NOVA SCOTIA COURT OF APPEAL

Citation: *Bonitto v. Halifax Regional School Board*, 2015 NSCA 80

Date: 20150826
Docket: CA 431358
Registry: Halifax

Between:

Sean Bonitto

Appellant

v.

Halifax Regional School Board

Respondent

Judges:	Fichaud, Beveridge, Bryson, Scanlan and Van den Eynden, JJ.A.
Appeal Heard:	June 16, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Fichaud, J.A.; Beveridge, Bryson, Scanlan and Van den Eynden, JJ.A. concurring
Counsel:	The Appellant on his own behalf Sheree L. Conlon and Jennifer L. Taylor for the Respondent

Reasons for judgment:

[1] Mr. Bonitto's children attend Park West School. It is a public school operated by the Halifax Regional School Board and offers grades primary through nine. Its students, aged 4-15, represent various cultures and religions. Mr. Bonitto is a fundamentalist Christian. He distributed gospel tracts to students and others on the School's premises during school hours. Their message was that anyone who does not accept Christ will go to hell. The School Board's formal Policy, adopted further to legislation, said that distribution of materials at the School requires the principal's approval. Another Board Policy said that religious instruction on school premises may only occur outside the regular school day. The principal declined to approve Mr. Bonitto's distribution and asked Mr. Bonitto to desist.

[2] Mr. Bonitto sued the School Board. He claimed that the Board had infringed his freedom of religious expression guaranteed by ss. 2(a) and (b) of the *Canadian Charter of Rights and Freedoms*. After a trial, a judge of the Supreme Court of Nova Scotia dismissed Mr. Bonitto's claim. Mr. Bonitto appeals.

[3] Did the restriction on Mr. Bonitto's distribution of gospel tracts infringe his freedom of religious expression under the *Charter*?

Background

[4] I draw the facts from the exhibits and the trial judge's findings. Those findings include the judge's recitation of evidence. In this respect, Justice Muise's decision (2014 NSSC 311) said:

> [8] Unless otherwise indicated, I found the evidence referred to in this decision to be credible and reliable, and I accepted it.

[5] The *Education Act*, S.N.S. 1995-96, c. 1 authorizes the Halifax Regional School Board ("Board") to operate public schools in Halifax. The Board leases the premises of Park West School ("Park West") from a private landowner, for the period between 7 a.m. and 6 p.m. weekdays, with the option to request weekend time. The Board operates Park West as a public elementary school for grades primary through nine for children aged four through fifteen. The judge found that Park West's students come from families with over 50 languages and cultures, various religious denominations, and that one-quarter of its students are Muslim.

[6] Park West's student body included Mr. Sean Bonitto's children.

[7] Mr. Bonitto is a man of faith. The judge said:

> [42] Mr. Bonitto testified to the following. He is a Bible-believing, evangelist Christian. He accepts Jesus Christ as his Savior. He believes that those who accept Jesus will go to heaven; and, that Jesus is the only way to heaven and eternal life. He has a mission to preach the gospel to every creature. That is what he is "commissioned" to do; and, that is what he does. He carries Bible tracts with him wherever he goes and hands them out. That literature promotes his personal religious beliefs as a born-again Christian and is based on the Bible.
>
> [43] He did not specifically testify that his mission to preach the gospel required him to hand out Bible tracts. However, in my view, when his evidence of that mission is considered in conjunction with his evidence that he always has Bible tracts to hand out wherever he goes, the most reasonable inference is that he believes that handing out that religious literature is part of what his religious convictions require him to do.
>
> [44] In my view, he showed he is sincere in his belief that his religion requires him to preach the gospel to every creature, including by handing out the religious tracts in question. Those tracts have a clear nexus to his religion as they all have the core message that, unless one accepts Jesus as his personal Savior, one will go to hell.

[8] For the instruction of Mr. Bonitto's children, Park West has accommodated his beliefs. The judge explained:

> [83] Mr. Bonitto has been welcome to attend the school regularly to accompany or transport his children, and to attend meetings with teachers and administration. The school has accommodated his request that his children not be exposed to materials or teachings which run contrary to his fundamentalist Christian beliefs, by allowing them to be exempt from sessions, activities and materials relating to things like Halloween, the Easter Bunny, Santa Claus, the occult, magic, homosexuality and transgender issues. Mr. Bonitto's wife, Pamela Bonitto, testified that the school had been 100% cooperative in accommodating that request.

[9] The crucible of this case is that Mr. Bonitto's faith impels him to proselytize to others wherever he goes, including the children at Park West. Justice Muise related Mr. Bonitto's "core message":

> [1] … While attending at the school to deliver or retrieve his children, or to meet with school staff, Mr. Bonitto distributed religious literature in the form of

> gospel tracts to persons on the school grounds, including students, during school hours. …
>
> [21] It is important to note that what is at issue in the case at hand is Mr. Bonitto's desire to express the religious message he feels he has a commission to do by handing out gospel tracts on school property, during the school day (i.e. when students are present and under the responsibility of the HRSB). The core of that message is that, unless one believes in and accepts Jesus Christ, he or she will go to hell. He is not seeking to express his views on issues related to his or his children's participation in the school and school system. …

[10] The judge noted other features of Mr. Bonitto's distributed tracts:

> [76] In addition to the core message in all of the materials that unless one accepts Christ as their Lord and Savior they will go to hell, some of the materials Mr. Bonitto wanted to distribute specifically stated that homosexuality and worshiping another God were sins which would lead to eternal damnation if not repented from. Concern was expressed over the impact that that would have on students of same-sex parents, non-Christian faiths, or of parents of non-Christian faiths. It would send a message to them that there was something wrong with them and/or their parents.
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> …
>
> [88] She [Ms. Pamela Comeau, the Board's Supervisor of School Administration] pointed to the tract known as the "Boo Tract", reproduced at Tab 4 of Exhibit 2. Her concerns emanated both from the language and the imagery used. The problematic language included the phrase: "they riddled him with bullets". The imagery included a cat being sacrificed with a knife, and a human figure wearing a pumpkin on its head carrying a chainsaw with a caption that it wanted a human as a sacrifice. These were particularly problematic because the Bible tract containing them came up on the primary to grade 3 playground.
>
> [89] She expressed similar concerns over the imagery in other Bible tracts. The one referred to as the Stinky Tract, at Tab 8 of Exhibit 2, shows a person being thrown over a cliff and someone celebrating that happening. The one referred to as The Empty Tomb Tract, at Tab 10 of Exhibit 2, refers to muscles being sliced wide open and blood spurting, and provides a detailed medical description of the injuries inflicted during crucifixion and the body's reaction to those injuries. …
>
> [91] … A brochure that Mr. Bonitto had given to her [Ms. Haikings, a teacher at Park West] during a meeting, and which she had left on her desk, was picked up by a student who began reading aloud the portion of the brochure speaking of sex in exchange for money.

[11] The Board has formal written policies that govern the distribution of materials in schools, religious education in schools and human rights in learning. These policies have been adopted under the authority of the *Education Act*, s. 64(2)(u).

