# The Right to Education in Canada: A Difficult Beast to Tame

***Gregory M. Dickinson****

## 1. Introduction

Although the purposes of education have shifted and been re-calibrated over the years, the idea that schooling is an important private and social good, critical to individual and societal well-being, has increasingly helped define Canadian democracy. Hence, free schools, followed by compulsory school attendance laws – though generally only for ages 7 to 12 – were in place quite early in Ontario (1874) and elsewhere.[1] Not surprising, all provinces and territories have enacted compulsory school attendance provisions – normally for children between the ages of 6 and 16,[2] although in Ontario the secondary school teachers' federation recently suggested that the school leaving age should be hiked to 18.[3]

This article, however, is not about *state-compelled* school attendance, but rather the obverse: the *right* to attend school. Indeed it is about more than that, as in many ways it is wholly inadequate to think of attendance at school and education as synonymous. So while the right to attend school is part of the answer, it is far from the whole answer to the question of the right to education. A meaningful answer needs to explore the nature of the experience children have when they attend school, which, in turn, begs an array of related issues regarding the quality of the education and whether it serves not only the purposes espoused by the state, but also those expected by parents, students and the general public.

Even as unpacking the implications of what 'education' means in the context of the question is challenging, so it is with the concept of 'rights'. Whose rights are we talking about – those of the child or his or her parents? Should the conception of rights include only those contained in and enforceable by positive law – domestic and international laws duly passed by the respective governing bodies? Or should the examination extend to rights embedded in so-called 'natural law', whether religiously or humanistically derived? The scope of this article precludes extending the discussion beyond positive law rights. And, I have some sympathy with Bentham's pronouncement that natural rights are 'nonsense upon stilts' – that is, the concept of rights has real meaning only when and where there is legal machinery to enforce them. Hence, I will confine my analysis of the right to education to the positive law regime in Canada that provides and helps enforce the right to education, in the knowledge and acknowledgment, however, that natural law philosophies and the politics of their various adherents can have an enormous impact on the creation, interpretation and enforcement of positive law.

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* Gregory M. Dickinson, B.A., LL.B., Ed.D. of the Bar of Ontario, Professor, Faculty of Education, The University of Western Ontario, London, Canada. The author is grateful to his colleague and friend, Dr. Jerald Paquette, who read a draft of this chapter and provided advice, especially on the matter of Aboriginal education.

1 Lawr, D. and Gidney, R. (eds) (1973), *Educating Canadians: A Documentary History of Public Education*, Van Nostrand Rheinhold, Toronto at pp. 61-66.

2 For a complete tabulation of compulsory school legislation in the provinces and territories, including requirements for attendance and penalties and excuses for non-attendance, see Wilson, J. (1994), *Wilson on Children and the Law*, Butterworths, Toronto (loose-leaf updated service) at App. 13. See also www.right-to-education.org/content/age/canada.html.

3 According to a University of Toronto economist, there is evidence to suggest a positive correlation between adding years of compulsory schooling and students' lifetime welfare. See Oreopoulos, P. (2003), 'The Compelling Effects of Compulsory Schooling: Evidence from Canada', July. Accessible at: www.economics.utoronto.ca/oreo/research/cancompuls/canada%20compulsory%20laws2.pdf.

Moreover, the mere fact that enforcement mechanisms exist is not an effective tool of measuring the *exercise* of the right in question. Innumerable reasons exist why rights may not be exercised by rights-holders – from socio-economic, cultural and political reasons to systemic discrimination in social and legal institutions. An analysis of educational indicators prepared jointly by Statistics Canada and the Council of Ministers of Education, Canada[4] and the kind of social, legal, and economic barriers that may block educational access, participation and attainment is far beyond what can be done here. But it is very much a part of the answer.[5]

One final *caveat*: it is nearly impossible – except in an exhaustive and lengthy treatise – to be completely accurate and comprehensive in one's remarks about the laws in place in a federal state such as Canada, especially where the subject-matter is controlled exclusively at the provincial rather than national level. So this examination seeks to be broadly applicable to the nation as a whole, in the understanding that it cannot account for all local variations. And, I may be pardoned, I hope, if Ontario is more front and centre in the statutory and case law examples cited, as they are the ones I know best.

This article first sets out briefly the constitutional framework in Canada insofar as it bears on the right to education, including whether a constitutional right to education can be implied under the Canadian Charter of Rights and Freedoms.[6] It next probes the extent to which provincial school acts and regulations, and provincial human rights codes, provide a general right to education. Third, it will summarize Canada's international obligations in the provision of education. The problematic collision of domestic and international law in this arena is illustrated in a later section through a discussion of a case in which Canada was found in violation of its obligations to provide equal educational opportunity under the International Covenant on Civil and Political Rights.[7] Finally, I will sketch out four contexts of the right to education in Canada: special education rights; religious rights; educational malpractice; and, the education of Aboriginal children. Again, these are not exhaustive but merely illustrative.

## 2. Getting Some Constitutional Bearings

### (a) Distribution of Legislative Powers

Canada, which is composed of ten provinces and three territories, and subject to federal governance by a national Parliament in Ottawa, was created as a federal state in 1867. The act of Confederation, the British North America Act, 1867[8] (now called the Constitution Act, 1867[9]) distributed legislative competence over an array of matters between the Parliament of Canada (section 91) and the legislative assemblies of the provinces (section 92). Education was deemed sufficiently important and politically contentious that it received a provision of its own (section 93).[10] In short, section 93 states that the provinces have exclusive legislative jurisdiction over education, except that the rights held by law in 1867 by religious denominational schools (originally Roman Catholic Separate Schools in Ontario and Protestant schools in Quebec), such as funding and governance rights, cannot be prejudicially affected by provincial laws or governmental action.[11]

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4 See Statistics Canada. *Education Indicators in Canada* accessible at: http://www.statcan.ca/english/freepub/81-582-XIE/1999001/1999001.htm. See also Education at a Glance: OECD Indicators. Country Profile for Canada. Council of Ministers of Education, Canada, 2004, accessible at: http://www.cmec.ca/stats/Profile2004.en.pdf

5 For the classic essay, see Coleman, J. (1968), 'The Concept of Equality of Educational Opportunity', *Harvard Educational Review*, 38, p. 7. Readers are also urged to consult what I consider to be a definitive exploration of the legal context of equality of educational opportunity in Canada, conducted by Smith and Foster in a series of two articles: see Smith, W. J. and Foster, W. F. (2003), 'Equal Opportunity and the School House: Part I – Exploring the Contours of Equality Rights', *E.L.J.*, 13, p. 1 and W. J. Smith and W. F. Foster (2003), 'Equal Opportunity and the School House: Part II – Access to and Benefit from Education for All', *E.L.J.*, 13, p. 173.

