James Chamberlain, Murray Warren, Diane Willcott, Blaine Cook, by his Guardian *Ad Litem*, Sue Cook, and Rosamund Elwin *Appellants*

v.

The Board of Trustees of School District No. 36 (Surrey) *Respondent*

and

EGALE Canada Inc., the British Columbia Civil Liberties Association, Families in Partnership, the Board of Trustees of School District No. 34 (Abbotsford), the Elementary Teachers' Federation of Ontario, the Canadian Civil Liberties Association, the Evangelical Fellowship of Canada, the Archdiocese of Vancouver, the Catholic Civil Rights League and the Canadian Alliance for Social Justice and Family Values Association *Interveners*

Indexed as: Chamberlain *v.* Surrey School District No. 36

Neutral citation: 2002 SCC 86.

File No.: 28654.

2002: June 12; 2002: December 20.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for british columbia

Administrative law — Judicial review — Standard of review — School boards — Selection of books for use in classrooms — School Board passing resolution declining to approve three books depicting same-sex parented families as supplementary learning resources for use in Kindergarten-Grade One classrooms — Standard of review applicable to Board's decision — Whether Board's decision reasonable — School Act, R.S.B.C. 1996, c. 412, s. 76.

Schools — School boards — Powers and duties — Selection of books for use in classrooms — School Board passing resolution declining to approve three books depicting same-sex parented families as supplementary learning resources for use in Kindergarten-Grade One classrooms — Whether Board applied criteria required by School Act, curriculum and its own regulation for approving supplementary learning resources — School Act, R.S.B.C. 1996, c. 412, ss. 76, 85.

Schools — School boards — Powers and duties — Selection of books for use in classrooms — Meaning of secularism and non-sectarianism in School Act — School Board passing resolution declining to approve three books depicting same-sex parented families as supplementary learning resources for use in Kindergarten-Grade One classrooms — Whether Board acted in manner that accorded with secular mandate of School Act — Whether requirements of secularism and non-sectarianism preclude Board making decisions based on religious considerations — School Act, R.S.B.C. 1996, c. 412, ss. 76, 85.

The B.C. *School Act* confers on the Minister of Education the power to approve basic educational resource materials to be used in teaching the curriculum in public schools, and confers on school boards the authority to approve supplementary

educational resource material, subject to Ministerial direction. A Kindergarten-Grade One ("K-1") teacher asked the Surrey School Board to approve three books as supplementary learning resources, for use in teaching the family life education curriculum. The books depicted families in which both parents were either women or men — same-sex parented families. The Board passed a resolution declining to approve the books. The Board's overarching concern, as found by the trial judge, was that the books would engender controversy in light of some parents' religious objections to the morality of same-sex relationships. The Board also felt that children at the K-1 level should not be exposed to ideas that might conflict with the beliefs of their parents; that children of this age were too young to learn about same-sex parented families; and that the material was not necessary to achieve the learning outcomes in the curriculum.

The British Columbia Supreme Court quashed the Board's resolution, finding the decision offended s. 76 of the *School Act*, because members of the Board who had voted in favour of the resolution were significantly influenced by religious considerations. The Court of Appeal set aside the decision on the basis that the resolution was within the Board's jurisdiction.

Held (Gonthier and Bastarache JJ. dissenting): The appeal should be allowed. The School Board's decision was unreasonable in the context of the educational scheme laid down by the legislature. The question of whether the books should be approved as supplementary learning resources is remanded to the Board, to be considered according to the criteria laid out in the curriculum guidelines and the broad principles of tolerance and non-sectarianism underlying the *School Act*.

Per McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Major, Binnie and Arbour JJ.: The pragmatic and functional approach points to reasonableness as the appropriate standard of review. The School Board is an elected body and a proxy for parents and local community members, which suggests that some deference is owed. However, the absence of a privative clause, the clear commitment of the *School Act* and the Minister to promoting tolerance and respect for diversity, and the fact that the problem before the Board has a human rights dimension, all militate in favour of a stricter standard of review.

The *School Act*'s insistence on secularism and non-discrimination lies at the heart of this case. The Act's requirement of secularism in s. 76 does not preclude decisions motivated in whole or in part by religious considerations, provided they are otherwise within the Board's powers. But the Board must act in a way that promotes respect and tolerance for all the diverse groups that it represents and serves.

The Board's decision is unreasonable because the process through which it was made took the Board outside its mandate under the *School Act*. First, the Board violated the principles of secularism and tolerance in s. 76 of the Act. Instead of proceeding on the basis of respect for all types of families, the Board proceeded on an exclusionary philosophy, acting on the concern of certain parents about the morality of same-sex relationships, without considering the interest of same-sex parented families and the children who belong to them in receiving equal recognition and respect in the school system. Second, the Board departed from its own regulation with respect to how decisions on supplementary resources should be made, which required it to consider the relevance of the proposed material to curriculum objectives and the needs of children of same-sex parented families. Third, the Board applied the wrong

criteria. It failed to consider the curriculum's goal that children at the K-1 level be able to discuss their family models, and that all children be made aware of the diversity of family models in our society. Instead, the Board applied a criterion of necessity, which was inconsistent with the function of supplementary resources in enriching children's experience through the use of extra materials of local relevance. The Board erred in relying on concerns about cognitive dissonance and age-appropriateness which were foreclosed by the curriculum in this case. In the result, the question of whether to approve the books is remanded to the Board.

Per LeBel J.: The pragmatic and functional approach has proven a useful tool in reviewing adjudicative or quasi-judicial decisions made by administrative tribunals. There are, however, limits to the usefulness of applying this framework to its full extent in a different context. When the administrative body whose decision is challenged is not a tribunal, but an elected body with delegated power to make policy decisions, the primary function of judicial review is to determine whether that body acted within the bounds of the authority conferred on it. The preliminary question is whether the Board acted legally; it could not validly exercise a power it did not have. Although the issue is not directly raised by this appeal, as long as the Board's educational policy decisions are made validly pursuant to its powers, they would be entitled to a very high level of deference. In this case, the Board's decision could not be upheld even on the most deferential standard of review, because it was patently unreasonable. It is, therefore, unnecessary to go through the full analysis of the various factors used to determine the appropriate standard of judicial review.

The Board was authorized to approve or not to approve books for classroom use. But its authority is limited by the requirements in s. 76 of the *School*

Act to conduct schools on "strictly secular and non-sectarian principles" and to inculcate "the highest morality" while avoiding the teaching of any "religious dogma or creed". The words "secular" and "non-sectarian" in the Act imply that no single conception of morality can be allowed to deny or exclude opposed points of view. Disagreement with the practices and beliefs of others, while certainly permissible and perhaps inevitable in a pluralist society, does not justify denying others the opportunity for their views to be represented, or refusing to acknowledge their existence. Whatever the personal views of the Board members might have been, their responsibility to carry out their public duties in accordance with strictly secular and non-sectarian principles included an obligation to avoid making policy decisions on the basis of exclusionary beliefs. Section 76 does not prohibit decisions about schools governance that are informed by religious belief. The section is aimed at fostering tolerance and diversity of views, not at shutting religion out of the arena. It does not limit in any way the freedom of parents and Board members to adhere to a religious doctrine that condemns homosexuality but it does prohibit the translation of such doctrine into policy decisions by the Board, to the extent that they reflect a denial of the validity of other points of view.

In this case, the evidence leads to the conclusion that the way the Board dealt with the three books was inconsistent with the *School Act*'s commitment to secularism and non-sectarianism. The overarching concern motivating the Board to decide as it did was accommodation of the moral and religious belief of some parents that homosexuality is wrong, which led them to object to their children being exposed to story books in which same-sex parented families appear. The Board allowed itself to be decisively influenced by certain parents' unwillingness to countenance an opposed point of view and a different way of life. Pedagogical policy shaped by such

beliefs cannot be secular or non-sectarian within the meaning of the *School Act*. The Board reached its decision in a way that was so clearly contrary to an obligation set out in its constitutive statute as to be not just unreasonable but illegal. As a result, the decision amounts to a breach of statute, is patently unreasonable, and should be quashed.

Per Gonthier and Bastarache JJ. (dissenting): Based on the nature of the decision being reviewed, the appropriate standard of review for such a decision, and an examination of the totality of the context, the School Board's decision should be affirmed. The decision is consistent with the *Charter*, the *School Act* and the Ministerial directives. It was made within the ambit of the discretion granted by the Act.

The appropriate standard of review in this case is reasonableness. First, the absence of a privative clause should be considered in light of the corresponding absence of a clause expressly allowing the decisions of the Board to be appealed before the courts and of the non-adjudicative nature of the School Board. Second, the decision to approve the books or not requires the Board to balance the interests of different groups, a function which falls within its core area of expertise as a locally elected representative body. While the decision also has a significant human rights dimension, here the Board made a largely factual determination with a view to balancing local parental concerns against the broad objective of promoting *Charter* values. The decision should thus attract greater deference than when administrative tribunals make general determinations of law concerning basic human rights issues affecting numerous future cases. Third, the purpose for which the legislature granted the Board authority to approve supplementary learning materials was to allow for local

input in choosing such materials. Fourth, the nature of the problem does not involve the strict application of legal rules or the interpretation of law, but a highly contextual and polycentric analysis.

Charter values are to be respected in the school context generally. That context, however, involves a need to respect both the right of homosexual persons to be free from discrimination and parental rights to make the decisions they deem necessary to ensure the well-being and moral education of their children. The privileged role of parents to determine what is in their children's well-being, including their moral upbringing, and their right to raise their children in accordance with their conscience, religious or otherwise, is central to analyzing the reasonableness of the School Board's decision. The common law has long recognized that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being providing they act in accordance with the best interests of their children. This Court has reiterated the paramount parental role by construing the nature of the authority schools and teachers have over children as a delegated authority. The notion of a school's authority being delegated, if it allows parents to remove their children from the public school system, must also guarantee to parents the role of having input with regard to the values which their children will receive in school. This is generally brought about by electing representatives to school boards who will develop consensus and govern on matters pertaining to public education. These local school boards are empowered by the *School Act* to approve or not approve complementary educational resource materials. They do not, however, have an unfettered discretion. They must act in a manner consistent with the *School Act* and the evaluation, selection criteria and procedures adopted by the Board. Here, the Board's criteria for approving complementary educational resource materials

contained reference to concepts such as "age-appropriateness" and envisaged that the existence of parental concern in the community would be a factor to be considered.

A school board is a branch of government and thus subject to the *Charter* by operation of s. 32. It is not appropriate, however, in this case, to embark upon a complete s. 15 analysis to establish a direct breach of the *Charter* by the School Board. The s. 15 issues and those concerning standing were not addressed by the courts below, and none of the appellants are same-sex parents or children of such parents, who could allege having been exposed to differential treatment based on their personal characteristics by not being represented alongside other family types in Surrey K-1 classrooms. The relevant *Charter* values are nevertheless incorporated in the requirements of the *School Act*. Therefore, approaching this case as one of accommodation or balancing between competing *Charter* rights adequately addresses the impact of the *Charter*. The *Charter* reflects a commitment to equality and protects all persons from discrimination. It also protects freedom of religion and freedom of expression. Where belief claims seem to conflict, s. 15 cannot be used to eliminate beliefs, whether popular or unpopular. An acceptable resolution is accommodating or balancing. The relationship between ss. 2 and 15 of the *Charter*, in a truly free society, must permit persons who respect the fundamental and inherent dignity of others and who do not discriminate, to still disagree with others and even disapprove of the conduct or beliefs of others. Thus, persons who believe, on religious or non-religious grounds, that homosexual behaviour, manifest in the conduct of persons involved in same-sex relationships is immoral, and those who believe that homosexual behaviour is morally equivalent to heterosexual behaviour, are entitled to hold and express their view. Both groups, however, are not entitled to act in a discriminatory manner. The distinction between actions and beliefs is present in Canada's

constitutional case law: persons are entitled to hold such beliefs as they choose, but their ability to act on them, whether in the private or public sphere, may be narrower. This approach reflects the fact that ss. 2(*a*) and 2(*b*) of the *Charter* coexist with s. 15, which extends protection against discrimination to both religious persons and homosexual persons. Here, there is no evidence that the parents who felt that the three books were inappropriate for five- and six-year-old children fostered discrimination against persons in any way.

The Board's decision is reasonable. The practice of approving or not approving books was clearly within the purview of the School Board's authority and its decision did not offend the requirement under s. 76 of the *School Act* that the "highest morality must be inculcated". That notion ought to be defined as a principle that maintains the allegiance of the whole of society including the plurality of religious adherents and those who are not religious. The values expressed in the *Charter* derive from a wide social consensus and should be considered as principles of the "highest morality" within the meaning of s. 76 of the *School Act*. The Board's decision is consistent with the *Charter*. It reflects a constitutionally acceptable balance and a position which is respectful of the views of both sides. The three books will not be employed in the two earliest grades, but this subject matter, like the issue of homosexuality as a general topic of human sexuality, is present in later aspects of the curriculum. Further, the failure to approve these books does not necessarily preclude the issue of same-sex parents being discussed in the classroom. While the best interests of children includes education about "tolerance", "tolerance" did not require the mandatory approval of the books. "Tolerance" ought not be employed as a cloak for the means of obliterating disagreement.

The Board's decision is also consistent with a proper understanding of "strictly secular and non-sectarian principles" in s. 76. Section 76 provides general direction as to how all schools are to be conducted. The assumption that "secular" effectively means non-religious is incorrect. The religiously informed conscience should not be placed at a public disadvantage or disqualification. To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of pluralism. The dual requirements that education be "secular" and "non-sectarian" refer to keeping the schools free from inculcation or indoctrination in the precepts of any religion, and do not prevent persons with religiously based moral positions on matters of public policy from participating in deliberations concerning moral education in public schools. Regardless of the personal convictions of individual members, the reasons invoked by the Board for refusing to approve the books — that parents in the community held certain religious and moral views and the need to respect their constitutional right to freedom of religion and their primary role as educators of their children — raise secular concerns that could properly be considered by the Board.

Lastly, the considerations taken into account by the Board were appropriate. The moral status of same-sex relationships is controversial and the School Board was caught between two vocal and passionate sides. While it would not have been unconstitutional to approve the three books for use as educational resources, it is similarly not unconstitutional to not approve the books. The *Charter* does not demand that five- and six-year-olds be exposed to parents in same-sex relationships within a dimension of a school curriculum, especially when there is significant parental concern that these materials may be confusing for these young children. The Board's decision was generally motivated by concerns related to age-appropriateness

and parental concern. The parental concern to which the School Board was responding revolves around the nature of the portrayal of same-sex parents in the three books and the capacity of Kindergarten and Grade One age students to interpret this portrayal. It was a difficult choice between permitting the three books to be taught in K-1 against the wishes of some parents and then provide for the exclusion of certain children from the class, or to teach a general lesson about tolerance and respect for people by less controversial means and leave the issue of parents in same-sex relationships and homosexuality for a time when students are better positioned to address the issues involved and better positioned to reconcile the potentially incongruous messages they may be receiving. That choice, however, was specifically intended to be made locally, as the *School Act* envisages. The majority of the trustees were of the view that the three books were not appropriate for K-1 students and were unable to conclude, based on their perception of parental concern and the demands of the curriculum, that such educational materials ought to be approved for K-1. Of particular importance to the Board's decision was that the recommended K-1 learning resources set out by the Ministry of Education did not, at that time, include any other resources expressly dealing with homosexuality or same-sex couples or families. The family life education curriculum suborganizer refers to students being expected to identify a variety of models for family organization but does not indicate that parents in a same-sex relationship are to be addressed in K-1. The prescribed learning outcomes for the K-1 family life curriculum suborganizer include having children draw and write about their own families, and having children talk about each others' families. In a situation where there is a child in the classroom that has same-sex parents, these activities and others would raise the issue of same-sex parented families and teachers may feel it necessary to discuss it. Even in such a situation it is not necessary that educational resource materials which portray same-sex parents be generally approved for use in

all classrooms in a particular school district. Other options exist. Furthermore, the School Board has a stringent anti-discrimination policy, one that is taken seriously. The totality of the context tends, therefore, towards a conclusion that the *Charter* values of equality and non-discrimination are being fostered by the School Board.

Cases Cited

By McLachlin C.J.

Referred to: *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554.

By LeBel J.

Referred to: *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231; *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40; *Public School Boards' Assn. of Alberta v. Alberta*

(Attorney General), [2000] 2 S.C.R. 409, 2000 SCC 45; *R. v. Sharma*, [1993] 1 S.C.R. 650; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3.

By Gonthier J. (dissenting)

B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315; *Young v. Young*, [1993] 4 S.C.R. 3; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141; *R. v. Jones*, [1986] 2 S.C.R. 284; *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *R. v. Audet*, [1996] 2 S.C.R. 171; *R. v. Forde*, [1992] O.J. No. 1698 (QL); *Adler v. Ontario*, [1996] 3 S.C.R. 609; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844; *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575; *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1

S.C.R. 982; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, preamble, ss. 1, 2(*a*), (*b*), 7, 15, 32.

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Ministerial Educational Resource Materials Order, M143/89 [am. M11/91 and M167/93], s. 1.

School Act, R.S.B.C. 1996, c. 412, preamble, ss. 65, 76(1), (2), 85(1), (2)(a), (b), 107, 119 *et seq.*, 168(1)(a), (2)(a), (c) [am. 1997, c. 52, s. 22], (e).

School District No. 36 (Surrey) Policy B 64-95/96.

School District No. 36 (Surrey) Policy 8425.

School District No. 36 (Surrey) Policy 10900.

School District No. 36 (Surrey) Regulation 8800.1.

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APPEAL from a judgment of the British Columbia Court of Appeal (2000), 191 D.L.R. (4th) 128, [2000] 10 W.W.R. 393, 143 B.C.A.C. 162, 235 W.A.C. 162, 80 B.C.L.R. (3d) 181, 26 Admin. L.R. (3d) 297, [2000] B.C.J. No. 1875 (QL), 2000 BCCA 519, reversing a judgment of the British Columbia Supreme Court (1998), 168 D.L.R. (4th) 222, 60 B.C.L.R. (3d) 311, 12 Admin. L.R. (3d) 77, 60 C.R.R. (2d) 311, [1998] B.C.J. No. 2923 (QL). Appeal allowed, Gonthier and Bastarache JJ. dissenting.

Joseph J. Arvay, *Q.C.*, and *Catherine J. Parker*, for the appellants.

John G. Dives and *Kevin L. Boonstra*, for the respondent.

Cynthia Petersen and *Kenneth W. Smith*, for the intervener EGALE Canada Inc.

Chris W. Sanderson, *Q.C.*, and *Keith B. Bergner*, for the intervener the British Columbia Civil Liberties Association.

Susan Ursel and *David A. Wright*, for the intervener Families in Partnership.

Daniel R. Bennett and *Paul A. Craven*, for the intervener the Board of Trustees of School District No. 34 (Abbotsford).

Written submission by *Howard Goldblatt*, for the intervener, Elementary Teachers' Federation of Ontario.

Andrew K. Lokan and *Stephen L. McCammon*, for the intervener the Canadian Civil Liberties Association.

D. Geoffrey G. Cowper, Q.C., and *Cindy Silver*, for the interveners the Evangelical Fellowship of Canada, the Archdiocese of Vancouver, the Catholic Civil Rights League and the Canadian Alliance for Social Justice and Family Values Association.

The judgment of McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Major, Binnie and Arbour JJ. was delivered by

THE CHIEF JUSTICE —

I. Introduction

1 The Surrey, British Columbia, School Board passed a resolution refusing to authorize three books for classroom instruction on the ground that they depicted families in which both parents were either women or men — "same-sex parented families". The question on this appeal is whether that resolution was valid. The appellants have challenged the resolution on two grounds: first, that the Board acted outside its mandate under the *School Act*, R.S.B.C. 1996, c. 412, and second, that the resolution violates the *Canadian Charter of Rights and Freedoms*.

2 I conclude that the resolution must be set aside on the first ground. The Board acted outside the mandate of the *School Act* by failing to apply the criteria required by the Act and by the Board's own regulation for approval of supplementary material.

3 My colleague, Gonthier J., and I, while differing in the result, agree on many points in this appeal: that the Board's decision is subject to review by the courts; that the appropriate standard of review is reasonableness; that, as an elected representative body, the Board is accountable to its local community; that its decisions about which books to approve as supplementary learning resources may reflect the concerns of particular parents and the distinct needs of the local community; and finally, that the requirement of secularism laid out in s. 76 does not prevent religious concerns from being among those matters of local and parental concern that influence educational policy. We disagree on whether the Board erred by failing to act in accordance with the requirements of the *School Act*. I conclude that the Board failed to conform to the requirements of the *School Act* and that this rendered its decision unreasonable, requiring that the matter be remitted to the Board for consideration on the proper basis.

II. The Appropriate Standard of Review

4 In order to assess the Board's decision, we must first determine the appropriate standard of review. My colleague LeBel J. in effect questions whether the pragmatic and functional approach should apply to this case, holding that as an elected body, the Board's decision should be assessed on the basis of whether it is contrary to the statute and hence patently unreasonable. In my view, the usual manner of review

under the pragmatic and functional approach is necessary. It is now settled that all judicial review of administrative decisions should be premised on a standard of review arrived at through consideration of the factors stipulated by the functional and pragmatic approach. This is essential to ensure that the reviewing court accords the proper degree of deference to the decision-making body. To apply the analysis that my colleague proposes, is first, to adopt an approach for which no one argued in this case; and second, to return to the rigid and sometimes artificial jurisdictional approach which the more flexible functional and pragmatic approach was designed to remedy.

