Canada: Supreme Court addresses gay-positive readers in public schools

David Schneiderman*

Equality rights in education—same-sex parenting in the Family Life Education program—religion in public school board administration—Chamberlain v. Surrey School District No. 36

Should public schools be expected to use gay-positive materials when teaching about the family? When elected school board officials decide such questions, may they bring religious concerns into their deliberations? In Chamberlain v. Surrey School District No. 36, the Supreme Court of Canada addressed these contentious questions.¹ The Court affirmed the ability of school boards to bring moral considerations guided by religion into their deliberations, but it also held that they could not exclude a particular group, such as gays and lesbians, from receiving equal consideration in primary-school instruction. If public school teachers were required to teach about the family, the Court concluded, the school board must ensure that teachers had available to them instructional materials that portrayed all types of families, including those with same-sex parents.

* Associate professor, faculty of law, University of Toronto.

1. Three books too many

The decision was not strictly a constitutional one. At issue was a school board resolution refusing permission to Chamberlain, an elementary school teacher in Surrey, British Columbia, to teach from three books in his kindergarten and grade one classes. *Asha’s Mums*;\(^2\) *One Dad, Two Dads, Brown Dad, Blue Dads*;\(^3\) and *Belinda’s Bouquet*\(^4\) had been approved as teaching resources by the independent group Gay and Lesbian Educators of BC. The three books approvingly described same-sex parenting, each conveying the principal message that children of same-sex parents are loved and cared for as are the children of heterosexual parents. Chamberlain proposed that the three books be used as supplementary learning resources in Family Life Education, a mandatory component of the British Columbia primary school curriculum (under the Canadian constitution, education generally is within provincial jurisdiction). This curriculum operates provincewide and requires kindergarten and grade one teachers to teach students that “there are a variety of family groupings.” Students are expected to identify the “variety of models of family organization,” the “roles and responsibilities of different family members.” and that “living things reproduce.” To achieve these learning objectives the Ministry of Education recommends that “students compare different families and discuss similarities and differences,” and that “students draw or write about their families; and have students talk about each other’s families.”\(^5\) The ministry guidelines are otherwise silent on the subject of same-sex parenting, and the ministry has not recommended books of the sort Chamberlain was seeking to use.

The British Columbia public school system is not affiliated with any particular sect or religious doctrine. The B.C. School Act—the statute governing the public school system in the province—requires that all schools be “conducted on strictly secular and non-sectarian principles,” and “that the highest morality must be inculcated but no religious dogma or creed be taught” in provincial public schools.\(^6\) School boards, made up of elected “trustees” who oversee the administration of public education in a school district, are delegated certain responsibilities under the act, including the power to authorize the use of supplementary learning resources.\(^7\) Once approved, the teachers are not required to use these resources, although individual teachers can opt to employ them to “suit their pedagogical needs and audiences.”\(^8\)


\(^3\) See generally JOHNNY VALENTINE, *ONE DAD, TWO DADS, BROWN DAD, BLUE DADS* (1994).


\(^5\) Chamberlain III, supra note 1, at para. 38.


\(^7\) Id. at §85 (2).

\(^8\) Chamberlain III, supra note 1, at para. 35.
Education requires that school boards formulate, in advance, a series of guidelines that will guide each board in making these decisions. The Surrey School Board guidelines require board members to consider the “relevance” of the material to learning outcomes and its appropriateness in terms of age, and they must be satisfied that the material is “free from gratuitous violence, propaganda and discrimination.”

Applying board guidelines, the school trustees refused to grant Chamberlain’s request to use the gay-positive books as supplementary learning resources. In so doing, some of the trustees were “significantly influenced by religious considerations, specifically opposition to homosexual conduct,” according to the lower court judge. The board was motivated, as well, by a concern that the books would conflict with parental views about same-sex parenting. Yet the School Act mandates that public schools be operated on “strictly secular and non-sectarian principles.” The trial judge ruled that the board resolution, motivated by sectarian considerations, offended these requirements. The B.C. Court of Appeal reversed the lower court ruling, holding that board members could take into account religious values in deliberating about public school matters. In any event, the issue of sexual orientation did not properly belong in kindergarten classrooms, the justices concluded. The Supreme Court of Canada, in a 7–2 split, agreed with Chamberlain that the board’s decision offended the provincial B.C. School Act requirement of strict secularism and so allowed the appeal. The matter was sent back to the school board for its reconsideration.

