THE COURTS, THE* CHARTER, *AND THE SCHOOLS: THE IMPACT OF THE* CHARTER OF RIGHTS AND FREEDOMS *ON EDUCATIONAL POLICY AND PRACTICE, 1982-2007, Michael Manley-Casimir and Kirsten Manley-Casimir, eds. (Toronto: University of Toronto Press, 2009)

The Courts, the Charter, *and the Schools: The Impact of the* Charter of Rights and Freedoms *on Educational Policy and Practice, 1982-2007*[1] is a collection of essays by various authors grouped by the sections of the *Canadian Charter of Rights and Freedoms*[2] that are most applicable to schools. The book starts from the intriguing premise that it is time to take stock to see if the premise of their earlier book,[3] that the advent of the *Charter* would radically change school law, has come to pass. Ultimately their answer, and that of the contributing essayists, is that the *Charter* has not fulfilled that premise.

The essays — some by lawyers, others by educators — offer uneven assessments of their subject matter, ranging as they do from tendentious polemic to astute analysis. In Chapter 1, senior academics William Smith and William Foster consider "Equality in the Schoolhouse: Has the *Charter* Made a Difference?"[4] and conclude that human rights laws rather than the *Charter* have provided the primary building blocks for advances in equality and non-discrimination in Canada's schools. They demonstrate an admirable grasp of the interplay between human rights legislation and the *Charter*, although they appear overly optimistic that courts can be persuaded to scrutinize new forms of analogous grounds under s. 15. They rightly observe that the courts are limited when applicants rely on the *Charter* to advance claims for rights not ensconced in statutes because the courts do not wish "to assume the role of policy-maker or arbiter of the allocation of scarce public resources and services."[5]

Chapter 2, "The Lighthouse of Equality: A Guide to 'Inclusive' Schooling,"[6] is written by Professor Wayne MacKay, who stresses that a policy of inclusion is all the more important the more diverse and multicultural Canada becomes. MacKay surveys the landmark equality cases from *Ross v. New Brunswick School District No. 15*[7] and *Eaton v. Brant County Board of Education*,[8] to *Vriend v. Alberta*[9] and reports on his own study of discrimination in New Brunswick from which he concludes that bullying and violence are the products not of diversity among students, but of not accommodating that diversity sufficiently.

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1 Michael Manley-Casimir & Kirsten Manley-Casimir, eds., *The Courts, the* Charter *and the Schools: The Impact of the* Charter of Rights and Freedoms *on Educational Policy and Practice, 1982-2007* (Toronto: University of Toronto Press, 2009).

2 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

3 A similar collection of essays, *Courts in the Classroom: Education and the Charter of Rights and Freedoms*, Michael Manley-Casimir & Terri A. Sussel, eds. (Calgary: Detselig, 1986).

4 William Smith & William Foster, "Equality in the Schoolhouse: Has the *Charter* Made a Difference?" in Manley-Casimir & Manley-Casimir, *supra* note 1, 14.

5 *Ibid.* at 33.

6 Wayne MacKay, "The Lighthouse of Equality: A Guide to 'Inclusive' Schooling" in Manley-Casimir & Manley-Casimir, *supra* note 1, 39.

7 [1996] 1 S.C.R. 825 [*Ross*].

8 [1997] 1 S.C.R. 241 [*Eaton*].

9 [1998] 1 S.C.R. 493.

In Chapter 3, "Special Education and the *Charter*: The Effect of the Equality Provisions and *Charter* Litigation on Educational Policy and Practice in Ontario,"[10] Brenda Bowlby and Rachel Arbour provide a survey of special education cases in the last 20 years or so and conclude that governmental policy, not the *Charter*, has spurred improvements in special education in Ontario because the courts, naturally enough, have dealt with the application of laws and policies in specific cases, rather than with the laws themselves. The authors include a useful history of social developments that led to Ontario's enactment of Bill 82 in 1980.[11] They rightly note that s. 15 of the *Charter* does not prohibit making distinctions between definable groups and indeed recognizes the necessity of such distinctions in modern society, and that s. 15 affords considerable deference to school boards in their decisions about special education. In their detailed description of the *Eaton* case, they note that the Supreme Court of Canada focused not on where the program is located, as did the Ontario Court of Appeal, but on the service provided to the student wherever the program may be offered.[12]