6 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, s. 15(2).

7 Can. T.S. 1976 No. 46.

8 1867, 30-31 Vict., c. 3 (U.K.).

9 The name was changed under the Constitution Act, 1982 being Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11.

10 For good reviews of the history of section 93, see Smith, W.J. and Foster, W.F. (1999-2000), 'Part 1 – Religion and Education in Canada: The Traditional Framework', *E.L.J.*, 10, p. 393 and Maybank, R. (1996-98), 'Have Constitutionally Protected Denominational Guarantees Inhibited the Modernization of Educational Governance Structures?', *E.L.J.*, 8, p. 315.

11 In 1997 Quebec secured a constitutional amendment to section 93, as it affects that province, to permit it to realign its school system along linguistic rather than denominational lines. And, in 1998, Newfoundland obtained an amendment to Term 17 of the Terms of Union of Newfoundland with Canada, 1949 permitting it to do away with a very expensive and cumbersome multi-denominational school system. Most jurisprudence regarding denominational rights has arisen in Ontario and Quebec. Other provinces, British Columbia, for example, had far fewer laws in place when they joined Confederation than did Ontario and Quebec and hence considerably fewer denominational rights exist there today: Finkelstein, N. (1985), 'Legal and Constitutional Aspects of Public Funding for Private Schools in Ontario', in: Bernard J. Shapiro, Commissioner, *The Report of the Commission on Private Schools in Ontario*, Queen's Printer.

By law, and as interpreted by the courts, then, education is an area from which the national government in Ottawa must abstain, having the ability to influence educational policy only indirectly through financial incentive programs and other policies arising out of its own areas of legislative competence, e.g., bilingualism, human resource planning, technology, and the national economy. It is clear that it is only by dint of political and economic leverage, rather than legal fiat, that Ottawa can direct provincial educational policy, an important reality in the context of Canada's international human rights obligations discussed below.

**(b) Entrenched Constitutional Human Rights: the Canadian Charter of Rights and Freedoms**

In 1982, after a tortuous and drawn-out process, the Canadian Constitution was patriated by the Constitution Act, 1982,[12] which was enacted by virtue of the 1982 Canada Act[13] passed by the Parliament of the United Kingdom. The Constitution Act, 1982 did a number of important things but it did not disturb the distribution of powers set out in the Constitution Act, 1867. Undoubtedly the most celebrated parts of the 1982 patriation package were Part I of the Act – the Canadian Charter of Rights and Freedoms (hereafter the 'Charter') – and section 52 of the Act, that provides that any law, federal or provincial, that is inconsistent with the rights contained in the Charter is of no force or effect. This provision gives the judiciary the power to nullify duly enacted federal and provincial laws – a power that has been used in some cases to judicially shape such laws by carving out objectionable portions or 'reading in' wording the courts deemed necessary to give effect to Charter rights. As such, the tandem of the Charter and section 52 has been harshly and persistently criticized for gutting the principle of parliamentary supremacy. For Charter supporters, though, section 52 provides the necessary teeth to enforce the rights in the Charter and render it a mandatory rather than hortatory rights document.

In addition to ruling offending laws inoperative the Charter gives courts the authority to make declarations of rights violations, and literally to give such remedies as they deem just under the circumstances, which generally has meant restrictive or mandatory injunctive relief but can also include the awarding of damages.

Surprising to many, especially given the constitutional importance the Fathers of Confederation placed on education in 1867, the Charter contains no explicit general right to education. This is a striking omission because, as MacKay points out, the provision of a 'right' to education by the state via ordinary legislation is more in the nature of a privilege than a right because it can be as readily withdrawn as it was granted.[14] The only express conferral of educational rights in the Charter is in connection with minority language educational rights – and then only for the two official language groups, anglophones and francophones (section 23). So it is true to say that the only groups in Canada afforded an explicit right to education, a right that has been interpreted by the courts to incorporate a qualitative element – are English and French speakers. Even then, the rights are granted to parents and not to children directly, and to persons whose first language learned and still understood or who received their primary school instruction in a language (English or French) that was a minority language in the province in which they were educated. Although the classes of rights-holders under section 23 are narrow, and indeed have been seen that way by the courts, the Supreme Court of Canada has interpreted the nature of the right itself in a broad, purposive way, holding that the true purpose of the section is not only equality of educational opportunity and the learning of the minority language, but the maintenance and enhancement of the minority culture.[15] Parental rights of governance of minority language schools or districts have also been implied under the section. Exactly *how* section 23 rights are to be afforded in a given province has largely been left up to the provincial government so long as it complies with the Supreme Court's broad 'sliding scale' approach toward the 'where numbers warrant' test set out in section 23.[16] Provincial responses have varied in accordance with their demographics, including the establishment of French first-language schools and school districts.

There is only one other explicit reference to education in the Charter. Although section 29 does not confer a right to education *per se*, it states that nothing in the Charter shall be interpreted to detract from denominational educational rights under section 93 of the Constitution Act, 1867. This provision effectively ensures that, at least in this respect, one part of the Constitution – the Charter – will not override the other – the Constitution Act, 1867, although the Supreme Court of Canada held in a landmark case that the constitutional code of educational

[12] Footnote 9 above.
[13] Canada Act 1982 (U.K.) 1982, c. 11.
[14] MacKay, A.W. (1984), *Education Law in Canada*, Emond Montgomery, Toronto, p. 37.
[15] *Mahé v. Alberta*, [1990] 1 S.C.R. 342 (S.C.C.).
[16] *Ibid.*

rights contained in section 93 stands independently and insulated from the reach of the Charter, even without the assistance of section 29.[17]

The inclusion of sections 23 and 29 in the Charter, together with the jurisprudential approach taken by the Supreme Court of Canada, highlights a major feature of the Canadian Constitution – entrenchment of historical privileges for the so-called founding linguistic and religious groups: francophones, anglophones, and Christians (Catholics and Protestants). This has proved a major stumbling block to other language and faith groups who would try to achieve equality in funding classes or schools tied to their ethnicity or religion. There is an uneasy tension and seeming incongruity between such privilege and section 15 of the Charter, which promises equality (including 'equal benefit of the law') without discrimination based on race, national or ethnic origin, or religion, and section 27, which celebrates the multicultural character of Canada by stating that the Charter should be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians. Supreme Court jurisprudence, however, makes it clear that the old constitutional values embedded in section 93 trump the new egalitarian ones in sections 15 and 27.

