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**BANNING BOOKS, BURNING BRIDGES:
RECOGNIZING STUDENT FREEDOM
OF EXPRESSION RIGHTS IN CANADIAN
CLASSROOMS**

DEVON PEAVOY[†]

ABSTRACT

In Canada, books and magazines are regularly intercepted at the border and are consistently removed from libraries, schools and bookstores. The banning of books is a controversial topic that involves issues of censorship and freedom of expression rights. The Supreme Court of Canada recently examined the issue in Chamberlain v. Surrey School District No. 36, where it was found that the School Board acted unreasonably in banning several books depicting same sex couples. The Court, however, did not consider the freedom of expression rights of students in reaching their decision. Despite this recent opportunity to comment on a student's right to information, Canadian jurisprudence remains silent on the issue of student freedom of expression rights in the banning of books from schools. Using Chamberlain as a backdrop, this paper will argue that a liberal interpretation of student's freedom of expression rights by the courts would provide much needed guidance for educators in making curriculum selections. The recognition of such rights would place the interests of the students first in pedagogical decision-making, enhance democratic functions within schools, and encourage a rights discourse to shape the classroom environment.

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I. INTRODUCTION

From Homer in 387 B.C. to Harry Potter in 2002, book banning is a perennial reality throughout the world. In Canada alone, books and magazines are regularly intercepted at the border and are consistently removed from libraries, schools and bookstores. These actions, however, occur amidst a great deal of controversy. The issue of book banning is particularly divisive among both proponents and opponents of censorship, and as the recent Supreme Court of Canada case *Chamberlain v. Surrey School District No. 36*¹ illustrates, the classroom is one forum currently embroiled in battles over the censorship of ideas.

In *Chamberlain*, the Surrey School Board censored three books because they depicted same-sex families. As with all incidents of censorship, the Board's decision raised questions concerning freedom of expression rights in Canadian classrooms.² What is not clear, however, is whose freedom of expression rights were at issue. While a teacher's right to freedom of expression has been the subject of healthy debate,³ the freedom of expression rights of students within the educational system have remained virtually unexplored in Canadian legal jurisprudence. The Supreme Court's treatment of the *Chamberlain* case did not deal with freedom of expression issues; however, it is this author's view that the case illustrates the need for Canadian courts to do so. Books are frequently banned in schools, and while the Court in *Chamberlain* found that the actions of the Surrey School Board were unreasonable, the holding was case-specific and did not amount to a condemnation of book banning in general. Moreover, while the *Chamberlain* decision acknowledged the fundamental importance of the values and practices of all members of the school population, it did not specifically address the rights, if any, a student holds in the educational decision-making process. Using *Chamberlain* as a backdrop, this paper will argue that a liberal interpretation of student's freedom of expression rights by the courts would provide much needed guidance for educators in making

¹[2002] S.C.J. No. 87 (QL) [*Chamberlain*].

² See *Canadian Charter of Rights and Freedoms*, s. 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

³ See *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 [*Ross*]; *R v. Keegstra*, [1990] 3 S.C.R. 697.

curriculum selections. Specifically, the recognition of students' freedom of expression rights will put their interests front and centre in pedagogical decision-making, enhance democratic functions within schools, and encourage a rights discourse to shape the classroom environment.

Part I of this paper will outline how and why censorship occurs in schools followed by a brief summary of the *Chamberlain* case and the resultant rights issues raised. Part II considers the general freedom of expression jurisprudence in Canada, along with American case law on free speech in schools, to explore the possible scope of a student's expression rights, including the right to access information. Finally, in Part III, the author will posit her view on why a student's freedom of expression rights should be given a broad interpretation and how these rights can aid in the curriculum selection process.

II: HOW AND WHY CENSORSHIP OCCURS

Censorship has been defined as "the removal, suppression or restricted circulation of literary, artistic or educational materials-of images, ideas and information on the grounds that these are morally or otherwise objectionable."⁴ The reasons to be concerned with censorship are varied but as one author suggests:

The basis of democracy is that people are able to make choices about issues which affect their lives, including what they wish to see, read, hear or discuss. While this may seem a somewhat luxurious distinction, preoccupying perhaps only wealthy western democracies, it is a comparatively short distance between censoring free expression and the silencing of political dissidents whose views are incompatible with those of the prevailing government. The distance between such silencing and the use of violence to suppress a political philosophy which a government finds inconvenient is even shorter. Censorship tends to have small beginnings and to grow rapidly.⁵

⁴ Henry Reichman, *Censorship & Selection: Issues and Answers for Schools*, 3rd ed. (Chicago: American Library Association, 2001) at 2.

