Chapter Fifteen

Teaching Within the Law:

The Human Rights Context of Physical and Health Education

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Introduction

The diversity of students today carries the corollary of an ever-expanding envelope of human rights that must be respected and modelled in school. Physical, emotional, intellectual, and other exceptionalities must be accommodated according to most provincial education acts (Smith and Foster 2003–04). Failure to do so can evoke not only appeals under such legislation but also complaints to human rights commissions and even to courts under the *Canadian Charter of Rights and Freedoms*. Moreover, rules and practices, and even curricula, that are insensitive to ethnic and religious diversity not only provoke political strife within a school community but can also be the subject of human rights litigation claiming discrimination and a failure to accommodate. Similarly, issues relating to sexuality and sexual orientation are often catalysts for conflict in schools, sometimes in health education, and can lead to involvement by human rights tribunals and the courts.[1]

The Duty to Accommodate Students with Disabilities

The legal rights of students with disabilities in Canada have been the subject of many books and articles.[2] The general principles discussed

here, however, should help place in a legal context the other chapters in this book that deal with the educational and practical implications of diversity in the gym and the classroom. As stated above, provincial legislation typically provides for the accommodation of students with disabilities who are formally identified as such. It is not the case, though, that the law requires such accommodation necessarily to occur in a regular classroom setting. For example, although Ontario's special education policies promote an inclusive philosophy, the law contains no such requirement.

The leading Canadian case on inclusion rights for students with disabilities is *Eaton v. Brant County Board of Education* (1995, 1997). In this case, the parents of Emily Eaton, a twelve-year-old student with profound multiple disabilities caused by cerebral palsy, brought a complaint under the *Charter* against the Brant County Board of Education when it refused to keep Emily in an integrated classroom setting at her neighbourhood school. The Board, and ultimately the Special Education Tribunal to which the parents appealed, concluded that Emily's needs were best met in a segregated special education class at a different school. The parents applied for judicial review of the tribunal's decision, arguing a violation of Emily's equality rights under section 15(1) of the *Charter* which states:

> 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.

Although the Ontario Court of Appeal agreed with the parents (*Eaton* 1995) and "amended" the Ontario *Education Act* (1990) by inserting a constitutionally based presumption that exceptional students must be integrated into a regular classroom unless overridden by parental wishes, the Supreme Court of Canada (*Eaton* 1997) reversed this ruling. The Supreme Court held that, in every case, a decision whether to place a student in an integrated or segregated setting should not be based on a presumption that equality would be served only by inclusion but on the assessment of the student's bests interests under the particular circumstances. This decision gave considerable power to school personnel to determine placements based on the "best interest" principle.

Best interests are not always easy to determine, especially in the case of children whose disabilities preclude their ever achieving knowledge, skills, or abilities anywhere near those expected of their non-disabled classmates. In such cases, though, "best interests" should still include the student's *dignitary* interests and the refusal to revisit the days when children with disabilities were segregated or even kept out of sight simply because they were "different." The landmark equality rights decision of the Supreme Court of Canada, *Law v. Canada* (1999), established the general principle that discrimination occurs when differential treatment on a prohibited ground, such as disability, is based on stereotypical assumptions about a person's abilities or worth and does not afford the person the human dignity and equal care and concern to which he or she is entitled as a citizen of Canada.

The failure of teachers, schools, and boards to provide students with the means of access, equipment, resources, personnel, or modified teaching methods, learning or performance expectations and testing procedures necessary to accommodate their disabilities, can also result in claims under provincial human rights legislation that equal treatment in the provision of services or facilities is being denied.[3] Despite the fact that a student with a disability may be incapable of actually exercising the rights that he or she seeks, for example, by not being able to participate in a certain physical or sporting activity as staged, in general there is an obligation on the school to reasonably accommodate the student's disability up to the point of undue hardship, taking into consideration "cost, outside funding, if any, and health and safety requirements" (Ontario *Human Rights Code* 1990, section 17, which is typical of such provincial legislation). Hence, if an assistive device or human aide would help a student with a disability participate in an activity, the school would be obligated to provide either, considering the factors outlined above. Human rights boards of inquiry and courts have served notice that they put a very high price on human rights and will not accept financial excuses easily. On a broader scale, a school board's failure to have in place opportunities for athletes with disabilities to compete or participate in intramural or possibly even inter-school sporting activities, could amount to systemic or "constructive" discrimination.[4] If so, a duty to reasonably accommodate exists, qualified by the same criteria outlined above.

