SUPREME COURT OF NOVA SCOTIA
Citation: *Bonitto v. Halifax Regional School Board*, 2014 NSSC 311

Date: 2014-08-22
Docket: Halifax, No. 346361
Registry: Halifax

Between:

Sean Bonitto

Plaintiff

-and-

Halifax Regional School Board

Defendant

Judge:	The Honourable Justice Pierre L. Muise
Heard:	November 25, 27 and 28, 2013, in Halifax, Nova Scotia
Final Written Submissions:	December 9, 2013
Counsel:	Sean Alexander Bonitto, Plaintiff, self-represented Sheree L. Conlon and Tipper McEwan, Solicitors for the Defendant

INTRODUCTION

[1] The Plaintiff, Sean Bonitto, is the father of two children who are students at Park West School, a public school operated by the Halifax Regional School Board ("HRSB"). 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. He was directed by the principal of the school and other representatives of the HRSB to discontinue the practice (while students were present and the HSRB 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.

[2] Mr. Bonitto, who is a fundamentalist Christian, commenced the within action alleging that the HRSB violated his rights under subsections (a) and (b) of Section 2 of the ***Canadian Charter of Rights and Freedoms***, and claiming damages in the amount of $85,000.

[3] His statement of claim also alluded to discrimination on the basis of religion. During closing argument, Mr. Bonitto handed the Court a document entitled

"Outline of Court Evidence in Halifax Regional School Board Case". That document refers to discrimination by violating his rights to freedom of religion and expression. However, no breach of equality rights was advanced at trial, and there was no evidence that other groups were permitted to distribute such materials, on school grounds, during school hours. Rather, the undisputed evidence was that multiple other religious groups had requested approval to do so, and, approval had been denied to them as well. There was no evidence to support a claim of discrimination. Mr. Bonitto's oral argument made it clear that he was alleging infringement of his rights to freedom of religion and expression, not discrimination. Therefore, discrimination is not an issue I need to address.

[4] His statement of claim further referred to his son, Isaac Bonitto, in October 2010, while a grade 3 student at Park West, being forbidden from handing out gospel tracts. However, at trial, Mr. Bonitto confirmed that he was the only plaintiff and that he was claiming for violation of his rights of religious expression by being directed to stop handing out gospel tracts. Thus, there was no issue at trial in relation to whether or not preventing Isaac from handing out gospel tracts of school violated Isaac's Charter rights.

[5] Although there was evidence regarding the children handing out Valentines and Christmas cards with religious content, the evidence was clear that those were permitted by the School and they were not in issue.

[6] Glenn Anderson, as Associate Chair of the School Advisory Council for Park West School, wrote a letter dated October 11, 2011 to Mr. Bonitto and his wife, Pamela Bonitto, asking them to "cease and desist distributing literature to students at the school *at any time* without prior written approval of" the school principal. Section 23(1) of the ***Education Act***, S.N.S. 1995-96, c. 1, provides that the Governor in Council "may transfer duties and powers of the school board to a school advisory Council". However, no regulations effecting such transfer have been made. Therefore, the School Advisory Council had no authority to direct the Bonittos to stop distributing literature. It, pursuant to Section 22 of the ***Education Act***, was limited to an advisory role. Consequently, it is unnecessary to consider whether that letter infringed Mr. Bonitto's ***Charter*** rights.

[7] HRSB acknowledges that the ***Charter*** applies, and it is noted at page 741 of Peter Hogg's text, "Constitutional Law of Canada, Fifth Edition" (Scarborough: Thomson Canada Limited – 2007), that it applies to "all actions of school boards that are taken under statutory authority".

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

ISSUES

[9] Therefore, the issues to be determined are as follows:

1. Is Park West School a location where the ***Charter*** Section 2 (a) and/or (b) rights of the parent of a student at that school, to distribute gospel tracts, are constitutionally protected?

2. Was the refusal to permit distribution of the gospel tracts in question an infringement of Mr. Bonitto's Section 2 (a) and/or (b) rights?

3. If so, did the HRSB justify the infringement?

4. If the infringement was not justified, what is the appropriate remedy?

LAW AND ANALYSIS

ISSUE 1. IS PARK WEST SCHOOL A LOCATION WHERE THE CHARTER SECTION 2 (A) AND/OR (B) RIGHTS OF THE PARENT OF A STUDENT AT THAT SCHOOL, TO DISTRIBUTE GOSPEL TRACTS, ARE CONSTITUTIONALLY PROTECTED?