Any further rights to education arising in the Charter must be implied within the general language of sections dealing with fundamental freedoms, rights of citizenship, liberty, and equality. Citing Island Trees Union Free School District No. 26 v. Pico,[18] a U.S. Supreme Court decision on school censorship, MacKay contends that education may be a necessary incident to the full realization of democratic rights.[19] Section 3 of the Charter grants citizens the right to vote and to run for election to Parliament or a provincial legislature. It stands to reason that neither right can be effectively exercised, especially in today's complex, information-based and -dependent world, without at least a basic education. Nor is it likely that the right of free expression – recognized to be at the very core of democracy[20] – can be as fully realized in the absence of an education. These rationales are strengthened by the agreement of most people, inside and outside education, that the preparation of young people for democratic participation as good citizens is one of the most important purposes of public education.[21] Although what good citizenship means and what values are central to civic responsibility lack unanimity, the basic goal remains virtually unchallenged. And if one accepts that social mobility – another widely cited rationale for public education – is a reasonably likely educational byproduct, the nexus between education, equality, and freedom 'to live the good life' stands out in relief. Surely, then, the state is bound to provide the major mechanism of social leveling; otherwise the promise of equal benefit of the law in section 15 of the Charter rings hollow.

## 3. Provincial Legislation

### (a) Human Rights Codes

Human rights codes or acts exist at both the federal and provincial levels. As ordinary acts, they can be amended or repealed at the will of the respective legislative bodies; consequently, the rights contained therein cannot be seen as constitutionally entrenched in any way. Such legislation is nevertheless often referred to as 'quasi-constitutional' as it typically overrides the provisions of other legislation unless otherwise stated, and is given a broad, purposive interpretation not given ordinary legislation. The Canadian Human Rights Act[22] has no application to the question of the right to education because of the distribution of powers discussed above.[23] Provincial human rights codes or acts (extant in every province and territory) typically are cast as anti-discrimination documents, designed to prevent inequality in services or accommodation offered in the private and public sectors. As such, they generally apply to both public and private schools.[24] They rarely establish first-level or autonomous rights by imposing a positive obligation on the state to grant such accommodations or services, although there are exceptions.

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17 Ref. re *Roman Catholic Separate High Schools Funding*, [1987] 1 S.C.R. 1148 (S.C.C.).
18 *Board of Education, Island Trees v. Pico*, 102 S. Ct. (1982 U.S.S.C.).
19 Footnote 14 above at p. 48.
20 *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.).
21 See, e.g., Guttman, A. (1987), *Democratic Education*, Princeton University Press, Princeton NJ and Paquette, J. (1991), *Social Purposes of Schooling: Alternatives, Agendas, and Issues*, Falmer Press, London.
22 R.S.C. 1985, c. H-6.
23 It might be assumed that the Act applies to the education of First Nations peoples, a federal responsibility under the Constitution Act, 1867, but the Indian Act, which governs such education is exempt from the application of the federal human rights code: Smith and Foster, footnote 5 above at p. 21 note 91.
24 Even though not specifically mentioned, courts have held education or schools to be included in the services and accommodations to which the act applies. See, e.g., Re *Peel Board of Education and Ontario Human Rights Commission (1990)*, 72 O.R. (2d) 593 (Ont. Div. Ct.).

Quebec's Charter of Human Rights and Freedoms – very much more a constitutional-style bill of rights than an ordinary human rights code – grants: an explicit right to a 'free public education' (section 40); the right of parents to require that their publicly-educated children receive a religious or moral education in keeping with their convictions (section 41); and, the right of parents to choose to have their children educated in private schools provided they comply with state legal requirements (section 42). Although the *Saskatchewan Human Rights Code*[25] states that every person and class of persons shall enjoy the right to education in any school, college or university, etc., this apparent grant of the general right to education is qualified by the phrase 'without discrimination' – suggesting that it means only that if the government decides to provide education, it must do so equitably. Nova Scotia's Act, though not granting an explicit right to education, states that its purpose is to 'recognize that the government ... [has] the responsibility to ensure that every individual in the Province is afforded an equal opportunity to enjoy a full and productive life ....'[26] However, controversy surrounds whether the Act is meant to apply to education since access to services or facilities provided to youth, and the conferral of benefits on or the protection of youth, are excluded from its prohibition against discrimination.[27] However, whether that exclusion qualifies the Act's *general* purpose of affording equal social opportunity to every individual is unclear.

In summary, excluding the Quebec Charter of Human Rights and Freedoms, which emulates the general educational rights contained in the international human rights documents discussed below,[28] provincial human rights laws can scarcely be seen to provide an effective platform for the autonomous right to education; their aim is to prevent discrimination where education is in fact offered. As a practical matter, of course, free public education – at least at the primary and secondary levels – is provided in all jurisdictions. The real issue is whether it is offered with equal opportunity – an issue played out in the special education and religious arenas, as discussed below.

### (b) Education and School Acts

Because of section 93 of the Constitution Act, 1867, education or school acts have been enacted in all provinces (and territories). Thus, as Smith and Foster point out, 'the vast majority of educational rights are found in the Education Act of each jurisdiction, and the regulations adopted under its aegis.'[29] Seven of these provide for a right to education (or at least a right to attend school) beginning at 5 years of age; age 7 has been adopted by the rest. All except Newfoundland extend this right to at least 18 years of age.[30] Ontario has removed age as a disqualifying criterion for free education (at least at the upper end) and provides for 7 years of free secondary education.[31] Pressure is being exerted in many jurisdictions to lower the age for access to free education as the evidence mounts regarding the individual and societal benefits associated with early childhood education.[32]

A sea change in the right to education for disabled children began in 1980 with the enactment in Ontario of an amendment to the Education Act,[33] still referred to as Bill 82, which was based largely on the model of Public Law 94-142 (Education for All Handicapped Children Act of 1975) in the United States. An 'exceptional pupil', defined as a student with one or any number of enumerated exceptionalities,[34] was given a statutory right to 'appropriate special education programs and services', without fee.[35] Although severely disabled – so-called 'hard to serve' – children were initially excluded from the right to an education under Bill 82, a subsequent amendment removed this discriminatory exclusion. Other Canadian jurisdictions followed suit, allowing Smith and Foster to report in 1996 that universal access to schooling, without exclusion of disabled students, was provided in nine Canadian provinces/territories, with one other providing possible exceptions for all students with disabilities

[25] S.S. 1979, Ch. S-24.1, s. 13(1).
[26] Human Rights Act, R.S.N.S. 1989, c. 214, s. 2(e).
[27] *Ibid.*, s. 6. See Smith, W. J. and Foster, W. F. (1996-98), 'Educational Opportunity for Students with Disabilities in Canada: How Far Have We Progressed?', *E.L.J.* 8, pp. 189-190. *LaFosse v. Kinsmen Daycare Centre Society*, [1995] *NSHRBID* No. 5, seems to support the view it does not.
[28] Even so, Smith and Foster point out that making education a human right has not necessarily enhanced equal educational opportunity in Quebec: see footnote above 5 at p. 203.
[29] Footnote 27 above at p. 193.
[30] *Ibid.* at p. 194.
[31] Education Act, R.S.O. 1990, c. E.2, s. 38.
[32] See, e.g., Ontario Royal Commission on Learning (1994), *For the Love of Learning*. Vol II, Chapter 7, 'The Learner from Birth to Age 6: The Transition from Home to School', Queen's Printer, Toronto.
[33] Education Amendment Act, 1980, S.O. 1980, c. 61.
[34] Including behavioural, communicational, intellectual, physical or multiple exceptionalities. Exceptionality can also include giftedness. Education Act, note 31 above, s. 1(1) 'exceptional pupil'.
[35] *Ibid.*, s. 8(3).

and two others for students with severe disabilities.[36] Reforms since then have somewhat ameliorated these exclusions.