Accommodating Religious and Cultural Diversity

Freedom of religion is explicitly protected in Canada under section 2(a) of the *Charter*. It is also protected indirectly under equality rights provisions in the *Charter* (section 15) and in provincial human rights codes

that prohibit discrimination on the basis of religion, creed, and national and ethnic origin. Flashpoints for such issues exist where classroom, gymnasium, and playing-field activities clash with the religious or cultural norms of some students. For instance, certain sports may require protective gear that is incompatible with religious apparel worn by the members of certain faiths. The uniform usually worn in gym—shorts and tee shirts—may violate the principles of modesty adhered to by certain faith groups.[5] This collision of norms may be compounded where coeducational activities are involved. Moreover, a health curriculum that openly discusses sex outside of marriage, homosexuality, and bisexuality as normal expressions of one's sexuality, and that promotes respect and equal rights for gay, lesbian, and transgendered persons is almost guaranteed to be unacceptable to a number of students and their parents. This can pose a difficult problem, especially where such classes comprise a mandatory part of the program.

Proving how central religious freedom is to our democracy, the Supreme Court of Canada was called upon very early in the *Charter*'s history to interpret the meaning of "freedom of religion." In a unanimous ruling in *R. v. Big M Drug Mart* (1985) Justice Dickson stated:

> 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 belief by worship and practice or by teaching and dissemination.
>
> ...
>
> 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 [or her] beliefs or his [or her] conscience. (353, 354)

Freedom of religion includes, therefore, both the *positive* right to manifest religious belief or non-belief and the *negative* right to not be forced to conform to the beliefs of anyone else (Smith and Foster 2000–01, 25). Hence, subject to the limitations within Justice Dickson's definition, especially public safety and health, school activities and curriculum content could be considered to violate the *Charter* if they amounted to a restriction on the right to manifest religious belief or coercion to reject one's own religious principles or to accept those of another religion or secular philosophy. Certainly arguments might be mounted that safety issues are involved where protective headgear is not worn or other apparel is worn that poses a safety risk (depending on the actual circumstances); that general health concerns are implicated in a curriculum that discusses the need for safer sex; or that concern for the freedom of expression and association and equality rights of others is served by a curriculum that teaches respect and support for gay rights. The real question, however, is not whether to shut down such activities and curricula because they are inconsistent with some students' and parents' beliefs and practices, but rather how they can be accommodated within them. Options exist, from creative reassignment to other activities or single-sex venues, to the provision of exemptions for those who choose to opt out of some activities or classes for religious reasons.

Equality rights under the *Charter* are also implicated because the state must not treat individuals or groups differently on the basis of prohibited grounds such as religion, race, or ethnic or national origin in a way that denies them human dignity and the equal concern and respect they deserve as members of Canadian society (*Law v. Canada* 1999). Differential treatment is possible, of course, if it benefits individuals or groups and is seen that way by them.

The right to equality is also provided under human rights codes. The kinds of examples of cultural clashes we have been discussing—for example, physical education clothing requirements' inconsistency with the apparel of some minority faith groups—generally are considered "constructive discrimination." The rules and requirements are *not intended* to discriminate and appear not to implicate religion but do so in their *effect* on some individuals or groups. The rule requiring the wearing of shorts and t-shirts is facially neutral but it has a discriminatory impact on certain groups because of their religious values. The rule in question may not be discriminatory, however, if it is a reasonable and *bona fide* qualification. The law will not consider a rule to be a reasonable and *bona fide* qualification unless the school has made reasonable attempts to accommodate the needs of affected students up to the point of undue hardship, taking into account financial cost, the availability of funds, and health and safety considerations.