[12] The Board's Distribution and Display of Materials in Schools of the Halifax Regional School Board Policy, approved April 27, 2005 ("Distribution of Materials Policy"), requires approval "at the discretion of the principal" for any materials to be distributed at the Board's schools:

> **PREAMBLE**
>
> The Halifax Regional School Board believes in promoting strong school and community partnerships. As part of this commitment, the board endorses schools' role in distributing and displaying communications that support such partnerships.
>
> In any decision regarding the display or distribution of materials, staff will ensure that all materials are in keeping with the Board's mission, its commitment to upholding the principles of publicly-funded education, and with all Board policies.
>
> **DEFINITIONS**
>
> For the purposes of this policy, **materials** include,
>
> - Leaflets, brochures or posters.
> - Electronic communications.
> - Signs and banners, placed inside or outside of schools.
> - Petitions.
> - Any other media or documents used to transmit information to students, staff or parents.
>
> **1.0 APPROVAL PROCESS**
>
> 1.1 Approval of materials intended for distribution to all schools will be at the discretion of the Superintendent or designate.
>
> 1.2 Approval of materials for distribution or display at individual schools will be ***at the discretion of the principal*** or designate. [emphasis added]

[13] The Board's Religious Education in Schools Policy, approved on June 25, 2002 ("Religious Education Policy") provides that denominational religious instruction "may only occur outside the regular school day":

1.0 RELIGIOUS EDUCATION

1.1 The Halifax Regional School Board will comply with the Public School Program when providing education in the broad area of religions.

1.2 Religious instruction that is initiated and maintained by a religious group or organization ***may only occur outside the regular school day,*** being the 300 minutes normally allocated to the Public School Program.

…

[Emphasis added]

[14] The Board's Race Relations, Cross Cultural Understanding and Human Rights in Learning Policy, adopted on May 23, 2007 ("RCH Policy"), acknowledges the existence of systemic biases, including those related to religion and faith, and responds by committing the school system to "inclusive learning environments" that "value diversity":

1. GENERAL PRINCIPLES

Our school system has an essential role in helping students to succeed in school and their transitions to adult roles. Equity in the delivery of all the board's programs, services, and resources is critical to the achievement of successful outcomes for all students.

At the same time, ***the Board recognizes that certain groups in our society are treated inequitably because of*** individual and systemic biases related to race, colour, culture, ethnicity, linguistic origin, physical or mental ability, socio-economic class, age, ancestry, national or aboriginal origin, place of origin, ***religion, faith,*** sex or gender, sexual orientation, family status, and marital status. We recognize that the biases existing within our society are also present in our school system. We also believe that ***the school board and its schools,*** like all organizations in Canadian society, ***have an ongoing responsibility to understand and work toward eliminating all forms of discrimination.*** Therefore, we place a high priority on the effective implementation and monitoring of the board's Race Relations, Cross Cultural Understanding and Human Rights (RCH) Policy Framework.

The board's commitment to positive Race Relations, Cultural Understandings, and Human Rights and Equity in Learning is grounded in our belief that ***we have shared responsibility for***:

- Improving student achievement, supporting the development of lifelong learners, and promoting the rights, dignity and self-worth of every person who is served by our school system.
- ***Building inclusive learning environments*** that foster social, intellectual, physical, cultural, emotional and moral development.
- ***Developing learning environments that value diversity*** and foster respect among all members of our school community.
- Creating a school system that is ***responsive to the diverse needs*** of the communities it serves.
- Working as advocates for social and educational change to improve equity, safety, and access to learning that supports the personal development and success of all students.
- Learning about bias, prejudice, stereotyping, harassment and discrimination.
- Actively working to identify and eliminate barriers that undermine the board's ability to reach its vision for student achievement and equity in learning.
- ***Building strong and inclusive school***, home and community relations that support improved student achievement and the board's ability to eliminate barriers to the equitable participation of parents and community members in our schools and school system.

[Emphasis added]

[15] Ms. Pamela Comeau is the Board's Supervisor of School Administration. Ms. Heather Chandler was the Board's Coordinator of Diversity Management during the events that precipitated this litigation. Ms. Tracey Lee Jones is Ms. Chandler's successor and the current Coordinator. Ms. Susan Haikings is a teacher at Park West. They explained the Board's approach to the administration of these Policies in general and particularly to Mr. Bonitto's distributed tracts. The judge summarized their testimony:

> [19] Ms. Comeau testified to the following in relation to access to public schools. There is no direct access to handout materials on school property. Persons wishing to do so can go to the main office and seek approval. This is to ensure that all materials handed out are in line with the public school program and comply with its expectations. The public school program sets the parameters of what is expected to be taught to students. The school is responsible for ensuring the program is taught and implemented, and it only has a limited number of hours to do it in. … The limitation of access to public schools is also to ensure the safety of students. The school needs to know who is on the school property and who has

access to the students. It is essential to management of the school and maintenance of orderliness in the school environment. The public is welcome on school property for variety [*sic*] of reasons. However, members of the public have to check in at the main office and obtain permission to access beyond that.

…

[24] There is no direct evidence regarding whether there has been any historical usage of public schools to distribute materials not within the school curriculum. However, Heather Chandler … testified that the HRSB regularly received requests from other groups to distribute religious materials on school property. These included requests from the Jewish community, pagans, Catholic groups, and others. None of the requests were approved. I infer from the fact that the requests were made that, at least those groups, did not perceive public schools as places traditionally used to distribute materials outside the school curriculum, without permission. I infer that they recognized a history of public schools controlling what materials were distributed on their properties. In my view, public school properties are not places where members of the public would traditionally enter and distribute literature without permission.

…

[52] Pamela Comeau … testified in relation to its Religious Education in Schools Policy, found at Tab 1 of Exhibit 2. She indicated that the purpose of the policy was to guide decision-making in relation to religious education to ensure that it complies with the public school program. It allows for education in the "broad area of religions". The approach taken by the HRSB in relation to religion is that it is not directly taught. Instead it is included in the discussion of different cultures and people in the world. In addition to not directly teaching religion, the HRSB does not permit promotion of one religion over another. The HRSB has a policy of staying neutral when it comes to religion so that it will comply with the public school program mandated by the Department of Education. The values it is looking to instill involve sharing and inclusion of different cultures, languages, religions, gender roles, and sexual orientation. The Board does not promote one particular religion, language, political party, etc.. Its policy is to remain neutral in relation to all such matters.

[53] Part of her concern over the gospel tracts Mr. Bonitto wanted to distribute was that it involved direct instruction of religion and promotion of one religion over another. Any materials distributed would have to be neutral regarding religion.

[54] The HRSB Religious Education in Schools Policy provides that "religious instruction that is initiated and maintained by a religious group or organization may only occur outside the regular school day" and that it must comply with the Use of Board Facilities Policy. In the case at hand, the prohibition complained of relates to dissemination during the regular school day, which Ms. Comeau testified was from when the students arrived to when they left, during which time

the school administration, teachers and staff were responsible for them. There was no evidence of a request to disseminate, nor of prohibition from dissemination, by anyone with authority to impose such a prohibition, outside that time. Consequently, it is unnecessary to consider whether the proposed dissemination would comply with the Use of Board Facilities Policy.

[55] Heather Chandler … testified that distribution of literature favouring one religion over another runs counter to the HRSB's objective of having all groups feel included. The purpose of its Religious Education in Schools Policy, Diversity Management Policy, and Race Relations, Cross-Cultural Understanding and Human Rights in Learning Policy ("RCH Policy") is to ensure that the Board treats all individuals and groups equitably, and that they all feel included in the school community. She testified that the objective of inclusion played a paramount role in how she advised HRSB schools in matters of practice and policy. She added that any materials handed to a student is something that they should read and learn from.

[56] Tracey Lee Jones … indicated the following. The Board seeks to create an environment of "inclusion", where all persons feel welcome and included. The Distribution and Display of Materials in Schools of the Halifax Regional School Board Policy, found at Tab 2 of Exhibit 2, is to ensure that schools are being inclusive and following the public school program and policies. The Distribution Policy contains "guidelines for evaluating materials intended for distribution or display in HRSB schools" which include considering whether the materials promote a particular religion or set of beliefs. That is to be assessed to ensure that one religion is not promoted over another, so that students will not feel excluded, and to avoid the message that they are inferior and the corresponding impact on their self-esteem. Her concern over the gospel tracts in question include that they: contain the message that those who do not believe in Jesus Christ will go to hell; and, favor one religion over others. The Board wishes to avoid sending such a message to students to eliminate the risk that they will think there is something wrong with them if they are nonbelievers or hold non-Christian beliefs. In addition, since the Board is responsible for what is distributed in its schools and on its school grounds, it sends the message that the Board is supporting one particular belief or religion.