5 The pragmatic and functional approach applicable to judicial review allows for three standards of review: correctness, patent unreasonableness and an intermediate standard of reasonableness.

6 The standard of "correctness" involves minimal deference: where it applies, there is only one right answer and the administrative body's decision must reflect it. "Patent unreasonableness", the most deferential standard, permits the decision to stand unless it suffers from a defect that is immediately apparent or is so obvious that it "demands intervention by the court upon review": *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at p. 237. The intermediate standard of "reasonableness" allows for somewhat more deference: the decision will not be set aside unless it is based on an error or is "not supported by any reasons that can stand up to a somewhat probing examination" (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 56; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 63).

7 Which of the three standards is appropriate in a given case depends on the amount of discretion the legislature conferred on the delegate. The relevant amount of discretion is evidenced by four factors, which often overlap: (1) whether the legislation contains a privative clause; (2) the delegate's relative expertise; (3) the purpose of the particular provision and the legislation as a whole; and (4) the nature of the problem. (See *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Southam, supra*; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.)

8 In this case, my colleague and I agree that the four factors point to reasonableness as the appropriate standard of review. First, the *School Act* contains no privative clause or a legislative direction to the courts to defer to the decisions of school boards. This is consistent with a less deferential standard of review. However, this is only one factor, and does not imply a high standard of scrutiny where other factors point to greater deference: *Pushpanathan*, *supra*, at para. 30.

9 The second factor, the Board's relative expertise, raises competing considerations. It requires us to ask: who is better placed to make the decision, the Board or the court? To assess this, this Court must characterize the expertise of the Board and consider its own expertise relative to that of the Board. And since what matters is expertise relative to the specific problem before the Board, we must consider the nature of the problem before the Board: *Pushpanathan*, *supra*, at para. 33.

10 The problem before the Board has two aspects. On the one hand, it requires the Board to balance the interests of different groups, such as parents with widely differing moral outlooks, and children from many types of families. On this

aspect, the Board has considerable expertise. As elected representatives, it is their job to bring community views into the educational decision-making process. The Board is better placed to understand community concerns than the court: see *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13, at para. 35.

11 On the other hand, the decision of whether to approve the three books has a human rights dimension. The Board must decide whether to accommodate certain parents' concerns about the books at the risk of trumping a broader tolerance program and denying certain children the chance to have their families accorded equal recognition and respect in the public school system. Courts are well placed to resolve human rights issues. Hence, where the decision to be made by an administrative body has a human rights dimension, this has generally lessened the amount of deference which the Court is willing to accord the decision: *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 24; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31, at para. 17; *Pezim, supra*, at p. 590; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 584-85, *per* La Forest J. Different types of human rights issues do, to be sure, play out differently. So the extent to which deference is lessened by the presence of a human rights issue will vary from case to case. The relevant question should always be whether the courts have an expertise equal to or better than that of the board, relative to the particular human rights issue that is faced.

12 The third factor is the purpose for which the legislature granted the Board authority to approve supplementary learning materials. Here the purpose was to allow for local input on choosing supplementary classroom materials. Different communities — urban, rural, aboriginal, for example — may benefit from different material. The

Board is in the best position to know what types of families and children fall within its district and what materials will best serve their diverse needs, suggesting deference. This deference is tempered, however, by the *School Act*'s requirement that the discretion to approve supplementary materials conform to norms of tolerance, respect for diversity, mutual understanding and acceptance of all the family models found in British Columbian society and its schools. Board decisions that undermine these norms are entitled to little deference. If the purpose of the *School Act* is not to be undermined, the courts must exercise a fairly high level of supervision over decisions involving tolerance and diversity.

13 The fourth factor, the nature of the problem, again negates the suggestion that the courts should accord high deference to the Board's decision. It is true that the issue does not involve the strict application of legal rules or the interpretation of the law, and that the legislature intended to let the Board and hence the community have a say in choosing resource material. However, as discussed, this is not simply a case of the Board balancing different interests in the community. This is a case requiring the Board to determine how to accommodate the concerns of some members of the community in the context of a broader program of tolerance and respect for diversity. This question attracts court supervision and militates in favour of a stricter standard.

14 The four factors, taken together, point to the intermediate standard of reasonableness. The Board is a political body and a proxy for parents and local community members in making decisions and has been granted a degree of choice on which the legislature has conferred a circumscribed role in approving books. However, the deference that might be warranted by these factors, standing alone, is undercut by clear commitment of the legislature and the Minister to promoting

tolerance and respect for diversity. These goals, touching on fundamental human rights and constitutional values, suggest the legislature intended a relatively robust level of court supervision.

15 A decision will be found to be unreasonable if it is based on an error or is "not supported by any reasons that can stand up to a somewhat probing examination" (*Southam*, *supra*, at para. 56). The court should not overturn a decision as unreasonable simply because it would have come to a different conclusion. But it can and should examine the process of decision making that led the Board to its conclusion, to ensure that it conformed to the Board's legislative mandate. If the reviewing court determines that the Board's process of decision making took it outside the constraints intended by the legislature, then it must find the resulting decision unreasonable. Where an error of this type occurs, the fact that the effects of a decision are relatively innocuous cannot save it.

16 Having determined the standard of review this Court should adopt, I turn to the decision at issue in this case.

III. The Policy of the *School Act* and Curriculum and the Board's Role

17 Before turning to the precise requirements imposed on the Board, it may be useful to discuss more generally three issues which underlie this appeal: (i) the meaning of the Act's insistence on strict secularism; (ii) the role of the Board as representative of the community; and (iii) the role of parents in choosing materials for classroom use.

A. *Secular Decision Making: The Requirement of Tolerance*

18 The *School Act*'s insistence on secularism and non-discrimination lies at the heart of this case. Section 76 of the *School Act* provides that "[a]ll schools and Provincial schools must be conducted on strictly secular and non-sectarian principles". It also emphasizes that "[t]he highest morality must be inculcated, but no religious dogma or creed is to be taught in a school or Provincial school".

19 The Act's insistence on strict secularism does not mean that religious concerns have no place in the deliberations and decisions of the Board. Board members are entitled, and indeed required, to bring the views of the parents and communities they represent to the deliberation process. Because religion plays an important role in the life of many communities, these views will often be motivated by religious concerns. Religion is an integral aspect of people's lives, and cannot be left at the boardroom door. What secularism does rule out, however, is any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community. A requirement of secularism implies that, although the Board is indeed free to address the religious concerns of parents, it must be sure to do so in a manner that gives equal recognition and respect to other members of the community. Religious views that deny equal recognition and respect to the members of a minority group cannot be used to exclude the concerns of the minority group. This is fair to both groups, as it ensures that each group is given as much recognition as it can consistently demand while giving the same recognition to others.

20 The children attending B.C.'s public schools come from many different types of families — "traditional" families parented by both biological parents; "single-

parent" families, parented by either a man or a woman; families with step-parents; families with adopted children; foster families; interracial families; families with parents of different religious or cultural heritages; families in which siblings or members of the extended family live together; and same-sex parented families. Inevitably, some parents will view the cultural and family practices of certain other family types as morally questionable. Yet if the school is to function in an atmosphere of tolerance and respect, in accordance with s. 76, the view that a certain lawful way of living is morally questionable cannot become the basis of school policy. Parents need not abandon their own commitments, or their view that the practices of others are undesirable. But where the school curriculum requires that a broad array of family models be taught in the classroom, a secular school system cannot exclude certain lawful family models simply on the ground that one group of parents finds them morally questionable.

21 The *School Act*'s emphasis on secularism reflects the fact that Canada is a diverse and multicultural society, bound together by the values of accommodation, tolerance and respect for diversity. These values are reflected in our Constitution's commitment to equality and minority rights, and are explicitly incorporated into the British Columbia public school system by the preamble to the *School Act* and by the curriculum established by regulation under the Act.

22 The preamble of the *School Act* states:

> WHEREAS it is the goal of a democratic society to ensure that all its members receive an education that enables them to become personally fulfilled and publicly useful, thereby increasing the strength and contributions to the health and stability of that society;

> AND WHEREAS the purpose of the British Columbia school system is to enable all learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy; [Emphasis added.]

23 The message of the preamble is clear. The British Columbia public school system is open to all children of all cultures and family backgrounds. All are to be valued and respected. The British Columbia public school system therefore reflects the vision of a public school articulated by La Forest J. in *Ross*, *supra*, at para. 42:

> A school is a communication centre for a whole range of values and aspirations of a society. In large part, it defines the values that transcend society through the educational medium. The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate. As the Board of Inquiry stated, a school board has a duty to maintain a positive school environment for all persons served by it. [Emphasis added.]

24 The Cross-Curricular Outlines confirm this conclusion, recognizing that:

> . . . British Columbia's schools include young people of varied backgrounds, interests, abilities, and needs. In order to meet these needs and ensure equity and access for all learners, the development of each component of this document has also been guided by a series of cross-curricular outlines. It is expected that these principles and cross-curricular outlines will guide the users of this document as they engage in school and classroom organization and instructional planning and practice. [Emphasis added.]
>
> (Province of British Columbia, Ministry of Education, *Personal Planning K to 7: Integrated Resource Package 1995* ("PP Curriculum"), at p. 267)

The gender equity outline specifies that: "Gender equitable education involves the inclusion of the experiences, perceptions, and perspectives of girls and women, as well

as boys and men, in all aspects of education" (p. 273 (emphasis added)). The principles of gender equity in education are listed as (PP curriculum, at p. 273):

> – all students have the right to a learning environment that is gender equitable
>
> – all education programs and career decisions should be based on a student's interest and ability, regardless of gender
>
> – gender equity incorporates a consideration of social class, culture, ethnicity, religion, sexual orientation, and age
>
> – gender equity requires sensitivity, determination, commitment, and vigilance over time
>
> – the foundation of gender equity is co-operation and collaboration among students, educators, education organizations, families, and members of communities [Emphasis added.]

25 In summary, the Act's requirement of strict secularism means that the Board must conduct its deliberations on all matters, including the approval of supplementary resources, in a manner that respects the views of all members of the school community. It cannot prefer the religious views of some people in its district to the views of other segments of the community. Nor can it appeal to views that deny the equal validity of the lawful lifestyles of some in the school community. The Board

must act in a way that promotes respect and tolerance for all the diverse groups that it represents and serves.

B. *The Role of the Board*

26 Local community input is essential to an effective public education system that serves many diverse communities. Local influence over approval and use of supplementary learning resources is achieved by delegating to boards the power to approve material and encouraging parents to participate in deciding which of the approved materials are used in their child's particular classroom.

27 The school board is the elected proxy of the collective local community, made up as it typically is of diverse subcommunities. The requirement of secularism means that the school board must consider the interests of all its constituents and not permit itself to act as the proxy of a particular religious view held by some members of the community, even if that group holds the majority of seats on the board.

28 Here I differ from my colleague, Gonthier J., who maintains that the Board can function in a manner akin to a municipal council or a legislature. It is true that, like legislatures and municipal councils, school boards are elected bodies, endowed with rule-making and decision-making powers through which they are intended to further the interests of their constituents. However, school boards possess only those powers their statute confers on them. Here the Act makes it clear that the Board does not possess the same degree of autonomy as a legislature or a municipal council. It must act in a strictly secular manner. It must foster an atmosphere of tolerance and respect. It must not allow itself to be dominated by one religious or moral point of

view, but must respect a diversity of views. It must adhere to the processes set out by the Act, which for approval of supplementary materials include acting according to a general regulation and considering the learning objectives of the provincial curriculum. Finally, to ensure that it has acted within its allotted powers, the Board is subject to judicial review in the courts.

C. *The Role of Parents*

29 The *School Act* assigns parents an important role in directing their children's education. This includes a role in choosing what materials are used in their children's classrooms, in consultation with other parents and the teacher.

30 The Act recognizes that parents are entitled to play a central role in their children's education. Indeed, the province encourages parents to operate in partnership with public schools and, where they find this difficult, permits them to homeschool their children or send them to private or religious schools where their own values and beliefs may be taught. Moreover, the curriculum at issue in this case emphasizes, through the advice it gives to teachers in the section on "Planning Your Program", that "[t]he family is the primary educator in the development of children's attitudes and values" (PP curriculum, at p. 6).

31 The curriculum guidelines also point out the need for partnership between home and school. In particular, they urge that "teachers recognize the role of parents", and that teachers involve parents through regular exchanges of information, meetings, and participation in lesson activities (PP curriculum, at p. 6). The guidelines lay out a variety of situations in which teachers should solicit the help of parents in selecting

appropriate material for their classes from among the materials which the board has approved. They suggest, for instance, that where "sensitive issues" is concerned, alternatives may be explored to allow parents to share responsibility for student outcomes (PP curriculum, at p. 6). And they advise that, before using materials on the Ministry's recommended list, teachers should "consider the appropriateness of any resource from the perspective of the local community" (PP curriculum, at p. 188).

32 This emphasis on parental involvement comes at the stage of selecting materials to be used in particular classes, after they have been approved for general use by the board. The curriculum guidelines contemplate extensive parental involvement at the stage of selecting books for use in a particular classroom. And indeed, this seems to be the appropriate stage at which to tailor the materials chosen for use in a particular classroom to the unique needs that particular parents perceive their children to have. This is much more easily done by parents in consultation with their children's teachers than it is by a school board, which must decide whether a resource can become available to a large number of children in different situations.

33 Moreover, although parental involvement is important, it cannot come at the expense of respect for the values and practices of all members of the school community. The requirement of secularism in s. 76 of the *School Act*, the emphasis on tolerance in the preamble, and the insistence of the curriculum on increasing awareness of a broad array of family types, all show, in my view, that parental concerns must be accommodated in a way that respects diversity. Parental views, however important, cannot override the imperative placed upon the British Columbia public schools to mirror the diversity of the community and teach tolerance and understanding of difference.

IV. The Scheme for Approval of Supplementary Resources

34 The *School Act* confers on the Minister the power to approve basic educational resource materials to be used in teaching the curriculum, and confers on school boards the authority to approve supplementary educational resource material, subject to ministerial direction: *School Act*, s. 85(2)(b). Here, the Minister made an order that the Board may use materials set out in the "Catalogue of Learning Resources, Primary to Graduation" published by the Ministry of Education; and also materials that "the board considers are appropriate for individual students or groups of students" (emphasis added): Ministerial Orders 143/89, s. 1(1)(a) and 165/93, s. 3(1)(e). The resolution at issue was made under the latter power.

35 The purpose of supplementary learning resources is to enrich the educational experience in ways appropriate to the school community. It should be emphasized that approved supplementary materials are not required to be used in every classroom. Rather, the goal is to provide a range of materials from which teachers may choose to enrich the learning experience. The "Integrated Resource Package" for the Personal Planning curriculum states: "It is expected that teachers will select resources . . . that suit their particular pedagogical needs and audiences" (PP curriculum, at p. 9). Approval of the three books at issue in this case would therefore not have meant that all teachers were obliged to use them or even that they were strongly encouraged to use them. Rather, it would have meant that teachers could use them if this were required to meet the needs of the particular children in their classroom. However, without the Board's approval of these or equivalent materials,

teachers who have students from same-sex parented families might be left without resources to assist them in having their particular families discussed and understood.

36 All supplementary materials approved under this power must conform to procedures for evaluation and selection which Ministerial Order requires a board to formulate in advance. This ensures that supplementary materials are approved on a principled basis, not on the basis of *ad hoc* personal views of board members. The Surrey School Board passed such a regulation. Included in the criteria are relevance to prescribed course content and non-discriminatory content, except as required to further critical thinking about social groups that might be the object of discrimination:

> 1. The recommended learning resource is relevant to the learning outcomes and content of the course or courses.
>
> 2. The recommended learning resource is appropriate in terms of the age, maturity, and learning needs of the student for whom it is intended.
>
> 3. The recommended learning resource is appropriate for the particular community in which it will be used.
>
> 4. The recommended learning resource is fair, objective, free from gratuitous violence, propaganda and discrimination, except where a teaching/learning situation requires illustrative material to develop critical thinking about such issues.
>
> 5. The recommended learning resource is readable, interesting, and manageable in the teaching/learning situation. [Emphasis added.]
>
> (Regulation 8800.1: *Recommended Learning Resources and Library Resources*, A (III) (A)(1) - (5))

37 The need to consider the relevance of proposed supplementary materials to the curriculum is also reflected in the Ministry's evaluation criteria contained in its publication *Evaluating, Selecting, and Managing Learning Resources: A Guide* (1996), which is meant to assist school districts with approving materials. The guide

makes multiple references to the fact that materials should "support the learning outcomes of the curriculum" (p. 4); "be relevant to the goals and prescribed learning outcomes of the curriculum" (p. 22); "assist the student in achieving the prescribed learning outcomes" (p. 25); and so forth.

38 This brings us to what the curriculum prescribed for the K-1 level. The Personal Planning curriculum established by the Minister for K-1, or Kindergarten and Grade One students, includes "Family life education" (p. 22). The aim of this part of the program is "[t]o develop students' understanding of the role of the family and capacity for responsible decision-making in their personal relationships" (p. 22). The curriculum suborganizer suggests that, at the end of the program, teachers "[l]ook for evidence of each student's . . . awareness that there are a variety of family groupings" (p. 23). It further states (at p. 22):

> *It is expected that students will:*
>
> - identify a variety of models for family organization
> - identify the roles and responsibilities of different family members
> - identify the characteristics that make the family environment safe and nurturing
> - identify the physical characteristics that distinguish males from females
> - identify that living things reproduce

In order to help K-1 students achieve these learning outcomes, the following instructional strategies are suggested (among others): have students compare different families and discuss similarities and differences; have students draw or write about their families; and have students talk about each other's families (p. 22).

39 The Minister's materials did not specify what kinds of families should be identified. Its general instruction that children talk about their families requires, however, that the program not be limited to particular families; teachers were encouraged to promote discussion on whatever family a child happened to have. This is in keeping with the views of the Minister and the Director of Curriculum Branch of the Ministry of Education. The Minister, the Honourable Moe Sihota, stated:

> The prescribed curriculum does not itemize the cultural, racial, disability, or other differences that should be addressed. Rather, it provides students with the skills and abilities to effectively deal with a wide range of diversity and to accept and value other cultures, races, genders, orientation, and points of view. While sexual orientation is not expressly mentioned in the Prescribed Learning Outcomes or Cross-Curricular Outlines, the curriculum allows a teacher to address issues such as sexual orientation within the context of the classroom environment.

The Director of the Curriculum Branch recognized same-sex parented families as a family model that might be discussed in teaching this curriculum.

40 It is therefore clear that the B.C. curriculum for the K-1 level contemplated discussion of all family types, including same-sex parented families. The exclusion of any particular type of family was contrary to the ministerial direction as embodied in the curriculum.

41 In summary, the Board was required to act in accordance with the Act and its own regulation. This meant that the Board was required to do three things:

> (I) to operate in a strictly secular manner, not allowing the concerns of one group of parents to deny equal recognition to the family models of other members of the school community;

(ii) to act in accordance with its own general regulation requiring that supplementary materials be relevant to the learning objectives, appropriate to the age, maturity and learning needs of the students, fair and free from discrimination, and readable, interesting and manageable in the teaching situation; and

(iii) to apply the criteria for supplemental resources indicated by the curriculum goals for K-1 students, which included the objectives of permitting all K-1 students to discuss their particular family models in class, and of making all students aware of the broad array of family models that exist in our society.

42 Against this background, I turn to the manner in which the Board proceeded in this case.

V. The Board's Decision

43 The story begins in December 1996 and January 1997, when Mr. James Chamberlain, a Kindergarten teacher in the Surrey School District, asked for approval of the three books here in question.

44 Mr. Chamberlain knew that, unless the Board approved the three books as learning resources, he could not use them in the teaching of the family life education curriculum. In January of 1996, the Board had adopted a policy stipulating that: "[t]eachers having responsibility for teaching the family life component of the Career and Personal Planning curriculum should use resource materials contained in the

Ministry recommended or District approved lists" (District Policy B64-95/96). And on October 23, 1996, the school principal had written to Mr. Chamberlain, directing him to "use only provincially or district approved learning resources in your classroom" (emphasis added). Therefore, unless Mr. Chamberlain could succeed in his request for approval of the books, he would not be able to use them in the classroom.

45 On April 10, 1997, the Board adopted a resolution stating that resources from gay and lesbian groups were not approved for use in the Surrey School District. This resolution has been quashed and is not under appeal. However, it provides the context of what occurred later. The resolution set out:

> THAT WHEREAS the parents delegate their authority to us as trustees of public education; and
>
> WHEREAS parents have voiced their concern over the use of Gay and Lesbian Educators of British Columbia (GALE BC) resources in the classroom; and
>
> WHEREAS the Gay and Lesbian Educators of British Columbia (GALE BC) resources or resource lists have not been approved for use in School District #36 (Surrey).
>
> THEREFORE BE IT RESOLVED THAT all administration, teaching and counseling staff be informed that resources from gay and lesbian groups such as GALE or their related resource lists are not approved for use or redistribution in the Surrey School District.

46 After this resolution was passed, certain resources, including library books, posters and pamphlets, were removed from schools within the district.