Difficulties arise when the limiting factors mentioned both by Justice Dickson in *R. v. Big M.* (1985) and within the qualifying words of the duty to accommodate in human rights codes, come into play. This has been especially the case with safety. Few cases exist in this area; the most instructive is *Pandori v. Peel Board of Education* (1990), where a Khalsa Sikh

student and teacher were forbidden to wear their kirpans at school.[6] A kirpan is a ceremonial dagger the Sikh religion requires all Sikh males to carry at all times. Like practically every school district in North America, the Peel board had a regulation forbidding the bringing of knives onto school property.[7] Because the rule was not aimed intentionally at Sikhs but rather at the general preservation of safety, it was viewed as a form of constructive discrimination. The mandatory nature of his religion's requirement led the student complainant to argue that the board's regulation denied him equal educational opportunity. After hearing lengthy testimony about the board's safety concerns, the nature of Sikhism and the significance of the kirpan—which has been transformed over the years from a weapon to a symbol of power, order, and dignity—and that the use of the dagger in anger as a weapon was punishable conduct that could lead to excommunication, the human rights board of inquiry ruled in favour of the complainants. The board of inquiry held that the school board had not shown any evidence of a kirpan's use as a weapon on school property anywhere in Canada or that it was an unacceptable safety risk amounting to undue hardship. This ruling was upheld on appeal to the courts.[8]

The kirpan cases are admittedly different from the kinds of situations we are discussing because they involved safety issues related to the threat of school violence. However, the fact that religious accommodation was judicially required in the face of such serious safety concerns suggests that a very heavy onus is faced by those who would attempt to rely on undue hardship as an exemption from the human rights requirement to accommodate religious diversity in the schools under *any* circumstances.

Clashes over curriculum content, such as those envisioned above regarding sex education, that pit religious and secular norms against one another, can pose serious concerns for schools. Not only do they raise thorny questions about the place of religion in general—let alone anyone's particular religion—in guiding educational policy, they also raise the prospect that everyone's educational experiences could be modified because of the dissonant views of one or more minority groups. It must be understood as a backdrop to the following discussion that in the public schools of most provinces (excluding Catholic schools in Ontario and elsewhere where they are publicly funded) religious instruction in a "confessional" or "devotional" sense has been eliminated from the curriculum. For example, in Ontario, it is widely accepted that the Court of Appeal's rulings in *Zylberberg v. Sudbury Board of Education* (1988)—regarding religious opening exercises—and *C.C.L.A. v. Ontario* (1990)— regarding indoctrinating

religious instruction—have judicially rendered schools secular institutions (Dickinson and Dolmage 1996). So the curriculum-content cases that concern us in the present context are not in the nature of complaints about the schools' teaching of Christian beliefs and practices to the exclusion of other believers and non-believers, but rather the contrary: complaints that the "secular humanist" curriculum attempts to inculcate values that are inconsistent with those of many different faith groups, including conservative Christians.

In British Columbia, a school board reacted to complaints raised by religious ratepayers by banning the use of primary school learning resources that depicted stories of children with same-sex parents. In this case, the British Columbia Supreme Court quashed the board's resolution banning the books on the grounds that the board was significantly influenced by religious considerations in violation of a section of the British Columbia *Education Act* (1996). The Court of Appeal reversed this finding and the case ended up at the Supreme Court of Canada, which allowed the appeal (*Chamberlain v. Surrey School District No. 36* 2002). The Supreme Court held that the board was required to act in a way that promoted respect and tolerance for all the diverse groups that it represented. Its actions had been wrongly based on an exclusionary philosophy because of the concerns of certain parents about the morality of same-sex relationships and had ignored the interests of same-sex families and their right to receive equal respect and concern in the education system. Also crucial was the curricular goal that all children should be able to discuss openly their family models and should be taught about the diverse models of family relationships in Canadian society. The main lesson learned from the Surrey decision is that the Supreme Court determined that a school board should not permit religious objection to trump the central goals of the provincial curriculum, presumably so long as those central goals complied with *Charter* principles of equality.