⁵ Frances D'Souza, "A World Without Censorship? The Mission and Achievements of Article 19," (1995) 6 *Logos* at para 12, online: [Logos <http://www.osi.hu/cpd/logos/Aworldwithout-censorship.html>](http://www.osi.hu/cpd/logos/Aworldwithout-censorship.html).

While the above comments may represent the most dramatic concerns related to censorship, the point is clear. Censorship, or rather, the lack thereof, is intertwined with our notions of a free and democratic society.

There are three significant ways in which censors in an educational context can attack a book or other materials.⁶ The impugned material can be subject to a challenge, either through public criticism or through written or oral complaint by a parent or community member. It also can be subject to state censorship through government policy, school board resolution, or through the decision of a school official. A book can also be censored through the individual acts of a teacher, who determines that a certain book may be inappropriate or subject to criticism, and neither assigns the book nor reads it aloud in class. Theft of individual copies of books from school libraries is another, more subtle way, that book censorship can occur. If a book or other material is challenged, there are several possible outcomes. School officials can ignore the complaint, they can limit the book to library usage with or without restrictions (*e.g.* needing parental permission before borrowing a certain book), they can provide students whose parents object to use of certain materials with alternative assignments, or they can ban the book altogether. Since school boards, school officials, and teachers are all in positions where they must choose which materials will be available and/or taught in classrooms, they necessarily walk a fine line between legitimate curriculum selection and censorship. When their decisions are influenced by parental concerns, this delicate balancing between selection and censorship becomes even more complex.

While it is true that Canadian schools usually resist demands from parental and community groups,⁷ they are still surprisingly susceptible to both book challenges and outright bans. In the United States, where incidents of censorship in schools are more frequent, the American Library Association (ALA) reported 472 challenges in 1999.⁸ While this

⁶ June Calwood, "When the Censor Comes," online: Freedom to Read <<http://www.freedom-toread.ca/censor/censor03.htm>>.

⁷ Reichman, *supra* note 4 at 3 (On the whole there are far more challenges to books than there are actual removals and/or restrictions on them).

⁸ Diane Weaver Dunne, "Look Out Harry Potter! Book Banning Heats Up," (2000), Education World, at para 10, online: <Education-World.com/a-admin/admin157>. See also American Library Association online: <<http://www.ala.org/bbooks/challeng.html#mfc>>.

is down from 762 challenges in 1995, the ALA is concerned that there is a higher incidence of self-censorship that goes unreported. Schools account for seventy-one percent of these reported challenges.⁹ In addition, it is estimated that half of the books that are challenged in the U.S. are either temporarily banned or removed permanently.¹⁰

The motivations behind demanding the removal of books are varied, but generally can be classified into four categories. Books are challenged by those who wish to promote “traditional family values” in schools, by those who disagree with the political message a book sends, by those who feel the material conflicts with their religious beliefs, and finally by those advocating minority rights.¹¹ These concerns are generally linked to the protection and appropriate education of children.

Over the years, the predominant reasons behind book censorship have shifted. In the 1980s, a book was more likely to be challenged by reason of its explicit language and sexual content. Currently, books are more likely to be challenged because of their depiction of witchcraft, magic, alternative families, or in the interests of political appropriateness and minority protection. Mark Twain’s *The Adventures of Huckleberry Finn* provides an example of such a shift. *The Adventures of Huckleberry Finn* has experienced decades of censorship in North America, the earliest being in 1885 when it was banned from a Massachusetts public library. The book was deemed to be “trash suitable only for the slums”¹² because of the dialect spoken by the central characters. After becoming a classic, however, it was challenged for different reasons. As early as 1957 the National Association for Advancement of Colored People protested the book’s racist aspects, and the book has continued to be challenged well into the 1990s. Opponents claim that it is damaging to the self-esteem of young African-American children, who are too young to read the word “nigger,” and even because the book doesn’t reject slavery outright.¹³

⁹ This includes both classrooms and school libraries.