…

[86] Ms. Comeau testified that Park West School teaches grades primary to nine, and has students age 4 to 15. In order to protect students from being exposed to language and imagery that is not appropriate for their age, it is imperative that any materials sought to be distributed on school property be reviewed to determine, among other things, whether they are age-appropriate. The HRSB is responsible for students from when they arrive at the school to when they leave. That includes being responsible for what materials are distributed to them or that they are exposed to on school property during the school day. The Distribution Policy applies to all materials distributed, whether they be distributed

> by the school board or by others. The reference to "in schools" in the distribution policy includes the school grounds. It is only during such times as the HRSB is not responsible to supervise or care for students that something can be passed to them on school grounds without approval pursuant to the Policy.
>
> [87] Ms. Comeau further testified that she had concerns over the age appropriateness of some of the Bible tracts.
>
> [88] She pointed to the tract known as the "Boo Tract" …
>
> [89] She expressed similar concerns over the imagery in other Bible tracts. …
>
> [90] Ms. Chandler also expressed the view that elementary school children were too young for the Boo Tract.
>
> [91] Ms. Haikings testified that a parent complained to the School Advisory Council about the Boo Tract and its content, in particular the fact that it showed a cat being sacrificed. …
>
> [92] Ms. Jones testified that, the pumpkin-person with a chainsaw and the sacrifice of the cat in the Boo Tract would make it impermissible to distribute, even if it did not remote [*sic* - promote?] one particular religion or set of beliefs.

[16] Acting on these concerns, the Board and Park West's principal, Ms. Anne Marie MacInnis, stepped in. In October 2010, first by phone and then in a meeting, Ms. MacInnis told Mr. Bonitto to desist. The judge found:

> [1] … [Mr. Bonitto] was directed by the principal of the school and other representatives of the HRSB to discontinue the practice (while students were present and the HRSB was responsible for them). The principal refused his request to approve distribution of the religious materials, which approval was required to authorize such distribution pursuant to the Distribution and Display of Materials in Schools of the Halifax Regional School Board Policy.

[17] Mr. Bonitto testified that, after the direction to desist, he continued to distribute the material on Park West's premises. Later, during a costs motion in chambers of the Court of Appeal, Mr. Bonitto said that he continues to distribute material at Park West after Justice Muise's ruling: *Bonitto v. Halifax Regional School Board*, 2015 NSCA 3, para. 21. At the appeal hearing in June 2015, he added that he will persist even if the Court of Appeal dismisses his appeal.

[18] On April 1, 2011, Mr. Bonitto filed a Notice of Action in the Supreme Court of Nova Scotia, naming the Board as sole Defendant. He claimed that the Board had infringed his rights to freedom of thought, expression and religion guaranteed by ss. 2(a) and (b) of the *Charter*.

[19] Justice Pierre Muise conducted the trial over three days in November 2013. Mr. Bonitto acted on his own behalf. Mr. Bonitto and his wife, Pamela Bonitto, testified. Mr. Bonitto was cross-examined. The School Board's witnesses were Pamela Comeau, Heather Chandler, Susan Haikings and Tracey Lee Jones, all cross-examined by Mr. Bonitto.

[20] On August 22, 2014, Justice Muise issued a written decision (2014 NSSC 311), followed by an Order on November 27, 2014. The judge dismissed Mr. Bonitto's action. A separate decision ordered him to pay costs of $13,500 plus disbursements (2014 NSSC 406). Later I will discuss the judge's reasons.

[21] On September 15, 2014, Mr. Bonitto appealed to the Court of Appeal. The Court heard the appeal on June 16, 2015. Mr. Bonitto spoke on his own behalf.

Issues

[22] Mr. Bonitto's factum lists seven issues:

> **Part II – List of Issues**
>
> 14. Is Park West School which is a HRSB controlled property, subject to section 2 of the Canadian Charter of Rights and Freedoms?
>
> 15. If HRSB property is subject to the Charter, was Mr. Bonitto's rights violated and infringed, according to the Canadian Charter of Rights and Freedoms?
>
> 16. Was the decision to violate Mr. Bonitto's freedom of religion by the HRSB and the principal an adjudicative, or administrative law decision, or a clear violation of a statutory law?
>
> 17. If Mr. Bonitto's rights to individual freedom of religious expression were infringed, was it a justified and reasonable limit "prescribed by law" according to section 1 of the Charter, or was the decision arbitrary?
>
> 18. If the limit was "prescribed by law" was it justifiable under section 1 of the Charter?
>
> 19. Is the core message of the (sic) Mr. Bonitto's Christian faith protected and guaranteed according to the Canadian Charter of Rights and Freedoms and does it injure or limit the rights of others?
>
> 20. If there was no "prescribed law" or the decision to ban Mr. Bonitto's individual freedom of expressing his Christian faith was not justifiable under section 1 of the Charter, and was completely unreasonable, what is the appropriate remedy?

[23] In the Supreme Court, Mr. Bonitto claimed infringements of ss. 2(a) and (b) of the *Charter*. Justice Muise dismissed both. In the Court of Appeal, Mr. Bonitto focusses on s. 2(a). The authorities define freedom of religion to include "teaching and dissemination" (below, paras. 64 and 73), from which Mr. Bonitto asserts a right to religious expression. His appeal factum puts it this way:

> 42. Without invoking section 2(b) of the Charter which could certainly be used, section 2 (a) is more than sufficient in proving without a shadow of a doubt that Mr. Bonitto's Charter rights and fundamental freedoms as guaranteed by the Charter were violated. In fact, it is essentially section 2 (a) that is truly relevant in this case because it deals with Mr. Bonitto's religious freedoms. It is this section of the Charter that specifically applies to Mr. Bonitto and this case.

[24] Instead of Mr. Bonitto's seven issues, the Board proposes one reconstituted issue. Citing *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395 and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, the Board's factum says:

> 28. The Appellant in his Factum has significantly narrowed his list of issues from the Notice of Appeal. The Appellant's seven issues can be further streamlined. In light of the Supreme Court's decision in *Loyola*, the Respondent suggests that there is really only one question for this Honourable Court to answer:
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> > *Did the Trial Judge err in finding that the decision to prohibit the Appellant from distributing materials on school property was reasonable and reflected a proportionate balancing of the Charter protections at play, in the context of the case?* [Board's italics]
>
> 29. The Appellant's more particularized issues are best addressed through answering this question.

[25] I will address four issues:

(1) What is the appropriate analytical framework – *Doré* or *Oakes*?

(2) Given *Doré*'s framework, should the Court consider the first two bases of the trial judge's ruling?

(3) Under *Doré*, did the principal's decision engage or implicate Mr. Bonitto's rights under s. 2(a) of the *Charter*?

(4) Under *Doré*, was the principal's decision proportionate and reasonable?

Standard of Review to Trial Judge

[26] This appeal is from a decision of a judge after a trial. The normal appellate standard of review to a trial judge's ruling applies: correctness to issues of law, including legal points that are extractable from issues of mixed fact and law, and palpable and overriding error to issues of both fact and mixed fact and law with no extractable legal issue. *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, paras. 25-37. Those principles apply to a *Charter* ruling. *R. v. R.E.W.*, 2011 NSCA 18, paras. 30-31.