It is certainly in everyone's best interest to avoid reaching the point where issues such as those discussed above require determination by human rights boards of inquiry or the courts. The best solution probably lies in the negotiation of a sensible political arrangement with the involved students and parents, so long as fundamental goals and values—such as safety, respect and tolerance—and core curricular requirements are not compromised.

A *Respectful and Harassment-Free Learning Environment*

Physical and health education classes, especially in sex education, are probably more conducive than most others to behaviour and comments with sexual content or overtones. Physical contact is more likely and comments concerning sexuality are expected. They are teaching venues, therefore, in which considerable care must be exercised to ensure that students' rights are respected and an appropriate learning environment is maintained.

One of the most basic human rights afforded students under Canadian law is the right to a learning environment free from discrimination. In *Ross v. New Brunswick School Board District No. 15* (1996) the Supreme Court of Canada held that a teacher's anti-Semitic writings outside of class so poisoned the learning environment in school for Jewish students that a human rights board of inquiry was correct in ordering the school board to remove him from the classroom. Although the Court acknowledged that such a ruling violated the teacher's freedom of expression, the removal order constituted a reasonable and justifiable limit on his rights because his behaviour conflicted so fundamentally with the education system's mission to teach and model *Charter* values, including equality. Moreover, Jewish students could hardly be expected to have faith in the teacher's ability to treat them fairly. Similarly, in *Kempling v. British Columbia College of Teachers* (2004, 2005), a teacher was disciplined by the B.C. College of Teachers for publicly condemning homosexuality and gay rights. The teacher's conduct ran contrary to the core values of the education system and justified discipline. The offensive conduct and its potential harm were compounded by the fact that the teacher was also a counsellor and the College found it reasonable to infer that gay students would be reluctant to go to him for counselling. Hence his ability to carry out his role and public faith in the system he represented were compromised. The College's imposition of a one-month suspension of the teacher's certificate of qualification was upheld by both the B.C. Supreme Court and Court of Appeal.

Conduct that constitutes sexual harassment violates not only *Charter* values but also provincial human rights legislation, school board policies, and professional norms established by virtually every college of teachers or teacher's federation in the country. Some forms of harassment, involving threats, stalking, harassing phone calls or sexual assault, also constitute criminal offences under the *Criminal Code* (1990).[9] Although there can be subtle differences among definitions of sexual harassment, in general

it is conduct—including words—of a sexual nature or based on gender stereotyping or hatred that is unwelcome or that the person doing the acts or making the comments ought reasonably to know is unwelcome. The Canadian Association for the Advancement of Women and Sport and Physical Activity (1994) elaborates on the concept of sexual harassment:

> Sexual harassment can be defined as unwelcome sexual advances, requests for favours, or other verbal or physical conduct of a sexual nature when:
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> - submitting to or rejecting this conduct is used as the basis for making decisions which affect the individual; or
> - such conduct has the purpose or effect of interfering with an individual's performance; or
> - such conduct creates an intimidating, hostile, or offensive environment.