¹⁰ Sharon Cromwell, “Banning Books from the Classroom: How to Handle Cries for Censorship” (2001) Education World at para 4, online: <Education-world.com/a_curr/curr031>. See also Linda Chion-Kenney, *Censorship: Managing the Controversy*, (Alexandria, VA: National School Boards Association, 1989).

¹¹ Reichman, *supra* note 4 at 18.

¹² Dawn B. Sova, *Banned Books: Literature Suppressed on Social Grounds*, (New York: Facts on File, 1998) at 3.

¹³ *Ibid.* at 4.

In Canada, the grounds on which books are challenged are as varied as the themes of the books themselves. Although it appears that more books are challenged in the interest of minority protection, there are occasions of book banning that represent all of the motivations previously mentioned. For example, Margaret Laurence's *The Diviners* was repeatedly challenged between 1976 and 1994, and at times has even been removed from high school curriculums across the country, on the grounds that it contains inappropriate sexual content and explicit language.¹⁴ Other books by Laurence have also been challenged or banned on these grounds. In 1988, William Golding's *Lord of the Flies* was recommended for removal by the Toronto Board of Education when the black community complained that the book's depiction of boys dressed up like savages was racist.¹⁵ In 1991, the Saint John, N.B. black community group Pride of Race, Unity & Dignity through Education (PRUDE) demanded the removal of *The Adventures of Huckleberry Finn* and Harper Lee's *To Kill a Mockingbird* on the grounds that the books were racist and promoted racial stereotyping.¹⁶ In 1993, *To Kill a Mockingbird* was removed from schools in the Hamilton, Ontario area, and in May 2002, a principal in a Halifax, N.S. school was advised to remove *In the Heat of the Night*, *Underground to Canada*, and *To Kill a Mockingbird* because of the use of the word "nigger."¹⁷

Children's books have also been subject to widespread challenges and bans. In 1992, *Indian in the Cupboard*, by Lynne Reid Banks, was temporarily removed from schools in Kamloops, B.C. because of complaints over the book's portrayal of Native peoples.¹⁸ Though the book was eventually reinstated, it remained on a list that indicated to teachers that it had previously been challenged. The *Impressions* series, a set of books used for reading in public schools across North America, has

¹⁴ Schools Case Study, "Harry Potter meets...The Dread Book Banners," online: Freedom to Read <www.freedomtoread.ca/kits/2001/pdf/kit2001/pdf>. See also *Chronicle of Freedom of Expression in Canada*, online: <<http://insight.mcmaster.ca/org/efc/pages/chronicle>>.

¹⁵ Sova, *supra* note 12 at 177.

¹⁶ Schools Case Study, *supra* note 14.

¹⁷ Brian Bauld, "Don't Kill the Mockingbird" *The Halifax Herald* (9 May 2002), online: <<http://www.mrbauld.com/mockbb.html>>.

¹⁸ Schools Case Study, *supra* note 14 (*Indian in the Cupboard* has won many awards including the 1982 New York Time Best Children's Novel. It was also selected as a Distinguished Book of 1981 by the Association of Children's Librarians. See online: <http://www.unioldenburg.de/~filmfest/films/indian_in_the_cupboard>).

been challenged for its use of “violent images” and “satanic verses” in Alberta, Manitoba and Ontario.¹⁹ Between 1990 and 1992, the *Impressions* series represented the most challenged book in the U.S.A.²⁰ Recently J.K. Rowling’s *Harry Potter* series has been subject to much of the same criticism. Protesters across the continent fear that the books promote witchcraft and worship of the occult. In the United States the series was collectively the most challenged book in 1999 and 2001, and for the years 1990–2000 it ranked seventh on the list of most frequently challenged books in the U.S.²¹ In 2000, a Durham, Ontario school board banned the series from classrooms after receiving twenty phone calls and ten letters from a Christian fundamentalist community demanding the series’ removal. After much public debate, the book ban was rescinded.²² In 1992, the International Woodworkers of America called for the removal a book entitled *Maxine’s Tree* by Diane Leger from the Sechelt, B.C. school district libraries, because they believed the book indoctrinated children with anti-logging and conservationist values.²³ While the grounds upon which books are challenged are varied, the parties challenging books in schools are equally diverse. It is important to recognize, however, that these examples represent a mere cross-selection of book challenges and book banning incidents across Canada. It is a persistent, frequent, and endemic concern for educators and for those concerned with the status of the education system. Moreover, it is a phenomenon relatively free from rights based examination. *Chamberlain* marks the first and only time that a censorship issue in a Canadian classroom has been decided by the courts.