## 4. Canada's International Obligations and the Right to Education

Like many other nations Canada is a State Party to international human rights documents that impose obligations regarding education. As a member of the United Nations Canada is subject to the moral suasion of the Universal Declaration of Human Rights (1948).[37] Though strictly speaking not legally enforceable against member states, the Declaration clearly has considerable moral force among many nations and the inclusion of education among its enumerated social, cultural and economic rights only supports arguments in favour of implying guarantees to education within the Canadian Charter.

The most comprehensive international agreement safeguarding children's rights, to which Canada is party, is the Convention on the Rights of the Child (1990).[38] Educational provisions include: the right of disabled children to live full, decent and dignified lives with active participation in the community, and to have effective access to education aimed at their fullest possible social integration and cultural, social and individual development; and the right of all children to financially accessible primary, secondary and higher education. Education should be aimed at developing the children's personalities, talents and mental and physical abilities; respect for human rights; respect for their parents, cultures, languages and values, together with the values of their own and other countries and civilizations; preparation for living a responsible life in a free, peaceful, tolerant and egalitarian society; and, respect for the natural environment. The Convention also protects the liberty to establish and run educational institutions separate from the state so long as they conform to the above-stated aims and to minimum standards laid down by the state.

Canada also ratified the International Covenant on Economic, Social and Cultural Rights (1966)[39] in 1976. Explicit educational rights are set out in Article 13, subsec. 2, including: free and compulsory primary education; generally available, accessible and free secondary education; free higher education available according to capacity; encouragement of 'fundamental education' for those not completing primary education; the active development of a system of schools at all levels; the right of parents to choose their children's schools according to their religious and moral convictions; and, the right to establish and direct educational institutions independent from the state.

In 1996 Canada found itself the object of a complaint lodged by one of its citizens under the Optional Protocol to the International Covenant on Civil and Political Rights,[40] which was adopted by the UN General Assembly in 1966 and signed by Canada in 1976. Together with anti-discrimination provisions, the Covenant obliges states to respect the liberty of parents to ensure that the education of their children conforms with their convictions. The case, which was decided by the United Nations Human Rights Committee in 1999,[41] is discussed below under the heading of Religion and Education.

## 5. The Right to Education in Context

### (a) Special Education

Where issues of access to, or equal treatment within, schools exist, human rights codes and/or the Charter can be invoked to assert equality rights on the child's behalf. Equality rights jurisprudence has developed quickly in recent years and with a complexity that defies responsible treatment here. Suffice it to say that a child is entitled to equal treatment, protection and benefit of the law without discrimination because of disability. Discrimination arises when differential treatment based on disability results from unjustified stereotypical assumptions about

[36] Smith and Foster, footnote 27 above at pp. 193-194.
[37] Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.
[38] U.N. Doc. A/RES/44/25, November 20, 1989.
[39] G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.
[40] Ca. T.S. 1976 No. 46.
[41] *Waldman v. Canada* (1999), United Nations Human Rights Committee http://www.pch.gc.ca/progs/pdp-hrp/docs/iccpr/waldman_e.cfm.

the person's ability or worth and does not afford the human dignity and the equal concern and respect every member of Canadian society deserves.[42]

The obvious difficulty posed in the case of the disabled is that often they may be unable to exercise the rights they are claiming by the very fact of their disability, and may indeed need to be treated differently to achieve true equality of opportunity (especially in the case of children on whose behalf decisions need to be made). Although this so-called 'dilemma of difference' is recognized by the courts,[43] there is nevertheless an obligation on a school to take steps to reasonably accommodate the student up to the point of undue hardship (if such a limitation is provided in a provincial human rights code), taking into account safety and cost, though the courts have not generally been sympathetic to fiscal arguments for denying equality. If the equality right is claimed purely as a Charter section 15 right, the only limitation that can be raised by the school is under section 1 of the Charter, which requires balancing the importance of the governmental objective behind a limitation of rights against the effect of the deprivation of individual rights.[44]

As mentioned above, under education acts most disabled children in Canada enjoy the right to access to schooling. But, the disabled child's right to pass through the door of a school and what happens once that door closes behind her, are very different things. For one thing, certain rules and practices designed for the general student population can work to impair the access rights of special education pupils. It is not only a question of tangible barriers: most schools have faced and addressed the problem of physical accessibility issues. Access issues can also take more subtle forms. One is associated with the recent North American phenomenon of 'zero tolerance' for school violence.

Motivated by the 'moral panic' of the public, policy-makers and politicians in the wake of Columbine and other like tragedies,[45] school discipline regimes have cropped up whose most identifiable feature is *mandatory* exclusionary punishment, usually suspension or expulsion, for certain enumerated conduct. Not surprising, special education students, especially those with behavioural exceptionalities, often run afoul of such codes of conduct. Ontario's Safe Schools Act[46] reforms in 2000 are a good case in point and indeed have been criticized for their discriminatory impact on students whose disability may be driving their deviant behaviour. Although regulations exist[47] purporting to exempt students from mandatory punishment if they are unable to control their tempers or appreciate the consequences of their actions, no guidelines exist to ensure an even application of such provisions.

A discernable tension exists in Ontario schools between the access rights of special education students and the general right to a safe school environment for all students and staff. This tension surfaced in a recent case in which the Court of Appeal refused to permit a principal to use the safe schools provisions of the Education Act to transfer an exceptional pupil he deemed a threat to school safety, especially as the matter of the student's placement as an exceptional pupil was under appeal but had not been heard by the appeal tribunal.[48] The threat the Safe Schools Act reforms pose to disabled students' access to education was also the subject of critical comment by the Ontario Human Rights Commission in a 2003 report and discussion paper.[49]

The qualitative dimension of the right to education for a disabled student is typically defined legislatively by the phrase 'appropriate progamme or appropriate services' or like wording. Obvious attendant questions are begged, including, how appropriateness is defined, how centrally that is done, whether inclusiveness (placement in a

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42 See *Law v. Canada*, [1999] 1 S.C.R. 497 (S.C.C.).

