# PUBLIC EDUCATION, CURRICULAR CONTROL & CONFLICTS OF RIGHTS

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*Under the Canadian Charter of Rights and Freedoms, there is a growing body of jurisprudence which reflects ongoing debates about who should ultimately maintain control of the formal and informal curriculum in our schools. In these cases, debates about curricular battles play out through rights conflicts, which our courts are required to resolve. These conflicts typically involve claims relating, directly or indirectly, to fundamental freedoms such as freedom of religion and freedom of expression as well as claims associated with the right to equality. In this article, I provide a critical assessment of the Chamberlain case, one of the leading educational law cases in the post-2000 era. My critique draws on the theoretical work of Rob Reich and Jeremy Waldron. Reich suggests that our best hope of understanding and resolving the curricular struggles related to the control of children's education requires a balanced approach whereby we attempt to reconcile the educational interests of three primary actors: parents, the state and children. Waldron maintains that rights conflicts are fundamentally about conflicts of duties and that we are likely to have more success reconciling conflicts of rights when we conceive of these conflicts in this manner.*

## I INTRODUCTION

In the context of Canada's Kindergarten to Grade 12 education system and given the *Canadian Charter of Rights and Freedoms*[1], there is a growing body of jurisprudence which reflects ongoing debates about who should ultimately maintain control of the formal and informal curriculum in our schools. In these cases, debates about curricular battles play out through rights conflicts, which our courts are required to resolve. These conflicts typically involve claims relating, directly or indirectly, to fundamental freedoms such as freedom of religion and freedom of expression as well as claims associated with the right to equality.

In this article, I offer a critical assessment of one of the most important Canadian educational law decisions in the post 2000 era - *Chamberlain v. Surrey School District No. 36.*[2] My critique draws on the theoretical work of Rob Reich and Jeremy Waldron. Reich[3] suggests that our best hope of understanding and resolving the curricular struggles related to the control of children's education requires a balanced approach whereby we attempt to reconcile the educational interests of three primary actors: parents, the State and children. Building on this conceptualization of the different interest holders, I identify a fourth stakeholder, namely, teachers, who have interests which are germane to our analysis because these interests raise issues connected to curricular control and children's education. In my analysis, I apply Reich's matrix of interests to the *Chamberlain* case to ascertain whether or not the Supreme Court of Canada is alive to the different interest holders in its treatment of this decision which involves a conflict of rights. I also want to know whether the interests of the four stakeholders overlap or conflict with another. Finally, I want to

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know how these interests are conceptualized by the Court and whether this conceptualization is consistent with, or differs from, the one offered by Reich.

Waldron's work[4] offers analytical clarity for how we might better understand and resolve conflicts of rights, including conflicts involving constitutional rights claims. He maintains that rights conflicts are fundamentally about conflicts of duties and that we are likely to have more success reconciling conflicts of rights when we conceive of these conflicts in this manner. Applying Waldron's strategy for reconciling rights conflicts to the *Chamberlain* case, I posit that we can make sense of the reconciliation process by examining the duties associated with the rights in question. Although our highest court does not explicitly draw on Waldron's theoretical framework in its legal analysis, I maintain that its approach in the decision is consistent with a Waldronian analysis of conflicts of rights.

This article is organized into a number of key sections. In Part Two, I set out Reich's matrix of the different interest holders and claim teachers should also be included in this conceptual framework related to curricular control. In Part Three, I describe Waldron's approach to resolving conflicts of rights. In Part Four, I offer a critical analysis of the *Chamberlain* decision. Finally, in Part Five, I present some brief concluding remarks.

## II A Matrix of Different Interest Holders

Legal and political theorists[5] have identified a trilogy of interests, which come into play when deciding how children are educated. These include the interests of parents, the State and children.

### A *Parental Interest in Children's Education*

According to Reich[6], parents have two primary interests in their children's education. They are self-regarding interests and other-regarding interests. In the first category, parents have an interest in children's education that reflects deep meaning for the lives of parents themselves. Eamonn Callan describes this as the 'expressive significance' of child rearing and notes: 'By the "expressive significance" of child-rearing I mean the way in which raising a child engages our deepest values and yearnings so that we are tempted to think of the child's life as a virtual extension of our own'.[7] He suggests that our judgement of how well we parent and the way parenting helps shape our identities have profound significance for our lives. Callan also acknowledges that measures of success vary widely within and across cultures, but 'they almost always include broadly educational ends of one sort or another'.[8] Hence, the educational hopes and ambitions parents have for their children are closely intertwined with the expressive interest in child-rearing.

The second interest parents have in their children's education is an other-regarding claim. Children typically cannot meet their own needs. As Reich notes:

> Parents, it is generally understood, are best situated (better situated than the state and the children themselves) to act in the best interests of their children, or, in an alternate formulation, to promote their general welfare. In modern society, the welfare of a child depends in part on being educated. Therefore, as the guardian of their children's best interests or welfare, parents have an interest in the education that their children receive.[9]

However, the 'best-interests' standard has been criticized, as Reich points out, because, 'Given plural conceptions of the good life, there will be no readily identifiable consensus about

the best interests of the child in all cases'.[10] Parental interests of course are not the whole story. One must also consider the interests of the State as well as those of children.