¹⁹*Impressions* edited by Jack Booth *et al.* is a language arts series for grades 1–6, published in 1984 and used as an educational tool throughout North America. See *Brown v. Woodland Joint Unified School Dist.* 27 F.3d 1373 (9th Cir. 1994) (the Court ruled that the school’s use of the *Impressions* series for activities which asked children to discuss witches or create poetic chants did not violate the “no preference clause” of the California Constitution; challenged selections from the teaching aid were not created or incorporated into the curriculum for the purpose of preferring or advancing witchcraft).

²⁰American Library Association, *supra* note 8.

²¹American Library Association, *supra* note 8, online: <<http://www.ala.org/bbooks/top100bannedbooks.html>> (out of 6,364 challenges reported to or recorded by the Office for Intellectual Freedom, as compiled by the Office for Intellectual Freedom, American Library Association. See Background Information: 1990–2000 under The Most Frequently Challenged Books of 2000. Research suggests that for each challenge reported there are as many as four or five which go unreported).

²²Schools Case Study, *supra* note 14.

²³Schools Case Study, *supra* note 14.

1. *Chamberlain v. Surrey School District No. 36*

In 1996, James Chamberlain, a kindergarten teacher, took three books to the school board to be approved as educational resource material for the Kindergarten-Grade One (K-1) level in the Surrey School District. If approved, the three books would then be generally available to all K-1 classrooms in the district, although their actual use would depend upon the discretion of individual teachers. The three books were entitled *Asha's Mums*;²⁴ *Belinda's Bouquet*;²⁵ and *One Dad, Two Dads, Brown Dad, Blue Dads*.²⁶ Each of the books included representations of same-sex families. In April, 1997 the School Board passed a resolution not to approve the three books as learning resources for classroom use, primarily because they were concerned about the religious views of many of the families that attended the school. Mr. Chamberlain challenged the resolution on the grounds that the board had acted outside of their mandate under the *School Act*²⁷ and that the resolution violated the *Canadian Charter of Rights and Freedoms*.²⁸

At the B.C. Supreme Court, many parents and community members filed affidavits in support of the School Board's resolutions. Their concerns were as follows: the books raised issues of sexual behaviour, advocated a "homosexual lifestyle," and introduced confusing issues to children to young to learn about sexuality.²⁹ Some opposed the books on moral grounds, and some simply didn't want the subject broached in school. Additionally, some parents felt that the use of the books negated their right to teach their children according to their own religious beliefs, and there were others who felt that where values taught at school conflicted with those taught at home, young children would be confused. Some authors refer to this concern as fear of "cultural relativism"—the fear that exposing children to diverse perspectives will teach them that

²⁴ Rosamund Edwin & Michele Paulse, *Asha's Mums*, (N.p.: Women's Press 1990).

²⁵ Leslea Newman, *Belinda's Bouquet*, (N.p. 1991).

²⁶ Johnny Valentine, *One Dad, Two Dads, Brown Dad, Blue Dads*, (N.p.: Alyson Wonderland 1994).

²⁷ R.S.B.C. 1996, c. 412, s. 76.

²⁸ *Supra* note 2 at ss. 2(a), 2(b), 15.

²⁹ *Chamberlain v. Surrey School District No. 36* (1998), 168 D.L.R. (4th) 222 (B.C.S.C.) at 247-48 [*Chamberlain BCSC*].

there is no such thing as truth, resulting in a “spiritual wasteland.”³⁰ Religious leaders also expressed concern that the books depicted homosexuality in a positive light, contrary to the Biblical doctrine that forms the basis of their beliefs.³¹

Mr. Chamberlain, while claiming the book ban violated the *School Act*, also claimed that it violated parent’s, teacher’s and student’s 2(a) freedom of religion, 2(b) freedom of expression, and section 15 equality rights under the *Charter*. Section 15 rights were implicated because the ban “effectively denies the validity of same-sex couples as legitimate family groupings in society.”³² Section 2(a) rights were at issue as demonstrated by the views above, however, the religious freedom of those who supported the use of the books was also potentially infringed, as the book ban forced all those involved to conform to a particular religious view.³³ Section 2(b) freedom of expression rights were implicated by the repression of certain books based upon their content or subject matter.³⁴ Specifically, the denial of the books resulted in constraints on expression manifest in two ways. First, teachers and students were not permitted to discuss certain family configurations. Second, the ban resulted in a denial of access to information about certain types of family models.³⁵

The majority of the Supreme Court was able to dispose of the case using the *School Act*, and thus did not touch upon the *Charter* issues. Though he was speaking in dissent, Justice Gonthier did articulate that “this case engages the section 15, section 2(a) and section 2(b) rights of both the appellants (Chamberlain) and the parents who expressed their views to the School Board.”³⁶ Notably absent, however, was any mention of the *Charter* rights of the students in Mr. Chamberlain’s class.