The next two chapters, "Equity, Equality of Opportunity, Freedom of Religion, Private School Funding, and the *Charter*,"[13] by Jerry Paquette, and "Religion in Canadian Education: Whither Goest Thou?,"[14] by John Long and Romulo Magsino, tackle the thorny issues surrounding the funding and status of private and alternative schools, and the largely unsuccessful struggles by their supporters to convince the courts that they are analogous to constitutionally protected denominational schools. After assessing the significance of such landmark cases as *Zylberberg v. Sudbury Board of Education (Director)*,[15] *Adler v. Ontario*,[16] *Bal v. Ontario (A.G.)*,[17] *Multani v. Commission scolaire Marguerite-Bourgeoys*,[18] *Chamberlain v. Surrey School District No. 36*,[19] *Trinity Western University v. British Columbia College of Teachers*,[20] *Kempling v. British Columbia College of Teachers*,[21] and *Ross*,[22] Long and Magsino conclude that while religious schools are permissible within the public system, there is no "right" to them, that the freedom to hold religious beliefs is broader than the freedom to act on such beliefs, and that both society and the *Charter* have contributed to the "hegemony of the secularist outlook" as a judicially-sponsored value in Canadian society.[23]

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10 Brenda Bowlby & Rachel Arbour, "Special Education and the *Charter*: The Effect of the Equality Provisions and *Charter* Litigation on Educational Policy and Practice in Ontario" in Manley-Casimir & Manley-Casimir, *supra* note 1, 64.

11 Bill 82, *An Act to Amend The Education Act, 1974*, 4th Sess., 31st Leg., Ontario, 1980 (assented to 12 December 1980), S.O. 1980, c. 61.

12 *Supra* note 8, rev'g (1995), 22 O.R. (3d) 1.

13 Jerry Paquette, "Equity, Equality of Opportunity, Freedom of Religion, Private School Funding, and the *Charter*" in Manley-Casimir & Manley-Casimir, *supra* note 1, 85.

14 John Long & Romulo Magsino, "Religion in Canadian Education: Whither Goest Thou?" in Manley-Casimir & Manley-Casimir, *supra* note 1, 109

15 (1988), 65 O.R. (2d) 641 (C.A.).

16 [1996] 3 S.C.R. 609.

17 (1997), 34 O.R. (3d) 484 (C.A.).

18 2006 SCC 6, [2006] 1 S.C.R. 256.

19 2002 SCC 86, [2002] 4 S.C.R. 710.

20 2001 SCC 31, [2001] 1 S.C.R. 772.

21 2004 BCCA 535, 203 B.C.A.C. 256, leave to appeal to S.C.C. refused, [2006] 1 S.C.R. x.

22 *Supra* note 7.

23 Long & Magsino, *supra* note 14 at 109.

In Chapter 6, "The Teacher in Dissent: Freedom of Expression and the Classroom,"[24] Kevin Kindred concentrates on what impact the *Charter* has had on such questions as whether teachers have freedom of expression in the classroom and whether they have the freedom to speak out against their employers. Basing his discussion on three cases decided between 2002 and 2005, *Morin v. Prince Edward Island Regional Administrative Unit No. 3 School Board*,[25] *Hamilton-Wentworth District School Board*,[26] and *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation*,[27] Kindred concludes that academic freedom for both students and teachers is a protected value under s. 2(b) of the *Charter*, and that school boards may not simply prohibit teachers from delivering political messages with impunity. Kindred's analysis proceeds from the perspective of teachers as professionals with some control over the subject being taught, and as state actors rather than as victims of governmental action.