Types of behaviour that constitute harassment include but are not limited to:

- written or verbal abuse or threats;
- the display of visual material which is offensive or which one ought to know is offensive;
- unwelcome remarks, jokes, comments, innuendo, or taunting about a person's looks, body attire...gender, or sexual orientation;
- leering or other suggestive or obscene gestures;
- condescending, paternalistic, or patronizing behaviour which undermines self-esteem, diminishes performance, or adversely affects working conditions;
- practical jokes which cause awkwardness or embarrassment, endanger a person's safety, or negatively affect performance;
- unwanted physical contact including touching, petting, pinching, or kissing;
- unwelcome sexual flirtations, advances, requests, or invitations; or
- physical or sexual assault. (8–9)

Similar kinds of behaviour that target persons because of their sexual orientation can also constitute harassment (*Jubran v. Board of Trustees* 2002).[10] Although harassment implies repeated conduct, human rights boards of in-

quiry have decided that a single act, if serious enough, can constitute harassment.

It is the duty of teachers not only to refrain from comments and behaviours that are discriminatory or harassing and that poison the learning environment, but as persons in positions of authority they are also expected to ensure that the students they supervise do not act that way. A teacher's failure to curb sexual discrimination or harassment or homophobic behaviour by students, thereby abetting the creation of a poisoned environment, amounts to a separate violation of human rights legislation, and no doubt professional rules of conduct and school board policies.

Sensitive to both the responsibility and vulnerability of coaches and athletic instructors concerning sexual harassment, the National Association for Sport and Physical Education (NASPE) offers the following advice aimed at providing not only a safe and harassment-free environment for students/athletes, but also protection for teachers and coaches against allegations of harassment or abuse.

- Use discretion when alone with an athlete, and when coaching students, try to have another coach or supervisor present.
- Don't touch an athlete outside of necessary touch [*sic*] to teach a skill.
- Don't drive alone with an athlete.
- Stay in separate sleeping quarters when travelling for athletic events.
- Educate your athletes about sexual harassment and encourage them to talk to you if anyone makes them uncomfortable.
- Document any behaviour by students directed toward you which is sexual in nature. Include witnesses, how you dealt with the situation, and who [*sic*] you talked to about the situation.
- Tell your athletic director or school principal about any accusations.
- Educate students/players about what sexual harassment is, providing quality examples, and about who the...person is that they should contact in such case [*sic*]. (National Association for Sport and Physical Education 2000, 3)[11]

Teachers of the sexuality components of health education can also face possible legal implications related to their disclosure of not only their personal views about sexuality but also their own sexual orientations. Teachers who discuss their own sexuality, or go beyond the normal bounds

of teaching and enter the realm of counselling students about personal—especially sexual—problems, run the risk of having their motivation misinterpreted. In light of the all-too-frequent reports of sexual abuse of students, teachers are well advised to steer away from classroom discussions that disclose personal, especially sexual, information, and from engaging in counselling students about their sexual and personal problems, unless of course they are trained and hired for that purpose. In an advisory released in 2002 concerning sexual misconduct, the Ontario College of Teachers offered its members the following wise counsel:

> Using good judgment
> Members understand that students depend on teachers to interpret what is right and wrong. This judgment can be difficult when certain acts seem innocent, but may be considered later as a prelude to sexual abuse or sexual misconduct. (Ontario College of Teachers 2002, in Allison and Mangan 2004, 246)

Members are advised by the College to consider the extent to which their actions and words might be interpreted as an attempt "to promote or facilitate an inappropriate relationship with a student" (ibid.). In particular, they should avoid exchanging personal notes, comments, or emails with students, involving themselves in students' personal affairs, and sharing personal information about themselves (ibid.). Regardless that a teacher's real motive in discussing his or her own sexuality or in counselling and befriending a student might have been in that student's best emotional and educational interests, the unfortunate teacher will find that once a complaint is lodged, perhaps years later, "reality" is what is reconstructed through the recollections and perceptions of the complainant and other witnesses. Thus it is important to avoid behaviour that is consistent with the reconstruction of an evil motive.