2. Court relies on principles of secularism

The Supreme Court’s discussion was guided by the provincial School Act’s mandate of secularism and by the Ministry of Education’s curricular objectives for kindergarten and grade one students. The majority decision also was heavily influenced by the equality rights principles the Court has developed under the Canadian Charter of Rights and Freedoms. The Court, as it does in constitutional cases, sought to balance religious freedom with equal protection.

The province’s School Act requirement of strict secularism makes clear that the public school system is “open to all children of all cultures and family backgrounds.” The Court held that religious beliefs cannot be imposed on students and that publicly funded schools must remain neutral in religious matters. The decision was consistent with the Court’s previous rulings that public schools cannot be used to advance religious or political causes.

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9 Chamberlain III, supra note 1, at para. 36.
11 Chamberlain I, supra note 10, at para. 93.
12 Chamberlain v. Surrey School District No. 36, [2000] 191 D.L.R. 4th 128 at para. 31 (B.C.Ct. of App.) [hereinafter Chamberlain II]. Justice Mackenzie wrote that “strictly secular and non-sectarian” can only mean that “religious establishment or indoctrination associated with any particular religion in the public schools [is precluded] but it cannot make religious unbelief a condition of participation in the setting of the moral agenda.” Id.
13 Chamberlain III, supra note 1, at para. 63.
According to Chief Justice McLachlin, writing for the majority, "[a]ll are to be valued and respected." The operation of the public school system is premised, then, upon pluralism, tolerance, and diversity. If the provincially mandated curriculum required that classrooms be open to the discussion of all variety of family groupings, then gay and lesbian parenting presumptively should be included in this discussion.

What about the claim of school board trustees that some parents would find such teaching objectionable on moral and religious grounds? Chief Justice McLachlin admitted that school board members “are entitled, and indeed required, to bring the views of the parents and communities they represent to the deliberation process.” As religion “is an integral aspect of people’s lives,” it could not be “left at the boardroom door.” Though the board was free to consider the religious sensibilities of parents, it could only do so in a manner that granted “equal recognition and respect” to members of minority groups within the community. A board organized on secular principles, then, could not exclude certain family groupings from the school curriculum on moral and religious grounds.

Chief Justice McLachlin proceeded to review the board’s resolution in light of ministerial directives and the board’s own guidelines regarding the approval of supplementary learning resources. She found that the board had based the “three-books resolution” on faulty reasoning. It was not appropriate for the board to ask whether the material was “necessary” to achieve learning objectives; the appropriate standard of review was one of “relevance.” A concern that students would receive conflicting messages at home also was misplaced. This kind of cognitive dissonance “is simply a part of living in a diverse society. It is also part of growing up.” The board had concluded incorrectly that these students were too young to learn about same-sex parenting. If the message of the three books at issue was one of respectful tolerance, then tolerance “is always age appropriate.” The board, therefore, had acted unreasonably in refusing to grant approval of the three books.

The Court further found that the board had violated the principle of secularism mandated by the School Act. Taking into account the religious concerns of parents was not in itself fatal, but it was incorrect for the board to act solely on this basis without fairly considering the interests of other parents. The board had given no consideration to the “multiplicity of religious and moral views” in the

14 Id. at para. 23.
15 Id. at para. 19.
16 Id.
17 Id. at para. 20.
18 Id. at para. 65.
19 Id. at para. 69.
community. Instead, it preferred the objections of a particular group despite the pluralistic curricular objectives that had been laid down by the Ministry.

It was significant for the two dissenting justices that the ministry had not prescribed materials expressly for the purpose of promoting discussion of same-sex parenting in kindergarten and grade one classes.\(^{20}\) Creating a climate of nondiscrimination in public schools undoubtedly was a pedagogical goal; promoting the controversial subject of same-sex parenting was not.\(^{21}\) For these reasons, Justice Gonthier, with Bastarache J. concurring, would have left intact the board’s decision. Justice Gonthier emphasized the primary parental responsibility in the education of children—a liberty right grounded in the “private sphere” of the family that the Court elsewhere has underscored.\(^{22}\) The school board resolution was likened to a local municipal council decision giving expression to parental views about what was in the best interests of their children.\(^{23}\) Where school boards have room to maneuver they should be entitled to “react more directly to parental determinations of age appropriateness.”\(^{24}\)

3. Pluralism, religion, and equality

The following discussion focuses on three aspects of the Court’s decision: (1) the measure of deference that is due to local school board decision making in pluralist democracies; (2) the admission of religious considerations in public school board deliberations; and (3) the role of constitutional equality rights in suppositions about normality.