### B *State Interest in Children's Education*

Reich notes that the State also has an interest in exercising educational authority over its youngest citizens. These interests are twofold. First, the State wants children to become able citizens. Second, it wants children to develop into independently functioning adults. As for the first interest, there is great debate about the appropriate scope of civic education the State should offer its young. On the more demanding side of the spectrum, the State must teach children about public policy, contemporary science, history, government and a broad array of critical thinking and empathy skills necessary to facilitate democratic deliberation in an increasingly diverse and complex world.[11] Yet, others argue for a middle of the road approach while some even adopt a minimalist view about the ambit of civic education. As Reich states:

> Others indicate that the state's civic interest in education lies more generally in assuring that children will have the opportunity to participate in public institutions and come to possess a number of political virtues, such as tolerance, civility, and a sense of fairness. And on the less demanding side of the spectrum, some argue that civic requirements are more minimal, encompassing the teaching of tolerance and, as one theorist puts it, 'social rationality'.[12]

Concerning the second interest, Reich notes that the State must perform a 'backstop' role to parents to ensure that their children develop into independently functioning adults.[13] In the literature, this interest does not appear to be the subject of much controversy. The State wants to enable children, through education, to become self-sufficient and self-reliant as they make the transition from childhood to adulthood.

### C *Children's Interest in Education*

Children themselves obviously have a significant interest in their own education. According to Reich, this interest can be accounted for in two ways. First, children have an interest in becoming independently functioning adults. This interest mirrors the State's interest (previously discussed) and does not seem to be contested by political and legal theorists. Second, children have an interest in becoming minimally autonomous. Reich defines minimal autonomy as follows:

> It refers simply to the capacity of the child to develop into an independent adult who can seek and promote his or her own interests, as he or she understands them, and who can participate, if he or she chooses, in political dialogue with others. This conception requires, to be sure, significant development of one's rational capacities, an ability to articulate and defend one's political positions, and a willingness to treat civilly those with whom one disagrees.[14]

This interest is controversial and not all agree with the promotion of minimal autonomy for children.[15] For the purposes of my article, I assume that children have an interest in minimal autonomy to prevent them from becoming, what one theorist has called, 'ethically servile'.[16]

Reich's conceptualization of the triad of interest holders is a helpful way to understand who has a legitimate voice in discussions concerning curricular control over children's education. Yet, two important qualifications obtain. First, Reich only enumerates two important interests for each of the three interest holders. In some sense, we might say that his description of the relevant

interests is underinclusive. For example, what he says about children's interest in their own education is incomplete. Reich concentrates exclusively on their interest in *becoming*, whether that relates to becoming an independently functioning adult or becoming minimally autonomous. The focus on *becoming* relates more to the development of the self and the uniqueness of each individual, what tends to distinguish him or her from others in the social world. Yet, children surely have an interest in an education that teaches them about *belonging* as well. As social creatures who typically do not live solitary lives, they interact with one another in families, in social institutions like schools, athletic clubs, artistic groups and religious organizations, as well as with other people in the larger society. Their sense of self is defined in large measure by the connections that they have with others, by the multiple communities that they belong to. Hence, they have an interest in learning how to relate to others, how to build healthy bonds of interdependence, and how to live in community with those who share both similar and different values.[17] It is likewise conceivable that parents and the State may also have interests, not identified by Reich, in children's education that emerge from a study of the relevant case law. In essence, we might say that Reich's framework does not capture all possible and relevant interests.

Second, the work of Reich and other theorists fails to include another stakeholder who has a direct interest in important matters that are relevant to the issue of children's education and curricular control. This stakeholder is the teacher who has an interest in moral rights such as freedom of expression. This interest is both professional and personal. [18] As professionals who must exercise some degree of independent judgement, teachers should have an interest in exerting some measure of curricular control over both *what* gets taught and *how* it gets taught. We might refer to this as teachers' professional or academic freedom. First and foremost, as educators, teachers have an interest in creating and maintaining a learning environment that stimulates, challenges, nurtures and strives to bring out the best in our students. In their personal lives, teachers (as private citizens) also have in interest in freedom of expression and expressing views which may not necessarily be held by the majority or others. This is a self-regarding interest which has implications for the kind of life teachers may wish to lead in the private realm.

### D *Interests and Constitutional Rights*

It is important to realise that some of the interests just discussed may give rise to rights because of the special nature and significance of those interests for human flourishing. For instance, parents have a right to educate their children at home if they so choose. They also have a right to educate their children in accordance with their religious beliefs and values. In the constitutional context, parents have a right to freedom of religion as protected under s. 2(a)[19] of the *Canadian Charter of Rights and Freedoms.* They also enjoy equality rights under s. 15(1)[20] of the *Charter* to protect them from attempts by the State to deny their children an education should their children have special physical and/or mental needs which require reasonable accommodation.

Children likewise have certain rights. They have a right to an education and enjoy similar constitutional protections as their parents under the *Charter.* For example, they have a right to freedom of religion, freedom of expression[21] and enjoy equality rights. Finally, teachers have rights guaranteed by the *Charter* such as the rights to freedom of religion and freedom of expression. Not all interests, of course, can be translated into rights claims. The State's interests in children's education are a prime example. Likewise, a teacher's interest in having more or better resources for her students does not typically constitute a rights claim.

## III Conflicts of Rights

How do the interests identified in the previous section, as well as emergent interests, and the rights associated with fundamental freedoms and equality translate into arguments for educational authority and control of children's education? In some circumstances, the interests and/or rights will overlap or complement one another. For instance, all stakeholders share a common interest in having children develop into independent and responsible adults. In other circumstances, the interests and/or rights will conflict with one another. For example, in public schools, parental objections to the use of controversial teaching materials (such as the Harry Potter books) based on religious beliefs may well be founded on a parental right to freedom of religion.[22] At the same time, this right may conflict with the teacher's interest in professional freedom and his or her right to freedom of expression. In these circumstances, where the dispute occurs in a public school, the State also has an interest in upholding the secular nature of public schools.