[10] McLachlin C.J.C. and Deschamps J., for the majority, in ***City of Montreal v. 2952-1366 Québec Inc.***, 2005 SCC 62, at paragraphs 60 to 81, discussed how

the method and location of expression may bring it outside the protection of Section 2(b) of the ***Charter*** and proposed the test to be used to determine what government-owned property is excluded from Section 2(b) protection.

[11] At paragraph 64, they stated:

> "Some areas of government-owned property have become recognized as public spaces in which the public has a right to express itself. But other areas, like private offices and diverse places of public business, have never been viewed as available spaces for public expression. It cannot have been the intention of the drafters of the *Canadian Charter*, the argument continues, to confer a *prima facie* right of free expression in these essentially private spaces and to cast the onus on the government to justify the exclusion of public expression from places that have always and unquestionably been off-limits to public expression and could not effectively function if they were open to the public."

[12] At paragraphs 73 to 77, they outlined the test for application of Section 2(b) to public property and provided factors to consider in applying the test, as follows:

> "**73** We therefore propose the following test for the application of s. 2(b) to public property; it adopts a principled basis for method or location-based exclusion from s. 2(b) and combines elements of the tests of Lamer C.J. and McLachlin J. in *Committee for the Commonwealth of Canada*. The onus of satisfying this test rests on the claimant.
>
> **74** The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment. To answer this question, the following factors should be considered:
>
> (a) the historical or actual function of the place; and
>
> (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression
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> **75** The historical function of a place for public discourse is an indicator that expression in that place is consistent with the purposes of s. 2(b). In places where

> free expression has traditionally occurred, it is unlikely that protecting expression undermines the values underlying the freedom. As a result, where historical use for free expression is made out, the location of the expression as it relates to public property will be protected.
>
> **76** Actual function is also important. Is the space in fact essentially private, despite being government-owned, or is it public? Is the function of the space -- the activity going on there -- compatible with open public expression? Or is the activity one that requires privacy and limited access? Would an open right to intrude and present one's message by word or action be consistent with what is done in the space? Or would it hamper the activity? Many government functions, from cabinet meetings to minor clerical functions, require privacy. To extend a right of free expression to such venues might well undermine democracy and efficient governance.
>
> **77** Historical and actual functions serve as markers for places where free expression would have the effect of undermining the values underlying the freedom of expression. The ultimate question, however, will always be whether free expression in the place at issue would undermine the values the guarantee is designed to promote. Most cases will be resolved on the basis of historical or actual function. However, we cannot discount the possibility that other factors may be relevant. Changes in society and technology may affect the spaces where expression should be protected having regard to the values that underlie the guarantee. The proposed test reflects this, by permitting factors other than historical or actual function to be considered where relevant."

[13] Is Park West School essentially private or public?

[14] Park West School is rented and occupied by the HRSB, established under the authority of the ***Education Act***. Therefore, it is essentially government-leased property.

[15] The ***Protection of Property Act***, R.S.N.S. 1989, c. 363, applies to public schools, such that the occupier of the school can, by notice, prohibit entry to persons, including parents of students attending the school in question: ***R. v. L.(C.)***, 2007 NSSC 14, para. 18; and, ***Doncaster v. Chignecto-Central Regional School***

Board, 2012 NSSC 383, para. 8. HRSB is an occupier of those premises because it "is in possession of the premises" and "has responsibility for and control over the condition of [the] premises [and] the activities there carried on, [and] control over persons allowed to enter the premises". Therefore, although Park West is a "public" school, its buildings and grounds are not public places, such as public parks, sidewalks and streets, where members of the public can enter without permission, express or implied. Persons, particularly parents of students, have implied permission to enter school grounds or buildings for legitimate purposes such as, in the case of parents, picking up or dropping off their children. However, such persons must, at some point, report to the office or school staff, even though that requirement may not have to be repeated each time parents pick up or drop off their children. Public School facilities, particularly those owned by the school board, may sometimes be used for community events or even as community centers. However, that is only with the permission of the school, much like halls owned and operated by private groups. Consequently, in my view, public schools in general have a strong private element, particularly during school hours, while staff are responsible for students.