47 The Board's procedures for approval of supplementary learning resources required staff to put requests for new materials to the Superintendent of Schools, who

was charged with "general responsibility for seeing that the approved criteria are known and appropriately applied" (Regulation 8800.1), in consultation with parents and professional colleagues. The Superintendent's recommendation would then be passed on to the Board. Here the Superintendent passed the request on to the Board with no recommendation, asking only that the Board "consider" the three books. He expressed his position subsequently as follows:

> . . . I questioned whether the Three Books were appropriate for the Kindergarten and Grade One level. The PP K-7 curriculum refers to family models but does not specifically address homosexuality or same-sex couples. In my view, the Three Books were not necessary to achieve the learning objectives of the PP K-7 curriculum. I was of the view that if the Ministry had intended that homosexuality and/or family models involving same-sex couples be a component of the PP K-7 curriculum for Kindergarten and Grade One, given the contentious and sensitive nature of the topic, such would have been expressly included in the Ministry's PP K-7 Integrated Resource Package ("IRP"). As the Ministry had not specifically included such in the IRP or included any other resources on homosexuality or same-sex couples for K-1, I anticipated that any decision by the District to approve such would be very controversial amongst parents in the District and a decision in this regard must come from the Board as elected representatives of the community. I was also concerned that the right of parents to be the primary educators in the development of attitudes and values of Kindergarten and Grade One children be maintained. I found it difficult to conclude that by approving the Three Books for Kindergarten and Grade One, the school would be providing a supportive role and maintaining a partnership between home and school. [Emphasis added.]

48 Although the final decision was the Board's and not the Superintendent's, the above passage appears to express the concerns on which the Board relied. It reveals a particular interpretation of the *School Act* and curriculum. First, it equates homosexuality and same-sex parented families and suggests that because of the controversial nature of these subjects, the legislature and Minister could not be taken to have intended them to be discussed, absent express language so requiring. Second, it applies a criterion of necessity. Third, it expresses a concern with maintaining the

right of parents to be the primary educators of K-1 children. Fourth, it expresses a concern that approval of the books would engender controversy in light of parents' views and might undermine the relationship between home and school.

49 What the Superintendent and the Board did not consider is as telling as what they did consider. The Superintendent's statement does not refer to the absence of restriction on the curriculum's direction to discuss different family types. It does not refer to the emphasis in the *School Act* and curriculum on tolerance, respect, inclusion and understanding of social and family diversity. And it does not refer to the secular nature of the public school system and its mandate to provide a nurturing and validating learning experience for all children, regardless of the types of families they come from.

50 On April 24, 1997, the Board passed the resolution here at issue declining to approve the three books. The resolution provides:

> THAT the Board, under Policy #8800 — *Recommended Learning Resources and Library Resources*, not approve the use of the following three (3) learning resources:
>
> Grade Level K-1 Personal Planning
> Elwin, R., & Paulse, M. (1990). *Asha's Mums.*
> Newman, L. (1991). *Belinda's Bouquet.*
> Valentine, J. (1994). *One Dad, Two Dads, Brown Dad, Blue Dads.*

The effect of this resolution was that the three books could not form part of the family life education curriculum taught in Kindergarten and Grade One classrooms.

51 The chambers judge found that parental concern over the portrayal of same-sex parented families in the K-1 classroom was the overarching consideration

in the Board's decision not to approve the books. She concluded that the Board's decision was based on concerns that the books would conflict with some parents' views on same-sex relationships:

> On review of all the evidence in this case on the basis of the School Board's decision, I conclude that when the School Board passed the Books resolution, some of the trustees who voted in favour of the resolution were motivated to a significant degree by concern that parents and others in the School District would consider the books incompatible or inconsistent with their religious views on the subject of same-sex relationships.
>
> ((1998), 168 D.L.R. (4th) 222, at para. 93)

The Board's view was that addressing the subject of same-sex relationships in Kindergarten and Grade One classes would raise sensitive issues for parents, and weight must be given to their concerns.

52 More specifically, the Board was concerned that the use of the three books in the classroom might teach values to children divergent to those taught at home, confusing the children with inconsistent values. As counsel for the Board argued:

> Very young children cannot assess competing moral views about homosexual relationships on their own. It is not in their best interest that they, or their parents, be placed in the predicament of having divergent moral lessons over sensitive and controversial issues taught at school and at home.

53 This argument, referred to as "cognitive dissonance", tied in with a second concern, "age appropriateness". The Board expressed the view that five- and six-year-old children in the K-1 classroom do not have the ability to resolve divergent moral lessons, and that children might be provoked to ask questions on subjects that parents

feel should not be discussed at such a young age. For this reason, approving the three books would not be keeping with the best interests of the child.

54 Finally, the Board considered whether the three books were necessary to achieve the required learning outcomes, in light of the views of senior district staff that the use of the three books is not necessary to teach the personal planning curriculum.

55 In summary, the resolution declining to approve the books was made without inquiring into the relevance of the books to the curriculum, and without asking whether there was a realistic possibility that there were, or would soon be, children from same-sex parented families in the school district whose family models would be discussed under the K-1 curriculum. The Board's position was simply that material depicting same-sex parented families should not be made available to children at the K-1 level. The reasons advanced for this position were: that the material was not necessary to achieve the required learning outcomes; that the books were controversial; that objecting parents' views must be respected; that children at the K-1 level should not be exposed to ideas that might conflict with the beliefs of their parents; and, that children of this age were too young to learn about same-sex parented families. Behind all these considerations hovered the moral and religious concerns of some parents and the Board with the morality of homosexual relationships.

VI. Application of the Standard to the Impugned Decision

56 Was the Board's decision not to approve the three books reasonable? As I discussed, the Board's decision will be unreasonable if the Board proceeded in a

manner that took it outside the constraints intended by the legislature. In my view, the Board's decision was unreasonable in this sense.

57 We have seen that the Board was required to exercise its power to approve or reject supplementary classroom resources in a manner that accorded with: (1) the secular mandate of the Act; (2) the regulation which the Board had put in place pursuant to Ministerial Order; and (3) the factors required to be considered by the Act, including the desired learning outcome for K-1 students found in the curriculum. While the Board must be given some latitude in making its decision, and not every error would make its decision unreasonable, its decision here must be set aside as unreasonable because the process through which it was made took the Board outside its mandate under the *School Act*.

58 The Board's first error was to violate the principles of secularism and tolerance in s. 76 of the *School Act*. Instead of proceeding on the basis of respect for all types of families, the Superintendent and the Board proceeded on an exclusionary philosophy. They acted on the concern of certain parents about the morality of same-sex relationships, without considering the interest of same-sex parented families and the children who belong to them in receiving equal recognition and respect in the school system. The Board was not permitted to reject the books simply because certain parents found the relationships depicted in them controversial or objectionable.

59 As discussed earlier, the religious origin of the parents' objections is not in itself fatal to the Board's decision. The requirement of secularism in s. 76 does not preclude decisions motivated in whole or in part by religious considerations, provided they are otherwise within the Board's powers. It simply signals the need for

educational decisions and policies, whatever their motivation, to respect the multiplicity of religious and moral views that are held by families in the school community. It follows that the fact that some parents and Board members may have been motivated by religious views is of no moment. What matters is whether the Board's decision was unreasonable in the context of the educational scheme mandated by the legislature.

60 The Board's second error was to depart from the regulation it had made pursuant to Ministerial Order as to how decisions on supplementary resources should be made. The Board's regulation required it to consider whether a proposed resource is "appropriate for the particular community in which it will be used", and recognized the existence of diverse communities within the School District and the Board's duty to approach the needs of each with respect and tolerance. Contrary to this requirement, the Board gave no consideration to the needs of children of same-sex parented families and instead based its decision on the views of a particular group who were opposed to any depiction of same-sex relationships in K-1 school materials. The Board's regulation also required it to consider the relevance of proposed material to curriculum objectives. Here too, it failed.

61 This brings us to the Board's third error — its application of the wrong criteria. The Board either ignored or mistook the requirements of the *School Act* and the learning outcomes of the curriculum. The curriculum states that children at the K-1 level should be able to discuss their family models, whatever these may be, and that all children should be made aware of the diversity of family models that exist in our society. The Board did not consider this objective. Indeed, the Superintendent, whose views appear to have guided the Board, took the view that unless the curriculum

expressly required that same-sex parented families should be discussed, the Board need not inquire into the relevance or suitability of the books as learning resources. This was an erroneous interpretation of the *School Act* and the Ministerial Orders, as well as of the Board's own general regulation on selection criteria.

62 Instead of applying the proper criteria, the Superintendent and the Board erroneously applied a criterion of necessity and justified their decision on the basis that discussion of same-sex parented families would send divergent messages and thus induce "cognitive dissonance", and that such discussion was not age appropriate for K-1 children.

63 I turn first to necessity. To require that supplementary resources be necessary is to misunderstand their function. If a given resource were necessary, one would expect to find it among the materials required for use in all classrooms. The purpose of allowing a school board to approve supplementary materials is to enable different communities to enrich the learning experience by bringing in extra materials of relevance, above and beyond the materials that are strictly necessary for the implementation of the curriculum. Instead of necessity, the Board should have considered relevance. Indeed, this is the test which the Board's own prior regulation on appropriate selection criteria lays down.

64 The argument based on cognitive dissonance essentially asserts that children should not be exposed to information and ideas with which their parents disagree. This claim stands in tension with the curriculum's objective of promoting an understanding of all types of families. The curriculum requires that all children be

made aware of the array of family models that exist in our society, and that all be able to discuss their particular family model in the classroom.

65 The number of different family models in the community means that some children will inevitably come from families of which certain parents disapprove. Giving these children an opportunity to discuss their family models may expose other children to some cognitive dissonance. But such dissonance is neither avoidable nor noxious. Children encounter it every day in the public school system as members of a diverse student body. They see their classmates, and perhaps also their teachers, eating foods at lunch that they themselves are not permitted to eat, whether because of their parents' religious strictures or because of other moral beliefs. They see their classmates wearing clothing with features or brand labels which their parents have forbidden them to wear. And they see their classmates engaging in behaviour on the playground that their parents have told them not to engage in. The cognitive dissonance that results from such encounters is simply a part of living in a diverse society. It is also a part of growing up. Through such experiences, children come to realize that not all of their values are shared by others.

66 Exposure to some cognitive dissonance is arguably necessary if children are to be taught what tolerance itself involves. As my colleague points out, the demand for tolerance cannot be interpreted as the demand to approve of another person's beliefs or practices. When we ask people to be tolerant of others, we do not ask them to abandon their personal convictions. We merely ask them to respect the rights, values and ways of being of those who may not share those convictions. The belief that others are entitled to equal respect depends, not on the belief that their values are right, but on the belief that they have a claim to equal respect regardless of

whether they are right. Learning about tolerance is therefore learning that other people's entitlement to respect from us does not depend on whether their views accord with our own. Children cannot learn this unless they are exposed to views that differ from those they are taught at home.

67 The Board's concern with age-appropriateness was similarly misplaced. The Board's regulation on appropriate selection criteria requires it to consider the age-appropriateness of proposed supplementary materials. However, here the curriculum itself designated the subject as age-appropriate by stating that all types of families found in the community should be discussed by K-1 students, including same-sex parented families. The Board was not entitled to substitute its contrary view.

68 The Board did not suggest that the manner in which the books treated the approved subject was age-inappropriate. The chambers judge, at para. 98, agreed with the Superintendent's description of the books as showing

> that there are alternative family models, that these family models include models [with] same-sex parents, that these ought to be valued in the same way as other family models, that they are peopled by caring, thoughtful, intelligent, loving people who do give the same warmth and love and respect that other families do.

Without prejudging the issue, this message of respectful tolerance appears to correspond to the intended purpose of the K-1 curriculum and does not seem to venture further into biology and morality than is contemplated by the curriculum.

69 It is suggested that, while the message of the books may be unobjectionable, the books will lead children to ask questions of their parents that

may be inappropriate for the K-1 level and difficult for parents to answer. Yet on the record before us, it is hard to see how the materials will raise questions which would not in any event be raised by the acknowledged existence of same-sex parented families in the K-1 parent population, or in the broader world in which these children live. The only additional message of the materials appears to be the message of tolerance. Tolerance is always age-appropriate.

70 The Board's final argument is that its decision cannot be attacked because it was not obliged to approve any particular supplementary materials. It is true that the Board is not obliged to approve every supplementary resource that it is presented with. It can reject supplementary materials — even supplementary materials that are relevant to the curriculum — if it does so on valid grounds, such as excessive level of difficulty, discriminatory content, inaccuracy, ineffectiveness, or availability of other materials to achieve the same goals. Had the Board proceeded as required by the Act, the curriculum and its own general regulation, its decision might have been unassailable. The difficulty is that the Board did not do so here.

71 I conclude that the Board's decision is unreasonable. It failed to proceed as required by the secular mandate of the *School Act* by letting the religious views of a certain part of the community trump the need to show equal respect for the values of other members of the community. It failed to proceed according to its own Ministry-mandated regulation which required tolerance and furtherance of prescribed curriculum learning outcomes. Finally, it failed to apply the appropriate criteria for approving supplementary learning resources and instead applied inappropriate criteria. The Board did not consider the relevance of the proposed material to the prescribed learning outcome of discussing and understanding all family types. Instead, it

proceeded on the erroneous assumption that unless the curriculum explicitly required consideration of materials on same-sex parented families, it was entitled to reject them, and relied on considerations of cognitive dissonance and age-inappropriateness that ran counter to the curriculum for K-1 students.

72 These errors went to the heart of the Board's decision. It is suggested that rejection of the materials did not materially lessen the opportunities for teaching and enforcing tolerance in the classroom, and therefore is of no great moment. Yet to the appellants, it is a matter of importance. The last word — indeed the only word that counts — is the word of the legislature and the curriculum. It stresses tolerance and inclusion, and places high importance on discussion and understanding of all family groups. The Board's rejection of these values must be seen as serious.

VII. Conclusion

73 I conclude that the Board's decision not to approve the proposed books depicting same-sex parented families was unreasonable because the Board failed to act in accordance with the *School Act*. In light of this conclusion, it is not necessary to consider the constitutionality of the Board's decision. The issues discussed by my colleague concerning whether the appellants have standing and whether the action raises a serious legal question are not, in my view, ones which it is necessary or appropriate to comment on, given that this appeal does not fall to be determined on the basis of the *Charter*.

VIII. Order

74 I would allow the appeal with costs throughout to the appellants and remand the question of whether the books should be approved to the Board, to be considered according to the criteria laid out in the Board's own regulation, the curriculum guidelines and the broad principles of tolerance and non-sectarianism underlying the *School Act*.

The reasons of Gonthier and Bastarache JJ. were delivered by

GONTHIER J. (dissenting) —

I. Introduction

75 This appeal concerns the judicial review of a discretionary educational policy decision of an elected school board not to approve three books as complementary "educational resource materials" for a dimension of the Kindergarten and Grade One ("K-1") curriculum in the Surrey School District. The three books in question depict parents in same-sex relationships. The character or nature of this portrayal will be discussed below in greater detail. The failure to approve the books is a discretionary educational policy decision of limited scope: it does not concern whether or not these books are or could be approved as "library resources"; it concerns only the potential classroom use of these particular books, since the ultimate discretion regarding employing materials in the classroom rests with individual teachers; it concerns only the curriculum for students in the earliest two school grades, children of five and six years of age; and it addresses only the status of these books being placed on the complementary local, as distinct from provincial, "Recommended Learning Resources" list. More general pedagogical questions of how, and at what age, subject

matter portraying parents in a same-sex relationship ought to be introduced into schools, are also not before this Court.

76 Based on the nature of the decision being reviewed, the appropriate standard of review for such a decision and an examination of the totality of the context, I am of the view that this appeal ought to be dismissed. While I agree with the Chief Justice as to the applicable standard of review, I respectfully disagree that the *School Act*, R.S.B.C. 1996, c. 412, and the relevant ministerial directives demand that all family types, rather than a diversity, be represented and, more importantly, that the three specific books at issue be approved for general classroom use by the School Board despite the fact that the Minister declined to approve them for province-wide use. I am of the view that the decision was *intra vires* the School Board under the *School Act* and was clearly reasonable. The practice of approving or not approving books is clearly within the purview of the School Board's authority, the decision is consistent with a proper understanding of s. 76 of that Act (i.e. the decision accords with a correct understanding of "strictly secular and non-sectarian principles" and does not offend the requirement that "[t]he highest morality must be inculcated"), the considerations taken into account by the School Board were appropriate, and the decision is respectful of ss. 2(*a*), 2(*b*) and 15 of the *Canadian Charter of Rights and Freedoms*.

77 At the outset, it is important to note that there is important common ground between the parties before this Court: all agree that all persons, as differentiated from the conduct of persons, are equally deserving of the respect, concern and consideration that is consonant with their inherent human dignity; all agree that public schools must provide a learning and working environment that is safe, supportive and free from

discrimination, including discrimination based on sexual orientation; and all agree that overt discussions of human sexuality, whether heterosexual or homosexual, and as distinct from both a basic understanding of the fact that living things, including humans, reproduce, and from the capacity to identify the physical characteristics which distinguish males from females, are not appropriate subject matter for discussion in K-1 classrooms.

78 The two most significant disagreements between the parties in the courts below were: whether or not it is valid for a school board to consider, when approving or not approving books, some expressions of parental concern when such concern manifests from those parents' conscience or belief, particularly, in this case, religious belief; and the nature of what the three books portray, when viewed from the perspective of K-1 students.

79 The above-mentioned two disagreements between the appellants and respondent resulted in a more general disagreement about the reasonableness of the Surrey School Board's decision. In effect, however, I am of the view that when one examines the totality of the context, the disagreement is actually about the appropriate way, in the K-1 classrooms of Surrey, B.C., to teach and guarantee tolerance and non-discrimination of all persons in a way which respects the rights of parents to raise their children in accordance with their conscience, religious or otherwise. In my view, it is obvious that *Charter* values are to be respected in the school context generally. That context, however, involves a need to respect both the right of homosexual persons to be free from discrimination and parental rights to make the decisions they deem necessary to ensure the well-being and moral education of their children. As noted by M. Ignatieff in *The Rights Revolution* (2000), a system devoted to the primacy of

human rights protection enhances and safeguards what he calls the two sides of human rights: the right to be equal, and the right to differ. This case involves a tension between these rights. Given, however, that there is generally a shared commitment to *Charter* values and to actual non-discrimination in the school context more broadly, this case truly shows itself to be a question of balancing or accommodation, a question of choosing "ways and means" within policy implementation in a school context.

II. Relevant Constitutional, Statutory and Non-Statutory Provisions

80 *Canadian Charter of Rights and Freedoms*

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **2.** Everyone has the following fundamental freedoms:
>
> (*a*) freedom of conscience and religion;
>
> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

School Act, R.S.B.C. 1996, c. 412

> **Preamble**
>
> WHEREAS it is the goal of a democratic society to ensure that all its members receive an education that enables them to become personally fulfilled and publicly useful, thereby increasing the strength and contributions to the health and stability of that society;

AND WHEREAS the purpose of the British Columbia school system is to enable all learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy;

THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

. . .

PART 6 — SCHOOL BOARDS

Division 1 — Corporate Status and Meetings

Board is a corporation

65 (1) The trustees elected or appointed under this Act for each school district and their successors in office constitute a board of school trustees for the district and are a corporation under the name of "The Board of School Trustees of School District No. 1 (Fernie)" (or as the case may be).

(2) A board may

(a) establish committees and specify the functions and duties of those committees,

(b) establish a district advisory council comprised of persons representing parents' advisory councils and other organizations in the community, and

(c) delegate specific and general administrative and management duties to one or more of its employees.

(3) Committees of trustees or individual trustees may not exercise the rights, duties and powers of the board.

(4) Unless expressly required to be exercised by bylaw, all powers of a board may be exercised by bylaw or resolution.

(5) A board may exercise a power with respect to the acquisition or disposal of property owned or administered by the board only by bylaw.

. . .

Division 2 — Powers and Duties

. . .

Conduct

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

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

. . .

Power and capacity

85 (1) For the purposes of carrying out its powers, functions and duties under this Act and the regulations, a board has the power and capacity of a natural person of full capacity.

(2) Without limiting subsection (1), a board may, subject to this Act and the regulations, do all or any of the following:

(a) determine local policy for the effective and efficient operation of schools in the school district;

(b) subject to the orders of the minister, approve educational resource materials and other supplies and services for use by students;

. . .

PART 9 — GENERAL

Division 1 — Ministry of Education, Skills and Training

Jurisdiction of minister

168 (1) The minister, subject to this Act and the regulations,

(a) has charge of the maintenance and management of all Provincial schools established under this Act,

. . .

(2) The minister may make orders for the purpose of carrying out any of the minister's powers, duties or functions under this Act and, without restriction, may make orders

(a) governing the provision of educational programs,

. . .

(c) determining the general nature of educational programs for use in schools and francophone schools and specifying educational program guides,

. . .

(e) governing educational resource materials in support of educational programs,

. . .

***Ministerial Educational Resource Materials Order,* M143/89, as am. by M11/91 and M167/93**

1. (1) In addition to the educational program guides referred to in Ministerial Order 165/93, the Educational Program Guide Order, a board may only use the following educational resource materials:

(a) the educational resource materials referred to as authorized or recommended in the most recent "Catalogue of Learning Resources, Primary to Graduation", published from time to time by the Ministry of Education;

(b) other educational resource materials that, subsequent to the publication of the Catalogue referred to in paragraph (a), are designated by the minister as authorized or recommended; and

(c) educational resource materials that the board considers are appropriate for individual students or groups of students.

(2) Where a board uses educational resource materials referred to in subsection 1(c), the board shall establish evaluation and selection criteria and procedures to approve those educational resource materials.