When a conflict of rights occurs, it will typically take one of two forms. The conflict will involve a tension between a right, such as a parental right to freedom of religion, and an interest, like the State's interest in maintaining the secular character of our public schools. Alternatively, the conflict will involve two competing rights, such as a parental right to freedom of religion and a teacher's right to freedom of expression. The State's interest may also figure in the rights conflict if a constitutionally guaranteed right is breached and the State, under s. 1[23] of the *Charter*, is required to justify why it is necessary to place reasonable limits on the right in the name of some compelling State interest such as protecting a teacher's ability to do his or her job by assuring that s/he has a certain measure of curricular freedom.

To resolve the conflict, we must therefore consider both the interests and the right(s) involved. We agree with Reich that no single interest holder, and by extension no single rights holder, can claim to always have the final say. As he reminds us:

> Given the triad of interest holders, and the significance of their respective interests, a theory of educational authority that claimed only the interests of one party mattered could potentially establish a kind of parental despotism, state authoritarianism, or child despotism. Any defensible theory of educational authority, then, will strike some balance among the three parties.[24]

Along with teachers, this quadripartite matrix of interest holders (who have overlapping and competing interests) furnishes an analytical lens to examine critically how courts have balanced the concerns and rights of the various stakeholders when it comes to exercising curricular control in our schools. Given that our educational jurisprudence involves conflicts between rights and interests, on the one hand, and rights versus rights, on the other, our examination of the *Chamberlain* decision should be informed by a coherent and workable theory of conflicts of rights. Thus, it is to Jeremy Waldron's work that we turn for guidance in this area.

### A *Waldron and Conflicts of Rights*

Waldron claims that individual rights cannot be understood without reference to choice and liberty for every individual: 'Liberty is a concept which captures what is distinctive and important in human agency as such and in the untrammelled exercise of powers of individual deliberation, choice and the intentional initiation of action'.[25] Unlike the prominent rights theorist Ronald Dworkin,[26] Waldron embraces a conception of rights, which does not focus on dignity and equality *per se*. Instead, he embraces an understanding of rights along the lines of Joseph Raz's Interest Theory.[27] As Waldron explains:

> According to Raz, a person may be said to have a right if and only if some aspect of his well-being (some interest of his) is sufficiently important in itself to justify holding some other person or persons to be under a duty. Thus, when A is said to have a right to free speech, part of what is claimed is that his interest in speaking out freely is sufficiently important from a moral point of view to justify holding other people, particularly the government, to have duties not to place him under any restrictions or penalties in this regard.[28]

In opposition to Dworkin, he does not view conflicts of rights as involving, first and foremost and in most cases, a competition between individual dignity and equality, on the one hand, and collective goals or the public interest, on the other. Rather, Waldron proposes the following definition of a rights conflict: 'When we say rights conflict, what we really mean is that the duties they imply are not compossible'.[29] By this, he means that there is a clash between the duties, which rights themselves generate. By way of example, Waldron suggests that *A* has an interest in not drowning, which is sufficiently important to justify holding others to be under a duty to rescue him. If the same is true for *B*, he notes that, 'we will be faced with a conflict of rights whenever both are in difficulties and there are resources available to rescue only one'.[30] Hence, the conflict arises because of the duty to rescue which extends to both *A* and *B*.

Waldron also maintains that rights should not be thought of as correlative to single duties. Instead, they should be seen as generating a multiplicity or 'wave' of duties. In his discussion about the right not to be tortured, for example, Waldron notes that the right generates a host of duties. These include: the duty not to torture, the duty to investigate torture, the duty to compensate victims of torture and any other duties associated with that right.[31] He observes that not all duties are of equal strength and that this may ultimately affect how we resolve conflicts of rights. Furthermore, Waldron claims that conflicts of rights take one of two forms. On the one hand, they may involve conflicts between rights and social utility. For instance, he states that the right to free speech 'is widely believed to clash with the interest people have in avoiding the distress that arises when their cherished beliefs are contradicted'.[32] On the other hand, the conflicts may be among rights themselves. As Waldron observes:

> Conflicts of rights can be placed initially in two categories: *intra*-right conflicts, that is, conflicts between different instances of the same right; and *inter*-right conflicts, that is, conflicts between particular instances of different rights.[33]

In the first category, he presents the scenario of conflict, which arises when the demands of a number of sick or injured people are placed on a supply of scarce medical resources. In the second category, Waldron considers the conflict that exists when a group of Nazis propose to make inflammatory speeches calling for the suppression of Communists. If the Nazi speech induces people to invade Communist gatherings to prevent Communists from speaking, then he suggests that we have a conflict between the Nazis' right to free speech and the Communists' right to free speech.

Waldron claims that, in some circumstances, rights have qualitative or lexical priority[34] over considerations of utility[35] and even in regard to one another. In other circumstances, however, rights conflicts are best handled in the sort of balancing way that a quantitative image of weight suggests. As he explains:

> [W]e establish the relative importance of the interests at stake, and the contribution each of the conflicting duties may make to the importance of the interest it protects, and we try to maximize our promotion of what we take to be important.[36]

Waldron's use of lexical ordering is similar to Dworkin's view of rights as trumps when conflicts between rights and social utility emerge. As for interright conflicts, he thinks that it is implausible that all rights should be put on a par. Hence, his suggestion that the right to life maybe more important than the right to free speech. To move beyond an 'intuitionist' defence of lexical priority, Waldron advances the notion of an *internal relation* between moral considerations. As he states, lexical priority 'expresses the fact that a pair of moral considerations are related internally to one another, rather than externally in the way that a purely quantitative amount of their respective importance would imply'.[37] In sum, Waldron's claim, that in some circumstances some rights have qualitative precedence over others while in other circumstances some weighing and balancing should take place when resolving conflicts of rights, is particularly insightful.[38]