3.1. Deference and pluralism

The Court’s majority and minority reasons invoke conceptions of pluralism. In pluralist, liberal-democratic societies it seems appropriate to treat the decisions of elected school board trustees with a measure of deference. After all, these are places where democracy is exercised at the grassroots level, as it is in municipalities, workplaces, and universities.\(^{25}\) Justice Gonthier in dissent found many similarities between school boards and other locally elected bodies, such as municipal councils, and so was more faithful to pluralist

\(^{20}\) Id. at para. 166.

\(^{21}\) Id. at paras. 140, 150.


\(^{23}\) Chamberlain III, supra note 1, at para. 121.

\(^{24}\) Id. at para. 117.

suppositions. These were elected bodies “endowed by legislation with largely autonomous rule-making and decisional powers,” he wrote.\textsuperscript{26} The minority was deferential to the school board’s reasons for refusing to use the three books since these were matters over which “reasonable parents disagree,”\textsuperscript{27} and “such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of modern pluralism.”\textsuperscript{28}

The majority justices, on the other hand, resisted an analogy with municipal councils. The school board’s authority was limited by the statutory directive that it operate in a strictly secular manner and in accordance with guidelines laid down by the ministry and the school board itself.\textsuperscript{29} “The last word—indeed the only word that counts”—wrote Justice McLachlin, “is the word of the legislature and the curriculum.”\textsuperscript{30} in which case courts were “well-placed” to exercise supervisory jurisdiction over school boards.\textsuperscript{31}

Which perspective best advances what Rawls has called the “fact of reasonable pluralism”?\textsuperscript{32} Both get it right, in part. The state empowers public school boards to advance local interests in the general administration of education in B.C. The board’s resolution regarding the three books issues from a genuine exercise in local democracy. The school board, however, is not affiliated with a religious denomination; rather, it purports to represent the multiple interests and allegiances of parents and students. The school board is constituted for the purpose of managing school matters within local districts for all citizens no matter what their faith or denomination. This is what the requirement of secularism entails. If the minority more appropriately likened school boards to municipal councils, the majority was also right to emphasize the public, nonsectarian mandate of the board.

3.2. Religion in the public school board square

The majority opinion, nevertheless, admits religious sensibilities into school board deliberations. The critical normative judgments of board members, the majority justices acknowledge, will be subject to the influence of a multitude of factors, including the religious views of parents. The Court appears here to be respectful of the need to defer both to local school boards and to a vibrant associational life that accommodates religious reasoning in deliberations by public bodies. The Court also seems to be saying, however, that it is the

\textsuperscript{26} Chamberlain III, \textit{supra} note 1, at para. 121.

\textsuperscript{27} \textit{Id.} at para. 133.

\textsuperscript{28} \textit{Id.} at para. 137.

\textsuperscript{29} \textit{Id.} at para. 28.

\textsuperscript{30} \textit{Id.} at para. 72.

\textsuperscript{31} \textit{Id.} at para. 11.

\textsuperscript{32} \textsc{John Rawls}, \textsc{Political Liberalism} 36 (1993).
religious sensibilities of parents, rather than the religious beliefs of board members themselves, which must not be excluded from board deliberations.

Whatever the case, the majority does not leave unchecked the admission of religious values into school board deliberations. Though religion “is an integral aspect of people’s lives, and cannot be left at the boardroom door,” the school board cannot be directed by religious views that “deny equal recognition and respect to the members of a minority group.” The requirement that the school be conducted on “strictly secular and nonsectarian principles” bars the exclusion of “certain lawful family models simply on the ground that one group of parents finds them morally questionable” on religious grounds. In such cases, the religious views of parents “that deny equal recognition and respect to members of a minority group cannot be used to exclude the concerns of a minority group.” If religion is admitted into public deliberation through the front door, it is ushered quickly out the back. Religious views are tolerated in school board deliberations only so far as the fundamental tenets of faith are tolerant of the purposes and goals of other associations. This reasoning favors only certain kinds of religions, and it elides the conflicts that often pervade controversial public policy questions, particularly where religious tenets are implicated.

The minority is more forthright about the implications of this position. Religious sensibilities will color deliberations about morality, and some beliefs will be preferred over others. All that is required is that school instruction be “free from inculcation or indoctrination in the precepts of any religion.” Justice LeBel, concurring, differed with the majority reasons of Justice McLachlin on the reasonableness of the board’s being influenced by religious considerations. He would have precluded religious views from entering into the school board’s deliberations: “The distaste of some parents for books that do not conform with their personal beliefs cannot shape the policy of a pluralist education system that has proclaimed its commitment to accepting and celebrating diversity.”