[27] Of course, *Charter*-based legal issues may have broader amplitude than those that arise in some other cases.

First Issue – Which Analytical Framework?

[28] What framework of analysis governs the review by a court of the principal's decision that Mr. Bonitto may not hand out religious tracts at Park West?

[29] First one must characterize the principal's decision.

[30] The *Education Act*, s. 7(1) authorizes the Governor in Council to establish regional school boards. Further to s. 7, the *Designation of School Regions and Establishment of School Boards Regulations*, O.I.C. 96-583, N.S. Reg. 40/2005 established the Halifax Regional School Board.

[31] The *Education Act* describes the Board's primary mandate:

> **Purpose of Act**
>
> **2** The purpose of this Act is to provide for a publicly funded school system whose primary mandate is to provide education programs and services for students to enable them to develop their potential and acquire the knowledge, skills and attitudes needed to contribute to a healthy society and a prosperous and sustainable economy.

[32] Section 64(1) of the *Act* says the Board is "responsible for the control and management of the public schools". Section 64(2) prescribes numerous "[d]uties and powers" of school boards. These include making "provision for the education and instruction" of its students, adherence to "the provincial program of studies", promoting "safe, quality learning environments" and developing "policies, consistent with any policies established by the Minister, that reflect the board's responsibilities". [ss. 64(2)(a), (b), (f) and (u)]

[33] Section 38 prescribes the "Function and duties" of principals. These include to "ensure that the public school program and curricula are implemented", to "ensure that reasonable steps are taken to create and maintain a safe, orderly, positive and effective learning environment" and to "ensure that provincial and school board policies are followed". [ss. 38(2)(a), (e) and (f)]

[34] Park West's principal prohibited Mr. Bonitto from distributing written religious material on school premises during school hours. She exercised the discretion that was prescribed by article 1.2 of the Board's Distribution of Materials Policy. The Board had adopted that Policy under s. 64(2)(u) of the *Education Act*. The principal applied it under s. 38(2)(f) of the *Act*. The criteria that govern the discretion derive from the *Education Act* and are informed by Policies adopted under the *Act*.

[35] This was a discretionary administrative decision under statutory authority.

[36] Justice Muise's Decision said:

> [67] The principal's decision to refuse to approve the Bible tracts for distribution was made using the discretion accorded to her under the HRSB's Distribution and Display of Materials in Schools of the Halifax Regional School Board Policy. There is no dispute that HRSB was authorized, by virtue of the ***Education Act*** and the regulations pursuant to it, to create that policy.
>
> …
>
> [69] He [Mr. Bonitto] is correct that the Distribution Policy does not specifically state that you cannot hand out religious material. It states that: "Approval of the materials for distribution or display at individual schools will be at the discretion of the principal or designate." It merely lists, as part of the guideline considerations for assessing whether material should be allowed to be distributed, whether the materials promote a particular religion or set of beliefs.
>
> [70] Considering these points, I am of the view that Mr. Bonitto is indeed challenging the constitutionality of the decision only, not of the policy itself.
>
> …
>
> [73] In the case at hand, we are dealing with the exercise of discretion contained in a policy made pursuant to statutory authority. …

[37] Justice Muise's observation is just as apposite on the appeal. In the Court of Appeal, Mr. Bonitto submitted that the exercise of discretion under the Policy infringed s. 2(a) of the *Charter*. He did not contend that the Board's Distribution of Materials Policy itself was either *ultra vires* its enabling authority in the

Education Act or of no force and effect under s. 52(1) of the *Constitution Act, 1982*.

[38] The Supreme Court recently has adjusted the traditional *Charter* approach for challenges to the exercise of an administrative discretion. The adjusted approach synthesizes the proportionality principle from *R. v. Oakes*, [1986] 1 S.C.R. 103 and the reasonableness standard of review from *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. The traditional two step approach – first infringement, then reasonable justification under *Oakes* – is re-embodied into a contextual inquiry. In summary: if the exercise of an administrative discretion further to statute – *i.e.* a decision that would attract the reasonableness standard under *Dunsmuir* – "engages" or "implicates" the claimant's *Charter* right, then the court determines whether the decision-maker has proportionately balanced the governing statutory objectives and the applicable *Charter* values. If the balance is proportionate, the decision is upheld as reasonable. If not, the decision is set aside as unreasonable. These principles emanate from *Doré* and *Loyola*.

[39] In *Doré*, a lawyer wrote a brusque letter to a judge to complain about the judge's conduct at a hearing. The Disciplinary Council of the Barreau du Québec reprimanded the lawyer for violating his duty of objectivity. The lawyer submitted that his letter was protected expression under s. 2(b) of the *Charter of Rights*. The Council's sanction was upheld on appeal by the Tribunal des professions and on judicial review by the Quebec Superior Court and Court of Appeal. The Court of Appeal applied a full *Oakes* analysis. The Supreme Court of Canada dismissed the lawyer's appeal, but refashioned the framework of analysis.

[40] Justice Abella for the Court explained the rationale:

> [2] The lawyer does not challenge the constitutionality of the provision in the *Code of ethics* under which he was reprimanded. Nor, before us, does he challenge the length of the suspension he received. What he *does* [Justice Abella's italics] challenge, is the constitutionality of the decision itself, claiming that it violates his freedom of expression under the *Canadian Charter of Rights and Freedoms*.
>
> [3] This raises squarely the issue of how to protect *Charter* guarantees and the values they reflect in the context of adjudicated administrative decisions. Normally, if a discretionary administrative decision is made by an adjudicator within his or her mandate, that decision is judicially reviewed for its reasonableness. The question is whether the presence of a *Charter* issue calls for the replacement of this administrative law framework with the *Oakes* test, the test

traditionally used to determine whether the state has justified a law's violation of the *Charter* as a "reasonable limit" under s. 1.

[4] It seems to me to be possible to reconcile the two regimes in a way that protects the integrity of each. The way to do that is to recognize that an adjudicated administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional s. 1 analysis an awkward fit. On whom does the onus lie, for example, to formulate and assert the pressing and substantial objective of an adjudicated decision, let alone justify it as rationally connected to, minimally impairing of, and proportional to that objective? On the other hand, the protection of *Charter* guarantees is a fundamental and pervasive obligation, no matter which adjudicative forum is applying it. How then do we ensure this rigorous *Charter* protection while at the same time recognizing that the assessment must necessarily be adjusted to fit the contours of what is being assessed and by whom?

[5] We do it by recognizing that while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: balance and proportionality. I see nothing in the administrative law approach which is inherently inconsistent with the strong *Charter* protection — meaning its guarantees and values — we expect from an *Oakes* analysis. The notion of deference in administrative law should no more be a barrier to effective *Charter* protection than the margin of appreciation is when we apply a full s. 1 analysis.

[6] In assessing whether a law violates the *Charter*, we are balancing the government's pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. In assessing whether an adjudicated decision violates the *Charter*, however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.

[7] As this Court has noted, most recently in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, the nature of the reasonableness analysis is always contingent on its context. In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one.

[41] Justice Abella distinguished the framework of judicial review of a discretionary decision that implicates the *Charter* from the analysis of whether a law infringes the *Charter*:

> [36] As explained by Chief Justice McLachlin in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, the approach used when reviewing the constitutionality of a law should be distinguished from the approach used for reviewing an administrative decision that is said to violate the rights of a particular individual (see also Bernatchez). When *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. *Dunsmuir* tells us this should attract deference (para. 53; see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 39). When a particular "law" is being assessed for *Charter* compliance, on the other hand, we are dealing with principles of general application.
>
> [37] The more flexible administrative approach to balancing *Charter* values is also more consistent with the nature of discretionary decision-making. Some of the aspects of the *Oakes* test are, in any event, poorly suited to the review of discretionary decisions, whether of judges or administrative decision-makers. For instance, the requirement under s. 1 that a limit be "prescribed by law" has been held by this Court to apply to norms where "their adoption is authorized by statute, they are binding rules of general application, and they are sufficiently accessible and precise to those to whom they apply" (*Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 53).
>
> [38] Moreover, when exercising discretion under a provision or statutory scheme whose constitutionality is not impugned, it is conceptually difficult to see what the "pressing and substantial" objective of a decision is, or who would have the burden of defining and defending it.