## IV Analysis of The Chamberlain Case

Under the *Canadian Charter of Rights and Freedoms*, and with respect to curricular control in our public schools, a number of cases related to educational authority involve the interests of parents, children, teachers and the State. These cases likewise implicate parents, children and teachers as respective rights claimants who advance, individually or together, constitutional law claims in the educational context. The decisions all involve conflicts of rights. In this part of the article, and drawing on Reich' matrix of different interest holders and Waldron's approach to resolving conflicts of rights, I offer a critical analysis of *Chamberlain v. Surrey School District No. 36.*[39]

### A *Key Facts*

In the *Chamberlain* case the Supreme Court of Canada addressed the issue of curricular control in the context of a heated debate, at the local school board level in British Columbia, about the use of teaching materials depicting gay families. By way of background, James Chamberlain, a Kindergarten-Grade One ('K-1') teacher in Surrey, asked his school board to approve the use of three books[40] as supplementary learning resources. All three books depicted same-sex parented families. Chamberlain wanted to use the books to help teach about family diversity within the confines of the provincially mandated family life education curriculum. The board rejected the request and passed a formal resolution declining to approve the books. It was concerned that the materials would engender controversy given 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. It also maintained 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. Chamberlain[41] initially argued that the school board's actions violated his rights to freedom of expression and equality, guaranteed respectively by ss. 2(b) and 15 of the *Charter*.[42]

The British Columbia Supreme Court quashed the school board's resolution, holding that board members 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. The Supreme Court of Canada allowed Chamberlain's appeal. The Court presents two very different visions about how we should strike the balance when it comes to resolving the question of curricular control. For the majority, led by Chief Justice McLachlin, parental interests are important but they must be balanced with other interests and considerations.[43] Yet, for the minority, led by Justice Gonthier, parental interests are supreme.[44]

They trump any State interests, which might bear on the question. Although one might read some concern for the educational interests of children, as separate from the interests of both parents and the State, into the opinion of the majority, the minority never considers the interests of children in its analysis.

### B *Reasoning of the Majority*

The reasoning of Chief Justice McLachlin focuses exclusively on the principles of administrative law. She only considers whether the school board acted outside its mandate, as governed by the *School Act*[45] of British Columbia. She does not take up the appellant's contention that the school board resolution banning the three books also violates the *Canadian Charter of Rights and Freedoms*. The Chief Justice underlines the fact that s. 76 of the school legislation provides that '[a]ll schools and Provincial schools must be conducted on strictly secular and non-sectarian principles'.[46] The section 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'. For the Chief Justice, the *School Act*'s focus on secularism means 'that Canada is a diverse and multicultural society, bound together by the values of accommodation, tolerance and respect for diversity'.[47]

In the context of British Columbia's secular and public schools, she emphasizes the State's interest in educating students for two primary purposes: one is for service as active and competent democratic citizens and the other is to help students realise their full potential as learners and contributors to society. She does this by citing the preamble to the province's *School Act*, which 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;[48]

She then concludes: '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'.[49] For the Chief Justice, the secular nature of public schools means that school boards must engage in decision-making on all matters, including the approval of supplementary resources, in a way that respects the views of all members of the school community. Thus, these boards can neither privilege the religious views of some people in their community nor deny the equal validity of the lawful lifestyles of others in the school community.[50] As McLachlin CJ. Declares: 'The Board must act in a way that promotes respect and tolerance for all the diverse groups that it represents and serves'.[51]

The State's interest in promoting a secular school system open to all students is not the only educational interest that the majority considers. The Chief Justice recognises that parents play an important role in directing their children's education. This includes, in consultation with other parents and the teacher, selecting what materials are used in their children's classrooms.[52] If this partnership proves impossible to obtain, she notes that parents are free to home school their children or to send them to private or religious schools where their own values and beliefs may be

taught.[53] In the context of public secular education, the Chief Justice held that there are limits to the amount of control that parents can exert on the selection of the curriculum:

> [A]lthough 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.[54]

She also considered the parental claim that cognitive dissonance would ensue should the three books be used in the classroom. As she explained: 'The argument based on cognitive dissonance essentially asserts that children should not be exposed to information and ideas with which their parents disagree'. [55] This claim, she remarks, stands in tension with the curriculum's objective of promoting an understanding of all types of families. The Chief Justice noted that such dissonance cannot be avoided and is not harmful. Rather, children encounter it every day in the public school system as members of a diverse student body.[56] She therefore rejected this approach because it was inconsistent with the teaching of tolerance, which demands that we respect the beliefs and values of others even when these worldviews differ from our own:

> 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.[57]

This part of the judgement suggests that exposing children to different viewpoints is an important educational interest and should be protected even if some parents do not favour such an approach.[58] But, it is unclear from the Chief Justice's comments whether this interest in tolerance is an interest belonging primarily to the State, to the children themselves or to both parties. One possible interpretation is that this is a State interest as this is consistent with the view that the State must offer its young a secular education and that to do so in a complex and diverse world requires the State to offer an education which prizes the development of tolerant attitudes among children. Implicitly, one might also read into the reasoning here that children themselves have an educational interest in becoming tolerant as this is part of what it means to be fully human.

If we accept that children have an interest in minimal autonomy, then they should be exposed to different beliefs and attitudes so they can better understand themselves and others and ultimately make up their own minds about the types of lives they wish to live and the kinds of values they wish to embrace. This kind of education which results from the collision of diverse and, at times, contentious world views is impossible without some exposure to difference and others who help us see the world from different perspectives. Equally plausible, one could posit that both the State and children share a similar interest in this concern for tolerance. Nonetheless, nowhere in the

judgement does the Chief Justice expressly state that children have an interest in their education that is distinct from the interest of both the State and the children's parents.[59] In any event, her rejection of the cognitive dissonance argument makes it clear that the need to learn about tolerance is an interest, by implication, of either the State or of the children or of both parties and that this interest merits special protection even in the face of strong parental opposition.