³⁰ Sherry H. Swindler, “Why the Expert Testimony of Teachers Should be Considered in Book Banning” (1993) 6 U. Fla. J.L. & Pub. Pol’y. 99 at 119.

³¹ *Chamberlain BCSC*, *supra* note 29 at 248.

³² Shaheen Shariff, Roland Case & Michael Manley-Casimer, “Balancing Competing Rights in Education—The Surrey School Board’s Book Ban” (2002) 10 Educ & L.J. 47 at 71.

³³ *R v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 346-47 (Chief Justice Dickson observed that freedom of religion protects equally freedom of belief and freedom of non-belief) [*Big M*].

³⁴ *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 [*Irwin Toy*].

³⁵ Shariff, Case & Manley-Casimer, *supra* note 32 at 103.

³⁶ *Chamberlain*, *supra* note 3 at para. 126.

At the B.C. Supreme Court, the School Board resolution was overturned on the grounds that the decision violated the requirement under the *School Act* that schools conduct themselves in a secular manner.³⁷ At the Court of Appeal, the School Board's decision was restored. At the Supreme Court of Canada, a 7-2 majority allowed the appeal. The majority held that the School Board's decision violated the requirements of secularism and non-discrimination under the *School Act*.³⁸ Further, they held that the Board had proceeded on an "exclusionary basis" by acting out of concern for one view in the community and ignoring the interests of same-sex families. The School Board had made their decision based upon whether or not the books were "necessary" to the curriculum, rather than basing it upon the three books' relevance.³⁹ The School Board was ordered to make a decision based upon more appropriate considerations.

The majority specifically found that the curriculum for K-1 level required that a broad array of family models be taught and that a secular school cannot exclude lawful family models on the grounds that some people morally object to those models.⁴⁰ The meaning of "secularism" in the *School Act* required that schools recognize the diverse multi-cultural reality in B.C. and teach values of tolerance and respect for all families.⁴¹ However, the majority also recognized the essential role that parents play in directing the education of their children and did not preclude the possibility that religious and/or moral view points in the community can have a role in shaping educational policy.⁴²

While the decision resulted in a victory for James Chamberlain and those who supported the use of the books, and for the most part recognized the interests at stake (*e.g.* equality rights for different types of families, the rights of parents to be involved in educational decision-making, and the rights of those with religious views to have their views be heard), what is missing from the decision is a discussion of the rights, if any, that students possess in the battle over what is taught in the classroom. Specifically, can and should a student's freedom of expression

³⁷ *Chamberlain BCSC*, *supra* note 29 at 222.

³⁸ *Chamberlain*, *supra* note 3 at para. 18.

³⁹ *Chamberlain*, *supra* note 3 at para. 63.

⁴⁰ *Chamberlain*, *supra* note 3 at para. 20.

⁴¹ *Chamberlain*, *supra* note 3 at para. 21.

⁴² *Chamberlain*, *supra* note 3 at para. 19 & 30.

right influence educational policies regarding what materials are used? The decision also gives no clear direction (aside from the ambiguous outer limits of relevance) regarding when or if a book can be legitimately banned. Further still, the decision is lacking in guidance on how exactly religion can influence educational policy without violating 15 or 2(a) of the *Charter*, or how competing parental views can be accommodated within the curriculum. It is this author's view that recognizing and defining a student's right to freedom of expression can and should play a significant role in the balancing of these competing interests. Moreover, allowing for the freedom of expression rights of students is a vital component of the education process. Part II of this paper will explore the possible nature and scope of a student's freedom of expression rights.