But what if a personal disclosure by a teacher is related to curricular objectives and overall human rights values, and is potentially protected freedom of expression? Such a scenario can arise regarding a teacher's decision to disclose his or her own sexual orientation. MacDougall (1998) is harshly critical of the judiciary's failure to protect homosexual expression and visibility in education.[12] He argues in favour of the right of teachers to identify their sexual orientation as part of a general need for increased expression in schools regarding homosexuality:

> Schools...need expression regarding homosexuality reflected in the teaching and materials used. They also need these materi-

> als to be presented by comfortably-homosexual-identified teachers, students and staff. The presence of positive expression about homosexuality will help counter the overwhelming negativity that is associated with the prevailing speech regarding homosexuality, for the most part, name calling on the playground, in locker rooms, and in school board meetings. (80–81)

It seems the only Canadian case that has dealt with the issue of a teacher's legal right to disclose her sexual orientation to her students is *Assiniboine South Teachers' Assn. of the Manitoba Teachers' Society v. Assiniboine South School Division No.* 3 (1997, 2000). In that case the school board turned down the grade 7 and 8 teacher's request to disclose to her students that she was lesbian. Although the case raised important *Charter* issues of freedom of expression and equality rights, unfortunately the Arbitration Board decided that the issue was really a question of management rights and therefore that it had no jurisdiction to hear the grievance, so the merits were never considered in the arbitration award given by the majority of the board. The board's decision was upheld by the Manitoba Court of Appeal. It is worth noting that the dissenting member of the Arbitration Board—although it is probably fair to assume that she was the grievor's nominee—would have upheld the grievance on the basis that the employer's actions were discriminatory and unjustified by any legitimate interest.

Given the Supreme Court's stance toward gay rights in a series of recent cases, it is reasonable to conclude that the denial of a right to disclose one's sexual identity could well be viewed as a violation of equality rights and that the onus then would fall to the board to show that its limitation on such disclosure was reasonable and justified. Though there appears to be no Canadian case directly on point, such a disclosure might even be protected expression under section 2(b) of the *Charter* in the nature of "academic freedom." Based on United States constitutional jurisprudence, Clarke (1998–99) argues that teachers might well enjoy freedom of expression in the classroom so long as it complies with the "legitimate pedagogical concerns" principle, which the American courts have found to be composed of several critical concerns: the "'fair and objective presentation of materials'"; the "'appropriateness of the materials'"; the "'general control of the curriculum'"; and, whether there is "'material and substantial disruption'" (356–357). In his view, such criteria would play an important role in determining whether an interference with freedom of expression was reasonable and justified under the test for applying section 1 of the *Charter*.[13]

It is significant that a teacher's disclosure of his or her sexual orientation becomes a relevant ethical and legal point of contention only when the teacher is gay or lesbian. Disclosure of one's heterosexuality generally is ethically and legally unremarkable, thus setting up a classic double standard. Moreover, a teacher's heterosexuality routinely is implicitly disclosed and validated in a school's culture through the sharing of family photographs, wedding announcements, bridal and baby showers and so on.

In summary, it seems unlikely that disclosure of sexual orientation alone would provide grounds for any disciplinary action, unless done for improper motives unconnected to the curriculum, and unless followed up by conduct that breached the boundaries of teacher-student relationships governing all teachers' conduct, as discussed above.

Conclusion

Over the past forty years human rights have become increasingly prominent in Canadian society. Part of the explanation for this lies in the growing diversity of the population and resulting demands that cultural, linguistic, religious, and gender differences be recognized and respected. The enactment of provincial human rights codes beginning in the 1960s, and especially the arrival of the federal *Canadian Charter of Rights and Freedoms* in 1982, helped create a "group rights" consciousness that forms a strong part of the Canadian identity.

The impact of human rights has been felt in schools as elsewhere. This chapter has discussed several human rights implications affecting physical and health education teachers. Although human rights issues concern all teachers, some have particular application for physical and health education. Some students reject the clothing requirements normally associated with certain physical education activities because of their impact on the norms of decency adhered to by the students' religions or cultures. Human rights laws forbid the unequal treatment of persons based on their religion, creed, or ethnicity and require that they be reasonably accommodated, including at school, up to the point of "undue hardship." Creative solutions are required to accommodate diversity while, at the same time, ensuring that important curricular objectives and safety concerns are met.

