during the adjudicative process, employing three case studies to illuminate the discussion. Taken as a whole, *Chamberlain*, *Multani* and *Commission scolaire des chênes* generate an important narrative on religion and public education in Canada.

Chapter 1 elaborated law's understanding of religion in education in the Canadian context. As noted, education's mandate as agent of socialization rests uneasily with the subject of religion. Within the Canadian context, it is illustrative of the lasting legacy of the negotiations at the time of Confederation. It is a distinctive feature of our constitutional landscape and indicative of the power of religious communities and schools within this conversation. This chapter argued that schools, as sites of legal analysis, have not received adequate attention. Drawing on the example of deconfessionalization of schools in Québec, this chapter endeavored to highlight the imbricated nature of secularization policies and the (re)shaping of social institutions, and more generally, illuminated the interrelationship between religion and schools in the rest of Canada.

[722] Lotem Perry-Hazan argues that the focus on a single issue in the context of court-led educational reform is also deeply problematic, since it reduces the scope of action and increases diviseness. See Perry-Hazan, "Court-led educational reform", *supra* note 120, at 5.

Chapter 2 argued that legal storytelling provides an important vehicle by which to discuss these nuanced stories about religion and education. This Chapter focused particularly on the litigation stories told in court, and thus relied on the evidentiary records. This approach to legal analysis enabled an in-depth examination of the various perspectives involved in my three case studies and laid bare some of the inherent challenges related to the judicial stories involving children, education and religion. It also enabled me to develop an important narrative thread in terms of the challenges of safeguarding religious diversity in the context of public schools. This Chapter suggested, by way of conclusion, that the adjudication process produced judicial stories that can be qualified as the 'legal curation' of children's narratives.

In the context of religious claims in public school settings, Chapter 3 proposed that children's narratives have the potential to be less constrained in the context of institutional spaces and are more likely to heard and taken into consideration in everyday decision-making processes. In this regard, institutional design underlines the relevance of individual and/or group actors, and their inclusion and/or exclusion. This Chapter argued that internal processes – such as administrative make-up, organizational politics and through internal codes of conduct – presented the best opportunity for children's voices to be included in the decision-making process. Looking at incremental change within this context also strengthened my Chapter's main argument, namely, that schools are complex constitutions, which, if taken with proper consideration, underscore the challenge of diversity and it is relevant to take them more seriously as sites of decision-making rather than simply as spaces of accommodation.

As elaborated in my General Thesis Introduction, I engaged with this area of investigation to further my understanding of my personal stories of religion and education, as well as my professional interest in this domain of study. This dissertation sought, therefore, to untangle children's narratives and stories about religion from our public schools, in view of developing a more robust understanding of this privileged space of learning about each other and about ourselves.

In the fullness of time: on boundaries and belonging in the context of public schools in Canada

The ambitions of this thesis were humble in nature and did not seek large-scale reform of freedom of religion in Canada. Rather, I focused on the law of religious freedom in everyday life in the context of three public school case studies. The sample size in this thesis is small for the reasons detailed in my Introductory Thesis Chapter. The choice for the narrow focus was deliberate, since on the one hand, a thesis project must be manageable in size and on the other, provide a cogent narrative from which to draw conclusions.

As such, my thesis sought to offer a nuanced understanding of freedom of religion for children in the Canadian context, rather than proposing an unreserved transformation, which would be both impracticable and unsuitable. Let me first address the things this thesis did not do. First, the argument of *impracticability*: the aim of this thesis was not to provide an alternative or child-friendly 'sincerity of belief' test to the one developed in *Amselem*. Many criticisms have

already been levied at the sincerity test since its inception[723] and devising a child-friendly version would not have added substantively to this conversation. The addition of such a version would undoubtedly present an inflexible perspective to how we understand children to be 'religious'.[724] Furthermore, the formulation of a child friendly version would have required substantially further legal shading, since a child's right to freedom of religion is different if we are speaking of an infant, a toddler, a pre-pubescent child or an adolescent; the list of impracticable arguments grows long upon closer examination. Second, the argument of *incongruousness* or *unsuitability*: promoting a child friendly sincerity test would have reinforced the preeminence of religious rights and hierarchy of rights that are protected in our Canadian constitutional order.[725] This latter argument is not one I wished to make. Rather, this thesis has sought to explain the physical and evidentiary barriers that children face in claiming religious rights – and relatedly, the challenges in defending public policy, like the ERC program when faced with students' rights. Both the arguments of *impracticability* and *incongruousness* illustrate the relational pull of these claims, highlighting that these are rarely only about the child, but also about the parents and religious community. These arguments also bring into