### C *Reasoning of the Minority*

By contrast, the minority judges in *Chamberlain* take a very different position about which party should control the education of children including the choice of suitable curricular materials. The parental interest dwarfs all other considerations in the minority's analysis. Furthermore, the minority expressly recognises only two interests in deciding how children are educated: the primary interests of the parents and the secondary interests of the State. As Justice Gonthier declares:

> 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: '[t]he 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': … Thus, parents are clearly the primary actors, while the state plays a secondary, complementary role.[60]

He also ruled that the parental right to educate children is protected by two provisions of the *Charter*. First, a parent's right to freedom of religion and conscience, as guaranteed under s. 2(a), encompasses the right to educate one's child. As Justice Gonthier noted:

> Parental decision making about what is in their children's 'best interests' concerns the core of the private sphere. In B.(R.), …. 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.[61]

Second, the parental right to control a child's religious and moral education is protected by section 7[62] of the *Charter*. Drawing once again on La Forest J's analysis in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*[63], Justice Gonthier describes this liberty interest as follows:

> 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.[64]

This parental liberty comprises two interests: an other regarding interest where parents are seen to be in the best position to promote their children's welfare[65] and a self-regarding interest

where parental concern for their children's education reflects deep meaning for the lives of the parents themselves. Justice Gonthier also noted that the parental right to educate, whether supported by the common law or the *Charter*, is not an absolute right and is premised on the notion that, 'Parents will be presumed to be acting in their children's 'best interests' unless the contrary is shown'.[66] He went on to add the following caveat: 'Generally, it is only when parental conduct falls below a 'socially acceptable threshold' that the State may properly intervene'.[67]

In the context of the *Chamberlain* case, Justice Gonthier held that, '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'.[68] In fact, he ruled that the facts of the case were particularly well suited to the primacy of parental choice and freedom in their children's moral and religious upbringing. As Justice Gonthier declared:

> 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'.[69]

In the final analysis, for the minority, the privileged role of parents to determine what serves the well-being of their children, including their 'moral upbringing', was 'central to analyzing the reasonableness of the School Board's decision in the case at bar'.[70]

The minority's reasoning is problematic on two grounds. First, it pays too little attention to the State's interest in children's education in the context of public and secular education. Second, it fails to accord sufficient attention to the interests children themselves have in their own education, interests which are independent from both those of the parents and the State. The analysis of Justice Gonthier leaves one with the impression that the only interest that counts, when it comes to curricular control, is the parental interest.

As we have already indicated, the State has an interest in ensuring that its young are well prepared, both intellectually and morally, to meet the demands of life in a diverse and ever changing society. In *Chamberlain*, the majority noted that children attending B.C.'s public schools come from many different kinds of families. These families include 'traditional' families with both biological parents, 'single-parent' families with a mother or a father, families with step-parents, families with adopted children, foster families, interracial families, families with parents of different religious or cultural backgrounds, families composed of siblings or members of the extended family who live together, and same-sex parented families.[71] The majority observed that children attending schools in the Surrey School district reflect this great family diversity. This means that some children come from families where two mothers or two fathers make up the family unit.

In a public and secular school, where family diversity cannot be avoided and where the State has a legitimate interest in promoting respect and tolerance for difference, according primacy to parental opposition, on religious grounds, to the use of supplemental teaching materials depicting same-sex parented families cannot be justified. To do otherwise would mean that some parents might then 'legitimately' oppose, and once again for religious reasons, the representation of interracial families or interfaith families (where parents come from different religious backgrounds) in the curricular materials. Although we must be careful not to demonize religion and religious belief, we must also ensure that religious conviction does not undermine

sound educational policy and the secular nature of the public school system, which the State has every interest in protecting and promoting. Furthermore, we must not forget that parents unhappy with the decision to use the three books still have a number of options that they can pursue. As the majority noted, they can send their children to private schools or home school them where they have greater religious control over the curriculum. Even if they choose to stay within the public and secular school system, other options exist. They might ask for an in-class exemption to the use of the three books. They are also obviously free to express their disagreement about same-sex relationships at an appropriate time and place (for example at home around the dinner table) with their children. The minority judgement is defective because it overlooks the State's legitimate interest in promoting tolerance and does not consider the possible forms of accommodation that are available to those opposed to homosexuality and same-sex parented families.

In addition, the minority reasoning is troubling because it does not give sufficient consideration to the interests of those most directly affected by the educational decision-making, namely, the children. Justice Gonthier simply equates the interests of parents with the interests of children. In one sense, he is correct to point out that parents have a strong and obvious interest in their children's education. Furthermore, absent abuse, neglect or some other compelling reason for State interference, one might posit that, under normal conditions, parents are better placed than others to know what is best for their children in matters educational and religious. Yet, children, with their own interests in education, should merit separate consideration on their own terms. Children deserve this type of consideration because they are, morally speaking, persons who are separate from their parents. As Reich reminds us, children possess 'independent interests'[72] and 'it is important to identify children's interests as distinct and not to subsume them under those of their parents or of the state'.[73]

The minority's failure to treat children as distinguishable from their parents is not consistent with a moral theory of the family and is therefore problematic. This treatment suggests that the interests of children do not count and that children serve only to further the religious or moral interests of their parents who are opposed to the depiction of same-sex parented families in the Kindergarten and Grade 1 curriculum. As Eamonn Callan explains:

> A moral theory of relationships in the family that says only the interests of one or both parents count is despotic. That is the sin of patriarchy, which entails that all members of a family are properly subject to the father. Patriarchy is no less gross a denial of the truism that we are all free and equal citizens as moral doctrines that argue for the subjection of one race to another. … No one would now deny that if a moral theory interprets the child's role so as to make individual children no more than instruments of their parents' good it would be open to damning moral objections.[74]

If children are to be counted as distinct moral members or persons[75] in the family, their interests must be considered separately from those of their parents. One interest that all children arguably have is an interest in minimal autonomy. In the context of public and secular schooling, parents may undermine children's interest in their own education by being able to veto any curricular exposure they object to simply because they are the children's parents and they believe they should have the final say. This approach seems inconsistent with recognizing that children have some interest in minimal autonomy. In this sense, I believe that the Courts are better placed to protect this autonomy when parents act unreasonably and solely to further their own ends and beliefs, however genuine and sincere they may be.