43 *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 (S.C.C.) per McIntyre J.

44 *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.).

45 For a discussion of this phenomenon, see Dolmage, W. R. (1995-96), 'One Less Brick in the Wall: The Myths of Youth Violence and Unsafe Schools', *E.L.J.*, 7, p. 185.

46 S.O. 2000, c. 12. This legislation is now incorporated into sections 300-316 of the Education Act. For more information, see Trépanier, J. (2003), *Student Discipline: A Guide to the Safe Schools Act*, Butterworths, Toronto.

47 See O. Reg. 106/01 and O. Reg. 37/01.

48 See G. Dickinson (2003-04), 'Court of Appeal Rejects Use of "Safe Schools" Provisions to Transfer Exceptional Pupil', *E.L.J.*, 13, p. 455.

49 Ontario Human Rights Commission (2003), *The Opportunity to Succeed: Achieving Barrier-Free Education for Students with Disabilities*, Ontario Human Rights Commission, Toronto, at pp. 22-25. The report can be accessed at: http://www.ohrc.on.ca/english/consultations/ed-consultation-report.shtml. See also, *The Ontario Safe Schools Act: School Discipline and Discrimination*, accessible at http://www.ohrc.on.ca/english/consultations/safe-schools.shtml. In passing, it is worth noting that it is not only in the case of special education that the tension between individual rights and collective 'safety' rights has reared its head. In a recent ruling in Quebec – which in some respects is a microcosmic image of the Islamic head-scarf controversy raging in France – the Court of Appeal held that a school board's policy prohibiting the carrying of a kirpan – a dagger Sikhs consider a religious symbol – was reasonable and did not violate either the Canadian Charter of Rights and Freedoms or the Quebec Charter of Human Rights and Freedoms : see *Commission scolaire Marguerite-Bourgeois v. Multani* (4 March, 2004), Montreal 500-09-012386-025 (Que. C.A.). The court found that the ban followed directly and rationally from the school board's important purpose of promoting school safety and that the board's limitation of the student's religious freedom was justified. The decision has been harshly criticized for, among other things, its reliance on a notion of public security defined by the mind-set of the post-9/11 world, to deny fundamental freedoms. See Smith, W. (August 2004), 'Balancing Security and Human Rights: Quebec Schools Between Past and Future', *E.L.J.*, 14.1, p. 99. An Ontario court, however, ruled the opposite way in a similar case: see Re *Peel Board of Education*, footnote 24 above.

regular class) is mandatory or hortatory, whether students (where practicable) and/or their parents have effective input into programming and placement decisions, and, finally, whether resources allocated to special education, in general, or individual students, in particular, are adequate. Examining all these issues is out of the question here; I will limit my comments to the questions of inclusiveness, who ultimately controls the placement decisions, and the refusal to provide resources for autistic children.

The landmark case in special education equality rights in Canada is indisputably the Supreme Court's 1997 ruling in Eaton v. Brant County Board of Education.[50] Emily Eaton was a profoundly disabled girl with cerebral palsy whose parents wished her returned to a regular-class placement contrary to the board's decision and ultimately to the ruling of a Special Education Tribunal. The parents sought judicial intervention by claiming a violation of Emily's Charter equality rights. The Ontario Court of Appeal ruled that there should be a constitutional presumption of inclusion of exceptional pupils in a regular-class setting. As the Education Act had no such requirement, though it was a policy of the Ministry, the court *proprio motu* read such a provision into the Act, subject in individual cases to the parents' wishes. The Supreme Court overruled the Appeal Court, holding that such a presumption contravened the need to consider the best interests of the child in each case. The parents had no right to trump the best interests of the child, which were ultimately to be decided by the court under its *parens patriae* jurisdiction. While a complex ruling, its nub was simple enough: the recognition that true equality of opportunity, especially in the case of a disabled child, often *requires* unequal treatment. This is no departure from the Court's general stance in Andrews v. Law Society of British Columbia[51] and Law v. Canada.[52] But some have questioned whether the decision to permit segregation in the name of the child's best interests paid sufficient attention to Emily's *dignitary* interests as required in Law. The practical upshot of *Eaton* is to place the onus on the parents of a segregated child to show discrimination rather than on the board to show that the limitation on the child's right to equal treatment was reasonable and justified.

A special education rights case attracting recent attention across the country concerns the Ontario government's refusal to provide funding beyond age 6 for Applied Behavioral Analysis (ABA) therapy – a widely used and effective intervention for autism. The government's refusal prompted hundreds of complaints to the Human Rights Commission and several civil actions. The parents of children affected by the policy applied to the court for relief, alleging a violation of rights under sections 7 (security of the person) and 15 (equality) of the Charter. As of September 2004, the cases were yet to be tried in the Ontario Superior Court. The only rulings to date concern the parents' applications for interim injunctive relief, which resulted in the courts' finding that a serious issue was at stake, irreparable harm would occur if funds were not provided pending the outcome of the trial and the balance of convenience in the circumstances favoured the applicants' position.[53]
Consequently the courts ordered the government, among other things, to top up ABA therapy funding for autistic children to a maximum of 40 hours per week and to pay for assessments for some of the child-plaintiffs. These cases pose serious implications for schools and school boards, as Byberg points out:

> 'Most children with autism are . . . "exceptional" . . . pursuant to section 8(3) of the *Act*, and section 170 of the *Act* obligates school boards and schools to provide appropriate services to such students. However, the Province has not committed the necessary funding to provide such services . . . leaving schools and boards in a quandary. The current delivery of IBI [Intensive Behavioural Intervention] across the schools in the province is a patchwork, but this decision could be used by parents . . . of autistic children to force schools and boards to provide this service until the matter is ultimately resolved at trial. An important