Unfortunately, Kindred's assertion that teachers have the right to participate in the decision-making process by running for elected office is now out of date given the Supreme Court of Canada's 2007 decision in *Baier v. Alberta*[28] that amendments to Alberta's *Local Authorities Election Act*,[29] which imposed an absolute ban on teachers running for trustee anywhere in the province, not just for their own employing school board, did not infringe s. 2(b) of the *Charter* nor establish that teachers' total exclusion from school trusteeship substantially interferes with their ability to express themselves on matters relating to the education system. Section 2(b) permits the legislature to take away a "positive" right (one established by statute) with impunity. Nor was there an infringement of s. 15(1) of the *Charter*. While there was differential treatment of school employees under the amendments as compared with municipal employees, the differential treatment was not based on an enumerated or analogous ground and neither the occupational status of school employees nor that of teachers had been shown to be immutable or constructively immutable characteristics. Moreover, school employees cannot be characterized as a discrete and insular minority. Therefore, despite its pronouncements in other cases that political speech was at the "core" of freedom of expression, the Court concluded (with a strong dissent by Fish J.), that the claim concerned a democratic right that the *Charter* does not protect. Reference to this case could well have moderated Kindred's optimistic analysis of s. 2(b) as it applies to teachers.

In Chapter 7, "School Searches and Student Rights under the *Charter*: Old Wine in New Bottles,"[30] education lawyer Greg Dickinson argues that the *Charter* has not significantly affected traditional (and U.S. influenced) judicial deference to school authority, and that students have a lower threshold of rights than adults in cases of school discipline. Instead,

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24 Kevin Kindred, "The Teacher in Dissent: Freedom of Expression and the Classroom" in Manley-Casimir & Manley-Casimir, *supra* note 1, 135.
25 (2005), 254 D.L.R. (4th) 410 (P.E.I.S.C. (A.D.)).
26 [2002] O.L.R.B. Rep. July/August 652.
27 2005 BCCA 393, 257 D.L.R. (4th) 385.
28 2007 SCC 31, [2007] 2 S.C.R. 673 [*Baier*]. The reviewer was counsel for the appellant teachers.
29 R.S.A. 2000, c. L-21.
30 Greg Dickinson, "School Searches and Student Rights under the *Charter*: Old Wine in New Bottles" in Manley-Casimir & Manley-Casimir, *supra* note 1, 155.

the *Charter* has made parents and students more "rights-conscious"; more likely to challenge authority than before. Back in the 1950s and 1960s, he writes vividly:

> [F]ar from scuttling off to court with rights-deprived son or daughter in hand, parents tended to reinforce the actions of teachers and administrators on the assumption, right or wrong, that the school was acting in the best interests of their child's character formation.… The enforcement of school discipline, in general, was rarely on the legal radar … the courts were not at all keen to intrude on school business.[31]

He cites A. Wayne MacKay, who states that "[a] complete denial of rights is no longer acceptable but neither is a granting of full adult rights."[32] School violence and the provision of safe schools have prompted the "judicial trumping of individual student rights," and student privacy expectations are "significantly diminished" from what they would be in other venues.[33] As for student searches, Dickinson is critical of the principle that where a court deems a school principal to be acting as the agent of school authorities rather than the police, the principal is accorded greater latitude in conducting searches, notwithstanding the serious results for the student of being convicted of a crime. Reasonable belief has been substituted for reasonable and probable grounds to justify searches. In Dickinson's view, courts have gone astray by emphasizing the school principal in his or her role rather than by looking at what he or she actually did, and the rights afforded should depend on what the impact of a detention or search is upon the accused rather than on who is doing the detaining or searching. The article is thought-provoking and persuasively written.

The next two chapters, "Corporal Punishment and Education: Oh Canada! Spare Us!,"[34] by Ailsa Watkinson, and "Children's *Charter* Rights: A Slogan Still in Need of Judicial Definition,"[35] by Cheryl Milne, take as their point of departure the authors' disappointment with the Supreme Court of Canada's refusal in *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)*[36] to abolish the defence under s. 43 of the *Criminal Code*[37] that it is lawful to use physical force on a child by way of correction when reasonable in the circumstances. Watkinson was an early proponent of the proposition that s. 43 violated at least three *Charter* sections: s. 15 (discriminates against children on the basis of age because the defence is available only to those who use force on children); s. 7 (using force violates a child's right to security of the person); and s. 12 (using force is a form of cruel and unusual punishment). A lawyer with a social work background, Milne stresses the value of international law, such as the United Nations *Convention on the Rights of the Child*.[38] She bemoans the fact that although the *Charter* does not on its face distinguish between the rights of adults and those of children, the way in which the Supreme Court of Canada has handled such claims "demonstrates a clear distinction between adults and children."[39] She describes