Reich claims that children have an interest in becoming minimally autonomous to prevent the possibility that they will become 'ethically servile'. Here, he draws on the work of Callan

for whom the concept of servility implies a kind of 'slavishness' to others and is predicated on 'a gross failure to understand or appreciate one's equal standing in the moral community as a right-holder on a par with others'.[76] Callan suggests that servility for children may take one of two forms: the child may be a 'Deferential Child' or an 'Ethically Servile Child'. The Deferential Child 'believes she has an overriding duty to serve her parents and acts and feels accordingly'.[77] The Ethically Servile child is reared so 'that as an adult she maintains an ignorant antipathy towards all alternatives to the ethical ideal I inculcated during childhood'.[78] Though the means of establishing servility differ in both cases, the servility for the two children is the same. As Callan remarks: 'In each case the field of deliberation in which the agent operates as an adult has been constrained through childhood experience so as to ensure ongoing compliance with another's will'.[79] For both Reich and Callan, children have an interest in minimal autonomy in order to overcome the vice of ethical servility.

In the context of *Chamberlain*, the minority might posit that children in Kindergarten and Grade 1 are far too young as five and six-year olds to exercise minimal autonomy. The age constraint means that they cannot make up their own minds, either in intellectual or moral terms, about the morality of same sex relationships and same-sex parented families. These concepts are beyond the children of tender years and for obvious reasons. Hence, parents must make these moral choices for them and this will inevitably lead to an imposition of what each parent deems is appropriate in the ethical realm. But this approach fails to grasp a significant point. Even young children in the early years of their schooling have a potential capacity to exercise minimal autonomy, by asking questions for example, and it is this potential of children, as bearers of a separate moral identity, that should be honoured and respected. Exposing young children, in appropriate ways, to diverse family models (including same-sex parented families) through curricular materials is one way to respect the child's interest in minimal autonomy. If young children cannot advance their interest in this autonomy, who will? In the context of public and secular schools where parental religious belief alone cannot serve as the foundation for curricular choices, the State may have no alternative but to act as an agent for the child to promote his or her own separate interest. This may strike some as a soft form of State paternalism. Yet, it is necessary to safeguard the interests of children in their own education. If these interests of children are both conceptually and morally distinct, they cannot simply be subsumed by the interests of the parents. This understanding of children's interests in their own education is essential if we are to attempt to balance the trilogy of interests presented in the *Chamberlain* decision, namely the interests of the parents, the State and the children, in a fair and coherent manner.

### D *Conflicts of Rights Perspective*

In terms of understanding the case from a conflict of rights perspective, the reasoning of the minority is problematic because it unduly privileges the religious freedom of parents, as protected by s. 2(a) of the *Charter*, to the detriment of the separate interests of children, the equality interests of gays and the promotion of tolerance. The reasoning of the majority, however, offers more hope as to how we might reconcile the conflicting rights and interests. Although the majority decided the case on the basis of administrative law principles, the *Charter* values of religious liberty and equality loom large in the background of the majority's analysis. In terms of religion, the majority stated: 'Religion is an integral aspect of people's lives, and cannot be left at the boardroom door'.[80] By the same token, the majority highlighted the concern for equality in these terms:

> 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. …[81]

In terms of freedom of religion, the State has a duty to ensure that parents are free to hold religious views and to express those religious views, even in the context of a public and secular education system.

Nonetheless, there are limits to religious freedom. Although the Surrey school board was free to address the religious concerns of parents, it had to act in a manner that gave equal recognition and respect to other members of the community. As the majority declared: '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'.[82] To uphold this equality principle, the State must ensure that all members of the public school community have access to a discrimination free environment. Hence, gay students and same-sex parented families cannot be shut out because of their sexual orientation. One might also posit that the right to equality requires the State to incorporate gay friendly materials in the curriculum so that gay students can be legitimised and see themselves reflected in the learning materials just like their heterosexual counterparts. Consistent with the concern for equality is both the State and the children's interest in tolerance. By exposing all children in the public school system to different and legitimate types of family configurations, including same-sex parented families, the State can teach children about peacefully co-existing with, and perhaps even celebrating, others who are different.

Children themselves also have an interest in learning and being in a discrimination free environment. The promotion of tolerance will help gay children more readily embrace who they are and may foster more positive attitudes among straight students who are simply ignorant about gays or who have negative views (based on stereotypes and/or an active dislike) of this sexual minority. The reconciliation of the rights and interests proposed by the majority is a reasonable one because it does not require religious believers to abandon their opinions about human sexuality. At the same time, the majority upholds the values of equality and secularism. Hence, public school boards cannot enact school board policy and practice which discriminate against gays and lesbians simply because of their sexual orientation. Finally, the majority recognizes the importance of teaching tolerance in public schools. Although it does not state whether this interest in tolerance belongs to the State and/or to children, both stakeholders should have a compelling interest in this political virtue.

## V Concluding Comments

In the final analysis, who should have ultimate control over children's education? Should this control belong to the parents, the State, children, or some combination of these actors? On the basis of the *Chamberlain* decision, I have attempted to examine this issue through the filter of a conflict of rights as adjudicated by the Supreme Court of Canada. Let us not forget that individual moral rights are important because they protect significant interests and show a deep respect for the separate existence of individuals. We have only to imagine a society without rights (and without some constitutional framework for the expression of those rights) to conjure up the horrors that would ensue if those exercising governmental authority or power over others were not held to account for their actions.