[50] [1997] 1 S.C.R. 241 (S.C.C.).
[51] Note 43 above.
[52] Note 42 above.
[53] See *Wynberg et al. and Her Majesty in Right of Ontario, Deskin et al. and Her Majesty in Right of Ontario* [2004] O.J. No. 1066 (Ont. S.C.J.) and *Naccarato (Litigation guardian of) v. Ontario* [2004] O.J. No. 3278 (Ont. S.C.J.). On October 8, 2004 the Ontario government announced it would expand services for children with autism, including providing additional classroom support through funding the hiring of new Autism Consultants. See 'New Supports for Children With Autism', available at http://www.children.gov.on.ca/cs/en/newsroom/backgrounders/041008.htm. However, the litigation by parents seeking the continuation of funding for intensive one-on-one IBI services in school, continues. A November 2004 Supreme Court of Canada ruling that it was not discriminatory for the Province of British Columbia not to fund ABA/IBI therapy appeared to squelch the hopes of these litigants: see *Auton (Guardian ad litem of) v. British Columbia* (A.G.) 2004 SCC 78 (S.C.C.). However, an Ontario judge subsequently granted an interim injunction in two such cases, ordering the government to continue ABA/IBI funding for the applicants' children in their classroom settings: see *Bettencourt (Litigation Guardian of) v. Ontario* (unreported), January 13, 2005, Court File No. 04-CV-280111CM3 (Ont. S.C.J.) and *McNabb (Litigation Guardian of) v. Ontario* (unreported), January 13, 2005, Court File No. 04-CV-272966CM2 (Ont. S.C.J.). Justice Ferrier distinguished *Auton* on the grounds that the British Columbia government had exercised its discretion not to fund the therapy as part of its health care program, within which it necessarily had to make hard choices. In the Ontario cases, because the government had chosen to provide funding up to age six, it arguably could not discriminate in terminating it. Moreover, Ontario did not fund the therapy as a matter of health care, but rather as part of a targeted program for autistic children operated through the Ministry of Community and Social Services. The injunctions were issued because the Court believed there were serious issues to be dealt with at trial, along with a risk of irreparable harm to the children if the funding were not continued in the interim. Whether the Ontario cases are indeed distinguishable from *Auton* remains to be determined.

policy aspect of this ruling is that provincial governments may now less easily strangle funding to school boards, and then attempt to place the financial burden on those boards to provide services to disadvantaged students.'[54]

Whether Byberg is correct awaits the decisions at trial and the appeals that are bound to follow.

**(b) Religion and Education**

Religious issues in Canadian schools have been shaped by the nation's constitutional peculiarities described above. A major issue relating to the right to education – especially in Ontario – has been access to full funding for Roman Catholic schools and claims for like treatment by other religious minorities. Claims for equal treatment and benefit of the law in school funding, comparable to that enjoyed by Roman Catholics, were inevitable given changing demographics, that provided the animus for such challenges, and the arrival of the Charter, that promised an effective legal vehicle for advancing them.

For the better part of a century Roman Catholic ratepayers in Ontario had been denied funding for their secondary schools on an equal footing with public schools, something they argued was guaranteed by a combination of section 93 of the Constitution Act, 1867 and the 1863 Separate Schools Act of Upper Canada.[55] Denied this right in litigation before the British Privy Council in 1927,[56] Catholics were elated when, in 1984, the government reversed its historical position and announced an intention to amend the Education Act to provide more or less full funding for Catholic secondary schools. The amendments, finally passed in 1986 by a subsequent government, were challenged constitutionally in court by a coalition of opponents. The case eventually reached the Supreme Court of Canada, which released its complex landmark decision in 1997.[57]

The nub of the court's holding was that: the Ontario government was constitutionally entitled to provide this funding in the form of new denominational rights protected under section 93; alternatively, the government was returning rights held at 1867 that had been denied wrongfully by successive provincial governments; and, such a conferral or return of rights did not contravene Charter rights to freedom of religion and equality because it would be wrong to use one part of the Constitution to override another, especially the code of educational rights in section 93 that was the political *sine qua non* to the very creation of Canada.

Despite this message that some religions are 'more equal' than others under the Constitution, others who wished their children to receive an education according to the tenets of their particular faiths tried again to invoke Charter rights in cases in which they sought funding for religious schools or programs *within* the public system (Bal v. Ontario)[58] or for their own separate schools (Adler v. Ontario).[59] For some of the claimants the situation was all the more urgent after the Ontario courts, utilizing the Charter to embrace an American-style establishment approach, ruled that mandatory prayer and Bible reading in the public schools violated freedom of religion[60] and, later, that religious instruction beyond teaching about religion (a comparative approach) in public schools was indoctrination and again a violation of religious freedom and an unjustified intrusion of the state into the religious sphere.[61]

The claims in Bal and Adler were denied for a number of reasons but, distilled, they amounted to a restatement of the principle that the claimants could not compare themselves to Roman Catholics since the latter were a constitutionally privileged party to a historical and political compromise that was the lynch-pin of confederation itself. Nor could they compare themselves to public schools, since they also – though now effectively secular – were sheltered under the section 93 code of educational rights. While the government could choose to advance educational rights to other groups (religious and non-religious) – as indeed has been done in several other provinces[62] – they were not constitutionally obliged to do so. However, if they chose to do so, they had to treat all groups equitably in accordance with Charter equality rights.[63] Although consistent with the basic jurisprudence

54 Byberg, M. (August 2004), 'Ontario Court Grants Interim Relief for Autistic Children to Obtain IEIP Program after Age Five', *E.L.J.*, 14.1, at pp. 74-75.
55 C.S.U.C. 1863, c.5.
56 *Tiny Separate School Trustees v. the King*, [1928] A.C. 363 (P.C.).
57 Reference Re *Roman Catholic Separate High Schools Funding*, [1987] 1 S.C.R. 1148 (S.C.C.).
58 *Bal v. Ontario* (1997), 34 O.R. (3d) 484 (Ont. C.A.).
59 *Adler v. Ontario*, [1996] 3 S.C.R. 609 (S.C.C.).
60 *Zylberberg v. Sudbury Board of Education* (1988), 65 O.R. (2d) 641 (Ont. C.A.). Similar rulings have occurred in other provinces: see, e.g., *Russow v. British Columbia* (A.G.) (1989), 62 D.L.R. (4th) 98 (B.C.S.C.) and *Manitoba Association for Rights and Liberties Inc. v. Manitoba* (1992), 94 D.L.R. (4th) 678 (Man Q.B.).
61 *Canadian Civil Liberties Assn v. Ontario (Minister of Education) (1990)*, 71 O.R. (2d) 341 (Ont. C.A.).
62 Including British Columbia, Alberta, Saskatchewan, Manitoba and Quebec.
63 For further discussion of these and related cases, see Dickinson, G. and Dolmage, W. R. (1996), 'Education, Religion and the Courts in Ontario', *Canadian Journal of Education*, 21, p. 363.

laid down in the 1997 Catholic funding case, the court's reasoning continues to be criticized by some as a warped approach toward equality, religious freedom and multiculturalism.[64]

The government's persistent refusal[65] to advance funds to Jewish schools (Adler) prompted an appeal to the international community by virtue of a complaint under the Protocol to the International Covenant on Civil and Political Rights. The complaint centred on the State Party's alleged discriminatory conduct in refusing to grant funding to religious schools other than those of Roman Catholics. The International Human Rights Committee ruled that Canada had violated the Protocol's anti-discrimination provisions, and that its defence that the constitutional arrangements made under section 93 provided 'reasonable and objective grounds' for the differential treatment – essentially the jurisprudence of the Supreme Court of Canada in Adler – was unsupportable. The Committee gave the federal government 90 days to provide a public response. After being informed that Ontario did not intend to change its policy, the Canadian government advised the Committee of its inability to force Ontario to act. Although its profession of impotency was no doubt constitutionally correct, the federal government clearly was not without political power. But given the uncertain direction of the political wind on this issue – it remains very contentious in Ontario – it is not at all surprising that little if anything has changed since the Committee's ruling.