[42] Justice Abella described the mechanics of judicial review of a discretionary administrative decision that implicates the *Charter*:

> [43] What is the impact of this approach on the standard of review that applies when assessing the compliance of an administrative decision with *Charter* values? There is no doubt that when a tribunal is determining the constitutionality of a law, the standard of review is correctness (*Dunsmuir*, at para. 58). It is not at all clear to me, however, based on this Court's jurisprudence, that correctness should be used to determine whether an administrative decision-maker has taken sufficient account of *Charter* values in making a discretionary decision.
>
> ...

> [55] How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. In *Lake*, for instance, the importance of Canada's international obligations, its relationships with foreign governments, and the investigation, prosecution and suppression of international crime justified the *prima facie* infringement of mobility rights under s. 6(1) (para. 27). In *Pinet*, the twin goals of public safety and fair treatment grounded the assessment of whether an infringement of an individual's liberty interest was justified (para. 19).
>
> [56] Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, "courts must accord some leeway to the legislator" in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, "falls within a range of possible, acceptable outcomes" (para. 47).
>
> [57] On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. As LeBel J. noted in *Multani*, when a court is faced with reviewing an administrative decision that implicates *Charter* rights, "[t]he issue becomes one of proportionality" (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives.
>
> [58] If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.

[43] In *Loyola*, the Supreme Court applied *Doré*'s framework to a challenge based on freedom of religion under s. 2(a) of the *Charter*. Quebec's education statute prescribed, in an Ethics and Religious Culture (ERC) Program, that religions be taught from a secular perspective, objectively and without promoting a particular faith. Regulation 22 under the statute permitted the Minister to grant an exemption from the ERC Program. Loyola High School, a private English

speaking Catholic high school, requested an exemption. The Minister denied the request. Loyola applied to the Quebec Superior Court for judicial review of the Minister's denial. On the ultimate appeal, the Supreme Court of Canada overturned the Minister's denial and remitted the matter for reconsideration by the Minister. The Court's panel was seven. Justice Abella, for four justices, applied *Doré*'s framework. Three justices partially concurred in the result, but did not apply *Doré*'s analysis.

[44] In *Loyola*, Justice Abella for the majority reiterated *Doré*:

> [3] This Court's decision in *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, sets out the applicable framework for assessing whether the Minister has exercised her statutory discretion in accordance with the relevant *Canadian Charter of Rights and Freedoms* protections. *Doré* succeeded a line of conflicting jurisprudence which veered between cases like *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, and *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, that applied s. 1 (and a traditional *Oakes* analysis) to discretionary administrative decisions, and those, like *Lake v. Canada (Minister of Justice)*, [2008] 1 S.C.R. 761, which applied an administrative law approach. The result in *Doré* was to eschew a literal s. 1 approach in favour of a *robust* [Justice Abella's italics] proportionality analysis consistent with administrative law principles.
>
> [4] Under *Doré*, where a discretionary administrative decision engages the protections enumerated in the *Charter* — both the *Charter*'s guarantees and the foundational values they reflect — the discretionary decision-maker is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue.

[45] Justice Abella said that the discretionary decision whether to grant the exemption for religious instruction engaged *Doré*'s test:

> [34] In this case Loyola, as an entity lawfully created to give effect to religious belief and practice, was denied a statutory exemption from an otherwise mandatory regulatory scheme. As the subject of the administrative decision, Loyola is entitled to apply for judicial review and to argue that the Minister failed to respect the values underlying the grant of her discretion as part of its challenge of the merits of the decision. In my view, as a result, it is not necessary to decide whether Loyola itself, as a corporation, enjoys the benefit of s. 2 (*a*) rights, since the Minister is bound in any event to exercise her discretion in a way that respects the values underlying the grant of her decision-making authority, including the *Charter*-protected religious freedom of the members of the Loyola community

> who seek to offer and wish to receive a Catholic education: *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, at para. 71.
>
> [35] This case, as the Court of Appeal noted and as the parties before this Court accepted, squarely engages the framework set out in *Doré*, which applies to discretionary administrative decisions that engage the *Charter*. *Doré* requires administrative decision-makers to proportionately balance the *Charter* protections —values and rights — at stake in their decisions with the relevant statutory mandate: *Doré*, at para. 55.

[46] Justice Abella then elaborated on *Doré*'s methodology, and the synthesis of *Charter* proportionality with reasonableness in administrative judicial review:

> [37] On judicial review, the task of the reviewing court applying the *Doré* framework is to assess whether the decision is reasonable because it reflects a proportionate balance between the *Charter* protections at stake and the relevant statutory mandate: *Doré*, at para. 57. Reasonableness review is a contextual inquiry: *Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5, at para. 18. In the context of decisions that implicate the *Charter*, to be defensible, a decision must accord with the fundamental values protected by the *Charter*.
>
> [38] The *Charter* enumerates a series of guarantees that can only be limited if the government can justify those limitations as proportionate. As a result, in order to ensure that decisions accord with the fundamental values of the *Charter* in contexts where *Charter* rights are engaged, reasonableness requires proportionality: *Doré*, at para. 57. As Aharon Barak noted, "Reasonableness in [a strong] sense strikes a proper balance among the relevant considerations, and it does not differ substantively from proportionality": "Proportionality (2)", in *The Oxford Handbook of Comparative Constitutional Law* (2012), Michel Rosenfeld and András Sajó, eds., 738, at p. 743.
>
> [39] The preliminary issue is whether the decision engages the *Charter* by limiting its protections. If such a limitation has occurred, then "the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play": *Doré*, at para. 57. A proportionate balancing is one that gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate. Such a balancing will be found to be reasonable on judicial review: *Doré*, at paras. 43-45.
>
> [40] A *Doré* proportionality analysis finds analytical harmony with the final stages of the *Oakes* framework used to assess the reasonableness of a limit on a *Charter* right under s. 1: minimal impairment and balancing. Both *R. v. Oakes*, [1986] 1 S.C.R. 103, and *Doré* require that *Charter* protections are affected as little as reasonably possible in light of the state's particular objectives: see *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160.

> As such, *Doré*'s proportionality analysis is a robust one and "works the same justificatory muscles" as the *Oakes* test: *Doré*, at para. 5.
>
> [41] The *Doré* analysis is also a highly contextual exercise. As under the minimal impairment stage of the *Oakes* analysis, under *Doré* there may be more than one proportionate outcome that protects *Charter* values as fully as possible in light of the applicable statutory objectives and mandate: *RJR-MacDonald*, at para. 160.
>
> [42] *Doré*'s approach to reviewing administrative decisions that implicate the *Charter*, including those of adjudicative tribunals, responds to the diverse set of statutory and procedural contexts in which administrative decision-makers operate, and respects the expertise that these decision-makers typically bring to the process of balancing the values and objectives at stake on the particular facts in their statutory decisions: para. 47; see also David Mullan, "Administrative Tribunals and Judicial Review of *Charter* Issues After *Multani*" (2006), 21 *N.J.C.L.* 127, at p. 149; and Stéphane Bernatchez, "Les rapports entre le droit administratif et les droits et libertés: la révision judiciaire ou le contrôle constitutionnel" (2010), 55 *McGill L.J.* 641. As Lorne Sossin and Mark Friedman have observed in their cogent article:
>
> > While the Charter jurisprudence can shed light on the scope of Charter values, it remains for each tribunal to determine . . . how to balance those values against its policy mandate. For example, while personal autonomy may be a broadly recognized Charter value, it will necessarily mean something different in the context of a privacy commission than in the context of a parole board. [p. 422]

[47] In Mr. Bonitto's case, Justice Muise (para. 73) held that *Doré*'s framework governed. *Loyola* had not yet been decided.