[16] Park West, according to the evidence of Pamela Comeau, Supervisor of School Administration for the HRSB, is leased by the HRSB from "Scotia

Learning", a private company, for the period between 7 am and 6 pm weekdays, with the option to request weekend time. Therefore, Park West has even less of a community or public element than school-board-owned schools. It is much closer to a private office space, than to a public park or street.

[17] In ***Committee for the Commonwealth of Canada v. Canada***, [1991] 1 S.C.R. 139, the Court unanimously held that a Crown-owned airport was a location in which Section 2(b) rights to distribute pamphlets and engage in discussion informing passers-by of the Committee and its political goals were protected. The portions of the airport in question were those "frequented by travellers and members of the public". However, unlike schools, members of the public entering airports are not required to report to any office or official. They can simply circulate within the public areas of the airport without doing so.

[18] Is the function of Park West School and the activity going on there "compatible with open public expression"? "Or is the activity one that requires privacy and limited access? Would an <u>open right to intrude</u> and present one's message by word or action be consistent with what is done in the space? Or would it hamper the activity?"

[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. Mr. Bonitto agreed that the purpose of public schools is to teach the school curriculum. 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 of reasons. However, members of the public have to check in at the main office and obtain permission to access beyond that.

[20] Section 2 of the ***Education Act*** states that the "primary mandate" of publicly funded school systems in Nova Scotia "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".

[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. In my view, this is incompatible and inconsistent with the administration and operation of a public school program, in an elementary school, with parameters set by a public school program. It particularly runs contrary to the constitutional requirement that any teachings of public schools not promote or assume the superiority of any one religion. The type of message which Mr. Bonitto wishes to convey is precisely the type of message that is prohibited in a public school program. Therefore, it conflicts directly with that program, and hampers its effective delivery.

[22] Further, permitting members of the public to hand out pamphlets of any kind on school grounds, during school hours, would, in my view, be disruptive to the school environment and learning process.

[23] Parents entrust the safety of their children to public schools. Having members of the public handing out pamphlets to people, including students, on

school property, during school hours, hampers the ability of schools to keep their students safe.

[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, Coordinator of Diversity Management for the HRSB during the period in which the incidents leading to the within action occurred, 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.

[25] Another aspect of Park West School which is relevant to whether free expression within its property would undermine the values underlying it is that, as an elementary school, servicing grades primary to nine, it is occupied by many

children between the ages of 4 and 15. Therefore, it is particularly important that any information disseminated on school grounds be vetted to ensure that it is age-appropriate. Dissemination of age inappropriate materials would create a serious risk of harm to the students. In my view, the potentially harmful effect of uncontrolled dissemination of information by the public on school grounds undermines the values underlying free expression.

[26] Elementary school students do not vote and will not be eligible to do so for many years. Consequently, elementary school properties are not venues where free expression of political opinion and criticism are likely to be an effective instrument of democratic government, at least in the short term.

[27] In my view, elementary schools strive to provide an environment conducive to the individual self-fulfillment of the students. It is not a place for members of the public, or even parents of students, to seek to express themselves for their own individual self-fulfillment, on matters unrelated to the school and its operation.

[28] Although schools generally are appropriate places to foster the truth finding process, many of the students are too young to be exposed to multiple differing views and sort out the "truth" on their own.

[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.

[31] In the event that I am wrong in this conclusion, I will examine whether the refusal to allow Mr. Bonitto to distribute the gospel tracts in question infringed his Section 2 (a) and (b) rights, and, if so, whether the infringement was justified.

ISSUE 2. WAS THE REFUSAL TO PERMIT DISTRIBUTION OF THE GOSPEL TRACTS IN QUESTION AN INFRINGEMENT OF MR. BONITTO'S SECTION 2 (A) AND/OR (B) RIGHTS?

[32] Section 2 (a) and Section 2 (b) of the ***Charter*** state:

> "**2.** Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression … ."