Is there a right to religious education in Ontario? Though the Education Act retains vestiges of the 19th-century non-sectarian religious purposes of schooling, the courts have struck down, under the rubric of religious freedom, the specific provisions that were put in place to implement that general right – essentially, as the courts have pointed out, making the public schools secular institutions. And, equality rights have been interpreted by the Supreme Court within the narrowing context of section 93, effectively shutting down funding entitlement arguments by religious groups. Unlike Roman Catholics' situation, their right to religious education, as required under international rights documents ratified by Canada, while not denied, is dependent on their own financial ability to access it by paying tuition to the private schools that provide it. Mostly germane to Ontario, these comments apply to lesser and varying degrees in other provinces where more access to public funding has been granted to independent and religious-based schools.

### (c) Educational Malpractice

Although it is possible to identify provisions supporting a conclusion that the right to *access* to schooling exists in Canada, and that minority language education rights-holders and exceptional pupils may even be legally entitled to a certain *quality* of educational experience, when it comes to finding any legal rights circumscribing the quality of education to which an 'ordinary' Canadian student is entitled, the trail is indeed faint. While a high quality of education might be implied in various policy documents of provincial governments and the standards of practice and norms established by federations and colleges of teachers, legal provisions accessible to students and their parents for enforcing such expectations are scarce. Moreover, in the absence of any explicit statutory right to sue education providers for failing to deliver an acceptable quality of education, the courts have almost unanimously refused to entertain the use of common-law remedies for that purpose.

As in other common-law jurisdictions,[66] Canadian courts have struck out claims for damages based on causes of action sounding in so-called 'educational malpractice'.[67] Adopting the reasoning of their U.S counterparts, the courts in Canada have routinely adopted the view that even if a legal duty of care to educate non-negligently existed, the lack of professional unanimity concerning a proper standard of care and the devilish difficulty of showing causation conspire to make such suits impracticable. Even if they were not, public policy suggests they are not the sort of lawsuits that *should* be entertained, as the courts have deemed themselves ill-equipped to judge the soundness of educational policies and practices. Although there may be a glimmer of hope for educational malpractice plaintiffs in cases involving mis-assessment or non-assessment of learning disabilities or

[64] See Fahmy, M. (2003-04), 'The Private School Funding Debate: A Second Look Through *Charter* First Principles', *E.L.J.*, 13, p. 397.

[65] A limited concession eventually came in the form of a private school tax credit granted in 2001-2 by the government; politically contentious, the credit was revoked in 2003 by the successive government.

[66] For the United States, see, e.g., *Peter W. v. San Francisco Unified School District*, 131 Cal. Rptr. 854 (C.A. 1976); *Donohue v. Copiague Union Free School District*, 391 N.E. 2d 1352 (N.Y. 1979); and *Hoffman v. Board of Education of City of New York*, 406 N.E. 2d 317 (N.Y. C.A. 1979). See also Parker, J. (1992-93), 'Educational Malpractice: A Tort Is Born', *E.L.J.*, 4, 1 for a review of U.S. case law. For the United Kingdom, see Holloway, J. (1995-96), 'The Liability of the Local Education Authority to Pupils Who Receive a Defective Education', *E.L.J.*, 7, p. 95. Holloway discusses the decisions in five consolidated appeals wherein the House of Lords refused a private law damages remedy for breach of statutory educational duties but held that a common-law duty of care existed where psychological services were offered by a school authority.

[67] See *Hicks v. Etobicoke (City) Board of Education* (November 23, 1988), Doc. 306622/87 (Ont. Dist. Ct.); *Gould v. Regina (East) School Division, No. 77*, [1997] 3 W.W.R. 117 (Sask. Q.B.); and *Haynes (Guardian ad litem of) v. Lleres* (March 10, 1997), Doc. Vancouver 969025 (B.C. Prov. Ct.). For a discussion of these and other educational malpractice cases, see MacKay, A.W. and Dickinson, G. M. (1998), *Beyond the 'Careful Parent': Tort Liability in Education*, Emond Montgomery Publications, Toronto at 103-114.

exceptionalities,[68] cases involving attempts to sue the provincial government or a school board for failure to provide disabled children with a sufficient quality of education have failed.[69] However, the judge in one Canadian case cryptically observed that conduct that was 'sufficiently egregious and offensive to community standards of acceptable fair play'[70] could perhaps ground a claim in educational malpractice. However, virtually every case of the so-called 'failure to educate' brand of educational malpractice has been unsuccessful.[71]

So, it is fair to conclude that the right to education in Canada – defined in terms of *a right to a certain quality of experience* – is likely legally unenforceable through a traditional common-law cause of action, like negligence. And, except perhaps in the area of disabled children,[72] the courts remain resistant to interfering with government policies regarding educational content and requirements.[73]

### (d) Education of Aboriginal Children

Section 91(24) of the Constitution Act, 1867 gives the federal government legislative authority over 'Indians and Lands reserved for Indians', which it continues to exercise through the Indian Act.[74] The history of Aboriginal education in Canada is nothing less than shameful, from its origins anchored in 'the solution to the Indian problem',[75] through the government's scandalous use, until the 1970s, of residential schools run under the auspices of churches and religious orders, whose mandate of assimilation was carried out by removing young children from their communities and families to be placed in institutions where they were punished for using their native languages and practicing their religions, and frequently sexually and physically abused by their teachers.[76]

Today, Aboriginal children are educated in both reserve and off-reserve schools under agreements with local education authorities.[77] As Wilson points out, the right to accommodation enjoyed by students under provincial school acts, is absent for Aboriginal students. Under section 117 of the Indian Act Aboriginal children in fact are excused from attendance if their schools cannot accommodate them, implying that – unlike the case for their non-native schoolmates – their exceptionalities may not need to be accommodated through special education services.[78] This lack of a statutory right to special education is clearly suspect under the Charter's equality rights provision, although, to date, it apparently has gone unchallenged. Similarly, no constitutional right to education in a language other than French or English exists.[79]

Education has been one of the most important matters in discussions between First Nations peoples and the federal government regarding replacement of the Indian Act with a regime of self-governance.[80] Despite a succession of commissions and reports, self-governance is still not a constitutional reality and the Indian Act

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68 See Holloway, note 66 above, and Lord, J. (2000-01), 'The Tort of Educational Malpractice: A Door Stuck Ajar', *E.L.J.*, 10, p. 209.