[48] I agree with the judge's conclusion.

[49] *Doré*'s approach "applies to discretionary administrative decisions that engage the *Charter*" (*Loyola*, para. 35), and to "administrative decisions that implicate the *Charter*, including those of adjudicative tribunals" (*Loyola*, para. 42). From this, I take it that the approach applies to a discretionary administrative decision despite that the tribunal is not strictly adjudicative. This view is consistent with the rationale for the *Doré*/*Loyola* test: *i.e.* that the administrative standard of review should accommodate a discretionary *Charter* issue. *Dunsmuir*'s reasonableness standard of judicial review is not reserved just for decisions of quasi-judicial tribunals that exercise classic "adjudicative" functions. It applies also to discretionary administrative decisions exercised further to statutory authority: *Dunsmuir*, paras. 27-30, 51; *Montréal (City) v. Montreal Port*

Authority, [2010] 1 S.C.R. 427, para. 36; *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, [2012] 2 S.C.R. 108, para. 43. In Mr. Bonitto's case, it is unnecessary to decide whether the principal was an "adjudicative tribunal".

[50] The *Doré/Loyola* framework applies.

Second Issue – Do Tests Outside Doré's Framework Apply?

[51] Justice Muise dismissed Mr. Bonitto's claim on three alternative bases.

[52] **First:** Citing *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, paras. 64, 73-77, and *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, he held that Park West was not a *Charter*-protected location for the freedoms of expression and religion:

> [29] Based on these factors, I am of the view that; a public elementary school in general is not "a public place where one would expect constitutional protection for free expression" by members of the public, i.e. persons other than staff and students; and, Park West School specifically is not a location where the ***Charter*** Section 2(b) rights of the parent of a student at that school, to distribute gospel tracts, are constitutionally protected.
>
> [30] The location analysis in ***City of Montreal*** was in relation to freedom of expression rights under Section 2(b). However, in my view, the same analysis is applicable to freedom of religion rights under Section 2(a) when, as in the case at hand, the alleged infringement of freedom of religion rights is a refusal to allow the dissemination of religious materials which the plaintiff seeks to effect as part of his religion. Mr. Bonitto's complaint of infringement to his rights to freedom of religion was a bar to expression of religious information, i.e. to distribution of gospel tracts. Consequently, the particular rights to freedom of religion he advances are also not protected on Park West School property.
>
> [Justice Muise's underlining]

[53] **Second:** "In the event that I am wrong in this conclusion" about location (para. 31) – the judge considered Mr. Bonitto's rights under ss. 2(a) and (b) on the assumption that Park West was a *Charter*-protected location. He concluded that the rights of non-Christian students to be free of Christian indoctrination outweighed Mr. Bonitto's freedom to disseminate his faith.

[54] As for freedom of religion, Justice Muise found:

> [44] In my view, [Mr. Bonitto] showed he is sincere in his belief that his religion requires him to preach the gospel to every creature, including by handing out the religious tracts in question. Those tracts have a clear nexus to his religion as they all have the core message that, unless one accepts Jesus as his personal Savior, one will go to hell.
>
> [45] He was prohibited from handing out Bible tracts. … The Supreme Court of Canada has clearly stated that the right to freedom of religion includes the right to dissemination of religious materials. Therefore, his ability to carry on his religious activities was interfered with.
>
> …
>
> [50] … In my view, from an objective point of view, that is an interference that is more than trivial or insubstantial.
>
> [51] However, I must go on to consider whether there are conflicting or competing rights of other individuals, and determine whether the religious activity Mr. Bonitto wishes to conduct, impacts the rights of those other individuals in a manner which warrants a finding that his religious rights ought not be protected.

The judge cited authority for the principle that:

> [59] … activity or instruction in public schools amounting to indoctrination of Christian belief, rather than providing information about, and a neutral review of, many religions, even with a right of exemption from the activity or instruction, and even with a voluntary program, violated the religious rights of the minority students and was unconstitutional.

Accordingly, Justice Muise ruled that Mr. Bonitto's religious freedom was not protected:

> [60] Consequently, even though students could choose whether or not to accept gospel tracts from Mr. Bonitto, School Board authorized dissemination of those tracts, on school property, during school hours, would, in my view, violate the rights of the non-Christian students to be free from religious indoctrination in public schools.
>
> …
>
> [62] Mr. Bonitto is one individual, who is not even a student at the school. In my view, considering that his proposed religious activity would violate the religious rights of so many non-Christian students, the circumstances of the case at hand are such that Mr. Bonitto's right to freedom of religion does not warrant protection.

[55] For freedom of expression, Justice Muise concluded:

> [63] … I have already concluded that the activity was excluded from protection because of the location. However, for the purposes of this analysis, I will assume that it was not. In my view, there is nothing about the method of expression which would warrant removing it from Section 2(b) protection. Preventing him from disseminating his Bible tracts interfered with his rights to freedom of expression.
>
> [64] However, given that this case involves religious expression, I am of the view that it is proper to consider the impact of the expression on competing rights of individuals to determine whether that impact makes it such that Mr. Bonitto's right to freedom of expression ought not be protected. For the same reasons that I found that Mr. Bonitto's right to freedom of religion did not warrant protection, I am of view that his right to freedom of religious expression does not warrant protection in the circumstances of the case at hand.
>
> [65] Consequently, I find that the refusal to permit distribution of the Bible tracts in question was not an infringement of Mr. Bonitto's rights to freedom of religion and expression, because the impact of that distribution on the rights of others removes those rights from protection.

[56] **Third:** "[A]ssuming his rights were infringed" (para. 66) - Justice Muise considered whether the infringement was justified. As noted earlier, the judge adopted *Doré*:

> [73] … In my view, the *Doré* framework is equally applicable in such circumstances. Therefore, I will apply it, rather than the *Oakes* Test.

For his proportionality analysis, the judge identified the statutory objectives:

> [74] The objectives which the decision sought to protect and promote can be gleaned from the applicable HRSB Policies, the enabling legislation, and the evidence of the HRSB witnesses. In my view, they include: neutrality in matters of religion; inclusion in the school community; and, student safety.

Justice Muise concluded that the principal's decision to prohibit distribution was reasonable, under the standard of review, and proportionate under the *Charter*:

> [93] In my view, the objectives of religious neutrality, inclusion and student safety are of paramount importance. The gospel tracts which Mr. Bonitto was seeking to distribute are directly and clearly contrary to those objectives. Permitting their distribution, would, in my view, result in violating the constitutional rights of non-Christian students, create too great a risk of a feeling of exclusion or lack of self-worth in them, and create an unacceptable risk of harm to the students who had not reached an age and stage of development where they could properly understand and assess the content of the materials.

> [94] In my view, given the paramount importance of those objectives, it was "within the range of possible, acceptable outcomes" for the principal, in the statutory and factual context of this case, to decide that there was no measure short of an absolute ban on the distribution of those materials on school grounds, during the school day, which would reach a proper balance between interfering with Mr. Bonitto's rights to freedom of religion and religious expression, against the importance of those objectives, and permit the attainment of the objectives.
>
> …
>
> [98] Based on these points, I find that the HRSB has justified the infringement, assuming there had been one.