PART III: THE NATURE AND SCOPE OF SECTION 2(B) RIGHTS

Section 32 of the *Charter* indicates that it applies to actions of the government. In order for the School Board's resolution to be subject to *Charter* scrutiny, it must first be determined whether or not the School Board is government, or a government actor.⁴³ While the Court has never ruled on this explicitly, it is generally assumed that schools and school boards constitute government; hence, the *Charter* applies to their actions.⁴⁴

Section 2(b) of the *Charter* states that:

Everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.⁴⁵

In *Edmonton Journal v. Alberta (A.G.)*⁴⁶, Cory J. stated the importance of freedom of expression rights to Canadian society:

It is difficult to imagine a guaranteed right more important to a democratic society. Indeed a democracy cannot exist without the freedom to express new ideas and to put forward opinions about the

⁴³ See *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

⁴⁴ See *R v. M.R.M.*, [1998] 3 S.C.R. 393 at 410 [*M.R.M.*]

⁴⁵ *Charter*, *supra* note 2 at s. 2(b).

⁴⁶ [1989] 2 S.C.R. 1326.

functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions.⁴⁷

In *Irwin Toy*, the majority said that freedom of expression is “fundamental because in a free and pluralistic and democratic society we prize diversity of ideas and opinions for their inherent value both to communities and to the individual.”⁴⁸ Freedom of expression is particularly significant among the fundamental freedoms guaranteed in the *Charter* because it allows for the meaningful exercise of all other freedoms. Walter Tarnopolsky has said:

Where freedom of expression exists, the beginning of a free society and a means for every extension of liberty are already present. Free expression is therefore unique among liberties: it promotes and protects all the rest.⁴⁹

In other words, freedom of expression is “the matrix, the indispensable condition of nearly every other form of freedom.”⁵⁰ In *Irwin Toy*, the majority articulated the purposes underlying 2(b) protection:

(1) Seeking and attaining truth is an inherently good activity; (2) participation in social and political decision making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning but also for those to who it is conveyed.⁵¹

Finally, in *R. v. Zundel*, the Court noted that the purpose of freedom of expression “extends to the protection of minority beliefs which the majority regards as wrong or false.”⁵² So as the Supreme Court of Canada

⁴⁷ *Ibid.* at 1336.

⁴⁸ *Supra* note 34 at 968.

⁴⁹ Walter Tarnopolsky *et al.*, eds., *Newspapers and the Law*, vol. 3 (Ottawa: Research Publications of the Royal Commission on Newspapers, 1981) at 7.

⁵⁰ *Palko v. Connecticut*, 302 U.S. 319 (1937) at 327 (Justice Cardozo’s words were quoted in *Irwin Toy* at 968).

⁵¹ *Supra* note 34 at 976.

⁵² [1992] 2 S.C.R. 731 at 752-3.

has said on more than one occasion, in light of its importance, the scope of freedom of expression must be very broad.⁵³

In *Irwin Toy*, the Court laid out a two-part analysis for determining whether 2(b) has been infringed. First, one must determine whether or not the activity at issue falls within the scope of 2(b), specifically, whether the activity is a form of expression. There can be little doubt that a book and/or the reading of a book are forms of expression. The second part of the analysis involves a determination of whether or not the purpose or effect of the state action in question was to restrict freedom of expression. When the purpose of the state action is to restrict the conveyance of a particular meaning, then there will be an infringement of freedom of expression. In the *Chamberlain* case, the School Board was attempting to restrict content-specific materials (books with same-sex family portrayals), hence 2(b) would be violated. However, if the purpose of a state action is not aimed at content per se, the effect of the action can still violate a person's expression rights if he or she can prove that an activity promotes at least one of the above principles outlined in *Irwin Toy*, and that the state action interferes with that pursuit.

The Supreme Court has further determined that expression rights on public property require particular consideration. Public schools are undoubtedly public property; hence, any freedom of expression right in schools will be subject to this factor. In *Comité pour la république du Canada v. Canada*, the Court split on the section 2(b) analysis with respect to public property.⁵⁴ Justice Lamer's view advocated that:

If the expression takes a form that contravenes or is inconsistent with the function of the place where the attempt to communicate is made, such a form of expression must be considered to fall outside the sphere of s. 2(b).⁵⁵

Chief Justice McLachlin suggested a broader view towards expression on public property; to determine whether or not an activity on public property falls within the sphere of 2(b), the test should be based upon:

⁵³ See *Irwin Toy*, *supra* note 34 at 970.

⁵⁴ [1991] 1 S.C.R. 139 [*Comité*].

⁵⁵ *Ibid.* at 157.