***Ministerial Educational Program Guide Order*, M165/93, as am. by M293/95, M405/95 and M465/95**

3. (1) A board may only use the following educational resource materials:

(a) resource materials in an educational program guide specified in section 1 of this Order;

(b) resource materials in a document referred to in column 1 of Table 1;

(c) the educational resource materials referred to as authorized or recommended in the most recent "Catalogue of Learning Resources", published from time to time by the Ministry of Education;

(d) other educational resource materials that, subsequent to the publication of the Catalogue referred to in paragraph (a), are designated by the minister as authorized or recommended; and

(e) educational resource materials that the board considers are appropriate for individual students or groups of students.

(2) Before a board uses educational resource materials referred to in subsection (1)(e), the board must approve those educational resource materials in accordance with evaluation and selection criteria and procedures established by the board.

School District No. 36 (Surrey) Regulation 8800.1

A. REGULATIONS AND CRITERIA FOR THE SELECTION AND APPROVAL OF RECOMMENDED LEARNING RESOURCES AND LIBRARY RESOURCES

I. Definitions

1. Recommended Learning Resources

For the purposes of this regulation, the term "Recommended Learning Resources" will refer to materials on either the Ministry list or the District Recommended Learning Resources list.

2. Library Resources

For the purposes of this regulation, the term "Library Resources" will refer to print and non-print resources that are curriculum-related, age-appropriate, and/or able to serve a wide range of learning levels and interests.

II. Procedures

1. Responsibility for selecting and using recommended learning resources and library resources with the approved criteria rests with the Superintendent of Schools and the other professional staff employed by the Board.

2. The Superintendent or designate and principals are expected to assume general responsibility for seeing that the approved criteria are known and appropriately applied.

3. In the case of recommended learning resources or library resources and controversial matters, the Board expects that good professional judgement will be exercised and that there will be consultation with others, including parents and professional colleagues where deemed appropriate.

4. In the case of challenged recommended learning resources or library resources where resolution has not been possible, the matter shall be referred to the Board with all documentation.

III. Criteria

. . .

A. <u>Recommended Learning Resources</u>

1. The recommended learning resource is relevant to the learning outcomes and content of the course or courses.

2. The recommended learning resource is appropriate in terms of the age, maturity, and learning needs of the student for whom it is intended.

3. The recommended learning resource is appropriate for the particular community in which it will be used.

4. The recommended learning resource is fair, objective, free from gratuitous violence, propaganda and discrimination, except where a teaching/learning situation requires illustrative material to develop critical thinking about such issues.

5. The recommended learning resource is readable, interesting, and manageable in the teaching/learning situation.

B. <u>Library Resources</u>

1. The library resource shall support and be consistent with the general educational goals of the province, district, and the aims and objectives of individual schools and specific courses.

2. The library resource shall meet high standards of quality in factual content and presentation.

3. The library resource shall be appropriate for the curriculum and for the age, emotional development, ability level, learning style, and social development of the students for whom the materials are selected.

4. The library resource shall have aesthetic, literary, historical, and/or social value.

5. The physical format and appearance of a library resource shall be suitable for its intended use.

6. The library resource may be chosen to motivate students and staff to read for the purpose of recreation.

7. The library resource shall be chosen to help students gain an awareness of our pluralistic society as well as an understanding of the many important contributions made to our civilization.

8. The library resource shall be chosen to motivate students and staff to examine their own attitudes and behaviors, and to comprehend their own duties, responsibilities, rights, and privileges as participating citizens in our society.

9. The library resource is fair, objective, free from gratuitous violence, propaganda and discrimination, except where a teaching/learning situation requires illustrative material to develop critical thinking about such issues.

School District No. 36 (Surrey) Policy 8425

PERSONAL PLANNING (K-7) AND CAREER AND PERSONAL PLANNING (8-12)

The prescribed curriculum for Personal Planning (K-7) and Career and Personal Planning (8-12) is intended to enable all students to acquire the knowledge, skills and attitudes needed to make healthy life and career choices.

The Board recognizes that this prescribed curriculum is broad in scope and addresses goals in human, social and career development which are appropriately shared between the school and the family.

Because of this broad scope and shared responsibility, the Board views student learning in this area as an ongoing learning process which develops confidence in meeting life's challenges through purposeful and responsible action.

The teaching and learning associated with this curriculum, therefore, must engage parents and students in active partnership with the school in program planning and implementation. Furthermore, the teaching and learning must also reflect positive family values such as honesty, trust, love, empathy and respect. The Board believes that such values represent

> our community's expectation regarding the education of our students and the development of citizenship.
>
> The Board expects, therefore, that the prescribed curriculum taught in Surrey Schools will be consistent in content and delivery throughout the district and will:
>
> - promote positive family values
> - develop student decision-making skills to help students make responsible healthy life and career choices
> - advocate abstinence as a preferred healthy life-style choice
> - adhere to topics and learning resources that are age and developmentally appropriate
> - be supported by a comprehensive teacher inservice program.
>
> Finally, the Board recognizes the importance and sensitivity of this curriculum and calls for leadership at both the district and school level to ensure that the program is congruent with this policy and refrains from unwarranted intrusion into families' privacy through the involvement of:
>
> - parents, students and staff in a school-based process to review instructional resources
> - a school-based committee, with representation from the Parent Advisory Council, to review school specific issues especially in sensitive areas
> - a district Standing Advisory Committee with representation from parent, school and broader community.

III. Key Facts

A. *Parties to the Proceedings and Surrey, B.C.*

81 The Surrey area is a culturally and religiously diverse community. It has large Protestant and Catholic Christian communities, including a large Evangelical Christian community. It also has a Sikh population of over 50,000 persons, the largest Muslim community in British Columbia, and a Hindu community.

82 The respondent, the Board of Trustees of School District No. 36 (Surrey), is comprised of seven elected school trustees (Mr. Robert Pickering, Mr. Gary Tymoschuk, Mr. Jim Chisholm, Mr. Ken Hoffmann, Ms. Laurae McNally, Ms. Heather Stilwell and Ms. Mary Polak). It is charged under the *School Act* with the administration of the public schools in the Surrey School District.

83 The appellants, Mr. James Chamberlain and Mr. Murray Warren, are both teachers. Mr. Chamberlain is a Kindergarten teacher in the Surrey District. Mr. Warren is an elementary school teacher in the Coquitlam School District (No. 43). Both belong to the British Columbia Teachers Federation and both are members of an association known as Gay and Lesbian Educators of B.C. ("GALE").

84 GALE is an unincorporated organization of educators who advocate change in the school system to foster a more positive environment for homosexual and bisexual persons. Since 1991, GALE has developed a list of resources dealing with the issue of homosexuality, which included the three books (the "Three Books") at issue in this case: R. Elwin and M. Paulse, *Asha's Mums* (1990); L. Newman, *Belinda's Bouquet* (1991); and J. Valentine, *One Dad, Two Dads, Brown Dad, Blue Dads* (1994).

85 The appellant Rosamund Elwin is one of the authors of *Asha's Mums*. The appellant Diane Willcott is the mother of two children who attend Latimer Road Elementary School in the Surrey School District. She is a member of the Parent Advisory Council of that school. The appellant Blaine Cook is a secondary school student in the Surrey School District and Sue Cook is his mother.

B. *Personal Planning K to 7 Curriculum*

86 In September 1995, the Minister of Education implemented a new curriculum for Personal Planning in grades Kindergarten to seven ("the PP curriculum"). The PP curriculum is "grounded in the recognition that emotional and social development are as important to the development of healthy and active educated citizens as academic achievement and the development of intellectual and physical skills" (Province of British Columbia, Ministry of Education, *Personal Planning K to 7: Integrated Resource Package 1995*, at p. 2). The PP curriculum complements the rest of the K-7 curriculum by focussing on students' personal development and on how their schooling and extra-curricular activities relate to their future plans and life after school.

87 The PP curriculum is divided into three inter-related components (at pp. 3-5):

> [The "Planning Process" component is designed to] help students develop personal, career and educational goals and work towards realizing them.
>
> [The "Personal Development" component] is designed to help students acquire the knowledge, attitudes, and skills needed to lead healthy and productive lives.
>
> [The "Career Development" component is designed to help] students integrate personal, educational, work, and community learning experiences to prepare for future career choices.

88 Each of these three components is divided into curriculum "suborganizers." For the "Personal Development" component, the "suborganizers"

are: "Healthy living"; "Mental well-being"; "Family life education"; "Child abuse prevention"; "Substance abuse prevention"; and "Safety and injury prevention".

89 In requesting approval for the Three Books, Mr. Chamberlain was seeking materials to assist in teaching the "Family life education" curriculum "suborganizer" of the "Personal Development" component of the PP curriculum. For students in K-7, the "Family life education" curriculum "suborganizer" "emphasizes the family's role in teaching moral and behavioral standards. Students focus on the nature and role of the family and address the basics of human reproductive biology" (p. 4).

90 For each curriculum "suborganizer", the Ministry of Education has identified "prescribed learning outcomes" to be achieved by the students at each grade level. The "prescribed learning outcomes" of the "Family life education" "suborganizer" for K-1 are as follows (at p. 22):

> To develop students' understanding of the role of the family and capacity for responsible decision-making in their personal relationships.
>
> *It is expected that students will:*
>
> - identify a variety of models for family organization
> - identify the roles and responsibilities of different family members
> - identify the characteristics that make the family environment safe and nurturing
> - identify the physical characteristics that distinguish males from females
> - identify that living things reproduce

91 In order to help K-1 students achieve these "prescribed learning outcomes", teachers are encouraged to employ the following instructional strategies

(amongst others): have children compare different families and discuss similarities and differences; have children draw and write about their own families; and have children talk about each other's families.

C. *Learning Resource Material Approval in B.C. Public Schools*

92 The publicly funded education system in B.C. is governed by the *School Act*. Section 65 of the *School Act* establishes that each school district is to be run by a board of elected or appointed trustees, constituting a corporation. The *School Act* and related Ministerial Orders clearly give school boards authority to approve "educational resource materials": see s. 85(2)(b) of the *School Act*. More specifically, Ministerial Orders M143/89 and M165/93 restrict a board to using only (1) "educational resource materials" approved by the Minister of Education, or (2) "educational resource materials" that a school board considers are appropriate for individual students or groups of students. Thus, it is clear that beyond the "educational resource materials" recommended by the Ministry, the *School Act* and both Ministerial Orders referred to above permit a school board to play a complementary role and approve additional educational resource materials which the board considers appropriate.

93 In order to engage in reviewing resource materials for approval at the school board level, the Ministerial Orders demand that a board must have established evaluation and selection criteria and procedures. To meet this requirement, the Surrey Board passed Regulation 8800.1, entitled *Recommended Learning Resources and Library Resources*. That regulation established criteria for selecting "learning resources":

1. The recommended learning resource is relevant to the learning outcomes and content of the course or courses.

2. The recommended learning resource is appropriate in terms of the age, maturity, and learning needs of the student for whom it is intended.

3. The recommended learning resource is appropriate for the particular community in which it will be used.

4. The recommended learning resource is fair, objective, free from gratuitous violence, propaganda and discrimination, except where a teaching/learning situation requires illustrative material to develop critical thinking about such issues.

5. The recommended learning resource is readable, interesting, and manageable in the teaching/learning situation. [Emphasis added.]

I note that the selection criteria for "library resources" are different.

94 When a teacher wants to employ a "learning resource" that is neither on the Ministry Recommended Learning Resources list nor on an existing District Recommended Learning Resources list, the procedure for obtaining approval is also set out in Regulation 8800.1:

1. Responsibility for selecting and using recommended learning resources and library resources with the approved criteria rests with the Superintendent of Schools and the other professional staff employed by the Board.

2. The Superintendent or designate and principals are expected to assume general responsibility for seeing that the approved criteria are known and appropriately applied.

3. In the case of recommended learning resources or library resources and controversial matters, the Board expects that good professional judgement will be exercised and that there will be consultation with others, including parents and professional colleagues where deemed appropriate.

4. In the case of challenged recommended learning resources or library resources where resolution has not been possible, the matter shall be referred to the Board with all documentation.

95 Specifically with regard to the PP curriculum, the School Board adopted Policy 8425 at the April 10, 1997 meeting. This policy was prepared in 1996 and early 1997 by the Career and Personal Planning Review Advisory Committee, composed of three school teachers, eight representatives of the District Parent Advisory Council, the Surrey Teachers' Association President, a principal from the Surrey Administrators' Association, and District Staff. This policy generally provides some direction to guide instruction and resource selection relating to the PP curriculum. With regard to resource selection, the policy states that the prescribed curriculum will "adhere to topics and learning resources that are age and developmentally appropriate" and states that to ensure compliance with the policy, the School Board is committed to the involvement of "parents, students and staff in a school-based process to review instructional resources".

D. *Mr. Chamberlain's Request for Approval of the Three Books*

96 In December 1996 and January 1997, Mr. Chamberlain submitted the Three Books, drawn from the GALE list, to the office of the Superintendent of Schools of the respondent School Board for approval as "educational resource material" at the K-1 level for the Surrey School District. Gaining this status would mean that the books would be generally approved for use in all K-1 classrooms in that School District. Their actual use, like all other "educational resource materials", whether provincially or locally approved, would remain subject to the discretion of individual teachers.

97 The Office of the Superintendent of Schools passed Mr. Chamberlain's request to the Education Services Committee ("ESC"). The ESC considered the Three Books at a meeting which was attended by the Superintendent of Schools, four Assistant Superintendents and four District Principals. The members of the ESC are clearly highly qualified in light of their academic backgrounds, their experience and their positions. At that meeting, "[t]here was discussion and debate as to whether the Three Books were age appropriate for Kindergarten and Grade One and whether these particular resources were necessary to achieve the learning objectives of the PP K-7 curriculum". The ESC ultimately decided, given the sensitive and contentious nature of the Three Books, and the likely concern of parents in Surrey if such books were approved, to refer Mr. Chamberlain's request to the School Board.

98 In so referring the request to the School Board, the Superintendent of Schools, Frederick I. Renihan, in an administrative memorandum given to the trustees of the School Board, decided not to "recommend" the Three Books for approval but simply requested that the Board "consider" the Three Books.

99 At the April 24, 1997 meeting of the School Board, Mr. Chamberlain's request to have the Three Books approved was considered. The meeting was attended by all the trustees except Chairman Robert Pickering. At this meeting, the Board heard representations from GALE, the B.C. Civil Liberties Associations and a parent from Latimer Road Elementary School, all in favour of approving the books.

100 Following a heated debate at that meeting, the Surrey School Board passed a resolution, by a vote of 4 to 2, not to approve the Three Books for use as "learning

resources" for the PP curriculum for K-1 (the "Resolution"). Trustees Stilwell, Hoffmann, Tymoschuk and Polak voted in favour of the Resolution while Trustees Chisholm and McNally voted against. The Resolution reads as follows:

> THAT the Board, under Policy #8800 — *Recommended Learning Resources and Library Resources*, not approve the use of the following three (3) learning resources:
>
> Grade Level K-1 Personal Planning
> Elwin, R., & Paulse, M. (1990). *Asha's Mums*.
> Newman, L. (1991). *Belinda's Bouquet*.
> Valentine, J. (1994). *One Dad, Two Dads, Brown Dad, Blue Dads.*

As stated above, this Resolution did not concern "library resources" and neither did it have any relevance to grades other than K-1.

E. *Commitment to Non-Discrimination in the Surrey School District*

101 With regard the Surrey School District's commitment to non-discrimination, the Court of Appeal noted the following, at paras. 38-39 of its reasons ((2000), 191 D.L.R. (4th) 128):

> The Surrey Superintendent of Schools, with the concurrence of the Board, sent a directive to the Surrey schools on 9 May 1997 under the heading "Tolerance For Sexual Orientation". The directive stated in part:
>
> > There has been extensive media coverage regarding recent Board motions on learning resources and sexual orientation. Let there be no confusion with regard to the District's expectation in terms of how we treat the matter of sexual orientation. The District will not accept any action of intolerance or discriminatory treatment of students, staff, or parents on the basis of their sexual orientation. Administrative officers must be vigilant in their responsibility and must confront instances of intolerance to ensure that they cease and that appropriate action results.

> Board Regulation 10900.1, Multicultural, Anti-Racist and Human Rights, states, in part:
>
> > ". . . any form of discrimination that results in disparagement towards others based on identifiable group features is unacceptable."
> >
> > Our Board is committed to providing a working and learning environment that is safe, supportive, and free of discrimination based on a person's sexual orientation. *The promotion of intolerance is unacceptable.* (Emphasis in original.)
>
> This directive was a clear, emphatic, and unambiguous statement of District policy.
>
> It cannot be ignored, as the Supreme Court stressed in *Vriend*, that discrimination against gays and lesbians can range from insults and ostracism to vicious and violent acts. Schools are not immune and all those involved in teaching and administration must be vigilant in prevention of all forms of discrimination and abuse. However, I do not think that there is any reason not to take this directive at its word or to conclude that the Board did not stand behind its admonition.

I also note that Surrey School Board Policy 10900, has been in effect since November of 1982. The version of the policy revised in April of 1996 states:

> It is an expectation that all school district programs and operations will promote the preparation of learners to participate in a just and equitable manner in society.
>
> The Board is committed:
>
> – to create in the Surrey School District an environment free of racial and cultural discrimination;
>
> – to hire on the basis of merit and not to discriminate against persons;
>
> – to prepare students for life in a multicultural society;
>
> – to eliminate racism and discrimination;
>
> – to reduce language and cultural barriers to best placement of students;
>
> – to communicate effectively with parents and the community; and
>
> – to monitor efforts to comply with policy.

I agree with the Court of Appeal below that there is no reason to doubt the School Board's commitment to these policies. The affidavit of Mr. Brian H. Bastien, the Associate Superintendent of Human Resources for the Board at the relevant times, outlines the policies and measures adopted by the district to combat intolerance, harassment and discrimination on the basis of sexual orientation.

IV. The Paramount Role of Parents in the Education of Children, the Best Interests of Children and the *Charter*

A. *Parental Responsibilities and the Best Interests of Children*

102 While this case specifically concerns the non-approval of particular books by an elected school board, it more generally raises contextual issues concerning the right of parents to raise their children in accordance with their conscience, religious or otherwise. In my view, the general nature of the interplay of the roles of parents and the state is clear: "The common law has long recognized that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being": *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 83. Thus, parents are clearly the primary actors, while the state plays a secondary, complementary role.

103 It is essential to note, however, that when parents exercise this primary responsibility, they must act in accordance with the "best interests" of their children: *Young v. Young*, [1993] 4 S.C.R. 3; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141. Parents, exercising choice in how to raise their children, acting on the basis of their conscience, religious or otherwise, however, will be presumed to be acting in the "best interests" of their children. Generally, it is only when parental conduct falls below a "socially

acceptable threshold" that the state may properly intervene: *B. (R.)*, at para. 86. Thus, the role of the state is properly construed as generally providing assistance to parents to nurture and educate their children, a good example being public schools, and in extreme cases intervening to take over the parental function where the parents have failed to act in their children's "best interests".

104 Parental decision making about what is in their children's "best interests" concerns the core of the private sphere. In *B. (R.)*, at paras. 104-5, La Forest J., for a majority of the Court, clearly situated the right of parents to rear their children according to their conscience, religious or otherwise, as a fundamental aspect of freedom of conscience and religion, protected by s. 2(*a*) of the *Charter*:

> Like the other provisions of the *Charter*, s. 2(*a*) must be given a liberal interpretation with a view to satisfying its purpose: see *Re B.C. Motor Vehicle Act*, *supra*. In *R. v. Big M Drug Mart Ltd.*, *supra*, Dickson J. stated, at p. 336:
>
> > 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. But the concept means more than that.
>
> In *R. v. Jones*, *supra*, I observed that freedom of religion encompassed the right of parents to educate their children according to their religious beliefs. In *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, a case involving a custody dispute in which one of the parents was a Jehovah's Witness, L'Heureux-Dubé J. stated that custody rights included the right to decide the child's religious education. <u>It seems to me that the right of parents to rear their children according to their religious beliefs, including that of choosing medical and other treatments, is an equally fundamental aspect of freedom of religion.</u> [Emphasis added.]

105 In that same case, dissenting on other grounds, Iacobucci and Major JJ., at para. 223, claimed with regard to s. 2(*a*) of the *Charter*:

> That constitutional freedom includes the right to educate and rear their child in the tenets of their faith. In effect, until the child reaches an age where she can make an independent decision regarding her own religious beliefs, her parents may decide on her religion for her and raise her in accordance with that religion. [Emphasis added.]

106 Beyond clearly rooting the protection of a privileged parental sphere of authority in s. 2(*a*) of the *Charter*, La Forest J., at paras. 83 and 85 of *B. (R.)*, *supra*, with McLachlin J. (as she then was), L'Heureux-Dubé J., and I concurring, stated the following with regard to s. 7 of the *Charter*:

> As observed by Dickson J. in *R. v. Big M Drug Mart Ltd.*, *supra*, the *Charter* was not enacted in a vacuum or absent a historical context. The common law has long recognized that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being. In *Hepton v. Maat*, [1957] S.C.R. 606, our Court stated (at p. 607): "The view of the child's welfare conceives it to lie, first, within the warmth and security of the home provided by his parents". This recognition was based on the presumption that parents act in the best interest of their child. The Court did add, however, that "when through a failure, with or without parental fault, to furnish that protection, that welfare is threatened, the community, represented by the Sovereign, is, on the broadest social and national grounds, justified in displacing the parents and assuming their duties" (pp. 607-8). Although the philosophy underlying state intervention has changed over time, most contemporary statutes dealing with child protection matters . . ., while focusing on the best interest of the child, favour minimal intervention. In recent years, courts have expressed some reluctance to interfere with parental rights, and state intervention has been tolerated only when necessity was demonstrated. This only serves to confirm that the parental interest in bringing up, nurturing and caring for a child, including medical care and moral upbringing, is an individual interest of fundamental importance to our society.
>
> While acknowledging that parents bear responsibilities towards their children, it seems to me that they must enjoy correlative rights to exercise them. The contrary view would not recognize the fundamental importance of choice and personal autonomy in our society. As already stated, the common law has always, in the absence of demonstrated neglect or unsuitability, presumed that parents should make all significant choices affecting their children, and has afforded them a general liberty to do as they choose. This liberty interest is not a parental right tantamount to a right of property in children. (Fortunately, we have distanced ourselves from the ancient juridical conception of children as chattels of their parents.) The state is now actively involved in a number of areas

> traditionally conceived of as properly belonging to the private sphere. Nonetheless, our society is far from having repudiated the privileged role parents exercise in the upbringing of their children. This role translates into a protected sphere of parental decision-making which is rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself. Moreover, individuals have a deep personal interest as parents in fostering the growth of their own children. This is not to say that the state cannot intervene when it considers it necessary to safeguard the child's autonomy or health. But such intervention must be justified. In other words, parental decision-making must receive the protection of the *Charter* in order for state interference to be properly monitored by the courts, and be permitted only when it conforms to the values underlying the *Charter*. [Emphasis added.]