[57] On the appeal, the Board confines its submissions to the third basis of Justice Muise's reasoning. At the appeal hearing, the Board's counsel conceded that the principal's prohibition of Mr. Bonitto's distribution of religious tracts was discretionary and "engaged" the *Charter*, meaning that the outcome turns on the reasonableness/proportionality analysis under *Doré* and *Loyola*. The Board's factum puts it this way:

> 39. Therefore, the preliminary issue is whether the Board's decision to prevent the Appellant from distributing materials on school property "engage[d] the *Charter* by limiting its protections." Related is the assessment of the "impact of the relevant Charter protection." In *Loyola*, section 2(a) was engaged, as the Minister's decision to refuse an exemption "demonstrably" interfered with how Loyola, as a Catholic school, could teach Catholicism. In this case, the Trial Judge accepted that the Appellant sincerely believed his religion obliged him to distribute gospel tracts; that the prohibition on distribution on school property interfered with his ability to pursue this activity; and that the interference was "more than trivial or insubstantial." These findings answer the preliminary issue, leaving the rest of the analysis to occur as part of the *Doré-Loyola* proportionality test.

[58] Justice Muise's first and second bases for dismissing Mr. Bonitto's claim were that Park West was not a *Charter*-protected location and that the right of non-Christian students to be free of religious indoctrination in Christianity outweighed Mr. Bonitto's freedom to disseminate. The judge treated these as stand-alone reasons independent of *Doré*'s proportionality/reasonableness inquiry. The Board's submission to the Court of Appeal does not adopt the judge's approach. Rather, the Board's factum folds these two factors into the contextual analysis of proportionality and reasonableness:

APPLICATION OF THE *DORÉ-LOYOLA* PROPORTIONALITY TEST

40. Recognizing that this analysis is "a highly contextual exercise" [citing *Loyola*, para. 41], the Respondent proposes to review the following four contextual and legal points:

(a) The nature of the decision in its statutory and policy context;

(b) Related, whether the decision was "prescribed by law";

(c) The location of the Appellant's religious expression; and

(d) The overall "proportionate balancing" of the competing interests involved.

[59] In line with the Board's submission, I will confine my reasons to the proportionality and reasonableness analysis under *Doré* and *Loyola – i.e.* Justice Muise's third basis. I do not adopt his first and second bases for dismissing Mr. Bonitto's claim. I say this for the following reasons.

[60] *Montréal (City)* and *Committee for the Commonwealth of Canada*, cited by the judge for his "locational" ruling, dealt with freedom of expression under s. 2(b) of the *Charter*. In Mr. Bonitto's case, the Board acknowledges that it is "government" under s. 32(1)(b) of the *Charter*. The Board and principal acted under the authority of statute, further engaging s. 32(1)(b) which applies to the "legislature". Given those circumstances, I am unaware of an authority, and neither the judge nor the parties cited one, that particular locations are sheltered from the precepts of religious freedom under s. 2(a).

[61] Justice Muise identified Park West's exempted "location" as a "public elementary school". Park West's function as a public elementary school weighs in the proportionality analysis under *Doré* and *Loyola*. The Supreme Court characterized this as a "contextual" inquiry. If "school" status is a free-standing trumping criterion, there is no contextual inquiry.

[62] Similarly - as to Justice Muise's second basis - whether non-Christian students' freedom from Christian indoctrination outweighs Mr. Bonitto's freedom to propound his faith is basic to *Doré/Loyola*'s proportionality inquiry (below, paras. 77-88). That is its place. It is doctrinally incongruent to lift it out as a pre-emptive factor.

Third Issue – Was s. 2(a) Engaged?

[63] I will turn to *Doré/Loyola*'s framework.

[64] The judge found that Mr. Bonitto's faith was sincere. The principal's decision, analyzed objectively, interfered with Mr. Bonitto's wish to disseminate his faith. The interference was more than trivial or unsubstantial. Dissemination and teaching are components of the free exercise of religion under s. 2(a). These criteria govern s. 2(a). *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, para. 94. *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, paras. 56-59, 62. *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, para. 32. *S.L. v. Commission scolaire des Chênes*, [2012] 1 S.C.R. 235, paras. 24-25. *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 S.C.R. 467, para. 159.

[65] The principal's decision engaged or implicated Mr. Bonitto's freedom of religious expression under s. 2(a) of the *Charter*.

Fourth Issue – Was the Decision Proportionate?

[66] The court "balances the *Charter* values with the statutory objectives", then asks "how the *Charter* value at issue will best be protected in view of the statutory objectives". The court "must accord some leeway to the legislator". This means the "proportionality test will be satisfied if the measure 'falls within a range of reasonable alternatives' " or, in other words, if "the decision reflects a proportionate balancing of the *Charter* protections at play". (*Doré*, paras. 55-57). A "proportionate balancing is one that gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate", and "[s]uch a balancing will be found to be reasonable on judicial review". (*Loyola*, para. 39).

[67] What statutory objectives are in play?

[68] The preamble to the *Education Act* extols "an orderly and safe learning environment", "a positive and inclusive school climate" and "the diverse nature and heritage of society in Nova Scotia within the context of its values and beliefs". School boards are duty-bound to provide "safe, quality learning environments": s. 64(2)(f). The RCH Policy (above, para. 14) reflects the aims of inclusion and diversity of belief as essential to a quality learning environment.

[69] Section 2 of the *Act* states that the "Purpose of Act" and the school system's "primary mandate" is "to provide education programs and services for students …". The *Act*, its regulations and its Policies establish that the scholastic program is to be approved by the provincial Minister of Education and implemented by the school boards, superintendents, principals and teachers under the Minister's departmental authority: *Education Act*, ss. 26(1)(b), 38(2)(a), 39(2)(a), 64(2)(a) and (b), 145(1)(g) and (p), the *Ministerial Education Act Regulations*, N.S. Reg. 80/97 as amended. The Minister and the Department frame the curriculum for public schools. The school isn't an institutional soapbox for random pedagogy. Hence the Distribution of Materials Policy (above, para. 12) requires the principal's approval for the distribution of written material at the school during teaching hours.

[70] Justice Muise (para. 74) deduced three statutory objectives: neutrality in matters of religion, inclusion in the school community, and student safety. In my view, these objectives are fully supported by the legislation, the Board's Policies, and the evidence. I would add a significant further objective: the public school's program or curriculum – *i.e.* what is to be inculcated at the school during school hours - is to be approved by the Minister of Education or those acting under the Minister's authority.

[71] Next, *Doré* directs that I identify the *Charter* values.

[72] One *Charter* value, in s. 1, is that a limitation be "prescribed by law". The principal's discretion to prohibit Mr. Bonitto's distribution of material on school premises was explicitly prescribed by article 1.2 of the Board's Distribution of Materials Policy. The Board had adopted that Policy under s. 64 of the *Education Act*. The principal applied it under s. 38. Criteria emanating from the *Education Act* govern the discretion. The Policy, its enabling authority and criteria affect general rights and obligations. They are sufficiently precise and accessible to satisfy the flexible test of whether an administrative decision further to the Policy is "prescribed by law" under s. 1 of the *Charter*. *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, [2009] 2 S.C.R. 295, paras. 50-65.

[73] The *Charter* value to the free exercise of Mr. Bonitto's religion was captured in the seminal passage by Justice Dickson (as he then was) in *Big M Drug Mart Ltd*. at p. 336:

> 94. … The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. …

[74] Mr. Bonitto quotes these words in his factum (para. 45).