[723] For a small sampling, see: Bruce Ryder, "State Neutrality and Freedom of Conscience and Religion" (2005) 29 *Supreme Court Law Review* (2d) 169; Richard Moon, "Religious Commitment and Identity: Syndicat Northcrest v. Amselem " (2005) 29 *Supreme Court Law Review* (2d) 201; Beaman, "Defining Religion", *supra* note 704; Lori G. Beaman, "Is Religious Freedom Impossible in Canada?" (2012) 8(2) *Law, Culture and the Humanities* 266; Margaret H. Ogilvie, "And Then There was One: Freedom of Religion in Canada – the Incredibly Shrinking Concept" (2008) 10 *Eccl. L.J.* 197; Berger, "The Cultural Limits of Legal Tolerance", *supra* note 392; Shauna Van Praagh, "View from the *Succah:* Religion and Neighbourly Relations" in Richard Moon (ed.), *Law and Religious Pluralism in Canada* (Vancouver, UBC Press, 2008), 21-40; Daniel Weinstock, "Beyond Objective and Subjective: Assessing the Legitimacy of Religious Claims to Accommodation" (2011) 6(2) *Les ateliers de l'éthique/The Ethics Forum* 155-175.

[724] Such an interpretation of children would inhibit the other facets of their identity on the one hand, and on the other, how we understand religion generally. For an early review of this in the American context, see Lori Leff Mueller, "Religious Rights of Children: A Gallery of Judicial Visions" (1986) 14 *N.Y.U. Rev. L. & Soc. Change* 323. See discussion in the Introductory Chapter of this thesis for the Canadian component of analysis.

[725] As noted by the Supreme Court, the *Charter* does not promote or create a hierarchy of rights: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835 at 877; *Reference re Same-Sex Marriage*, *supra* note 84*,* ¶ 50; *Gosselin (Tutor of) v. Quebec (Attorney General)*, [2005] 1 SCR 238, ¶ 25-26; *Chamberlain*, *supra* note 4, ¶ 150 (Gonthier J., dissenting).

conversation how we recognize the role of our public schools within our understandings of religion.

In dispatching the arguments related to what my thesis *did not do*, I now move to the arguments that I did make within the corpus of my dissertation.

The stories used at the outset of my thesis spoke about illustrations of children's agency and imagination in the face of majoritarian practices in schools. My personal stories of religion in schools spoke to children's resilience in encounters with obligatory school practices, missionary ethic and unsanctioned (and unbecoming) behaviour. They spoke also to the reality that not all cases involving religious difference need to be litigated. School-level decisions can act as a more conducive milieu in which to address questions of discrimination: the personal stories, lessons from *Multani* and the focus on the individual student, rather than abstract principles, all speak to schools as appealing sites of process-based decision-making. Nevertheless, schools should not be thought of as infallible: there are risks in assuming that the school level decision-making will be better. Courts need to act as a check to protect rights when everyday decisions are made in ways that are exclusionary or discriminatory.

The use of space as a discrete lens through which to analyse children, religion and education in Canada enabled me to bring three disparate but related threads into conversation, namely legal geography, the geography of education and the geography of religion. It allowed me to slow down the conversation to our everyday experiences of law and religious difference in the

context of schools. Considerations over jurisdiction and space here speak to how we imagine and reinvent our communities of belonging;[726] this consideration is amply illustrated through my three case studies as well as my parents' stories of education and religion. Attentiveness to space also enabled me to engage with the different facets of decisions over religious difference, both within and outside the realm of adjudication.

My thesis argued for schools to be understood as complex constitutions, fostering a deeply relational approach to rule- and decision-making, built on the power of relationships. A contextual analysis of – and dialogic approach to – *Chamberlain, Multani* and *Commmission scolaire des chênes* underscore *how* – and *what* – we understand belonging and tolerance to be in the realm of public education. Such an approach also revealed the challenges, both methodological and theoretical, of putting children at the forefront of these settings and the difficulty of hearing children's voices in the legal setting. Within this setting, it becomes clear that litigation does not tell the whole story. Approaching these cases through a 'thick' or 'deep' analysis reduces the space in which examination takes place when talking about religious diversity in schools. It focuses on the importance of relationships through storytelling. As noted at the outset of this thesis, schools form "micro-territories of everyday life".[727] The internal decisions uncover how we talk about religion and children and their own responsibility within that decision-making process, employing insights from both legal pluralism and legal geography: such an approach made a compelling case for schools as informal sites of law-

[726] Benjamin Berger has spoken about this in terms of the "aesthetics of religious freedom" in Winnifred Fallers Sullivan & Lori G. Beaman (eds.), *Varieties of Religious Establishment* (Burlington, Ashgate AHRC/ESRC Religion and Society Series, 2013), 33-54 and more recently in *supra* note 20, 42-52.
[727] *Supra* note 99.

making. The documentary evidence analysed in the pre-litigation portion of my thesis provided important insights into the institutional context of schools, as well as a method to further sites of investigation on religious diversity. Finally, a constitutional analysis of education's domain in federal-provincial division of powers underscored its privileged position within our constitutional edifice. Within this context, education's role has been instrumental in understanding the incremental shifts towards the secularization of public institutions.