[33] McLachlin C.J.C., for the majority, in ***Hutterian Brethren of Wilson Colony v. Alberta***, 2009 SCC 37, at paragraph 32, articulated the test for determining whether there has been a Section 2(a) infringement as follows:

> "**32** An infringement of s. 2(a) of the Charter will be made out where: (1) the claimant sincerely believes in a belief or practice that has a nexus with religion; and (2) the impugned measure interferes with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial: *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, and Multani. "Trivial or insubstantial" interference is interference that does not threaten actual religious beliefs or conduct. As explained *in R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759, per Dickson C.J.:
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> The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices. The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. For a state-imposed cost or burden to be proscribed by s. 2(a) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial: see, on this point, *R. v. Jones*, [1986] 2 S.C.R. 284, *per* Wilson J. at p. 314. [Emphasis added.]"

[34] Iacobucci J., for the majority, in ***Syndicat Northcrest v. Amselem***, 2004 SCC 47, at paragraphs 56 to 59, had described the test as follows:

> "**56** … [A]t the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered.
>
> (2) Infringement of Religious Freedom
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> **57** Once an individual has shown that his or her religious freedom is triggered, as outlined above, a court must then ascertain whether there has been enough of an interference with the exercise of the implicated right so as to constitute an infringement of freedom of religion under the Quebec (or the Canadian) *Charter*.
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> 58 More particularly, as Wilson J. stated in *Jones, supra*, writing in dissent, at pp. 313-14:
>
> > Section 2(a) does not require the legislature to refrain from imposing any burdens on the practice of religion. Legislative or administrative action whose effect on religion is trivial or insubstantial is not, in my view, a breach of freedom of religion. [Emphasis added.]
>
> Section 2(a) of the Canadian *Charte*r prohibits only burdens or impositions on religious practice that are non-trivial. This position was confirmed and adopted by Dickson C.J. for the majority in *Edwards Books, supra*, at p. 759:
>
> > All coercive burdens on the exercise of religious beliefs are potentially within the ambit of s. 2(a).
> >
> > This does not mean, however, that every burden on religious practices is offensive to the constitutional guarantee of freedom of religion... . Section 2(a) does not require the legislatures to eliminate every minuscule state-imposed cost associated with the practice of religion. Otherwise the *Charter* would offer protection from innocuous secular legislation such as a taxation act that imposed a modest sales tax extending to all products, including those used in the course of religious worship. In my opinion, it

> is unnecessary to turn to s. 1 in order to justify legislation of that sort... . The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. For a state-imposed cost or burden to be proscribed by s. 2(a) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial: see, on this point, *R. v. Jones*, [1986] 2 S.C.R. 284, per Wilson J. at p. 314. [Emphasis added.]
>
> **59** It consequently suffices that a claimant show that the impugned contractual or legislative provision (or conduct) interferes with his or her ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial. …"

[35] At paragraph 62, Iacobucci J. added:

> "Even if individuals demonstrate that they sincerely believe in the religious essence of an action, for example, that a particular practice will subjectively engender a genuine connection with the divine or with the subject or object of their faith, and even if they successfully demonstrate non-trivial or non-insubstantial interference with that practice, they will still have to consider how the exercise of their right impacts upon the rights of others in the context of the competing rights of private individuals. Conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected."

[36] He made those comments in the course of assessing whether there had been an infringement of religious freedom, before turning to consider whether there was justification for the limit on the exercise of the freedom of religion. Consequently, a Court must consider and balance conflicting or competing rights of individuals to determine whether there has been an infringement of the rights of the individual or individuals claiming a violation.

[37] In ***L.(S.) v. Des Chênes (Commission scolaire)***, 2012 SCC 7, Deschamps J., for the Court, emphasized that determining whether an interference with religious practice is more than trivial or insubstantial must be done based upon an objective analysis, stating at paragraph 24:

> "**24** It follows that when considering an infringement of freedom of religion, the question is not whether the person sincerely believes that a religious practice or belief has been infringed, but whether a religious practice or belief exists that has been infringed. The subjective part of the analysis is limited to establishing that there is a sincere belief that has a nexus with religion, including the belief in an obligation to conform to a religious practice. As with any other right or freedom protected by the *Canadian Charter* and the *Quebec Charter*, proving the infringement requires an objective analysis of the rules, events or acts that interfere with the exercise of the freedom. To decide otherwise would allow persons to conclude themselves that their rights had been infringed and thus to supplant the courts in this role."