Heightened awareness of human rights has also resulted in the increasing inclusion of students with special needs within regular classroom settings. Students with disabilities are protected against discrimination on

the basis of their disabilities under both human rights codes and section 15 of the *Charter*. Although the general expectation is that students' disabilities must be accommodated, the Supreme Court of Canada has held that "the best interests of the child" principle is the paramount concern, displacing any presumed legal requirement that children with disabilities must always be placed in a regular classroom setting or treated precisely as their school mates without disabilities. Indeed, equal educational opportunity may sometimes require that children with disabilities be treated differently from their classmates. Physical educators, assisted by technology, have creatively derived ways of ensuring that the educational and safety needs of students with disabilities are met, while enhancing their human dignity—the core of true equality—through their meaningful inclusion in physical education and sporting activities. This is the essence of the legal obligation to accommodate.

Health educators face particular human rights challenges related to the curriculum they are mandated to teach. The contents of curriculum units on family life and sexuality are sometimes offensive to students and their families because of the dissonance between the implicit, if not explicit, moral stances in the curriculum and the students' and families' religious beliefs. Teachers can find themselves dealt a seemingly impossible task—mediating a collision between the beliefs of a particular religious group and the general secular values of equality, tolerance, and respect found in the *Charter*, which the Supreme Court of Canada has said form the core values of the education system. The dissonant views of some cannot be allowed to call the educational tune for all and, sometimes, where freedom of religion is truly at stake, the only answer may be an exemption from attending the classes or studying the material found to be offensive.

Lastly, educators play an important role in fostering human rights and equal educational opportunity by ensuring that the educational environment is not poisoned by harassment based on gender or sexual orientation. Physical and health education classes sometimes provide fertile ground for harassment, given the politics of competition and athleticism, the apparel and physical actions associated with gym class and athletics, and the sexual nature of some of the content in the health education curriculum. Teachers have a professional and legal obligation not only to refrain from actions and words that comprise sexual harassment but also to deal effectively with such conduct by their students.

Physical and health education teachers and coaches are often more vulnerable to accusations of improper touching or personal relationships

with students by virtue of the physical skills they teach, the subjects they discuss, and the opportunities for mistaken perceptions by students and others. It is important that physical education and health teachers and coaches heed suggestions, like those provided in this chapter, for safeguarding themselves against false allegations of sexual harassment or abuse.

Human rights are a fundamental part of Canadian democracy and belong to us all. They should not be viewed as posing problems, but rather as offering solutions and opportunities. Accommodation of diversity leads to richer, more inclusive educational experiences for the broadest possible array of students. Although safety and individual students' best interests must always be borne in mind, administrative inconvenience and financial costs are poor excuses for denying students respect for their fundamental human dignity.

Conclusion to Chapters Fourteen and Fifteen

I shall end where I began: by exhorting you to "teach within the law." There are considerable legal incentives for doing so, including avoiding liability for damages for negligence, and professional and employment discipline for human rights complaints. But even more compelling is the thought, rightly held, that teaching within the law is the best way to ensure a safe, welcoming, and productive learning environment—something that ought to be the mission of all educators.

By no means have these two chapters provided an exhaustive look at all areas of the law that may be implicated in the day-to-day lives of teachers of physical and health education. Moreover, law is a dynamic social force. It is constantly changing, we hope for the better. My final words, then, are to urge you, as part of your professional development, to remain up-to-date about your legal responsibilities. You owe it to yourselves, but, most of all, you owe it to your students.