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31 *Ibid.* at 157.
32 *Ibid.* at 159, citing A. Wayne MacKay, "The Canadian Charter of Rights and Freedoms: Implications for Students" in Manley-Casimir & Sussel, *supra* note 3, 9 at 13.
33 Dickinson, *ibid.*
34 Ailsa M. Watkinson, "Corporal Punishment and Education: Oh Canada! Spare Us!" in Manley-Casimir & Manley-Casimir, *supra* note 1, 181.
35 Cheryl Milne, "Children's *Charter* Rights: A Slogan Still in Need of Judicial Definition" in Manley-Casimir & Manley-Casimir, *supra* note 1, 200.
36 2004 SCC 4, [2004] 1 S.C.R. 76 [*Canadian Foundation*].
37 R.S.C. 1985, c. C-46.
38 UN GAOR, 44th Sess., UN Doc. A/RES/44/25 (1989).
39 Milne, *supra* note 35 at 202.

the *Canadian Foundation* case as "bizarre," pointing to the Court's interpretation of s. 43, which introduced arbitrary age cut-offs such that "only children aged 3 to 12 may be subject to force by way of correction."[40]

In Chapter 10, "The Judicial Contours of Minority Language Education Rights under the *Charter*,"[41] Paul Clarke effectively describes the unusual nature of s. 23 rights, in that they are "positive" rights that require governments to do something, they pertain to individual and group rights, and they are not fundamental and universal since they grant special constitutional status to minority English and French communities in Canada. Clarke addresses the key questions of who qualifies for s. 23 protection (parents) and what minority language instruction means. He reminds us (1) that s. 23(2) does not guarantee to the majority the right to a French immersion program; (2) that s. 23(1)(a) still does not apply in Quebec because the required ratification by the National Assembly has not occurred; and (3) that in Alberta and Ontario, French-language school boards have been forced to split along denominational lines.

In the final chapter, "The Courts and the School: The Judicial Construction of the School,"[42] Cesare Oliverio and Michael Manley-Casimir argue that the courts regard the school as "an institutional hierarchy with strongly embedded normative expectations respecting the appropriate behaviour of all its players … [while] respect[ing] the differences that are present in a multicultural society."[43] They find little guidance for the courts in provincial statutes on the role of the school as a social and formative institution through which cultures perpetuate themselves. However, for the authors to try to find a common philosophy on the role of the school in either court decisions or statute law is to misinterpret the function of the courts, which concentrate on resolving the cases before them rather than on contributing to a "pooled" definition of education or schools.

By its very nature, as a collection of articles, the book lacks cohesiveness because of the diversity of viewpoints and experiences of the various authors. In some respects, the book is already outdated; for example, internal evidence indicates that the Clarke article concerning s. 23 dates from 2004, despite the publication date of 2009 for the book as a whole. The chosen book form means in any event that cases decided subsequent to the dates on which the authors submitted their articles for publication are of course not considered, as the example of *Baier* illustrates. As for the format itself, it would have been more helpful to have the footnotes at the end of each article or at the bottom of the page, rather than grouped together at the back of the book. It was a good idea to include the *Charter* as an appendix, but s. 93 of the *Constitution Act, 1867*[44] should have been reproduced as well, since it provides the fundamental constitutional basis for Canadian schools.

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40 *Ibid.* at 204.

41 Paul T. Clarke, "The Judicial Contours of Minority Language Education Rights under the *Charter*" in Manley-Casimir & Manley-Casimir, *supra* note 1, 213.

42 Cesare Oliverio & Michael Manley-Casimir, "The Courts and the School: The Judicial Construction of the School" in Manley-Casimir & Manley-Casimir, *supra* note 1, 242.

43 *Ibid.* at 243.

44 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

Nevertheless, the book is a welcome addition to the relatively sparse literature on education law in Canada. While it would be of limited value for lawyers preparing cases in the area or for serious systematic study of the *Charter*, it constitutes an engaging introduction, especially for Canadian educators, to areas of school law affected by the advent of the *Charter*. One hopes that the editors will repeat the effort ten to 15 years from now and will be able to report in that not so distant future that the initial high expectations for the *Charter*'s impact on schools will have been more effectively fulfilled than is currently the case.

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