[38] Deschamps J., then, at paragraph 25, also referenced the requirement to consider competing or conflicting rights in determining whether there has been an infringement, stating:

> "**25** Furthermore, the following comment of Wilson J. in *R. v. Jones*, [1986] 2 S.C.R. 284, at p. 314, which Iacobucci J. quoted in Amselem, para. 58, bears repeating: s. 2(a) of the *Canadian Charter* " does not require the legislature to refrain from imposing any burdens on the practice of religion" (emphasis omitted; see also *Edwards Books*). "The ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises" (*Amselem*, at para. 62). No right is absolute."

[39] In ***Saskatchewan Human rights Commission v. Whatcott***, 2013 SCC 11, at paragraph 159, Rothstein J., for the Court, stated:

> "Preaching and the dissemination of religious beliefs is an important aspect of some religions. As stated by Dickson J. in *Big M Drug Mart*, at p. 336, '[t]he 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' (emphasis added). Section 4 of the Code confirms that every person enjoys the right to 'freedom of conscience, opinion and belief and freedom of religious association, teaching, practice and worship'."

[40] The three-part test applicable to determining whether there has been a Section 2(b) infringement, emanating from ***Irwin Toy Ltd. c. Québec (Procureur général)***, [1989] 1 S.C.R. 927, was articulated at paragraph 56 of ***City of Montréal*** as follows:

> "First, did the noise have *expressive* content, thereby bringing it within s. 2(b) protection? Second, if so, does the method or location of this expression remove that protection? Third, if the expression is protected by s. 2(b), does the By-law *infringe* that protection, either in purpose or effect?"

[41] The same test was more recently outlined and applied by the Supreme Court of Canada in ***Canadian Broadcasting Corp. v. Canada (Attorney General)***, 2011 SCC 2, at paragraphs 33 to 54. The Court summarized the test at paragraph 38, as follows:

> "In sum, to determine whether an expressive activity is protected by the *Charter*, we must answer three questions: (1) Does the activity in question have expressive content, thereby bringing it, *prima facie*, within the scope of s. 2(b) protection? (2) Is the activity excluded from that protection as a result of either the location or the method of expression? (3) If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action?"

[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.

[45] He was prohibited from handing out Bible tracts. There is some dispute in relation to whether he was prohibited from handing out any Bible tracts, or simply the ones that he presented and sought permission to distribute. However, as indicated, all Bible tracts he wished to distribute had the same core message in any event. 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.

[46] The Defendant argues that the interference was trivial and insubstantial as it was a very small part of his religious conduct, when considered in the context of everything that he does to preach the gospel. It pointed out that he takes Bible tracts with him everywhere he goes and hands them out, as an activity which is incidental to his daily business, including at the grocery store, bank, and the likes. It emphasized Mr. Bonitto's evidence that, as part of his ministry, he: conducts church services; supports other churches, including in other countries; preaches on the street; conducts Bible conferences; conducts Bible crusades in other countries; runs a website, controlling its content; posts videos on his YouTube channel; posts podcasts; and, streams a 24 hour Internet radio station.

[47] Mr. Bonitto argues that the question is: not whether the interference with his rights to freedom of religion is trivial or insubstantial in the context of everything

that he does elsewhere; but, whether the interference complained of, at the location complained of, is more than trivial or insubstantial.

[48] I agree with Mr. Bonitto that, in determining whether the interference is more than trivial or insubstantial, I must assess the interference complained of, at the location complained of, not whether or not his religious practice has been interfered with elsewhere. Otherwise, defendants could simply defend infringing conduct by showing the religious activity could be exercised elsewhere, without having to justify their own infringing conduct, policies or laws. In addition, once a plaintiff had been unsuccessful on the basis that he or she was allowed to conduct his or her religious activities at many other places, he or she would be unlikely to be able to have the issue tried again if those other locations began prohibiting such activities. Further, it would risk making constitutional challenges alleging violation of religious rights overly cumbersome. The cautious plaintiff would join as defendants, or subpoena to testify, persons responsible for many other locations where he or she conducts, or might seek to conduct, the same religious practice.

[49] The Defendant argues handing out Bible tracts, in the circumstances of this case, is not a core religious practice. I disagree. When a person believes that their religion requires them to preach the gospel to every creature, and that

dissemination of Bible tracts is part of that preaching, it is, in my view, part of a core religious practice.