Reflections on future avenues of research

The field of education law is perhaps one of the most complex areas of constitutional inquiry in Canada. The matrix of provincial or territorial specificity, historical religious and linguistic minorities, models of integration and current understandings of education, present a formidable legal cocktail, one that I would deeply like to pursue as a legal scholar.

As noted, schools have provided a unique lens of legal analysis in my thesis and it is one that I wish to explore in future research. The use of evidentiary files and administrative frameworks offer a different vantage point than solely the final decision and would provide a rich terrain for further inquiry. A few areas would benefit from this form of legal analysis, in my view. First, a broader study on the impact of religious diversity, religious instruction and religious education in both public and private schools would be greatly beneficial to our understanding of the role that education plays in forming our future citizens. Related to this, the recent controversy over

the creation of a law school by Trinity Western University,[728] a private Christian university, suggests that the apprehensions over the place of religion in postgraduate education is also a going concern. Second, and drawing from my thesis conclusions, a more specific project on school codes of conduct, would be appealing to carry out and has been highlighted as being demonstratively necessary. Much of the research on codes of conduct has focused, up until now, on the negative impact of these codes on racial minorities and students with disabilities,[729] as well as the disciplining of student bodies.[730] Less attention has been paid, however, to how religion is addressed in these codes of conduct, whether directly or indirectly, in small towns or large metropolitan and multicultural cities. Moreover, codes of conduct from religious schools have conscientiously been set aside by some researchers since, as admitted by one author, "while interesting, are complicated by the specialized, religious context of the school."[731] In addition to public schools' 'public' mission, it is the 'specialized' context of the private schools that further compels me to examine these areas of so-called 'soft law'. Third, the issue of the constitutional protection of linguistic minority education in Canada presents another significant vector of legal analysis, as reiterated recently,[732] and would enable me to engage in contextual examination of narrative, linguistic and spatial considerations. Along with

[728] *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25 (currently on appeal before the Nova Scotia Court of Appeal: see *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25, appeal as of right to the CA, no. 438894 (28 August 2015)); *Trinity Western University v. The Law Society of British Columbia*, 2015 BCSC 2326; *Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250.

[729] See, for example: Ontario Human Rights Commission, *The Ontario Safe Schools Act: School Discipline and Discrimination* (2003), online: http://www.ohrc.on.ca/en/ontario-safe-schools-act-school-discipline-and-discrimination; Civil Rights Project Harvard University, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies* (2000), online: http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf.

[730] See, for example: Rebecca Raby, "Polite, Well-dressed and on Time: Secondary School Codes of Conduct and the production of Docile Citizens" (2005) 42(1) *CRSA/RCSA* 71 **[Raby, "Polite, Well-dressed"]**; Raby, *supra* note 657.

[731] Raby, "Polite, Well-dressed", *supra* note 730 at 75.

[732] *Rose - des - vents, supra* note 235.

religious belonging, linguistic identity constitutes a rich area of statutory privilege.[733] Finally, the questions raised in the context of schools, namely governance and religious diversity can also serve as a prism through which to study other issues, such as the funding of public institutions with a religious vocation (or vestiges) and their obligations in light of such controversial issues as doctor-assisted dying.[734] While some might consider the discussion of funding to be extraneous to the issues at hand, I consider them central to understanding the narratives of rights and obligations and deserving of further analysis.

In sum, narratives about children, religious diversity and public education reveal much more than a simple discussion about religious courses or religious rights. The juxtaposition of these narratives provides an unparalleled vantage point into the making of civil society and our understanding of tolerance and difference. Through the prism of religious diversity and law in Canada, this dissertation has endeavoured to develop public schools as sites of boundaries and belonging, or put differently, as complex constitutions.

[733] See s. 23 of the *Canadian Charter of Rights and Freedoms, supra* note 159. Parallels have been drawn between religious and linguistic privileges in school settings. See, for example, *Erazo*, *supra* note 10 at 11, where the Catholic school board argued (unsucessfully) that the religious program was akin to linguistic program considerations. In *Erazo,* the religious expectations were conveyed as analogous to the "ethos of French schools (both Catholic and public) [in Ontario] in the use of their French assemblies, cultural trips to Quebec, local "Bonhomme Carnaval" (winter carnivals), the playing of French radio stations during lunch, the prohibition on the use of English on school buses, fund raising for French endeavours, French daily announcements, French daily announcements, French folk events, celebration of St-Jean-Baptiste Day, all of which are part of the fabric of French school, and certainly not programs."