107 I also generally agree with the following statement made by Wilson J. in *R. v. Jones*, [1986] 2 S.C.R. 284, at pp. 319-20, in the context of her argument that s. 7 of the *Charter* does include the right to bring up and educate one's children in line with one's conscientious belief:

> The relations of affection between an individual and his family and his assumption of duties and responsibilities towards them are central to the individual's sense of self and of his place in the world. The right to educate his children is one facet of this larger concept. This has been widely recognized. Article 8(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222 (1950), states in part "Everyone has the right to respect for his private and family life. . . ." Particularly relevant to the appellant's claim is Article 2 of Protocol No. 1 of the Convention:
>
> > No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

108 I was then, and I am still of the view that the above overview is a correct statement of the law: parents clearly have the right, whether protected by s. 7 or s. 2(*a*) of the *Charter*, to nurture, educate and make decisions for their children, as long

as these decisions are in the children's "best interests". Parents will be presumed to be acting in their children's "best interests" unless the contrary is shown. That having been said, it is clear that, whether rooted in s. 2(*a*) or s. 7 of the *Charter*, the paramount parental right to nurture, make decisions for and direct the moral education of their children, like all rights protected by the *Charter*, is obviously not absolute: see *B. (R.)*, at paras. 87, 107 and 224; see also *Jones*, at pp. 320 and 322.

109 The general approach taken by this Court is consistent with Article 18(4) of the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (entered into force March 23, 1976), which reads as follows:

> The States Parties to the present Covenant undertake to have respect for the liberty of parents . . . to ensure the religious and moral education of their children in conformity with their own convictions.

110 The Canadian approach is also loosely analogous to the situation in the United States, where the notions of parental rights and the integrity of the family unit have been granted constitutional status as a result of judicial interpretation of the First and Fourteenth Constitutional Amendments: see *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), amongst numerous others. In *Prince v. Massachusetts*, 321 U.S. 158 (1944), at p. 166, Rutledge J., speaking for the court, stated: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

111 Other cases of this Court have reiterated the paramount parental role by construing the nature of the authority schools and teachers have over children as a "delegated authority": see *R. v. Audet*, [1996] 2 S.C.R. 171, at para. 41. In that case, La Forest J., for a majority of the Court, cited with approval a passage from Cosgrove J. in *R. v. Forde*, [1992] O.J. No. 1698 (QL) (Gen. Div.): "In our society the role of the teacher is second in importance only to the parent." I note that Saunders J. below referred to these passages at paras. 72-73 of her reasons ((1998), 168 D.L.R. (4th) 222). In *Adler v. Ontario*, [1996] 3 S.C.R. 609, at para. 196, McLachlin J., in dissent on a different point, reiterated the paramountcy of the parental role by confirming the right of parents to remove their children from the public school system and place them in an environment which is more suited to the belief system which the parents want to impart, whether that be at home or in a parochial school.

112 The notion of a school's authority being "delegated", if it permits the parental control response of removing a child from the public school system, also entails that parents must be guaranteed the role of having input with regard to the values which their children will receive in school. This is generally brought about by electing representatives who will develop consensus and govern on matters pertaining to public education, which may occur at the provincial level and at the local level. As noted above, when consensus is developed at the provincial level and becomes reflected in a provincial curriculum and a provincial list of approved resources, any teacher in any school in the province may employ those resources in teaching the curriculum. The future development of the general nature of the provincially developed curriculum may, of course, be modified by results at the provincial ballot box or by changes in politically developed consensus.

113 At the subsidiary local school board level, parents participate directly by electing local school board trustees. As noted above, these local school boards are empowered by the *School Act* to approve or not approve complementary "educational resource materials". It is also clear that a school board does not have an unfettered discretion when it engages in such approving or non-approving: it must act in a manner consistent with the *School Act*, as well as consistent with the evaluation and selection criteria and procedures which the Ministerial Orders discussed above demand be adopted. Further, as well elaborated in the reasons of the Chief Justice, a local school board must, when approving or not approving materials, act in a manner consistent with the demands of the provincial curriculum. If a local school board does approve materials, then in addition to the provincially approved resources, teachers in that district may employ these complementary materials as well. Similar to the situation at the provincial level, the future development of these complementary educational resource materials lists at the local level is also subject to the results of the ballot box, being the results of local school trustee elections.

114 Another practical reflection of parental involvement at the local level is that many schools have parental organizations geared at facilitating parental involvement, such as the Parent Advisory Council at Latimer Road Elementary School, one of the schools at which Mr. Chamberlain taught Kindergarten, and of which appellant Diane Willcott was a member at the time of trial. A further example of parental involvement is that eight representatives of the District Parent Advisory Council formed a majority on the Career and Personal Planning Review Advisory Committee which approved Policy 8425, the Surrey School Board policy directed at providing some guidance for the selection of materials for the PP curriculum. Parents may also make submissions before school boards, as did one parent, in favour of

approving the Three Books Resolution, at the April 24, 1997 Surrey School Board meeting.

115 With regard to the role of "values" in school, I note that this Court clearly established in *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 42, that:

> A school is a communication centre for a whole range of values and aspirations of a society. In large part, it defines the values that transcend society through the educational medium. The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate. As the Board of Inquiry stated, a school board has a duty to maintain a positive school environment for all persons served by it.

In my saying that parents do and ought to have input at the local level with regard to the values which their children receive in school, I want to make it clear that this does not amount to, as alleged in submissions before this Court, that a particular parent or group of parents has a "veto" over the local delivery of the provincial curriculum. This is not the case since the curriculum and the core "educational resource materials" related to it are developed at the provincial level. Further, any local school board decision must be consistent with the demands of the provincial curriculum, and must certainly not directly contradict the provincial curriculum. What local parent involvement does mean, however, in the case at bar, is that in the absence of a clear provincial indication in the curriculum that a particular subject matter be taught, parents at the local level may exercise, through electing their school trustees, some control over complementary materials related to the delivery of the curriculum. Engaging this local evaluation is aimed, to borrow the language of *Ross* cited just above, exactly at the objective of "maintain[ing] a positive school environment for all

persons served by it" and is "premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate". It is also consistent with the preamble of the *School Act*, which identifies a purpose of the province's school system as developing students with a skill set required in a "democratic and pluralistic society".

116 The recognition that primary responsibility for the education of children resides in parents is, interestingly, also manifest in the PP curriculum itself. The PP curriculum, when discussing the "Family life education" "sub-organizer" claims: "this aspect of Personal Development emphasizes the family's role in teaching moral and behavioral standards" (p. 4). The PP curriculum also states that "[t]he family is the primary educator in the development of children's attitudes and values" (p. 6). Building upon these points, the Surrey School Board's Policy 8425 claims: "this prescribed curriculum is broad in scope and addresses goals in human, social and career development which are appropriately shared between the school and the family".

117 Why are parents guaranteed a paramount role in their children's education and moral development? As was quoted above from *B. (R.)*, at para. 85, the primacy of parents is "rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself". This reasoning strikes particularly true with regard to the facts in the case at bar. A parental determination of what is appropriate subject matter for their children's education involves an examination of the psychological age or maturity of their children, as well as a parental reflection upon what conscience-based guidance they

seek to impart. As one parent's affidavit puts it: "As my children's mother, I feel I am in the best position to determine their ability to understand and deal with complex and contentious value-based issues involving human sexuality." This evaluation is individualized, and, in my view, preferable, when possible, to assumptions which root child readiness or capability in an undifferentiated chronological analysis. In many, if not most, educational policy situations, however, general chronologically based decisions are unavoidable as a practical matter. Even these general decisions, however, are still the result of a consensus which has been developed by the community. In the penumbra which this case concerns, the space permitted for local school board approval or non-approval of educational resources in the absence of provincially approved resources, responsiveness to parental concern allows a school board to react more directly to parental determinations of age appropriateness. Since this local solution is not only possible, but clearly envisaged by the operation of the *School Act*, it is preferable and to be respected, in that it reflects the clear proposition of law that parents stand before the state in relation to their children and are in a uniquely privileged position to be able to gauge their needs and abilities.

118 I have undertaken the above review of the parental role in the moral education of children and the "best interests" of the child test because, in my view, the privileged role of parents to determine what serves the well-being of their children, including, as quoted above, their "moral upbringing", is central to analyzing the reasonableness of the School Board's decision in the case at bar. This is because the School Board, acting in the capacity of approving or not-approving "educational resource materials" which are complementary to the provincially approved materials, is acting as an elected representative body. As will be discussed below, the School Board's criteria for approving complementary "educational resource materials", not

surprisingly, contained reference to concepts such as "age appropriateness" and envisaged that the existence of parental concern in the community would be a factor to be considered. These dimensions of the criteria obviously require the trustees to canvass local parental views as it is clear, from my discussion above, that parents are the best arbiters of what is in their children's best interests.

B. *Parental Involvement in the School System and the Charter*

119 As noted above, parents are presumed to have acted in accordance with their children's "best interests" unless it is shown to the contrary. In my view, nothing in the record lends itself to the view that parents who were concerned about the appropriateness of the Three Books have been shown to have failed to act in the "best interests" of their children.

120 What of the interaction between what is parentally determined to be in the "best interests" of their children and the *Charter*? In *Young, supra*, L'Heureux-Dubé J. stated that custodial parents have a duty to ensure, protect and promote the "best interests" of their children. With regard to the content of that duty, L'Heureux-Dubé J. claimed, at p. 38: "That duty includes the sole and primary responsibility to oversee all aspects of day to day life and long-term well-being, as well as major decisions with regard to education, religion, health and well-being." This is consonant with the more general discussion above about the privileged parental role in the upbringing of their children, whether rooted in ss. 2(*a*) or 7 of the *Charter*. With regard to the constitutionality of the "best interests of the child" test, L'Heureux-Dubé J. claimed, at p. 71:

> It would seem to be self-evident that the best interests test is value neutral, and cannot be seen on its face to violate any right protected by the *Charter*. Indeed, as an objective, the legislative focus on the best interests of the child is completely consonant with the articulated values and underlying concerns of the *Charter*, as it aims to protect a vulnerable segment of society by ensuring that the interests and needs of the child take precedence over any competing considerations in custody and access decisions.

While the case at bar does not concern a legislative reference to the "best interests" of the child standard *per se*, the standard, in my view, is implicated since the School Board purports to be acting in response to the concerns of parents, who are otherwise obligated to act in their children's "best interests". This was, in fact, noted by the trial judge, who, at para. 55, recognized that the School Board purported that "its corporate decision was made in the best interests of the children". This case, therefore, while obviously not ignoring the needs and constitutional rights of parents in same-sex relationships, is about the "best interests" of all children in the public school system.

121 Although the issue does not appear to have been expressly considered by this Court in the past, in my view, there can be no doubt that the School Board is a branch of government and thus subject to the *Charter* by operation of s. 32. In applying the approach set forth by La Forest J. in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, and *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, I find many similarities between the status of elected school boards such as the respondent and that of a municipal council, which he addressed in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844. Thus, like a municipal council, the School Board is an elected body endowed by legislation with largely autonomous rule-making and decisional powers. As La Forest J. indicated (at para. 47):

> I take to be an important idea governing the application of the Canadian *Charter* to entities other than Parliament, the provincial legislatures or the federal or provincial governments . . . that where such entities are, in reality, "governmental" in nature — as evidenced by such things as the degree of government control exercised over them, or by the governmental quality of the functions they perform — they cannot escape *Charter* scrutiny. In other words, the ambit of s. 32 is wide enough to include all entities that are essentially governmental in nature and is not restricted merely to those that are formally part of the structure of the federal or provincial governments.

Here, as was the case of the municipal council in *Godbout*, school boards "are democratically elected by members of the general public and are accountable to their constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to the electorates they represent . . ., this itself is a highly significant (although perhaps not a decisive) indicium of 'government' in the requisite sense" (para. 51). Moreover, although not directly endowed with taxation powers, they are the beneficiaries of school taxes levied by municipalities on behalf of the province under ss. 107 and 119 *et seq.* of the *School Act*. Finally, and most importantly, school boards "derive their existence . . . from the provinces; that is, they exercise powers conferred on them by provincial legislatures, powers and functions which they would otherwise have to perform themselves" (para. 51). I believe that these considerations clearly establish the applicability of the *Charter* to the School Board.

122 However, in my view, it would be inappropriate to embark upon a complete s. 15 analysis in the case at bar, as if to establish a direct breach of the *Charter* by the School Board. Although the appellants raise such issues before this Court, they were not addressed by the courts below, whose reasoning was based exclusively on the scope of the Board's authority under the Act. Thus, I would be reluctant, for instance, to deal with issues such as substantive discrimination under s.

15 and justification under s. 1 without the benefit of findings of fact specifically directed at them.

123 In addition, such an analysis would raise substantial issues concerning standing, which have similarly not been addressed by the courts below. None of the appellants are same-sex parents or children of such parents, who could allege having been exposed to differential treatment based on their personal characteristics by not being represented alongside other family types in Surrey K-1 classrooms. Thus, this Court would have to decide whether the criteria for public interest standing set forth in *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575, and *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, are met by at least one of the plaintiffs in this case. Professor P. W. Hogg, in *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, summarizes the result of these cases as follows (at p. 56-9):

> While it is still the case that a private plaintiff has no right to bring a declaratory action when he or she has no special personal interest in an issue of constitutional or public law, the courts will grant standing as a matter of discretion to the plaintiff who establishes (1) that the action raises a serious legal question, (2) that the plaintiff has a genuine interest in the resolution of the question, and (3) that there is no other reasonable and effective manner in which the question may be brought to court.

In my view, while there is no doubt that the appellants, including Mr. Chamberlain, have a genuine interest in the resolution of the question, a suit by same-sex parents or children directly affected by the Resolution appears to be the "reasonable and effective manner" in which one would expect an allegation of a s. 15 breach by the Board to be raised.

124 Moreover, a determination that "the action raises a serious legal question" in the context of the standing analysis would involve some circularity here, as the test established by Iacobucci J. in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, requires that the impugned law or act draw a formal distinction between the claimant and others on the basis of one or more personal characteristics. In the case at bar, none of the claimants has been made subject to a distinction based on his or her personal characteristics. As mentioned above, Mr. Warren is a homosexual teacher in the Coquitlam school district, rather than in Surrey, and is unaffected by the Three Books Resolution. Mr. Cook was a secondary school student in Surrey at the time the Resolution was adopted, and was not directly affected by it. Ms. Elwin is the author of *Asha's Mums*, one of the books at issue, and her evidence concerns the reception of the book in places other than Surrey. She makes no claim to having been impacted by the Resolution. Ms. Willcott is a Surrey resident who opposed the Resolution and whose six-year-old son was in Mr. Chamberlain's Grade One class at that time. She does not claim to be a homosexual or to otherwise have been directly affected by the Resolution. Finally, Mr. Chamberlain himself is a homosexual K-1 teacher in Surrey. Although he introduced the books for approval and argues that the Resolution may deny benefits to some children, he cannot claim that it denies him equal benefit of the law based on his personal characteristics. He does not claim, for instance, that the Board's refusal to approve the books was in any way related to his own homosexuality. Indeed, there is every reason to think that the same conclusion would have been reached had the books been introduced by a heterosexual teacher.

125 The appellants could conceivably circumvent these difficulties by arguing, for instance, that Mr. Chamberlain has been discriminated against by him not being

able to teach materials that reflect his lifestyle, or that homosexual persons in general are being discriminated against by their not being shown to exist in the learning resources adopted by the Minister and the School Board for use in K-1 classrooms in Surrey. In my view, while these arguments may have some merit, it is unnecessary to resolve the issue at this point. I believe the standing difficulties I have outlined arise from the fact that this case truly shows itself to be about a distinction linked, not to the personal characteristics of any individual, but to the particular features or contents of the Three Books; in other words, it is about the "ways and means" of implementing the curriculum, an exercise of educational policy choice, within the context of a broader commitment to actual non-discrimination. As I suggested above, there is effectively consensus on *Charter* values in the context of the case at bar. No one is advocating discriminatory treatment of any persons. Moreover, as will be explained below, I am of the view that the relevant *Charter* values are incorporated in the requirements of the *School Act*, notably through the criterion of "highest morality" in s. 76. Therefore, I am satisfied that approaching this case as one of accommodation or balancing between competing *Charter* rights adequately addresses the impact of the *Charter*.

126 The *Charter* reflects a commitment to equality, protects all persons from discrimination, protects the rights of all Canadians to exercise their religious freedom and freedom of conscience, and also protects freedom of expression. Thus, persons who believe that homosexual behaviour, manifest in the conduct of persons involved in same-sex relationships, is immoral or not morally equivalent to heterosexual behaviour, for religious or non-religious reasons, are entitled to hold and express that view. On the other hand, persons who believe that homosexual behaviour is morally equivalent to heterosexual behaviour are also entitled to hold and express that view. Both groups, however, are not entitled to act in a discriminatory manner. Thus, this

case engages the s. 15, s. 2(*a*) and s. 2(*b*) rights of both the appellants and the parents who expressed their views to the School Board — and all must be considered as imported into the review of the School Board's decision. I note that in *Trinity Western University v. British Columbia College of Teachers,* [2001] 1 S.C.R. 772, 2001 SCC 31, at para. 31, this Court affirmed the position elaborated in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, that:

> A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict . . . *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.

127 Many of the parents who signed affidavits supporting the respondent specifically stated that they do not discriminate and are not "homophobic". A sample of such statements includes the following:

> I am aware that there are differing views regarding the issue of homosexuality and same-sex couples, or religion, politics or other matters of strong personal opinion, and I respect the right of others to hold views that differ from my own and live in a manner consistent with those views, so long as they do not disregard the rights of my family and children to differ. I am not homophobic as I neither fear nor hate homosexuals, I merely disagree with some of their views regarding sexual behaviour and wish to be free to do so without discrimination or harassment.
>
> I am not homophobic and respect the right of each individual in society to live their lives without the occurrence of discrimination contrary to the law. However, I do not believe that I, as a parent, nor my child, should be required or taught to agree with the appropriateness of same-sex sexual relationships.
>
> . . . we do not wish our children to be exposed to the topic of same-sex couples at an early age where they are unable to deal with the complexities of the issue when we believe that this is not a proper family unit. We are not homophobic as we neither hate nor fear those of a homosexual orientation. We simply have strong religious beliefs regarding homosexual behaviour which we wish to impart to our children. It is our desire that the school system not interfere with our right to teach our

> children our values. Our children will, at some point, be exposed to the topic as we do not wish to be overly protective or keep our children away from what is happening in society. However, we believe that this topic should be addressed primarily at home and at an age we deem appropriate.
>
> I am bringing up my children to love and respect everyone, but not necessarily to accept their actions or beliefs.

Adults in Canadian society who think that homosexual behaviour is immoral can still be staunchly committed to non-discrimination. In the case at bar, there is, in my view, no evidence that the parents who felt that the Three Books were inappropriate for five- and six-year-old children fostered discrimination against persons in any way. Many persons, religious and not, justify this distinction by drawing a line, reflected in the passages above, between beliefs held about persons and beliefs held about the conduct of persons.

128 If many Canadians, as a result of deeply held religious or non-religious beliefs or opinions, draw such a line and commit to such a distinction in their daily lives, must the law obliterate it because of the allegation that acts of discrimination against persons are born from the view held by some that certain persons' conduct is immoral or inappropriate? Does a commitment to eradicating the potential for future instances of discrimination require that religious persons or others be forced to abandon their views regarding the immorality of certain conduct? Can s. 15 be used to eliminate beliefs, whether popular or unpopular? In a society committed to liberal values and robust pluralism, the answer to all of these questions must be in the negative.

129 This Court has recognized that there are many religious organizations within our Canadian community, and that their diversity must be respected. To this

I add that there are many other organizations within civil society, including those such as GALE or the intervener EGALE, which espouse particular views about homosexuality which, while not being "religious" *per se*, are clearly particular normative claims about "beliefs". The views of these institutions of civil society must also be respected.