[50] The Defendant prohibited Mr. Bonitto from distributing the religious literature that he presented to them, and took the position that he would be prohibited from distributing any literature with the same core message that, unless you accept Jesus Christ as your Savior, you will go to hell. 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.

[52] Pamela Comeau, Supervisor of School Administration for the HRSB, 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, former Coordinator of Diversity Management for the HRSB, testified that distribution of literature favoring 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, current Coordinator of Diversity Management for the HRSB also testified. She 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. That 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 concerns 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.

[57] In ***Des Chênes***, parents of students in Quebec schools challenged the constitutionality of the mandatory Ethics and Religious Culture program on the basis that it interfered with their obligation to pass on the Catholic religion to their children. At paragraph 37, the Court concluded:

> "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."

[58] Similarly, the HRSB has adopted a "policy of neutrality", and "cannot set up an education system that favors … any one religion". Mr. Bonitto testified that he wanted to be able to hand out gospel tracts to anyone, including students. Even if he had had no intention of handing them out to students, their dissemination on school property would, more likely than not, at some point, result in them falling into the hands of students. In addition, any materials handed out on school property during school hours are to be materials which students should read and learn from. Therefore, permitting someone, including Mr. Bonitto, to hand out materials which favor one religion over others would effectively be in contravention of the policy of neutrality. It would be circumventing the Board's inability to include such materials and its curriculum. As such, in my view, it would interfere with the students' right to religiously neutral education, and it would amount to "indoctrination".

[59] The Ontario Court of Appeal, in ***Canadian Civil Liberties Association v. Ontario*** (1990), 71 O.R.(2d) 341 and ***Zylberberg v. Sudbury Board of Education*** (1988), 65 O.R.(2d) 641, held that 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.

[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.

[61] The evidence of Susan Haikings, a teacher at Park West School, included that students at the school were from families representing over 50 different languages and cultures, and that probably one quarter of the students were Muslim.

[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.

[63] I will now turn to a brief analysis of whether Mr. Bonitto's Section 2(b) rights were violated. The religious literature he sought to disseminate clearly had

expressive content. 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.

[66] I will, nevertheless, go on to briefly address whether, assuming his rights were infringed, the HRSB has justified the infringement.

ISSUE 3. IF SO, DID THE HRSB JUSTIFY THE INFRINGEMENT?

[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.

[68] During the pretrial conference held May 22, 2013, Mr. Bonitto stated that: he was not challenging the policy itself; and, was only challenging the application of the policy. On cross-examination he stated that he was not sure whether that was still the case. He indicated that: the primary challenge was to the decision; but, he believed the policy was also at issue. On redirect examination he clarified that he believed the way that the policy was being interpreted and extrapolated from was problematic. In closing argument he stated that he had no problem with the principal having to approve any materials that are disseminated on school property. The problem he is complaining of is that there was allegedly a blanket denial without any attempt to work with him so that he could express his faith. He pointed

out that the policy does not state that you cannot hand out religious material. He concluded by saying that, therefore, he was challenging the decision.

[69] He 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.

[71] In ***Doré v. Barreau du Québec***, 2012 SCC 12, at paragraphs 4 to 7, Abella J., for a unanimous Court, stated:

> "**4** … [A]n 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. …
>
> **5** [W]hile 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."

[72] At paragraphs 55 to 57, she stated:

"**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. …

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."

[73] In the case at hand, we are dealing with the exercise of discretion contained in a policy made pursuant to statutory authority. In my view, the *Doré* framework is equally applicable in such circumstances. Therefore, I will apply it, rather than the *Oakes* Test.

[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.

[75] In the course of assessing whether the impact of Mr. Bonitto's proposed dissemination of religious materials on the rights of other individuals was such as to warrant a finding that his religious rights ought not be protected, I have already canvassed the objectives of religious neutrality and inclusion in the school community. Those comments are equally applicable here, under this *Doré* analysis. I also add the following comments.

[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.

[77] The preamble to the ***Education Act*** refers to the obligation to "maintain a positive and inclusive school climate".