The values and interests at stake and should not be confined to characteristics of particular types of government property. Reflecting the concepts traditionally associated with free expression (*i.e.* the purposes outlined in *Irwin Toy*) it should extend constitutional protection to expression on some but not all government property.⁵⁶

Justice L'Heureux-Dubé argued that given the importance of expression on public property, restrictions could only be justified under section 1 of the *Charter*. While the courts have yet to determine which approach to follow, each could have particular implications for the public school context. However, it does seem counterintuitive to conclude that even under Justice Lamer's narrow view, exposure to certain family models through reading a book aloud would interfere with the function of a public school classroom. This idea will be expanded upon shortly.

As with all other fundamental freedoms under the *Charter*, section 2(b) is subject to section 1, which provides that limits on freedom of expression will be valid only if they can be demonstrably justified in a free and democratic society.⁵⁷ In the educational sphere, the onus will be on school authorities to justify any limits they place on student rights and freedoms. Using the approach outlined in *R v. Oakes*, the objective behind the limitation would have to be "pressing and substantial."⁵⁸ School authorities would then have to demonstrate that the method used to infringe the right was rationally connected to the objective underlying the limitation, and that the limitation was as minimally impairing as possible. Finally, school authorities would have to demonstrate the proportionality between the deleterious and salutary effects of the limitation.

While this has the potential to be an additional limitation on expression rights, it is conceivable that section 1 could also be a useful tool for students and those setting school policies, as it requires school officials to clearly articulate the justification for rules that may have the effect of limiting student's rights.⁵⁹ Furthermore, as *Big M* suggests, any limits on freedom of expression must be sufficiently important and "necessary to protect public safety, order, health, or morals, or the fundamental rights

⁵⁶ *Ibid.* at 236-7.

⁵⁷ See *R. v. Oakes*, [1986] 1 S.C.R. 103.

⁵⁸ *Ibid.* at para. 73.

⁵⁹ Ailsa M. Watkinson, *Education, Student Rights and the Charter*, (Saskatoon: Purich, 1999) at 44.

and freedom of others.”⁶⁰ Therefore, limitations on one’s expression rights would have to meet a fairly high threshold of justification.

In summary, while 2(b) freedom of expression rights have a broad scope, they are inherently limited on public property, and externally limited by section 1. No doubt, both of these limits will affect the scope of a student’s right to freedom of expression in schools. Since the courts have yet to provide specific guidance on how a student’s expression rights might be influenced by these limitations, the American experience may prove instructive.

1. Students’ Rights in Schools

In the United States, the general starting point in a discussion on student rights is the landmark case *Tinker v. Des Moines Independent Community School District*.⁶¹ In this case, a group of students came to school wearing black armbands in protest of the Vietnam War. The school suspended them, but the students applied for an injunction restraining the school from pursuing disciplinary action. The case eventually reached the U.S. Supreme Court, where the majority opinion noted that neither teachers nor students “shed their Constitutional rights at the school house gate.”⁶² Specifically, *Tinker* held that students have substantive expression rights in school. In order for the school to justify any prohibition of expression, it would have to demonstrate that:

Its action was caused by something more than a mere desire to avoid discomfort and unpleasantness that always accompanies an unpopular viewpoint. Certainly, where there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirement of appropriate discipline in the operation of the school, the prohibition cannot be sustained.⁶³

In Canada, the *Charter* applies to all Canadian citizens, and as *Lutes v. Board of Education of Prairie View School Division No. 74* demon-

⁶⁰ *Supra* note 33 at 337.

⁶¹ 393 U.S. 503 (1969) [*Tinker*].

⁶² *Ibid.* at 506.

⁶³ *Ibid.*

strates, students do have freedom of expression rights.⁶⁴ In *Lutes*, the applicant sought an injunction restraining the school from disciplining him for singing a rap song called “Let’s Talk About Sex” by the group “Salt ‘N’ Pepa.” Justice Barclay held that the grade nine student was disciplined primarily for singing a banned song and that this violated his freedom of expression as guaranteed by the *Charter*.⁶⁵ But while students ostensibly have *Charter* rights, these rights are potentially limited in ways that the rights of other citizens are not. In *M.R.M.*, a case that dealt with the constitutionality of a search performed by a school official, the Supreme Court of Canada examined the extent to which students have the right to privacy while on school property.⁶⁶ While the Court recognized that “schools have a duty to foster the respect of their students for the constitutional rights of all members of society”⁶⁷ and that “these values are best taught by example and may be undermined if the student’s rights are ignored by those in authority,”⁶⁸ the Court also found that a lower expectation of privacy was justified in the interests of ensuring the safety of all students, to prevent violation of school rules, and to promote an orderly environment.⁶⁹ While this decision was contextual in that it related to concerns over drug use on school property, it is possible that the principle of reduced rights for students could be transferable if it is felt that reducing such rights will promote safety, obedience or orderliness in schools.