130 In *Trinity Western*, this Court held that while the British Columbia College of Teachers was correct to have considered the *Charter* and other human rights legislation when examining the question of whether to grant accreditation to a private university, the College of Teachers also had to ask whether the rights in question were actually in conflict. In that case, at para. 29, this Court concluded that any potential conflict between the s. 2(*a*) and s. 15 *Charter* rights "should be resolved through the proper delineation of the rights and values involved. In essence, properly defining the scope of the rights avoids a conflict in this case. Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute." In an instance where belief claims seem to conflict, there will be a need to strike a balance, either by defining the rights so as to avoid a conflict or within a s. 1 justification. In the case at bar, the recognition of the value of each rights claim is adequately respected in the balance or accommodation that was struck by the School Board: the Three Books portraying parents in same-sex relationships will not be employed in the two earliest grades, but this subject matter, like the issue of homosexuality as a general topic of human sexuality, is present in later aspects of the curriculum. Further, the failure to approve the Three Books does not necessarily preclude the issue of same-sex parents being discussed in the classroom, a point which I will address below.

131 As this Court has stated in *Trinity Western*, at para. 36:

> . . . the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. . . . For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society. [Emphasis added.]

The key underlined phrase is a recognition that the distinction between conduct and belief is present in Canada's constitutional case law: persons are entitled to hold such beliefs as they choose, but their ability to act on them, whether in the private or public sphere, may be narrower. This approach reflects the fact that s. 2(*a*) and s. 2(*b*) of the *Charter* co-exist with s. 15, which extends protection against discrimination to both religious persons and homosexual persons. The balance struck in the case at bar reflects a position which is respectful of the views of both sides when one looks at the totality of the context.

132 Beyond this, nothing in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, or the existing s. 15 case law speaks to a constitutionally enforced inability of Canadian citizens to morally disapprove of homosexual behaviour or relationships: it is a feeble notion of pluralism that transforms "tolerance" into "mandated approval or acceptance". In my view, the inherent dignity of the individual not only survives such moral disapproval, but to insist on the alternative risks treating another person in a manner inconsistent with their human dignity: there is a potential for a collision of dignities. Surely a person's s. 2(*a*) or s. 2(*b*) *Charter* right to hold beliefs which disapprove of the conduct of others cannot be obliterated by another person's s. 15 rights, just like a person's s. 15 rights cannot be trumped by s. 2(*a*) or 2(*b*) rights. In

such cases, there is a need for reasonable accommodation or balancing. In my view, in the context of this case, the decision reflects a constitutionally acceptable balance.

133 It was submitted before this Court in the case at bar that the best interests of children includes education about "tolerance". I, obviously, agree. As was quoted above from *Ross, supra*, at para. 42: "The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate." But to suggest that "tolerance" requires the mandatory approval of the Three Books, which is what the appellants seek as a remedy, begs the question as to what the books portray and the capability of children to receive the messages in the books in a manner which is consistent with the parental determination of what is in their best interests. This is a question regarding which reasonable parents disagree, regarding which some form of accommodation between disagreeing parents has to be struck, and regarding which, in my view, given the paramount role of parents *vis-à-vis* their children, explained above, significant deference is owed to parents.

134 I also note that language espousing "tolerance" ought not be employed as a cloak for the means of obliterating disagreement. Section 15 of the *Charter* protects all persons from discrimination on numerous enumerated and analogous grounds, including the grounds of religion and sexual orientation. Language appealing to "respect", "tolerance", "recognition" or "dignity", however, must reflect a two-way street in the context of conflicting beliefs, as to do otherwise fails to appreciate and respect the dignity of each person involved in any disagreement, and runs the risk of escaping the collision of dignities by saying "pick one". But this cannot be the answer. In my view, the relationship between s. 2 and s. 15 of the *Charter*, in a truly

free society, must permit persons who respect the fundamental and inherent dignity of others and who do not discriminate, to still disagree with others and even disapprove of the conduct or beliefs of others. Otherwise, claims for "respect" or "recognition" or "tolerance", where such language becomes a constitutionally mandated proxy for "acceptance", tend to obliterate disagreement.

135 It is often suggested, and was in fact submitted by many of the parties before this Court, that religious belief and practice, and public policy decisions based on such views, ought to effectively be privatized, retreated into the religious "closets" of home or church. I note, however, that the essence of freedom of religion or conscience, and in my view also the essence of freedom of expression more generally, was addressed in the following passage from Dickson J.'s reasons in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at pp. 336-37:

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. 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. But the concept means more than that.
>
> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. 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.

I note that this passage refers to many "public" words, such as "declare" and "manifest". This was not, in my view, an accident. Perhaps, if as submitted before this Court, it is preferable that the development of beliefs relating to religious faith or morality be undertaken exclusively in the private sphere, then perhaps so too should the development of beliefs as to what is or is not appropriate sexual conduct be undertaken in the private sphere, since it is clear that the nature of both kinds of belief, although constitutionally protected, are publicly contested. In my view, however, it is preferable that no constitutionally protected right be forced exclusively into the private sphere. In cases where there is a conflict between public expressions of rights, an accommodation or balance will need to be struck, either by defining the scope of the rights so as to avoid the conflict, or within s. 1 balancing. But an acceptable resolution when rights collide is not to allow one rights claim to obliterate the public exercise of another right. An acceptable resolution is accommodation or balancing: "Freedom of religion, conscience and association coexist with the right to be free of discrimination based on sexual orientation" (*Trinity Western*, *supra*, at para. 34).

C. *Section 76 of the School Act*

136 The discussion above is consistent with the proper understanding of "secular" and "non-sectarian", terms referred to in s. 76 of the *School Act*, which provides general direction as to how all schools are to be conducted. A proper understanding of these concepts was well elaborated by the Court of Appeal below and has been discussed in the reasons of the Chief Justice. (See also, generally, Iain T.

Benson, "Notes Towards a (Re)Definition of the 'Secular'" (2000), 33 *U.B.C. L. Rev.* 519.)

137 In my view, Saunders J. below erred in her assumption that "secular" effectively meant "non-religious". This is incorrect since nothing in the *Charter*, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy. I note that the preamble to the *Charter* itself establishes that ". . . Canada is founded upon principles that recognize the supremacy of God and the rule of law". According to the reasoning espoused by Saunders J., if one's moral view manifests from a religiously grounded faith, it is not to be heard in the public square, but if it does not, then it is publicly acceptable. The problem with this approach is that everyone has "belief" or "faith" in something, be it atheistic, agnostic or religious. To construe the "secular" as the realm of the "unbelief" is therefore erroneous. Given this, why, then, should the religiously informed conscience be placed at a public disadvantage or disqualification? To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of pluralism. The key is that people will disagree about important issues, and such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of a modern pluralism.

138 As Mackenzie J.A. stated in the Court of Appeal below, at paras. 31-34:

> Today, adherents of non-Christian religions and persons of no religious conviction are much more visible in the public square than a century ago and any truly free society must recognize and respect this diversity in its public schools. "Strictly secular and non-sectarian" must be interpreted in a manner that respects this reality. That respect precludes any religious establishment or indoctrination associated with

> any particular religion in the public schools but it cannot make religious unbelief a condition of participation in the setting of the moral agenda. Such a disqualification would be contrary to the fundamental freedom of conscience and religion set forth in s. 2 of the *Charter*, and the right to equality in s. 15. It would negate the right of all citizens to participate democratically in the education of their children in a truly free society.
>
> "Non-sectarian", while originally it may have been limited to a Christian context of various denominations and sects, must now be extended to include other religious traditions as well as those who do not adhere to any religious faith or tradition. The section precludes the teaching of religious doctrine associated with any particular faith or tradition (except in a context which is intended to educate students generally about the various religious traditions for the purpose of advancing religious tolerance and understanding and does not advance any particular doctrinal position over others).
>
> In my opinion, "strictly secular" in the *School Act* can only mean pluralist in the sense that moral positions are to be accorded standing in the public square irrespective of whether the position flows out of a conscience that is religiously informed or not. The meaning of strictly secular is thus pluralist or inclusive in its widest sense. This interpretation accords with *Big M*, where the fatal flaw in the *Lord's Day Act* was its link to exclusively Christian doctrine rather than morality. It also accords with the distinction between morality and dogma or creed in s. 76(2).
>
> No society can be said to be truly free where only those whose morals are uninfluenced by religion are entitled to participate in deliberations related to moral issues of education in public schools. In my respectful view "strictly secular" so interpreted could not survive scrutiny in the light of the freedom of conscience and religion guaranteed by s. 2 of the *Charter* and the equality rights guaranteed by s. 15.

139 Therefore, in my view, the dual requirements that education be "secular" and "non-sectarian" refer to keeping the schools free from inculcation or indoctrination in the precepts of any religion, and do not prevent persons with religiously based moral positions on matters of public policy from participating in deliberations concerning moral education in public schools. Regardless of the personal convictions of individual members, the reasons invoked by the Board for refusing to approve the books — notably the fact that parents in the community held certain religious and moral views and the need to respect their constitutional right to freedom of religion

and their primary role as educators of their children — raise secular concerns that could properly be considered by the Board.

140 The discussion above is also consistent with a proper interpretation of the requirement, set out is s. 76 of the *School Act*, that the "highest morality" be inculcated. I agree with Mackenzie J.A. that this notion ought to be defined as a principle that "maintain[s] the allegiance of the whole of society including the plurality of religious adherents and those who are not religious" (para. 35). There can be no doubt that the values expressed in the *Charter* derive from a wide social consensus and should be considered as principles of the "highest morality" within the meaning of s. 76 of the *School Act*. Consequently, public schools in British Columbia are obliged to conform their teaching to *Charter* values, such as the principle of non-discrimination against persons on the basis of their sexual orientation, embodied by s. 15 and affirmed by several decisions of this Court, such as *Egan v. Canada*, [1995] 2 S.C.R. 513, and *Vriend*, *supra*. Such an interpretation is consistent with this Court's approach to the statutory requirement, considered in *Trinity Western*, *supra*, that the British Columbia College of Teachers establish standards for the competence of its members "having regard to the public interest" (para. 11). Iacobucci and Bastarache JJ. held that "the pluralistic nature of society and the extent of diversity in Canada are important elements that must be understood by future teachers because they are the fabric of the society within which teachers operate and the reason why there is a need to respect and promote minority rights" (para. 13). Thus, the College of Teachers could properly, in light of the "public interest" requirement, consider alleged discriminatory practices in an institution requesting accreditation of its training program for teachers. Likewise, in my view, it can be said that the requirement of "highest morality" incorporates such fundamental values.

141 However, in the implementation of this general *School Act*-mandated policy of promoting tolerance, the need to strive for an appropriate balance between competing *Charter* rights — in the case at bar, the parents' freedom of religion under s. 2(*a*) and the right of same-sex couples and their children to equality under s. 15 — remains a relevant consideration in the exercise by the School Board of its powers to approve complementary educational resources for local use. Thus, the question becomes whether the Board struck such an appropriate balance between these competing rights, taking into account the entire context, including the contents of the curriculum in its entirety, the framework established by the *School Act* and the nature of the Board's own authority as a delegate of the parents' right to educate their children. This question can only be answered by applying the relevant standard of review to the Board's decision.

V. Standard of Review

142 I agree with the Chief Justice that the standard of review is to be established upon a consideration of the factors under the pragmatic and functional approach and the appropriate standard of review in this case is reasonableness. First, the absence of a privative clause or a legislative direction to defer to the school boards, while consistent with a less deferential standard of review, should be considered in light of the corresponding absence of a clause expressly allowing the decisions of the Board to be appealed before the courts and should not be given undue weight when an administrative decision maker, rather than an adjudicative body, is concerned. Second, the decision to approve the books or not requires the Board to balance the interests of different groups, a function which falls within its core area of expertise as a locally

elected representative body. As Major J. stated in *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13, at para. 35:

> Municipal councillors are elected by the constituents they represent and as such are more conversant with the exigencies of their community than are the courts. The fact that municipal councils are elected representatives of their community, and accountable to their constituents, is relevant in scrutinizing *intra vires* decisions. The reality that municipalities often balance complex and divergent interests in arriving at decisions in the public interest is of similar importance. In short, these considerations warrant that the *intra vires* decisions of municipalities be reviewed upon a deferential standard.

The same considerations apply to an elected school board. As I indicated above, I am of the view that the Board's decision did not contradict the requirements of the *School Act* or the ministerial directives. Thus, it was made within the ambit of the discretion granted by the Act and should normally be reviewed upon a deferential standard.

143 As the Chief Justice points out, however, the decision also has a significant human rights dimension. This Court has recognized that such decisions ought to be treated with less deference, as the courts have primary expertise in interpreting and applying human rights instruments and balancing fundamental rights claims: see, e.g., *Ross*, *supra*, at para. 24. While I agree with this general approach, I believe courts should be reluctant to assume that they possess greater expertise than administrative decision makers with respect to all questions having a human rights component. In my view, the pragmatic and functional analysis was and is meant to be contextual in nature, and specific factors considered in previous cases, such as the presence of a human rights component, should not be looked at in isolation. Thus, in *Trinity Western*, *supra*, other factors also pointed to a less deferential standard: the legislation empowering the College of Teachers to grant accreditation to teacher training

programs expressly subjected its decisions to appellate review and, unlike the School Board in the case at bar, the College of Teachers was not directly elected by citizens. More importantly, courts should recognize that administrative decisions may involve a spectrum of human rights issues, not all of which are within the courts' core area of expertise. *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, leaves no doubt that when administrative tribunals make general determinations of law concerning basic human rights issues and affecting numerous future cases, little or no deference is to be expected. However, in the case at bar, the Board made a largely factual determination with a view to balancing local parental concerns against the broad objective of promoting *Charter* values such as tolerance and respect through a comprehensive educational program spanning several years. In my view, this is the very kind of polycentric decision described by Bastarache J. in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, and should thus attract greater deference.

144 Third, I agree with the Chief Justice that the purpose for which the legislature granted the Board authority to approve supplementary learning materials was to allow for local input in choosing such materials, and that such purpose should be accorded appropriate weight. However, as I explained above, the presence of human rights issues among the factors relevant to the Board's decision in this case does not defeat this purpose; there is no indication that such exercise of local democracy, when made within the boundaries set by the *School Act* and the Minister, is strictly limited to uncontroversial matters. Finally, as mentioned above, the nature of the problem does not involve the strict application of legal rules or the interpretation of law, but a highly contextual and polycentric analysis. Thus, while, as will be explained below, I believe the Board's decision to be justified under a reasonableness

standard, it is also my view that the foregoing considerations should inform this Court's examination of this decision.

VI. Reviewing the Three Books Resolution

145 As stated at the outset, I am of the view that the decision of the School Board was clearly a reasonable one. To explain why, I will revisit one contextual factor, and address several specific factors.

A. *This Case Is About Accommodation or Balancing Between Competing Interests*

146 Must subject matter involving portrayals of same-sex parents or couples be placed on a list of approved teaching materials for children of five and six years of age? Were such materials approved at the provincial level, any teacher in any school district in British Columbia could, at his or her discretion, employ the materials. In the absence of provincially approved materials, however, individual communities are empowered, by the operation of the *School Act*, to approve or not approve resource materials. Perhaps some parents, as their collective will manifests in the decisions of their elected school trustees, might answer the above question in the affirmative. Other parents may be of the view that this subject matter is too complicated, too "controversial", too far removed and different from their life experiences, too confusing, for children of the tender years of five and six. This parental view will yield a negative response to the above question. Surely it cannot be said that the *Charter* mandates only one educational policy response, especially when the totality of context of the curricula for grades K-12 inclusive are considered. Also, as noted above, with regard to the disapproval of decisions made, either at the provincial or

local level, recourse can be sought, as it is on most matters of public policy, at the ballot box.

147 The School Board was clearly caught between two vocal and passionate sides in this dispute. As was discussed above, accommodation is the overarching factor in the case at bar. Clearly, this case involves competing interests: those of parents in same-sex relationships and certain teachers, such as Mr. Chamberlain, who desire to have books portraying parents in same-sex relationships employed in K-1, and those of parents who are concerned about the use of such material in classrooms with children of such a young age. I am of the view, on these facts, that while it would not have been unconstitutional to approve the Three Books for use as educational resources, it is similarly not unconstitutional not to approve the books. The *Charter* does not demand that five- and six-year-olds be exposed to parents in same-sex relationships within a dimension of a school curriculum. Nor, explicitly, does the curriculum itself. Therefore, any decision as to whether and when such subject matter is raised in the classroom is left to the operation of the *School Act*. As discussed above, in the absence of approval of material addressing the subject matter at the provincial level, school boards have a discretion to approve or not approve complementary educational materials: the nature of the division of responsibilities between the provincial Ministry of Education and the school boards is clear. Underpinning and prior to this division of responsibilities, however, is the primary and paramount role of parents in the moral education of their children: state interests, be they provincial or local, are subsidiary to those of parents in the education context.

148 In addition, as I mentioned above, the PP curriculum itself expressly recognizes that "[t]he family is the primary educator in the development of children's

attitudes and values" (p. 6) and sets forth several guidelines for dealing with "sensitive issues". Notably, it recommends that teachers "[i]nform parents of the objectives of the curriculum before addressing any sensitive issues in the classroom and provide opportunities for parents to be involved in their children's learning", "[e]xplore alternatives to allow parents to share the responsibility for student attainment of the Personal Development learning outcomes", and "[o]btain the support of the school administration before beginning instruction on any potentially sensitive issues" (p. 6). In addition, while "[a]ll resources on the Ministry's *recommended* list have been thoroughly screened for social concerns from a provincial perspective", "teachers must consider the appropriateness of any resource from the perspective of the local community" (p. 188 (emphasis added)). Thus, the curriculum established by the Minister clearly contemplates that even provincially approved resources may be considered inappropriate for use in certain local communities, and that parental concerns about such "sensitive issues" constitute a valid and proper consideration in the exercise of the teacher's discretion to use such materials. In my view, there appears to be no reason why such concerns or controversy could not equally be considered by the school board in deciding whether to approve complementary materials for local use.

149 Are the books "controversial"? If so, how? They are alleged to be controversial since they deal with the subject matter of parents in a same-sex relationship. Is choosing to not approve books which portray parents in a same-sex relationship something capable of being done in pursuit of the "highest morality"? In my view, it is clear, as per the reasons of the Court of Appeal below, that a proper understanding of the "highest morality" must include the principle of non-discrimination. But, does the failure to portray same-sex parents at all to K-1 students

result in discrimination? If so, how must same-sex parents be portrayed? Must they be just shown to exist as one family model amongst many, or must they be portrayed as "morally equivalent" to heterosexual parents? Is a distinction between these two methods of portrayal possible when the target audience is comprised of five- and six-year-old children?

150 The moral status of same-sex relationships is controversial: to say otherwise is to ignore the reality of competing beliefs which led to this case. This moral debate, however, is clearly distinct from the very clear proposition that no persons are to be discriminated against on the basis of sexual orientation. The appellants, using the courts, seek to make this controversial moral issue uncontroversial by saying that s. 15 and "*Charter* values" are required to eradicate moral beliefs, because the hypothesis is that possible future acts of discrimination are likely to emanate from such beliefs. This is not, however, necessarily true. As discussed above, many persons are staunchly committed to the principle of non-discrimination and the inherent dignity of all persons, and yet concurrently hold views which disapprove of the conduct of some persons. To permit the courts to wade into this debate risks seeing s. 15 protection against discrimination based upon sexual orientation being employed aggressively to trump s. 2(*a*) protection of the freedom of religion and conscience, as well as s. 15 protection against discrimination based on conscience, religious or otherwise. This would be a reading of the *Charter* that is inconsistent with the case law of this Court, which does not permit a hierarchy of rights, as well as inconsistent with the purpose of the *Charter* itself.

151 The "controversy" or parental concern to which the School Board was responding when it decided to not approve the Three Books revolves, in my view,

around two factors: (1) the nature of the portrayal of same-sex parents in the Three Books; and (2) the capacity of K-1 age students to interpret this portrayal. It is clear that the books have normative content, but the question is what content is perceived by five- and six-year-olds, a determination which must be addressed from the perspective of parents, who are the arbiters of such a question.

152 I note finally that judicial review as to constitutionality is about what is essential, constitutionally mandated, rather than what may or may not be desirable as a matter of educational policy or personal preference. This case is not about whether or not this Court thinks that it would be preferable, as a pedagogical question, that the Three Books be approved. On this point, I note a relevant comment, within the majority reasons of Burger C.J. in the U.S. Supreme Court case of *Wisconsin v. Yoder*, *supra*, that: "courts are not school boards or legislatures, and are ill-equipped to determine the 'necessity' of discrete aspects of a State's program of compulsory education" (p. 235). Moreover, in my view, the standard of reasonableness *simpliciter* is normally associated with cases where there are a number of reasonable outcomes among which the decision maker is entitled to choose. Thus, courts should be wary of using this standard to effectively constrain the decision maker to a single specific outcome. This accords with the general approach to judicial review of administrative action adopted by this Court. In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, Iacobucci J., after describing this standard, wrote for a unanimous Court, at para. 80:

> [A] reviewer, and even one who has embarked upon review on a standard of reasonableness *simpliciter*, will often be tempted to find some way to intervene when the reviewer him- or herself would have come to a conclusion opposite to the tribunal's. Appellate courts must resist such temptations. . . . Judicial restraint is needed if a cohesive, rational, and, I believe, sensible system of judicial review is to be fashioned.

B. *The School Board's Decision Was Reasonable*

153 Since a school board is not a court or tribunal, it does not give detailed reasons to support the decisions in its resolutions. When facing a school board decision, courts are thus forced to read into what went on, with some speculation. Much of the justifying provided has clearly benefited from such hindsight. It has been established, however, that the Board was generally motivated by concerns related to age appropriateness and parental concern.