At the same time, it is important to recognize that a 'rights only' account of what happens in our schools and educational communities is only a partial account of this reality. Although rights are important, there are other morally significant values which are at play in life's relationships. Chief among these are duty, friendship and compassion. In the daily interactions among students, teachers, administrators and parents, we expect our educators to model virtuous conduct and to inspire those around them. Teaching others about responsibility and healthy relationships takes time, involves hard work and serious commitment. We want adults to model high standards of ethical behaviour because we know that our children are watching and looking to them for guidance and support.

Jean Vanier claims that the life undertaking of us all is 'to become human'.[83] He goes on to state:

> We humans are called to be free, to free others, to nurture life, to look for the worth and the beauty in each and every one of us, and to make of our world a beautiful garden where each person and each society can create a harvest of flowers and fruits, and so prepare the seeds of peace for tomorrow.[84]

If the goal of education is human flourishing, then bringing out the best in people under difficult circumstances is not always likely to happen when individuals are pitted against one another in an adversarial context where 'winners' and 'losers' are frequently declared. Furthermore, in the school yard, life's valuable lessons cannot be imposed by fiat through judges' decisions and cannot be accounted for solely by a rights based morality. Control over school curriculum ultimately involves an ongoing and, at times, precarious negotiation among different stakeholders about who should have the final say about how we do things in our schools. This negotiation reflects an ever present tension between the self and the other, a struggle between the needs of the individual and the needs of the community, and a conflict about becoming and belonging. It may also highlight at times a power imbalance between children and adults. How we address these challenges, and how we treat one another in moments of disagreement and conflict, is what defines us as human beings.

Sometimes, in the field of education, we may have no choice but to seek the help of our courts to resolve difficult conflicts of constitutional rights. Hopefully, the judicial method of conflict resolution will be seen as the exception rather than the norm. The help of judges should not be seen as a substitute for our best efforts. This help should not relieve us of our ethical responsibilities and duties, and especially in the context of education, to work out our differences in a respectful and non-violent manner. If we as educators and parents fail to model this type of commitment and action, we fail to offer our children the values and skills they will need to both survive and thrive in an ever changing and complex world.

*Keywords*: curricular control; conflicts of rights; education.

## Endnotes

1 *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11.

2 [2002] SCJ No. 87. [SCJ = Supreme Court Judgments]

3 Rob Reich, 'Testing the Boundaries of Parental Authority Over Education: The Case of Homeschooling' in Stephen Macedo & Yael Tamir (eds), *Moral and Political Education* (2002) 280.

4 Jeremy Waldron, *Liberal Rights: Collected Papers 1981-1991* (1993) 203.

5 See Eamonn Callan, *Creating Citizens: Political Education and Liberal Democracy* (1997); James G.

Dwyer, *Religious Schools v. Children's Rights* (1998); Stephen Macedo, 'Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?,' (1995) 105 *Ethics* 468.

6 Reich, above n 3, 283.

7 Callan, above n 5, 172.

8 Ibid.176.

9 Reich, above n 3, 284.

10 Ibid 285.

11 Ibid 287.

12 Ibid.

13 Ibid 288. According to Reich:

> By 'independently functioning' adults, I mean persons who are self-sufficient, productive members of society, who are able to navigate and participate in the familiar social and economic institutions of society. We would rightly consider a child unfairly deprived if he or she were denied the opportunity to receive an education. *Ibid*.

14 Ibid 292.

15 William Galston, for instance, argues that liberalism properly values diversity over autonomy and that the state should permit wide, though not unlimited, tolerance of parents who do not wish to lead autonomous lives nor want their children to lead autonomous lives. See 'Two Concepts of Liberalism' (1995) 105 *Ethics* 516.

16 Callan, above n 5. Someone might ask why children have an interest in being 'minimally autonomous' rather than just being autonomous. For some, minimal autonomy might be an attempt to compromise with those who do not believe in full-fledged autonomy. In this article, I use the term 'minimally autonomous' to indicate that a life of Socratic reflection and inquiry need not be the *summum bonum* for a successful or flourishing life. Yet some capacity to question the world and to develop one's rational abilities is still integral to an understanding of minimal autonomy.

17 Jean Vanier describes the value of belonging in these terms:

> Belonging is important for our growth to independence; even further, it is important for our growth to inner freedom and maturity. It is only through belonging that we can break out of the shell of individualism and self-centredness that both protects and isolates us.

See *Becoming Human* (1998) , 35. Reich's account of children's interests is a good description for why one might teach the liberal arts in high school. Yet, he offers no explanation as to why, for example, we should teach children mathematics or physics. One could argue that students simply have an interest in learning various subject matters that are potentially part of the established and evolving curriculum. Furthermore, one could posit that there is an equality-based argument for teaching children math and physics. This could be viewed as giving all children an equality of opportunity since some or many children might not otherwise learn these subjects on their own.

18 One might argue that teachers, at least in the public schools, are *State* agents and therefore do not constitute a separate class of actors. Yet, this argument fails in the context of private schools and even as far as public school teachers are concerned, their interests in children's education may not always be the same as the State's interest in children's education. Hence, it is best to represent teachers as a separate class of actors who shape curriculum choices in our schools.

19 According to this section:

> Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;

20 This section states:

> 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.

21 According to s. 2(b) of the *Charter*:

> Everyone has the following fundamental freedoms:

freedom of thought, belief, opinion and *expression*, including freedom of the press and other media of communication;

22 I recognize that, in certain circumstances, parents opposed to certain controversial materials might claim that their opposition has to do with their children becoming responsible adults rather than evil people influenced by witchcraft.