Yet it is consistent with Canada’s constitution to require that public policy grounded in religious principle be translated into nonsectarian terms. The structure of adjudication under the Canadian Charter of Rights and Freedoms requires that we be alert to problems of such translation by requiring that governments provide nonsectarian justifications for government actions that infringe charter rights. Decisions based solely on religious reasons, in other words, will not survive the charter’s justification process (in section 1).

33 Chamberlain III, supra note 1, at para. 19.
34 Id. at para. 20.
35 Id. at para. 19.
37 Chamberlain III, supra note 1 at para. 139; School Act, supra note 5, at § 76(2).
38 Chamberlain III, supra note 1. at para. 215.
Government actors should be expected to seek out some justification for their action other than that of coercing or inducing others into religious conformity.39

3.3. Role of equality

*Chamberlain* is the most recent case in which the Court has addressed equality rights of gays and lesbians. The Court previously settled whether sexual orientation is a prohibited ground of discrimination under the Charter of Rights and Freedoms (it is),40 whether governments are required to include prohibitions against discrimination of gays and lesbians in statutory human rights codes (they are),41 and whether gays and lesbians are bound by spousal support obligations (they are).42 Lower court rulings have followed this lead. Courts of appeal in British Columbia43 and Ontario44 have declared that Canada’s marriage law discriminates against gays and lesbians (a similar ruling was issued by a Québec trial court).45 Rather than further appealing these decisions, the Canadian federal government has promised to introduce new legislation permitting same-sex marriage while preserving religious freedom. The government also has asked the Supreme Court of Canada to answer the question whether the opposite-sex requirement in Canadian marriage law is consistent with the charter.

In *Chamberlain*, the majority opinion confidently attends to the implications of the school board’s conduct regarding gay and lesbian families. Chief Justice McLachlin accepts without hesitation that in kindergarten and grade one discussions about “family groupings,” it is entirely normal to talk about gay and lesbian parents. For the majority, same-sex parenting simply is not controversial and is implicitly mandated by the provincewide curriculum. If such teaching created cognitive dissonance because of parental disapproval at home, this dissonance “is neither avoidable or noxious” as it is encountered “every day in the public school.”46 The minority justices express far more timidity. For Justices Gonthier and Bastarache, “homosexuality” is a controversial topic, and so there can be no presumption that same-sex parenting is a required part of the kindergarten or first grade curriculum. Nor does reference to the charter lead the minority to a different conclusion—only “nondiscrimination” is mandated by the charter’s values. The differences between the majority and minority, then,

46 Chamberlain III, supra note 1, at para. 65.
turn on suppositions about “normality” as those suppositions are informed by equality-rights analysis. For the majority, the logic of the Court’s equality rights jurisprudence leads to the inclusion of same-sex parenting; for the minority, the subject remains too steeped in controversy to be accepted.

The answers to such questions should not turn on feelings of confidence or hesitation on the part of the judiciary. Rather, the province should have taken action to respect and promote the Charter’s value of equality rights. If the province considers it age-appropriate to teach about the variety of family groupings, to “identify the physical characteristics that distinguish males from females,” and to “identify that living things reproduce,” then it is reasonable that teachers like Chamberlain should expect to be able to teach about same-sex parenting, even though the religious sensibilities of some parents will be offended. School boards, in turn, should be expected to advance these teaching objectives, as set out in the curriculum, by approving appropriate learning resources. Furthermore, governmental authorities should be expected to address such conflicts more directly than they did in this case. From this angle, the difference between the majority and minority is less sharp. The province ought to have been more explicit about the learning objectives and the accompanying resources available to those teaching about the family in kindergarten and grade one classes.

The failure of the province became more evident with subsequent events. The Court’s remedy in this case was to send the matter back to the Surrey School Board to reconsider its decision applying the proper criteria set out in ministry directives and the board’s own guidelines. The school board returned to the subject in June 2003 and, once again, refused to endorse the three books for use in the classroom. This time, however, the school trustees steered clear of religious and moral influences and focused instead on text and pictures. The board refused to approve one book because of problems with punctuation and grammar. The word “favourite,” for instance, is used inconsistently, “switching from Canadian to the American” spellings. According to the board chair, Mary Polak, this would be confusing to children in kindergarten. Another book was rejected because of the way it handled the subject of dieting, while One Dad, Two Dads, Brown Dad, Blue Dads was unacceptable because it “made fun” of Indo-Canadians by referring to “brown” dads and because it dealt “too much” with sexual orientation. The board, it is reported, had never before scrutinized books as closely as it had these three. To many, its decisions appeared to be lacking in bona fides. The board wisely belied these suspicions two weeks later by authorizing the use of two books that described approvingly families led by same-sex parents.