1. Role of the School Board

154 As developed at length above, it is well established in Canadian law that parents have the primary authority and responsibility for the moral and religious education of their children, and that responsibility is then delegated to teachers, administrators and schools: the state's interest is secondary. In the context of the case at bar, the School Board is an instrument by which, in the absence of an already clearly developed consensus at the provincial level (whether pertaining to curriculum subject matter or to education resource materials), consensus is developed locally, a reflection of what parents deem is in their children's best interests. These determinations must be consistent with the framework of the curriculum developed by the province, and, in my view, also complement that framework by permitting a more localized evaluation, based upon an individualized parental examination of their children's needs.

155 This understanding of shared authority, in my view, is clearly inherent in the nature of the *School Act* itself, insofar as the *School Act* permits, in the absence of

provincial selection of learning resources, room for local selection of complementary "educational resource materials": local variation exists to respond to views of local communities and parents. Note that Ministerial Orders reproduced above refer to "educational resources materials that the board considers are appropriate" (emphasis added). This must have some significance. If not, this case would provide an odd logic: in the absence of the development of consensus regarding curriculum subject matter or resources at the provincial approval level, can parents, teachers or interest groups, who perhaps would not have succeeded at the provincial level (note that Mr. Chamberlain did first bring his request to the Ministry of Education), demand for a particular subject matter or resource for a particular age level to be addressed or employed at the local level, when that local level is precisely an environment within which it is highly likely that parents will be concerned and highly unlikely to voluntarily choose to employ such material at such a young age? Does the *Charter* dictate the minutia of school curricula such as to dictate whether material must be treated in K-1 rather than possibly at a later grade level? Specifically, does it require that all types of families be depicted in K-1? In my view, the answer is no.

156 The School Board had two choices: to approve or not to approve, that was the question. The appellants' argument seems to tend towards the conclusion that the School Board had no choice but to approve the books. What is a better educational choice, permit the Three Books to be taught in K-1 against the wishes of some parents and then provide for the exclusion of certain children from the class as suggested by the appellants, or to teach a general lesson about tolerance and respect for people by less controversial means and leave the issue of parents in same-sex relationships and homosexuality for a time when students are better positioned to address the issues involved and better positioned to reconcile the potentially incongruous messages they

may be receiving on this subject matter? The choice is difficult. The choice, however, was specifically intended to be made locally, as the *School Act* envisages.

157 The views of school trustees may vary from area to area and may differ regarding the appropriateness of particular materials in their district. The views of individual trustees within a district will also likely vary, and as on all matters of policy, decisions will need to be reached by consensus or, when necessary, by vote. Not only does this reality permit a recognition of differing views held by various communities within the province, but such variation is specifically envisioned by the operation of the *School Act*. This *status quo*, not unexpectedly, will result in some local variation between districts in the nature of the "educational resource materials" lists. For example, the trial judge noted, at para. 97, that two of the Three Books have been approved for use in other school districts in B.C. Any local list, however, must be consistent with the general framework of the curriculum, and must certainly not include materials which contradict the demands of the curriculum. Lastly, any local variation, like the provincial curriculum itself, is not static: school trustees, like provincial politicians, will ultimately face the consequences of their decisions at the ballot box.

158 When the School Board engages in the local evaluation of complementary "educational resource materials", they are governed by Regulation 8800.1, which sets out the criteria and procedure for evaluation. The key dimensions of that regulation demand that the learning resources be "relevant to the learning outcomes and content of the course or courses", "appropriate in terms of the age, maturity, and learning needs of the student for whom it is intended", "appropriate for the particular community in which it will be used", and "fair, objective, free from gratuitous

violence, propaganda and discrimination, except where a teaching/learning situation requires illustrative material to develop critical thinking". The procedure for obtaining approval is also found in that regulation. It preliminarily addresses that responsibility for selecting resources rests with the Superintendent of Schools and other professional staff employed by the Board. It also states that on "controversial matters", the Board "expects that good professional judgement will be exercised and that there will be consultation with others, including parents and professional colleagues where deemed appropriate". Regulation 8800.1 is complemented by Policy 8425, which specifically addresses materials selection for the PP curriculum. It reiterates the need for "age and developmentally appropriate" materials and also reiterates the need to involve parents, students and staff in the materials review process.

2. Reasons Given by the Superintendent and the Board, and their Relevance to the Curriculum Requirements

159 The initial request for approval of the Three Books by Mr. Chamberlain was addressed by the ESC, as demanded by Regulation 8800.1. The ESC was headed by Superintendent Renihan. He expressed his position on the Three Books as follows:

> Based on my experience in education and curriculum, particularly my experience as Assistant Deputy Minister, Curriculum and Evaluation (1989 to 1993) and Executive Director, Curriculum and Instruction (1987 to 1998) for the Department of Education, Province of Saskatchewan, I questioned whether the Three Books were appropriate for the Kindergarten and Grade One level. The PP K-7 curriculum refers to family models but does not specifically address homosexuality or same-sex couples. In my view, the Three Books were not necessary to achieve the learning objectives of the PP K-7 curriculum. I was of the view that if the Ministry had intended that homosexuality and/or family models involving same-sex couples be a component of the PP K-7 curriculum for Kindergarten and Grade One, given the contentious and sensitive nature of the topic, such would have been expressly included in the Ministry's PP K-7 Integrated Resource Package ("IRP"). As the Ministry had not specifically included such in the IRP or included any other resources on

> homosexuality or same-sex couples for K-1, I anticipated that any decision by the District to approve such would be very controversial amongst parents in the District and a decision in this regard must come from the Board as elected representatives of the community. I was also concerned that the right of parents to be the primary educators in the development of attitudes and values of Kindergarten and Grade One children be maintained. I found it difficult to conclude that by approving the Three Books for Kindergarten and Grade One, the school would be providing a supportive role and maintaining a partnership between home and school.

Notably, he was of the view that the books were likely not age appropriate, that they were not necessary to meet the objectives of the PP curriculum, and that parents were likely to be concerned about the approval of such materials, especially given the lack of any similar approved materials at the provincial level. As stated in Superintendent Renihan's affidavit, his professional opinion was generally concurred with by the other members of the ESC:

> Given the review of the Three Books by Dr. Cynthia Lewis, Maureen MacDonald, the EDC, Dr. Wayne Taylor and myself, and our collective concerns, it was decided to not recommend approval of the Three Books to the Board and specifically to word the Administrative Memorandum to go to the Board along with the Three books as only requesting "that the Board consider the (Three Books)". [Emphasis in original.]

This sending of the issue to the Board is consistent with both Regulation 8800.1 and Policy 8425.

160 The Board then considered the Three Books. The lack of a "recommendation to approve" from the ESC was a factor considered by the trustees: Trustee Polak stated "I was cognizant that senior District staff . . . are highly qualified in the areas of curriculum required learning resources and the fact that such were not recommending approval was duly noted."

161 Four of the six trustees were of the view that the Three Books were not appropriate for K-1 students. The School Board did not have all of the expert views before them that are found in the record. These four trustees voted their conscience, unable to conclude, based on their perception of parental concern and the demands of the curriculum, that such educational materials ought to be approved for K-1. Responding to parental concern is a valid and secular concern. Two other trustees voted against the Resolution, in favour of approving the Three Books.

162 Trustee Mary R. Polak states in her affidavit that:

> The questions that I considered relevant to the Three Books Motion were:
>
> 1. Do the Three Books deal with the subject matter in a way that is appropriate given the age and developmental maturity of Kindergarten and Grade One children and the learning needs of these children;
>
> 2. Are the Three Books necessary given the required learning outcomes for Personal Planning K-7; and
>
> 3. Do the Three Books deal with the subject matter in a way that reflects the needs and values of the Surrey community including parents?

Such concerns are clearly appropriate, and consistent with the *School Act* and Regulation 8800.1 and Policy 8425.

163 Further, Trustee Polak's affidavit, certified as accurate within Superintendent Renihan's affidavit, describes as follows the various arguments given by the trustees in favour of their respective positions. It states:

> The discussion of the Board focused on the fact that the Three Books raise issues of a sensitive nature which parents must be involved in, and

> their concerns given weight, in accordance with Policy 8800 and the Regulation thereto and also new Policy 8425.
>
> Trustee Chisholm indicated to the Board that he would not support the Three Books Motion because the Three Books were only going to be used to initiate discussion in the classroom.
>
> Trustee Stilwell responded to Mr. Chisholm by indicating that her concern was exactly as stated by Mr. Chisholm, the Three Books would initiate discussion on a sensitive issue, without involving parents. Trustee Stilwell stated that in her view initiating discussion in the classroom on this sensitive topic without including parents would be wrong.
>
> Trustee Tymoschuk spoke in support of the Three Books Motion. He indicated that he had two key concerns with approval of the Three Books as instructional learning resources for Kindergarten and Grade One. His first concern was that if the Board approved the Three Books, all Kindergarten and Grade one students in the District would be exposed to the issues raised by such. There would be little or no choice for parents with respect to whether they desired to have their children exposed to such issues. Secondly, Trustee Tymoschuk indicated to the Board that he had "done his homework" prior to the meeting. He indicated that he had read the Three Books at least twice together with his wife. At that time, Trustee Tymoschuk had a child in Kindergarten and he stated to the Board that he and his wife had reviewed the Three Books as parents. He indicated that he and his wife had come to the conclusion that the Three Books were not age appropriate for Kindergarten and Grade One because they could create confusion and conflict. He expressed to the Board his view, as a parent, that most Kindergarten and Grade One children are curious by nature and if the Three Books were used in Surrey classrooms, Kindergarten and Grade One students would begin to ask questions that many parents given the sensitive nature of the topic would not want to have to respond to at such young ages.

164 Of particular importance to the decision of the Board with respect to the Three Books was the fact, as referred to in the quote from Superintendent Renihan above, that the provincial "recommended learning resources" as set out by the Ministry of Education in the Integrated Resource Package for K-1, particularly the "Family life education" "suborganizer" of the "Personal Development" component did not, at that time, include any other resources expressly dealing with homosexuality or same-sex couples/families. In fact, at that time, none of the provincially approved "educational resource materials" for any aspect of the K-1 curriculum addressed this subject matter.

165 As noted by the reasons of the Chief Justice, in October of 1996, the B.C. Minister of Education, the Honourable Moe Sihota, made public statements which suggested that same-sex parented families were amongst the family models which he thought could be addressed under the PP curriculum. This was stated while at the same time the Ministry had both, as of that date, refused to approve the Three Books in this case at the provincial level and had also failed to approve any "learning resources" to support such instruction. Thus, this case came about since, after not getting the materials he wanted approved by the Minister, Mr. Chamberlain turned to the local level.

166 In my view, what the Minister of Education thought personally is one view of many, especially in light of his Ministry's failure to take any concrete action to include a resource on the subject matter for the K-1 curriculum. The more important question is: what does the PP curriculum actually require, in terms of educational resource materials, to meet its objectives? The reasons of the Chief Justice have argued that the Resolution is unreasonable in that it directly contradicts what the curriculum intends or requires. I disagree: the curriculum does not indicate that parents in a same-sex relationship are to be addressed in K-1. Further, in the context of judicial review, I am aware of a need to defer not only to the perceptions of parents, but also to the views of the educational professionals who evaluated the material before sending the issue to the School Board for the ultimate determination of the issue.

167 Is the Resolution consistent with the demands of the curriculum? The "Family life education" "suborganizer" refers to students being expected to "identify

a variety of models for family organization". In my view, this statement does not support the Chief Justice's interpretation that "all types of families found in the community should be discussed by K-1 students" (para. 67) and that "discussing and understanding all family types" is a "prescribed learning outcome" (para. 71). There must be some space for a school board to refuse to approve a book, regardless of the fact that the book actually concerns "family models" in the broadest understanding of the concept. Based on the reasons of the Chief Justice, it would seem that a school board could not exclude any book regarding any family model, because to do so would be contrary to the curriculum's reference to a "variety of models" being addressed. But surely the imagination can conjure up some family models, which despite existing in our society as a matter of fact, parents would rather were not portrayed to five- and six-year-olds. I note that at the time of trial, only three books had been approved by the province, which suggests that, while there was a curriculum commitment to a "variety" of family models, the provincial list was far from achieving a comprehensiveness standard of portraying all families.

168 The "prescribed learning outcomes" for the K-1 "Family life education" "suborganizer" include having children draw and write about their own families, and having children talk about each other's families. In a situation where there is a child in the classroom who has same-sex parents, it is obvious that these activities would raise the issue of same-sex parents. Even in such a situation, however, it is not necessary that educational resource materials which portray same-sex parents be generally approved for use in all classrooms in a particular school district. As I will discuss below, there may be instances where teachers may find it necessary, in their discretion, of course, to discuss families with same-sex parents, and perhaps even employ materials in the classroom.

169 I also think that the broader context of the Surrey Board's curriculum is relevant, in that the record indicates that in the later grades in the curriculum, older students are introduced to some of the more complicated dimensions of human sexuality, including the subject matter of homosexuality. This is a recognition of the fact that the education of children continues throughout the totality of their schooling: therefore, not all topics need to be addressed in the first two years. Therefore, it becomes clear that this case is not about addressing an educational context where the topic of homosexuality is being completely excluded from the school. Beyond this, as found by the Court of Appeal, it is clear that the School Board has a stringent anti-discrimination policy, one that is taken seriously. Thus, the totality of the context tends towards a conclusion that the *Charter* values of equality and non-discrimination are being fostered by the School Board more generally.

170 In my view, these considerations are consistent with the conclusion reached by the Board and its professional staff that the books were not necessary to attain the objectives set by the curriculum. While I agree with the Chief Justice that, beyond necessity, relevance to these objectives is an important consideration in any decision to approve supplementary materials, I disagree that it is determinative in the case at bar. Indeed, the reasons provided by Dr. Renihan and the discussion at the Board implied that the relevance of the Three Books to the curriculum's objective of representating a variety of family types was assumed. The debate was as to the necessity of this material to satisfy the K-1 curriculum. Relevance is but one factor in the balance; otherwise, as discussed above, the Board would have no choice but to approve all relevant materials (i.e., all books about families) sought to be introduced by parents, teachers or interest groups, which would be incompatible with the

discretionary authority which the legislature clearly conferred upon the Board. As I explained above, parental concerns concerning the age appropriateness of the books and their impact on their ability to pass on their religious views to their children also were factors that the Board was properly entitled to consider.

171 What of the books themselves? Do they contain a neutral message? It is clear that the reason why the books were proposed for approval by Mr. Chamberlain and why they are found on the GALE list of recommended resources is because they contain some normative content related to a positive portrayal of parents in same-sex relationships. The appellants claim that the books are harmless, insofar as they do not pronounce on the moral rightness or wrongness of homosexual relationships or parents: they only show such families to exist, as one amongst many models of family. The books, therefore, it is submitted, are only about tolerating others and learning not to discriminate. In this way, they espouse values that directly emanate from the *Charter*.

172 The respondent's reading of local parental concern is that the books portray same-sex parents as being on a moral par with heterosexual parents, i.e., there are many kinds of relationships that are out there, and none is better or worse than the others. This is a moral message, and a moral message of some concern to these parents since they disapprove of same-sex relationships. This view is concerned about the moral equating of homosexual parents with heterosexual parents, which is implicit in the identification, in all three of the books, of homosexual "Moms" and "Dads". The message which caused concern, in the words of one parent's affidavit, is that: "Mommies and Daddies are seen as good things in the eyes of my children and therefore the lifestyles of the Mommies and Daddies in the stories must be acceptable".

173 Another concern is that the natural curiosity of children will lead to inquiries about homosexuality that parents are uncomfortable having raised at school. For example, given that the basics of human reproduction, an inherently heterosexual phenomenon, are a dimension of the curriculum to be addressed in K-1, the concern is that when a discussion of "Mommies" and "Daddies" manifests, perhaps the presence of two "Mommies" or two "Daddies" might cause certain children to be exposed to issues or questions which might seem, in the views of some parents, too complicated for children of five or six years of age. This view was shared by ESC member and Surrey District Principal Dr. Cynthia Lewis, who claimed:

> My own view of the Three Books, based on my expertise in curriculum, is that the stories themselves are relatively innocuous but the social issues underlying the stories are sensitive. They are sensitive because they bring in the social issue of same-sex couples. The message of tolerance and inclusion is necessary at all grade levels but the Three Books are meant to be used to deal with far broader social issues. In my opinion, unless a child has had life experience regarding same-sex parents, this topic could potentially be mysterious and confusing in Kindergarten and Grade One. There is a risk of misinterpretation if the Three Books were approved for use with all students in Kindergarten and Grade One.

174 The experts basically present two competing views of these Three Books. One view is that they are simply books aimed at the dominant theme of non-discrimination, with the presence of parents in a same-sex relationship simply being tangential context. The books are therefore about acceptance. The other view is that regardless of the valid and present acceptance theme, a different message is also present: parents in same-sex relationships are being portrayed as "normal" by being portrayed in a positive sense.

175 In my view, one book clearly purports to pronounce on the morality of same-sex relationships: *Asha's Mums*. In that book, there is the following exchange:

> When my turn came to talk about my drawing I said, "This is my brother Mark and my mummies and me. We're on our way to the Science Centre."
>
> Coreen said "How come you've got two mummies?"
>
> "Because I do," I said.
>
> "You can't have two mummies," Judi insisted.
>
> "Yes she can," Rita said turning around in her seat.
>
> "Just like you can have two aunts, and two daddies and two grandmas," yelled Diane from across the room.
>
> Diane likes to yell.
>
> "See," I said to Coreen.
>
> "My mum and dad said you can't have two mothers living together. My dad says it's bad," Coreen insisted.
>
> "It's not bad. My mummies said we're a family because we live together and love each other," I said.
>
> "But how come you have two?" Judi asked.
>
> Before I could answer Terrence said to Ms. Samuels, "Is it wrong to have two mummies?"
>
> "Well . . ." Ms. Samuels began but Diane yelled, "It's not wrong if they're nice to you and if you like them." [Emphasis added.]

In my view, this raises the issue of the morality of parents in same-sex relationships and purports to pronounce on their moral status.

176 The other two books contain more subtle messages. In *One Dad, Two Dads, Brown Dad, Blue Dads*, the key theme seems to be racial discrimination, as what is being portrayed as normal about the dads is their blue or green skin. One of

the two key characters, Lou, has two blue dads. Lou explains how his blue dads are just like other dads: they talk, sing, and they even eat cookies in bed. The plot then continues, with the discussion turning to "how they got that way". The answer is clear: "They were blue when I got them and blue they are still. And it's not from a juice, or a toy, or a pill." The book closes with the speculation as to whether green dads exist. Enter Jean, who claims that "I have two dads who both are green."

177 *Belinda's Bouquet*, is about an overweight girl who is made fun of by a mean bus driver. After this incident, Belinda visits her best friend Daniel's house, and Belinda is comforted by Daniel's (first) mother: "Belinda, you tell that bus driver that your body belongs to you . . . . It's none of anybody else's business what size your body is." Belinda replies that she is not going to eat lunch: "I'm going on a diet", she says. "Maybe if I stop eating so much, I won't be fat." The mother then seeks to empower Belinda by telling her a story/parable about plant growth, within which a woman planted a garden, and then tried to make all the plants the same by feeding some plants less food/sunlight/water than others. We then learn that those underfed flowers wilted, so the woman, realizing her foolishness, watered the underfed flowers, letting them drink their fill. The children ask what became of the plants, and the mother responds by pointing outside, where the woman from the story/parable, who we now learn is "Mommy", the second mother, is tending to a multitude of healthy plants. Belinda then sprints in to finish her snack, so that she doesn't "wither and droop". Everyone has a snack together in the kitchen shared by "Mama and Mommy". This book is clearly about Belinda's self-esteem, with the key difference being that it is set in a non-traditional home.

178 In my view, the difference between the two general approaches to the Three Books raises the question as to whether it is possible for parents in same-sex relationships to be portrayed to five- and six-year-olds in a way which reflects the subtle distinction between the clearly appropriate public message of promoting non-discrimination on the basis of sexual orientation while at the same time avoiding forcing a conclusion regarding the controversial question of whether homosexual relationships (i.e., persons acting on the basis of their sexual orientation) are morally acceptable. This question relates to the notion of "age appropriateness": do five- and six-year-olds have the capacity and ability to differentiate between accepting such portrayals as "another mode of being" that is not to be discriminated against, without also considering that it is "just as good a mode of being"? The second factual question relates to the significant emphasis in the expert and parental testimony regarding the concern that to provide for the portrayal of one view of parents in same-sex relationships at school and yet another at home may give rise to a conflict of authority, which will cause "cognitive dissonance" on the children's part.

179 With regard to both the age appropriateness factor and the cognitive dissonance point, the experts, not surprisingly, split. That having been said, however, the views of the experts, plausible on both sides of the argument, are of secondary importance since what is paramount and constitutionally protected in an educational context is the views of parents. The parents are in the best position to examine their child's frame of perception and the likelihood that books which portray parents in same-sex relationships will lead to their child being curious about questions which the parents feel are best not addressed at the ages of five and six.

180 The school trustees were of the view, based on their perception of the concerns of parents, that the subject matter in the books was inappropriate for children of five and six years of age. This is a determination rightly made by parents. Since a decision at the provincial level was not made, the advantage of making a decision at the local level, discussed above, is that parents can undertake an individualized analysis of what is best for their children, and represent this view to their local school board. Evaluating the cognitive dissonance point could involve wading into hundreds of pages of testimony as to whether or not certain theories of child developmental psychology are convincing or not. Courts are ill-equipped for such analysis. Regardless, it is clear that the experts' views, offered in hindsight, convincing or not, cannot impeach decisions arrived at by parents and communicated to their representatives at the School Board. The only exception would be if it could be shown that the parental views and decisions are not in the children's "best interests", which is clearly not so in the case at bar.