23 According to section 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.

24 Reich, above n 3, 295. Given our inclusion of teachers as a relevant actor who helps shape curriculum, Reich's reference to a 'triad of interest holders' should now be read to mean a 'quadruple of interest holders'.

25 Waldron, above n 4, 39.

26 Most notably, see Ronald Dworkin, *Taking Rights Seriously* (1977).

27 *he Morality of Freedom.* (1986), 166.

28 Waldron, above n 4, 204.

29 Ibid 206.

30 Ibid 207.

31 Ibid 219.

32 Ibid 221.

33 Ibid 217.

34 Here, Waldron draws on John Rawls idea of lexical ordering as set out in *A Theory of Justice* (1971). Rawls adopts the notion of lexical ordering in relation to the rights he establishes by his principles of justice. For him, rights of political liberty have lexical priority over rights of equal opportunity in the economic realm, and equal opportunity, in turn, has priority over the social and economic rights generated by the difference principle. Ibid 42-44, 243, 298.

35 Waldron does acknowledge that considerations of ordinary utility may at some point play a relevant role in a rights conflict situation. As he states:

> We surely think that *some* attention is due to considerations of ordinary utility, and while it is reasonable to postpone that until the most striking of the requirements generated by rights have been satisfied, it is not reasonable to postpone it forever while we satisfy duty after duty associated with rights. Maybe there is no limit on the social convenience that should be sacrificed for the sake of the prohibition on torture. But is there equally no limit on the convenience that should be sacrificed for the success of the Commission of Inquiry that has been set up to bring torturers to justice and ensure that torture is made marginally less likely in the future? Above n 4, 216.

36 Ibid 223-24.

37 Ibid 220.

38 Waldron's take on conflicts of rights is, of course, not universally accepted. For instance, see Samantha Besson, *The Morality of Conflict* (2005) and Andrei Marmor, 'On the Limits of Rights' (1997) 16 *Law and Philosophy* 1.

39 Above n 2.

40 Rosamund Elwin & Michele Paulse, *Asha's Mums* (1990). Leslea Newman, *Belinda's Bouquet* (1991). Johnny Valentine, *One Dad, Two Dads, Brown Dad, Blue Dads*. (1994).

41 Chamberlain was joined in his initial action by four other plaintiffs. These were: a parent, a student, an author and another teacher.

42 The courts chose not to entertain his constitutional arguments, deciding the case rather on the basis of administrative law principles.

43 L'Heureux-Dubé, Iacobucci, Major, Binnie and Arbour JJ. concurred. LeBel J wrote separate concurring reasons.

44 Justice Bastarache concurred with Justice Gonthier.

45 See R.S.B.C. 1996, c. 412.

46 Ibid.
47 Above, n 2, 21.
48 Ibid 22.
49 Ibid 23.
50 Ibid 25.
51 Ibid.
52 Normally, as McLachlin CJ. remarked, parental involvement in the selection of appropriate materials to be used in particular classes occurs after the board has approved the materials for general use in its schools. *Ibid* 32.
53 Ibid 29-30.
54 Ibid 33.
55 Ibid 64.
56 As she observed:

> [Children] 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. *Ibid* 65.

57 Ibid 66. The majority also rejected the Board's contention that the materials were age inappropriate. As it noted:

> 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. *Ibid* 67.

58 The Chief Justice gave short shrift to the idea that the books might generate difficult and embarrassing questions for parents:

> 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. *Ibid* 69.

59 Strictly speaking, one might argue that there is no need for the Chief Justice to consider the interests of the children in her analysis because she decides the case on administrative law principles. Nonetheless, the *Charter* values of equality and religious freedom provide the backdrop for her analysis and she does make a strong case for the teaching of tolerance in our schools. In this sense, the children's interest in some exposure to tolerance becomes relevant.
60 Ibid 102.
61 Ibid 104.
62 According to this section:

> Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

63 *B. (R.) v. Children's Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315.
64 Above n 2,106. In *R. v. Jones*, Justice Wilson of the Supreme Court of Canada likewise articulated the view that s. 7 includes the parental right to bring up and educate one's children in line with one's

conscientious belief. See [1986] 2 S.C.R. 284, 319-320. Furthermore, article 18(4) of the *International Covenant on Civil and Political Rights*, and to which Canada is a signatory, 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. See 999 U.N.T.S. 171(entered into force March 23, 1976).

65 In this situation, one might argue that the deference consideration related to the parental interest in the child's welfare stems from institutional factors rather than from a substantive decision about interests.

66 Ibid 108.

67 Ibid 103. Neglect and abuse are obvious examples where state intervention is justified.

68 Ibid 119.

69 Ibid 117.

70 Ibid 118. The minority went on to hold that the School Board's resolution was a reasonable one and that the concerns related to age appropriateness and parental disquiet were legitimate concerns. Moreover, it held that homosexuality is morally controversial and that the board had effective policies in place to address any instances of discrimination on the basis of sexual orientation. *Ibid* 153-186.

71 Ibid 20.

72 Reich, above n 3, 290.

73 Ibid.

74 Callan, above n 5, 114-5. At the same time, Callan recognizes that 'a moral theory of the family that says only the interests of children really count merely inverts the despotism of patriarchy' and that we should object to any theory 'that interprets the parent's role in ways that make individual parents no more than instruments of their children's good'. *Ibid* 144-5.

75 I am not suggesting here that children are 'moral equals'. One can assume that children do not have an equal claim to prevent their parents from moving to take up career opportunities if their parents have to move.

76 Callan, above n 5, 152.

77 Ibid 153.

78 *Ibid.*

79 *Ibid.* at 154.

80 Above, n 2, 19.

81 Ibid 21.

82 Ibid 19.

83 Hence, the title of his book *Becoming Human*. Above n 17.

84 Ibid 135.