[78] At paragraph 82 of ***Attis v. New Brunswick School District No. 15***, [1996] 1 S.C.R. 825, LaForest J., for a unanimous court, stated:

> "**82** There can be no doubt that the attempt to foster equality, respect and tolerance in the Canadian educational system is a laudable goal. But the additional driving factor in this case is the nature of the educational services in question: we are dealing here with the education of young children. While the importance of education of all ages is acknowledged, of principal importance is the education of the young. As stated in Brown, supra, education awakens children to the values a society hopes to foster and to nurture. Young children are especially vulnerable to the messages conveyed by their teachers. They are less likely to make an intellectual distinction between comments a teacher makes in the school and those the teacher makes outside the school. They are, therefore, more likely to feel threatened and isolated by a teacher who makes comments that denigrate personal characteristics of a group to which they belong. Furthermore, they are unlikely to distinguish between falsehoods and truth and more likely to accept derogatory views espoused by a teacher. The importance of ensuring an equal and

> discrimination free educational environment, and the perception of fairness and tolerance in the classroom are paramount in the education of young children. This helps foster self-respect and acceptance by others."

[79] Mr. Bonitto questioned how he could be made to feel welcome and included in the school community if he was forbidden to exercise his religious practice of dissemination.

[80] The RCH Policy, in its statement of general principles, states:

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

[81] The definition of "inclusion" in the RCH Policy reads: "Inclusion is actions taken to ensure that students, staff, parents and school community members feel they belong, are engaged, and connected through their participation in classrooms, schools, and the school board."

[82] In my view, this demonstrates that the objective of inclusion is aimed at the learning environment, schools and the school system. It does not relate to having persons feel included by permitting them to engage in activities unrelated to those target areas.

[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.

[84] Therefore, the objective of inclusion, in my view, has been applied to Mr. Bonitto for the purposes it targets.

[85] The HRSB witnesses provided the following evidence in relation to the objective of protecting the safety of the students.

[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", 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. She was of the view that these aspects of the materials made them inappropriate for the students at their age and stage of development.

[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. A brochure that Mr. Bonitto had given to her 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.

[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 one particular religion or set of beliefs.

[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.

[95] There was a dispute over whether the HRSB prohibited distribution of any and all gospel tracts by Mr. Bonitto, or only the ones presented by Mr. Bonitto. It is unnecessary to resolve this factual dispute because Mr. Bonitto clearly stated that all materials he wished to distribute contain the same core message of facing eternal damnation if one does not accept Jesus Christ as his or her Savior. That core message prevents the achievement, and is the obverse, of the paramount objectives of religious neutrality and inclusion. Therefore, in my view, the principal's decision is also within the range of reasonably acceptable outcomes even if the materials sought to be distributed do not contain language and imagery creating a risk to the young students.

[96] Even though Mr. Bonitto testified that the great majority of the literature he distributes is to adults, he also indicated that he wanted to, and did, hand some out to students as well. In addition, as can be seen from what happened in relation to the pamphlet left by Ms. Haikings on her desk, some of the pamphlets handed to adults will, more likely than not, find their way into the hands of students. Further, the HRSB policies and objectives include that parents also feel included. More likely than not, a large part of the adults on the school grounds would be parents.

Exposing them to dissemination of such materials on school grounds, during school hours, would not be conducive to a feeling of inclusion in non-Christians. Therefore, I am of the view that a proportionate balancing could not have been achieved by limiting the age of the recipients of the materials. It would still have defeated the objectives.

[97] As a result, I cannot accept Mr. Bonitto's argument that, to achieve a proportionate balancing, the principal could not prohibit distribution of all the Bible tracts he wished to disseminate, to all persons.

[98] Based on these points , I find that the HRSB has justified the infringement, assuming there had been one.

ISSUE 4. IF THE INFRINGEMENT WAS NOT JUSTIFIED, WHAT IS THE APPROPRIATE REMEDY?

[99] In light of my answers to the other questions, the decision of the principal was constitutionally valid. Therefore, it is unnecessary to answer this question.

CONCLUSION

[100] Based on the foregoing, Mr. Bonitto's action is dismissed.

ORDER

[101] I ask counsel for the Halifax Regional School Board to prepare the order.

COSTS

[102] I have already received some submissions on costs. However, it has been indicated that there have been formal offers to settle which may be relevant to the issue of costs depending on the outcome of the trial. If the parties are unable to agree on costs, I ask that any further submissions they wish to make on the question of costs be provided to me within one month of receipt of this decision.

Muise, J.