181 Given the parental perception that the Three Books are not age appropriate and risk causing cognitive dissonance, another factor, expressed by several parents, arises: the fact that teachers are authority figures for young children. Parents expressed this concern as follows:

> My children see their teachers as authority figures and would uncritically accept their teachers' views about homosexuality and same-sex relationships as trustworthy and accurate.
>
> We are also teaching our children to respect and obey authority, including their teachers. At the early stages of Kindergarten and Grade One, we do not believe that our children can deal with a conflict between what we are attempting to teach them about . . . and what they may be introduced to at school.

> Teachers are very influential in children's lives, especially at the lower grades. This is true of [my daughter] as I have taught her to respect the authority of teachers.

This Court, in *Ross, supra*, at para. 43, made a near identical observation:

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

Further, and in particular reference to the facts of the case at bar, the reasons in *Ross*, at para. 82, stated that: "Young children are especially vulnerable to the messages conveyed by their teachers." Given that the parents in the case at bar have communicated their views to the School Board, to insist on the materials being approved directly undermines parental authority, an authority which the parents have only conditionally delegated to teachers and public schools.

182 The Three Books Resolution only purported to not approve the Three Books as approved educational resource materials. Thus, all it did was indicate that the Three Books were not generally approved for all classrooms as materials that could be employed to deliver the curriculum. The Resolution does not preclude a change of view, either locally or provincially. Were the local School Board or the provincial Ministry of Education to choose to employ books in K-1 which portray parents in same-sex relationships, then teachers could, in their discretion, employ the materials.

183 In addition, the Resolution is silent as to the possibility that the Three Books could or could not be approved as Library Resources. Although this question

is not expressly before this Court, I agree with the Court of Appeal that the criteria set out by the Board in Regulation 8800.1 do not reveal any compelling reasons for the Board not to approve the books as Library Resources. Notably, the approval criteria for such resources do not include the requirement that the books be "appropriate for the particular community in which it will be used", which was crucial to the Board's refusal to approve them as Recommended Learning Resources.

184 As I noted above, the "prescribed learning outcomes" of the K-1 PP curriculum, in a situation where there was a child with same-sex parents in the classroom, might lead to the issue of parents in a same-sex relationship being raised in class. Beyond this curriculum-related raising of the subject matter, however, there are many other means by which it could be raised: consider sleep-overs at a friend's house, birthday parties, permission slips for field trips (as per the plot of *Asha's Mums*), car-pooling, parental chaperoning, etc, in the context of a child who has parents in a same-sex relationship. In such circumstances, teachers may feel it is necessary to discuss the issue. In addition, as the Court of Appeal rightly noted, were the books to be approved as Library Resources, their classroom use may be appropriate in such circumstances, subject to the parents' right to be informed and, as described below, to "opt out". This is different, however, than including such subject matter as generally approved to be employed in all classrooms in the School District. With regard to this alternative solution, I note, in fact, that some parents who submitted affidavits in support of the respondents referred to a variant of this possibility. One set of parents suggested:

> We are not suggesting that the Three Books not be available in any situation. For example, we would support the Three Books being available for presentation to children on a one-to-one basis where that child has some life experience with the topic of same-sex couples.

> However, we do not support the use of the Three Books for all students in a classroom to introduce a homosexual couple . . . .

If some parents seek to resist having their children exposed to the subject matter of homosexuality in a situation where there is a child in the class with parents in a same-sex relationship, then the situation where the children of such parents may be excused from the class for a short time may arise. I note that some school boards, cognizant that such a parental desire to have their children "opted out" of certain subject matter might arise, have mechanisms by which parents will be notified when sensitive or controversial subject matter is going to be raised. Such mechanisms are geared at respecting the constitutionally protected paramountcy of the parental role in the moral education of their children. Ultimately, as per *Adler*, *supra*, the ultimate parental response would be to remove children from the public school system. However, in my view, this should be seen as a last resort, and not as a natural alternative when there is an acceptable balance to be struck between local parental concerns and a broader program of tolerance. When such a balance is available, as in the case at bar, keeping the concerned children in the public school system can only further and strengthen the message of respect and tolerance that it wishes to inculcate.

185 Another way in which the subject matter of homosexuality or same-sex parented families could be raised in K-1 classrooms might be in the context of name-calling, slurs, or insults being used as harassment. It was submitted before this Court that sexual orientation-related slurs are common in the school context, often employed by younger children harbouring a complete lack of understanding as to what the derogatory insult means. In such instances, it would be expected that a teacher or administrator would take action: such discriminatory behaviour is unacceptable and teachers' discretion to combat it by the mechanism of addressing sexual orientation in

specific cases ought to be acknowledged. This having been said, addressing name-calling is distinct from the question at bar.

186 This case concerns policy choices regarding curriculum implementation, decisions which are the responsibility of the province or the local school board. It is not constitutionally mandated that five- and six-year-old children be exposed to educational resource materials which portray parents in same-sex relationships, especially when there is significant parental concern that these materials may be confusing for children to whom they wish to teach the subtle, but essential in the eyes of certain parents, distinction between what may exist on the one hand and conduct which may not be morally right on the other.

VII. Conclusion

187 I would therefore dismiss the appeal with costs throughout to the respondent.

The following are the reasons delivered by

LEBEL J. —

I. Introduction

188 I have had the advantage of reading the reasons of the Chief Justice, and I concur with her disposition of the case. I agree with her that it can be dealt with on the basis of administrative law principles. I also agree with much of the substance of

her analysis of those principles and their application here. I part company with her approach, however, on the characterization of the problem with the Board's resolution, and on the methodology that should be employed in reviewing it. In my view, the Board's decision could not be upheld even on the most deferential standard of review, because it was patently unreasonable. It is therefore unnecessary to go through the full analysis of the various factors used to determine the appropriate standard of judicial review.

189 The Board reached its decision in a way that was so clearly contrary to an obligation set out in its constitutive statute as to be not just unreasonable but illegal. The *School Act*, R.S.B.C. 1996, c. 412, directs the Board to conduct all schools on strictly secular and non-sectarian principles. The overarching concern motivating the Board to decide as it did was accommodation of the moral and religious belief of some parents that homosexuality is wrong, which led them to object to their children being exposed to story books in which same-sex parented families appear. The Board allowed itself to be decisively influenced by certain parents' unwillingness to countenance an opposed point of view and a different way of life. The question then becomes whether the trustees were faithful to the mandate spelled out in the statute. A decision taken on such a basis, whether reasonable or not, cannot be called secular or non-sectarian within the meaning of the statute, on any plausible interpretation. As a result, the decision amounts to a breach of statute, is patently unreasonable, and should be quashed.

II. The Methodological Framework for Reviewing the Board's Decision

190 Interesting as it may be, a discussion on the applicable standard of review seems to me to be a digression from the real issue presented by this appeal. The pragmatic and functional approach has proven a useful tool in reviewing adjudicative or quasi-judicial decisions made by administrative tribunals. There are, however, limits to the usefulness of applying this framework to its full extent in a different context.

191 When the administrative body whose decision is challenged is not a tribunal, but an elected body with delegated power to make policy decisions, the primary function of judicial review is to determine whether that body acted within the bounds of the authority conferred on it. Courts must respect the responsibility of such bodies to serve those who elected them, and will, as a rule, interpret their statutory powers generously (see *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at p. 244, *per* McLachlin J. (as she then was); *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, 2000 SCC 13, at para. 36; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, 2001 SCC 40, at para. 23). The decisions or actions of an administrative body of this kind will be invalidated if they are plainly contrary to the express or implied limitations on its powers. The mechanical application, in this context, of a test which was developed with a quite different kind of administrative body in mind is not only unnecessary, but may also lead both to practical difficulties and to uncertainties about the proper basis of judicial review.

192 When courts are called upon to review adjudicative decisions of administrative tribunals, the key question is the basis on which the legislature intended review by the courts to be available. This inquiry must be undertaken bearing

in mind the fact that the legislature has decided to take the matter out of the hands of the courts and to give the tribunal primary authority over it, as well as the axiom that no administrative body has untrammelled discretion. Evidence of the degree of discretion granted to the tribunal is to be found in its constitutive statute and a variety of other contextual factors. Questions such as the presence or absence of a privative clause in the legislation, the specialized nature of the subject matter, the expertise of the tribunal, the legislature's reasons for entrusting this decision to the tribunal, and the nature of the question compared to the kinds of questions courts are accustomed to considering, are relevant to the inquiry because they shed light on the ultimate question: what standard of review the legislature intended.

193 The decision under review here is different. Our Court is reviewing a policy decision made by an elected body whose function is to run local schools with the input of the local community. The full set of factors included in the standard-of-review formula does not translate well into this context. Consider, for example, the presence or absence of a privative clause. One would not expect to find a privative clause in connection with the Board's decisions, and the absence of one in the statute in no way signals that the legislature expected intervention by the courts in the Board's day-to-day business to be possible. Expertise is another factor which is more apposite in the adjudicative context than it is here. Trustees are authorized to make decisions not because they have any special expertise, but because they represent the community. Their level of expertise does not indicate anything about the extent of their discretion.

194 The ultimate question remains the legislature's intention. Going through the various factors in the "pragmatic and functional method" is not always the best

path to that intention. In the context of this appeal, we should look instead to the statutory grant of power to the Board and the conditions attached to it. The courts are responsible for ensuring that the Board acts within the scope of its power. In my opinion, interference in the Board's functions on any other basis would generally be unwarranted.

195 I do not intend to cast any doubt on the validity of the pragmatic and functional approach. On the contrary, I suggest that it is more consistent with the philosophy underlying that approach to adapt the framework of judicial review to varying circumstances and different kinds of administrative actors than it is to go through the same checklist of factors in every case, whether or not they are pertinent — a methodology which, I would suggest, is neither pragmatic nor functional.

196 This Court's jurisprudence on review of the actions of municipal councils is instructive here, because municipalities share many of the characteristics of the School Board. Like a municipal council, the Board is an elected body whose role is to bring the views of the community into the making of local policy decisions. Like a municipality, it exercises statutory powers, and its autonomy is circumscribed by the language of the statute (see *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [2000] 2 S.C.R. 409, 2000 SCC 45, at paras. 33-34, *per* Major J.). In this crucial sense, both a school board and a municipality are unlike a legislature, which has plenary law-making power within the limits of the Constitution.

197 In evaluating municipal actions, our Court has always focussed on whether the action in question was authorized, not on whether it was reasonable. A

municipality's enactment of a by-law "is reviewable to the extent of determining whether the actions are *intra vires*" (*Shell*, *supra*, at p. 273). A municipality is a creature of statute and can only act pursuant to powers expressly conferred by statute, powers necessarily or fairly implied by the statute, and ancillary powers indispensable to carrying out its purpose (*R. v. Sharma*, [1993] 1 S.C.R. 650, at p. 668; *Hudson*, *supra*, at para. 18). Actions not grounded in a power that can be derived from the statute are invalid, and the extent of the municipality's powers is generally a matter of statutory interpretation.

198 In *Nanaimo*, *supra*, this Court held that the pragmatic and functional framework applies to the adjudicative decisions of municipalities. Review of the municipality's decision was divided into two steps: the preliminary question of whether the municipality had the authority to make this kind of decision and the decision itself. As long as the decision was *intra vires*, it was entitled to a high degree of deference, reflecting the fact that municipal councillors represent their constituents and know more about their needs and concerns than courts do (*Nanaimo*, at para. 35).

199 I would not take *Nanaimo* to imply that the framework for reviewing adjudicative decisions of municipalities is different in principle from the approach we have consistently taken in reviewing the actions of municipalities generally. The two-step inquiry in *Nanaimo* is simply another way of expressing the single test of *vires* that was applied in *Shell*, *supra*. The municipality's decision in *Nanaimo* would have been found to be patently unreasonable if it had been so capricious or arbitrary as to be beyond its legal powers. As this Court observed in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 55, "[t]he standard of patent unreasonableness is principally a jurisdictional test".

200 The Board's decision not to approve the three books had political and adjudicative aspects. It could be analogized to the passage of a by-law, or to the decision challenged in *Nanaimo*. In either case, the preliminary question is whether the Board acted legally; it could not validly exercise a power it did not have.

201 Although my conclusion on the legality of the decision leads me to think that the issue is not directly raised by this appeal, I would hold that the Board's educational policy decisions, as long as they are made validly pursuant to its powers, would be entitled to a very high level of deference. If anything, there are even more compelling reasons for deference in this context than there were in *Nanaimo*. What kind of educational materials are best suited to realizing the province's pedagogical objectives and to reflecting the preferences of the particular community served by the Board is a question on which courts are singularly ill-equipped to impose their views. Review of this decision on a reasonableness standard, in my respectful view, fails to give due recognition to the Board's role as a local government body accountable to the electorate. As long as it acts pursuant to its statutory powers, it is carrying out the will of the community it serves and in general is answerable to the community, not to the courts. But if it purports to exercise powers it does not have, its actions are invalid.

202 I alluded above to the practical difficulties and the problems of legitimacy that can ensue if the pragmatic and functional approach is applied to the Board, and other bodies like it, in a formulaic way. Attention will be diverted from the real issue of legality to an unnecessary exploration of tangential questions. This needlessly drains the resources of courts, particularly trial courts, which must often devote a great

deal of time to intricate arguments on the applicable standard of review before they can get to the heart of the matter.

203 In any dispute about the standard of review, some combination of factors will almost always indicate more deference while others point to less deference. Indeed, at times a single factor will raise competing considerations, as the second factor of expertise is said to do in this case. As a result, it can be expected that the most frequent outcome of balancing the factors on both sides will be a conclusion that review should be on the compromise standard of reasonableness.

204 The reasonableness standard may entail practical problems of its own. It is perhaps the most difficult of the three standards to apply in a manner that is attentive both to the prerogatives of the administrative body and to the court's supervisory responsibilities. The difference between review on a correctness standard and review on a standard of patent unreasonableness is intuitive and relatively easy to observe. But many courts, including this one, struggle to keep reasonableness analytically distinct from correctness on the one hand and patent unreasonableness on the other. The application of the reasonableness standard involves a delicate analysis that is necessary and helpful when appropriate. The need for its conventional application becomes less compelling in cases like this one, where the key issue to be resolved boils down to a question of legality which turns on the interpretation of the statutory grant of power.

205 The danger that the reasonableness standard could be overused leads, in turn, to the danger that the line dividing the role of a local government body from that of a reviewing court will be blurred. It is important to keep that line distinct, for it

helps to maintain the separation between the judiciary and representative government. The insulation of the judicial and political spheres from each other does not only protect our independent judiciary from political interference (see *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3). It also protects political bodies from excessive interference by the courts. It is beyond the scope of legitimate judicial review to apply a standard of reasonableness to the actions of local policy-making entities like municipalities and school boards. Courts should not be tempted to replace the decisions of such bodies with their own view of what is reasonable, or to become unduly involved in the management of towns, cities and schools.

III. The Legality of the Resolution

206 In my view, we should focus on whether the Board acted legally, consistent with its mandate under the *School Act*. I respectfully agree with the Chief Justice that the *School Act*'s directive to observe principles of secularism and non-sectarianism is at the heart of this case. All the other factors canvassed by the majority do not change the fact that in the end we identify the same central issue and agree on how it should be resolved.

207 Clearly, the Board was authorized to approve or not to approve books for classroom use. But its authority is limited by the requirements in ss. 76(1) and 76(2) of the Act to conduct schools on "strictly secular and non-sectarian principles", and to inculcate "[t]he highest morality" while avoiding the teaching of any "religious dogma or creed". The evidence in this appeal leads me to conclude that the way the Board dealt with the three books was inconsistent with the *School Act*'s commitment

to secularism and non-sectarianism. The decision not to approve the books was primarily driven by a desire to accommodate the beliefs of a number of parents, and at least one Board member, that homosexuality is wrong and should be condemned. Pedagogical policy shaped by such beliefs cannot be secular or non-sectarian within the meaning of the *School Act*.

208 I am in substantial agreement with the Chief Justice's views on the meaning of these provisions. Like her, I take the words "secular" and "non-sectarian" in the *School Act* to imply that no single conception of morality can be allowed to deny or exclude opposed points of view. I would also note that the language of the *School Act* must be interpreted with awareness of its context and history, which are particular to the province of British Columbia. In this connection, the analysis of Mackenzie J.A. observed that s. 76 and its precursor provisions, dating back to the *Common School Act, 1865*, "aimed toward a non-denominational system of public education and prohibition of control by any denominational establishment" ((2000), 191 D.L.R. (4th) 128, at para. 21). British Columbia has changed since this provision was first adopted, and today the words "strictly secular" and "non-sectarian" must be interpreted in a manner cognizant of the inclusion of many adherents of non-Christian religions, as well as persons of no religious affiliation, in the province's population. The meaning of the statutory language has evolved in the modern context, but the underlying concern is still the same: to ensure that the public school system is not a vehicle for indoctrinating children in any particular set of beliefs, religious or otherwise.

209 I share the view of both Mackenzie J.A. and the Chief Justice that s. 76 does not prohibit decisions about school governance that are informed by religious belief. As Mackenzie J.A. points out, the history of the words "secular" and "non-

sectarian", which at the time they were adopted meant something like "non-denominational Christia[n]", makes such a conclusion impossible. Furthermore, it is precluded by the language and the spirit of s. 76, which aims to foster tolerance and diversity of views, not to shut religion out of the arena. I respectfully disagree with the opinion of the chambers judge that s. 76 forbids the Board to make any decision based on religious considerations, and requires its members to confine their religious beliefs to the private sphere. In my opinion, this approach would almost make religious unbelief into a species of sectarianism or dogma.

210 The powers of trustees to make policy decisions reflecting their beliefs or those of parents do not extend as far as their personal freedom of religion and conscience, but it does not follow that their decisions may not be influenced by religious convictions. What s. 76 rules out is policy based on beliefs that are intolerant of others. It is of little import whether those beliefs are religious, moral or philosophical.

211 Section 76 does not limit in any way the freedom of parents and Board members to adhere to a religious doctrine that condemns homosexuality. It does prohibit the translation of such doctrine into policy decisions by the Board, to the extent that they reflect a denial of the validity of other points of view. There is no difficulty in reconciling the *School Act*'s commitment to secularism with freedom of religion. Freedom of religion is not diminished, but is safeguarded, by the state's abstention from favouring or promoting any specific religious creed.

212 Reasonable people may disagree about the precise meaning of the terms "secular" and "non-sectarian", and the Board's own interpretation of them may well

be entitled to curial deference. But I do not think it is possible on any interpretation to reconcile the requirements of secularism and non-sectarianism with the decision it made here, one that was fundamentally animated by the conviction of certain parents that materials which might suggest a moral perspective different from their own were not to be tolerated. Disagreement with the practices and beliefs of others, while certainly permissible and perhaps inevitable in a pluralist society, does not justify denying others the opportunity for their views to be represented, or refusing to acknowledge their existence. Whatever the personal views of the Board members might have been, their responsibility to carry out their public duties in accordance with strictly secular and non-sectarian principles included an obligation to avoid making policy decisions on the basis of exclusionary beliefs. In effect, the Board circumvented the policy set out by the legislature in s. 76. As the legislature's delegate, it lacked the authority to do so, and by doing so it rendered its decision patently unreasonable.

213 The affidavits filed by many of the parents explain their reasons for opposing approval of the three books. One parent's affidavit, quoted by the chambers judge at para. 89 ((1998), 168 D.L.R. (4th) 222), stated "[w]e believe, and would like to teach our children that according to our religious views, the homosexual lifestyle is wrong." Another parent said "I wish to teach my children according to my own religious beliefs and oppose lessons at school which contradict what I am attempting to teach my children." I have no doubt that the affiants are good, nurturing parents who deserve credit for the care they are taking to impart religious and moral values to their children. But their children go to school in a system in which no one doctrine (religious or otherwise) can be imposed so as to condemn a lifestyle that does not fit with its values, or to preclude the discussion of any other point of view. In such a

system, they will not be shielded from lessons that may contradict what their parents teach them.

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

215 The legislature has delegated a broad discretion to the Board in choosing educational materials, and there is no positive obligation on it to introduce books that portray same-sex parented families. But when the possibility of doing so was placed before it, it had a duty to consider the matter in accordance with the values of secularism and non-sectarianism, and to arrive at a decision that avoided the taint of intolerance. It is not the prerogative of the Board to repeal or override the legislated policy of running schools on strictly secular and non-sectarian principles, whether in

response to pressure from certain parents or for any other reason. The distaste of some parents for books that do not conform with their personal beliefs cannot shape the policy of a pluralist education system that has proclaimed its commitment to accepting and celebrating diversity.

Appeal allowed with costs, GONTHIER *and* BASTARACHE JJ. *dissenting.*

Solicitors for the appellants: Arvay Finlay, Victoria.

Solicitors for the respondent: Dives, Grauer & Harper, Vancouver.

Solicitors for the intervener EGALE Canada Inc.: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Lawson, Lundell, Vancouver.

Solicitors for the intervener Families in Partnership: Green & Chercover, Toronto.

Solicitors for the intervener the Board of Trustees of School District No. 34 (Abbotsford): Bull, Housser & Tupper, Vancouver.

Solicitors for the intervener the Elementary Teachers' Federation of Ontario: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Paliare, Roland, Rosenberg, Rothstein, Toronto.

Solicitors for the interveners the Evangelical Fellowship of Canada, the Archdiocese of Vancouver, the Catholic Civil Rights League and the Canadian Alliance for Social Justice and Family Values Association: Fasken Martineau DuMoulin, Vancouver.