Notes

1. I must emphasize, however, that the comments I make below regarding accommodation of religious diversity and sexual orientation appertain mostly to non-Roman Catholic public schools. At the risk of over-generalization, Catholic schools and private schools usually are able to avail themselves of constitutionally entrenched denominational educational rights (in the case of Catholic schools in some provinces), and *bona fide* and reasonable qualification provisions in provincial human rights codes (in the case of both types of schools),

in order to exempt themselves from the legal obligation to treat people equally. However, in claiming such exemption the onus is on Catholic and private schools to show that the particular reason they excluded or preferred a person on what otherwise would be a prohibited ground—sexual orientation, for example—was truly a matter of denominational rights or a *bona fide* qualification based on the nature of their organization. This is a complicated area of human rights law that cannot and need not be explored any further in a chapter of this scope. Readers wishing to do so, however, should see Smith and Foster (1999–2000; 2000–01a; 2000–01b).

2. For a detailed discussion of such rights see, e.g., Williams and Macmillan (1999–2000; 2002–03). For a comprehensive explanation of the legal issues involved in Ontario's special education system, see Bowlby et al. (2001).
3. See, e.g., Ontario's *Human Rights Code* (1990), section 1.
4. Constructive discrimination occurs where a facially neutral requirement, rule, or other factor has the effect of excluding a person on the basis of a prohibited ground. So, although an intramural sports league probably would not have a rule barring students with disabilities, the nature of the sport itself and its general rules of play may have that very effect.
5. See, e.g., Yazdani (2004).
6. For a detailed discussion of this case, see Brown and Zuker (2002), 224–249.
7. Indeed, possession of a "weapon" is grounds for mandatory expulsion under Ontario's safe schools reforms enacted in 2000: see *Education Act* (1990), section 309.
8. A similar ruling occurred in Alberta in *Tuli v. St. Albert (Protestant Board of Education)* (1985), but different conclusions were reached in Manitoba in *Hothi v. R.* (1985) (regarding the wearing of a kirpan in a courtroom) and in Quebec in *Quebec (Commission scolaire Marguerite-Bourgeois v. Multani* (2004). For a critical comment on the *Multani* decision, see Smith (2004).
9. See sections 151 (sexual interference), 152 (invitation to sexual touching), 153 (sexual exploitation), 153.1 (sexual exploitation of a person with a disability), 271 (sexual assault), 264 (criminal harassment), and 372(3) (harassing telephone calls).
10. In this case, however, the decision of the human rights tribunal was overturned based on the court's view that there had been no harassment on the basis of sexual orientation because the boy subjected to homophobic comments was in fact heterosexual: *North Vancouver School District No. 44 v. Jubran* (2003). I have criticized this decision (see Dickinson 2003–04) and it has been reversed on appeal: *North Vancouver School District No. 44 v. Jubram* (2005).
11. The Women's Sports Foundation offers a coach's self-assessment for determining whether one is crossing the line with an athlete. Though aimed at coaches, the questions and analysis also apply broadly to others, including teachers who work closely with vulnerable populations and for whom crossing boundaries is a critical concern. Available at: www.womenssportsfoundation.org/cgi-bin/iowa/issues/coach/article.html?record=27
12. MacDougall's criticism is based largely on the Alberta Court of Appeal's ruling in *Vriend v. Alberta* (1996) upholding a religion-based college's termination of a gay teacher for failure to comply with its rules prohibiting homosexuality. However, the Supreme Court of Canada reversed the ruling, implying sexual orientation as a prohibited ground of discrimination in the Alberta *Individual's Rights Protection Act* (1980): *Vriend v. Alberta* (1998).
13. The "*Oakes* test" involves asking: (1) Is the governmental purpose in limiting the right in question sufficiently important, disclosing a pressing and substantial concern? (2) Is there a rational connection between the purpose and the law or rule that seeks to achieve it? (3) Is there a proper proportionality between the importance of the governmental purpose and the seriousness of the rights violation—could the purpose be achieved by a means that violated rights less? See *R. v. Oakes* (1986).

References

Statutes

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being ScheduleB of the *Constitution Act, 1982* (U.K.), c. 11.
Education Act (Ontario), R.S.O. 1990, c. E.2.
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