[734] *Carter v. Canada (Attorney General)*, [2015] 1 SCR 331; Sean Fine, "Canada's Catholic hospitals in a tough spot on assisted death", *The Globe and Mail* (4 March 2016) online: < http://www.theglobeandmail.com/news/national/canadas-catholic-hospitals-in-a-tough-spot-on-assisted-death/article29040629/>. See also *Loyola*, *supra* note 9; *An Act Respecting End-of-Life Care*, RSQ c S-32.0001.

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Appendix 1

Request for Supreme Court of Canada Transcripts

SUPREME COURT OF CANADA / COUR SUPRÊME DU CANADA

To/À: Registrar / Registraire

From/De: Records Centre / Centre des dossiers

Date: September 28 2015

Subject/ Objet: Fee Waiver / Dispense des frais

A fee waiver has been requested. / Une demande pour dispense des frais a été déposée.

File / dossier : 33678 (S.L. et al. v. Commission scolaire des chênes, [2012] 1 RCS 235)

On behalf of / de la part de: Dia Dabby (dia.dabby@mail.mcgill.ca)

For the purpose of / pour le but de: Doctoral thesis, Faculty of Law, McGill University (under the supervision of Professor Colleen Sheppard)

Comments of the Client / Commentaires du Client:

I would like to obtain a copy of the transcription (112p) (received 2011-06-13).

I am particularly interested in how, or if, children's voices are part of the conversation when questions of religion and schools arise. To this end, I am focusing on the evidentiary record in a select number of cases to explore how children's voices appear, notably through affidavits, examinations and court transcripts.

Records Centre Recommandation / Recommandation du Centre des dossiers:

Granted / Approuvée :_____ **Denied / Rejetée :_____**

_____ **Date _____ 2013**

Registrar / Registraire

Macintosh HD:Users:diadabby:Documents:McGill DCL:SCC transcripts (Chamberlain & Multani & Commission scolaire des chesnes):Court Fee Waiver-3 (Dia Dabby).docx

SUPREME COURT OF CANADA / COUR SUPRÊME DU CANADA

To/À: Registrar / Registraire

From/De: Records Centre / Centre des dossiers

Date: January 16 2014

Subject/ Objet: Fee Waiver / Dispense des frais

A fee waiver has been requested. / Une demande pour dispense des frais a été déposée.

File / dossier : 28654 (Chamberlain v. Surrey School District No. 36, [2002] 4 SCR 710)

On behalf of / de la part de: Dia Dabby (dia.dabby@mail.mcgill.ca)

For the purpose of / pour le but de: Doctoral thesis, Faculty of Law, McGill University (under the supervision of Professor Colleen Sheppard)

Comments of the Client / Commentaires du Client:

I would like to obtain a copy of the transcript (155p) (received 2002-06-28).
I am particularly interested in how, or if, children's voices are part of the conversation when questions of religion and schools arise. To this end, I am focusing on the evidentiary record in a select number of cases to explore how children's voices appear, notably through affidavits, examinations and court transcripts.

Records Centre Recommandation / Recommandation du Centre des dossiers:

Granted / Approuvée :_____ **Denied / Rejetée :_____**

_____ **Date _____ 2013**
Registrar / Registraire

Macintosh HD:Users:diadabby:Documents:McGill DCL:SCC transcripts (Chamberlain & Multani & Commission scolaire des chesnes):Court Fee Waiver-2 (Dia Dabby).docx

SUPREME COURT OF CANADA / COUR SUPRÊME DU CANADA

To/À: Registrar / Registraire

From/De: Records Centre / Centre des dossiers

Date: January 16 2014

Subject/ Objet: Fee Waiver / Dispense des frais

A fee waiver has been requested. / Une demande pour dispense des frais a été déposée.

File / dossier : 30322 (Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 SCR 256)

On behalf of / de la part de: Dia Dabby (dia.dabby@mail.mcgill.ca)

For the purpose of / pour le but de: Doctoral thesis, Faculty of Law, McGill University (under the supervision of Professor Colleen Sheppard)

Comments of the Client / Commentaires du Client:

I would like to obtain a copy of the transcription (70p) (received 2004-05-26).

I am particularly interested in how, or if, children's voices are part of the conversation when questions of religion and schools arise. To this end, I am focusing on the evidentiary record in a select number of cases to explore how children's voices appear, notably through affidavits, examinations and court transcripts.

Records Centre Recommandation / Recommandation du Centre des dossiers:

Granted / Approuvée :_____ **Denied / Rejetée :_____**

_____ **Date _____ 2013**
Registrar / Registraire

Macintosh HD:Users:diadabby:Documents:McGill DCL:SCC transcripts (Chamberlain & Multani & Commission scolaire des chesnes):Court Fee Waiver-1 (Dia Dabby).docx