69 See *R.(L.) v. British Columbia* (1999), 180 D.L.R. (4th) 639 (B.C.C.A.), where parents claimed provincially operated schools for the deaf failed to provide students with a 'sufficient opportunity to obtain an education' and denied them 'access to a proper education appropriate to [their] needs, skills and abilities', and *Concerned Parents for Children with Learning Disabilities Inc. v. Prince Albert* (Various Boards of Education) (1998), 170 Sask. R. 200 (Sask. Q.B.), which involved a claim that the Province of Saskatchewan and the local school board defendants had failed to provide 'education and educational services "appropriate to the needs and circumstances of a child with a learning disability".' For a discussion of these cases, see Lord, footnote 68 above.

70 *Gould v. Regina (East) School Division, No. 77*, footnote 67 above at 129.

71 Ben Jaafar argues, though, that stricter and more definitive provisions regarding teachers' professional duties and provincial promises regarding the enhancement of educational quality may make it easier for the courts to escape the public policy bonds that have kept them from permitting such suits. See Ben Jaafar, S. (2002-03), 'Fertile Ground: Instructional Negligence and the Tort of Educational Malpractice', *E.L.J.*, 13, p. 1.

72 As illustrated in the autism cases referred to, see footnote 53 above.

73 For a recent example where parents have sought court intervention, see *Germain (Litigation guardian of) v. Ontario (Minister of Education)*, [2004] O.J. No. 1977 (Ont. S.C.J.), where a representative group of parents sought an injunction preventing the Ontario government from requiring students to pass the Ontario Secondary School Learning Tests (the so-called 'literacy test') before graduation. It is alleged that the test discriminates against students on the basis of disability, race and ethnicity. The court dismissed the application for interim relief. Although the court found that there was a serious issue to be tried, it concluded that there was insufficient evidence of irreparable harm or that the balance of convenience in granting interim relief rested with the applicants. The trial of the main action, however, is pending.

74 R.S.C. 1985, c. I-5. Sections 114-122 deal with education.

75 Annual Report of the Department of Indian Affairs, 1893, quoted in Canadian Council on Children and Youth (1978), *Admittance Restricted*, The Council, Ottawa.

76 For a history of residential schools, see Miller, J.R. (2003), 'Troubled Legacy: A History of Native Residential Schools', *Sask. Law Review*, 66, p. 357.

77 For a description of Aboriginal education and discussion of related issues, see Royal Commission on Aboriginal Peoples (1996), *Report of the Royal Commission on Aboriginal Peoples (Vol. 3)*, Canada Communication Group Publishing, Ottawa at 433-444.

78 Wilson, footnote 2 above at 8.89.2-8.89.3. Paquette and Smith have noted that in 2001 no funding existed for special education services for the overwhelming majority of the 75,000 First Nations students attending schools within their own communities. Only those children with the most profound exceptionalities obtain special education within public or sometimes private schools, on a fee for service basis. The rest of the students, many of whom have significant learning disabilities and other exceptionalities, must remain in their community schools to be educated as best they can by teachers in regular classrooms with no special education support or services. The authors estimate that more than $250 million would be required to redress this inequity. In its 2001 throne speech, the federal government announced forthcoming policy changes and funding for this purpose, but the parliamentary session came and went without the government's having followed through on its promise. See Paquette, J. and Smith, W. (2004), 'The Cost of Inclusion in the Community: Funding Special Needs in First Nations Community Schools in Québec', *Exceptionality Education Canada*, 14, 63 at 67, 89.

79 Wilson, footnote 2 above at 8.93. Although this is no different from the situation of non-Aboriginal students, as discussed above regarding s. 93 rights.

80 See *Report of the Royal Commission on Aboriginal Peoples*, note 77 above, Recommendation 3.5.1.

remains in place. Even with self-government, an effective right to education for Aboriginal children will be realized only if autonomous rule is accompanied by the necessary financial resources to deliver it. In this way, the right to education for Aboriginal children lies several layers of skin beneath the surface of a very thick onion which cannot be peeled here – native land claims.

## 6. Conclusion

The right to education in Canada has been shaped by the nation's constitutional history. The distribution of legislative powers in 1867 dealt education to the provinces. Hence, twelve distinct systems of education governed by their own acts exist. Moreover, the country was born out of linguistic and religious privileges that survive to this day and affect educational policies and rights. The enactment of the Canadian Charter of Rights and Freedoms in 1982 promised a nationalizing influence insofar as it applies not only to federal but also to provincial and territorial legislation as well as to governmental action at all levels.

It is difficult to identify in Canadian law an unequivocal autonomous right to education. The right to attend school is ubiquitous in provincial school acts. But school attendance – correctly viewed as a statutory privilege rather than an inalienable right – is far from a right to *education*, which implies a certain quality in one's schooling. Moreover, human rights codes, save perhaps in Quebec, fail to grant an autonomous right to education but promise only equal treatment in education. The Charter makes express mention of education only twice, granting a constitutional right to minority language education, and indirectly guaranteeing denominational education to Roman Catholics. Otherwise one must imply the right to education from the general language and purpose of other sections in the Charter, which, to date, no Court has expressly done. Although Canada has educational obligations under international declarations and covenants, when these have collided with domestic law they have come up second-best.

The right to education in Canada is multi-dimensioned. Historically it has been – and continues to be – played out in the religious arena over questions of devotional exercises, religious curriculum and religious school funding. More recently, the right to education has implicated the rights of the disabled to be accommodated – and with equal opportunity – in the education system. The development of the law in the area of special education has been such that it may be fair to say, as a general rule, that disabled children have an enforceable legal right to a certain quality of educational experience, one that is suited to their needs, whereas non-exceptional students do not. Or if they do, there is little judicial appetite for litigation that would enforce such a right.

Finally, the history of the right to education in Canada is punctuated by the special situation of First Nations peoples. Viewed first by the federal government as a problem to be solved through an educational program driven by an assimilationist and racist ideology, and practiced by abusive educators, Aboriginal children today attend school in either their local communities or in off-reserve schools. Aboriginal education is a critical part of the puzzle of self-governance that successive federal governments have seemingly been unable or unwilling to solve. Meaningful education for Canada's First Nations children, as is the case for self-governance itself, depends not only on the political will to see it realized but also on the infusion of the massive financial resources necessary to carry it out.