[75] Immediately after those words, Justice Dickson added at pp. 336-337:

> 94. … But the concept means more than that.
>
> 95. Freedom can primarily be characterized by the absence of coercion or constraint. … Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.
>
> 96. What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of "the tyranny of the majority".
>
> 97. To the extent that it binds all to sectarian Christian ideal, the *Lord's Day Act* works a form of coercion inimical to the spirit of the *Charter* and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and non-believers alike. The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture.

[76] Justice Dickson's additional comments have generated a significant line of authority on the place of religious inculcation in public schools, culminating in what is now the state's "duty of neutrality".

[77] In *Zylberberg v. Sudbury Board of Education* (1988), 65 O.R. (2d) 641, 1988 CanLII 189 (C.A.), a regulation required public schools to open or close each day with religious exercises including a Scripture reading and the Lord's Prayer.

The Prayer was led by the classroom teacher or over the public address system. Students had the option not to participate. The Court of Appeal declared that the regulation violated non-Christians' freedom of religion under s. 2(a) of the *Charter* and was of no force and effect under s. 52(1) of the *Constitution Act, 1982*. The majority cited Justice Dickson's comments from *Big M* and, as to proportionality under s. 1, said "it is not necessary to give primacy to the Christian religion in schoolopening exercises and … they can be more appropriately founded upon the multicultural traditions of our society" (CanLII, p. 19).

[78] *Zylberberg* was not appealed. The decision was cited with approval in *S.L. v. Commission scolaire des Chênes*, [2012], 1 S.C.R. 235, para. 19 and *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, para. 124.

[79] After *Zylberberg*, Ontario eliminated the "religious exercises", but retained a regulation that public schools commit two hours per week to "religious education". In *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341 (C.A.), the Court of Appeal struck down that regulation. The Court expanded on its ruling in *Zylberberg*.

[80] In *S.L.*, Justice Deschamps, for seven justices, cited *Canadian Civil Liberties Assn.* with approval and summarized the Ontario Court of Appeal's reasons:

> [20] … The court held unanimously that the purpose and effect of the regulation were to provide for religious indoctrination, which the *Canadian Charter* does not authorize. Such indoctrination was not rationally connected to the educational objective of inculcating proper moral standards in elementary school students. The Court of Appeal noted that a program that taught about religion and moral values without indoctrination in a particular faith would not breach the *Canadian Charter* (p. 344).

[81] In *S.L.*, Quebec's public schools offered a mandatory course in "Ethics and Religious Culture", which canvassed various religious beliefs objectively without denominational primacy. Roman Catholic parents contended that this approach infringed their right to impart Catholicism to their children. The Supreme Court held that there was no infringement of freedom of religion. Justice Deschamps said:

> [37] … Having adopted a policy of neutrality, the Quebec government cannot set up an education system that favours or hinders any one religion or a particular vision of religion. Nevertheless, it is up to the government to choose educational programs within its constitutional framework. In light of this context, I cannot

> conclude that exposing children to "a comprehensive presentation of various religions without forcing the children to join them" constitutes in itself an indoctrination of students that would infringe the appellants' freedom of religion.
>
> …
>
> [40] … The suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents amounts to a rejection of the multi-cultural reality of Canadian society and ignores the Quebec government's obligations with regard to public education. …

[82] Recently in *Mouvement laïque*, Justice Gascon, for eight justices, summarized the state's responsibility of neutrality in religious matters:

> [1] The state is required to act in a manner that is respectful of every person's freedom of conscience and religion. This is a fundamental right that is protected by the Quebec *Charter of human rights and freedoms* … and the *Canadian Charter of Rights and Freedoms* … Its corollary is that the state must remain neutral in matters involving this freedom. …
>
> …
>
> [71] Neither the *Quebec Charter* nor the *Canadian Charter* expressly imposes a duty of religious neutrality on the state. This duty results from an evolving interpretation of freedom of conscience and religion. …
>
> …
>
> [72] As LeBel J. noted, the evolution of Canadian society has given rise to a concept of neutrality according to which the state must not interfere in religion and beliefs. The state must instead remain neutral in this regard. This neutrality requires that the state neither favour nor hinder any particular belief, and the same holds true for non-belief (*S.L.*, at para. 32). It requires that the state abstain from taking any position and thus avoid adhering to a particular belief.
>
> [73] … When the state adheres to a belief, it is not merely expressing an opinion on the subject. It is creating a hierarchy of beliefs and casting doubt on the value of those it does not share. …
>
> [74] By expressing no preference, the state ensures that it preserves a neutral public space that is free of discrimination and in which true freedom to believe or not to believe is enjoyed by everyone equally, given that everyone is valued equally. …
>
> [75] … The state may not act in such a way as to create a preferential public space that favours certain religious groups and is hostile to others. It follows that the state may not, by expressing its own religious preference, promote the participation of believers to the exclusion of non-believers or vice versa.

> [76] When all is said and done, the state's duty to protect every person's freedom of conscience and religion means that it may not use its powers in such a way as to promote the participation of certain believers or non-believers in public life to the detriment of others. It is prohibited from adhering to one religion to the exclusion of all others. … Today, the state's duty of neutrality has become a necessary consequence of enshrining the freedom of conscience and religion in the *Canadian Charter* and the *Quebec Charter*.

[83] Returning to this case, the Board's duty of neutrality tempers the *Charter* value of Mr. Bonitto's religious expression. Both tenets emanate from s. 2(a) of the *Charter*. *Doré*'s proportionality must accommodate that equilibrium.

[84] One option would be a Board sponsored program of objective and secular instruction on world religions, similar to that upheld in *S.L.*. The Halifax Regional School Board's Religious Education Policy, article 1.1 contemplates such a program (above, para. 13). Another option is embodied in article 1.2 of the Religious Education Policy – no denominational religious instruction on school premises during school hours (above, para. 13). The Board's witnesses testified that, in the past, requests from other denominations had been denied, as had Mr. Bonitto's. Either option would satisfy the Board's duty of neutrality. Unless there is a third proportionate option that is less intrusive to Mr. Bonitto's religious freedom, either option would satisfy *Doré* and be reasonable under *Dunsmuir*.

[85] Mr. Bonitto suggests a third option. He would proselytize at Park West during school hours. He undertakes not to enter the classrooms. As for the Board's duty of neutrality, Mr. Bonitto says he seeks no preferential treatment. He acknowledges that proponents of other faiths are welcome to speak just as freely.

[86] With respect, Mr. Bonitto's suggestion is not proportionate to the statutory objectives under *Doré*.

[87] Mr. Bonitto's model envisages a theological midway with rivals beckoning nine year olds walking to their classrooms. The Minister, Board and school would have no control over the messages. That would contradict a basic premise of public schooling under the *Education Act – i.e.* on school premises during school hours, the inculcated message must pertain to the approved scholastic program.

[88] Mr. Bonitto's message is that non-Christians will burn in a sea of flames for eternity. The Board's witnesses held the view that elementary students, especially non-Christians, hearing this on the steps would entertain an unsettling distraction from their classwork. The message would undermine the "orderly and safe

learning environment" and the "positive and inclusive school climate" proclaimed by the preamble to the *Education Act*. That view makes good sense to me.

[89] The principal's decision to prohibit Mr. Bonitto from distributing religious material on public school premises during school hours was proportionate under *Doré* and *Loyola* and occupied the range of reasonably acceptable outcomes under *Dunsmuir*. I agree with Justice Muise's conclusion.

Conclusion

[90] I would dismiss the appeal. I would order appeal costs of $5,000 (approximately 40% of the trial costs) plus reasonable disbursements to be payable by Mr. Bonitto to the Board.

Fichaud, J.A.

Concurred: Beveridge, J.A.

Bryson, J.A.

Scanlan, J.A.

Van den Eynden, J.A.