American jurisprudence supports this concern. In *Hazelwood School District v. Kuhlmeier*, a school principal removed two articles from a student newspaper.⁷⁰ Students filed a suit claiming that this violated their First Amendment right to free speech. The Supreme Court held that the principal was acting reasonably and that as long as his actions were related to “reasonable pedagogical concerns,”⁷¹ there was no

⁶⁴ (1992), 101 Sask. R. 232 (Q.B.) [*Lutes*].

⁶⁵ *Ibid.* at 239.

⁶⁶ *M.R.M.*, *supra* note 44.

⁶⁷ *M.R.M.*, *supra* note 44 at 401.

⁶⁸ *M.R.M.*, *supra* note 44 at 402.

⁶⁹ *M.R.M.*, *supra* note 44 at 414.

⁷⁰ 484 US 260 (1988) [*Hazelwood*].

⁷¹ *Ibid.* at 261 (“A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school”).

First Amendment violation. This is a much narrower allowance for student expression than *Tinker's* test of limiting expression only where it "materially or substantially interferes" with the operation of the school. Schools were found to have a right to exercise greater control over freedom of expression when seeking to protect students from materials that may be inappropriate for their level of maturity.⁷² This approach was followed in *Virgil v. School Board of Columbia County*, where a ban on a high school text book which contained selections from Aristophanes' Greek comedy *Lysistrata* and Geoffrey Chaucer's *The Millers Tale* was upheld.⁷³ The books' use of "explicit sexuality" and "excessively vulgar language" were held to be legitimate pedagogical concerns. In *Bethel School District No. 403 v. Fraser*, the Supreme Court held that the protection of the rights of other students was sufficiently important to warrant a restriction on the expression rights of a high school student giving a sexually suggestive speech.⁷⁴ Moreover, the Court held that a student's right of expression would not necessarily be given the same latitude as those of an adult.⁷⁵ These cases provide further justifications for limiting a student's right to freedom of expression which, if followed in Canada, could prevent a variety of materials (including the *Chamberlain* books) from being taught in classrooms.

As Wayne Mackay argues, one crucial aspect of freedom of expression is control over access to school curricular material.⁷⁶ The right to access information, or rather the "right to read," is a corollary right to any freedom of expression and has been upheld by the Supreme Court of Canada on more than one occasion. Without the right to access expressive material, any right to express oneself would be rendered meaningless. In *Ford v. Quebec (A.G.)* the Court held that freedom of expression extends to listeners as well as speakers.⁷⁷ More recently, in *Little Sisters Book and Art Emporium v. Canada*, Justice Binnie held that "the constitution protects the right to receive expressive material as much as

⁷² Shariff, Case & Manley-Casimer, *supra* note 32 at 95.

⁷³ 862 F.2d 1517 (11th Cir. 1989).

⁷⁴ 478 U.S. 675.

⁷⁵ *Ibid.* at 683.

⁷⁶ Wayne Mackay, "The Canadian Charter of Rights and Freedoms: A Springboard to Student Rights" (1984) 4 Windsor Y.B. Access Just. 174 at 220.

⁷⁷ [1988] 2 S.C.R. 712.

it does the right to create it.”⁷⁸ Although this case involved the censoring of sexually explicit materials at the border, the principle is equally applicable to other contexts where expression rights are implicated. A student’s right to access books will no doubt be interpreted as a precondition to any right of expression. The American jurisprudence supports this viewpoint, with some qualifications.

The leading case in the United States concerning a student’s right to access information is *Board of Education, Island Trees Union Free Sch. No. 26 v. Pico*.⁷⁹ In this case, the School Board sought the removal of nine books from the school library because they were “anti-American, anti-Christian, anti-Semitic, and just plain filthy.”⁸⁰ The Supreme Court, in a 5-4 decision, held that the right to receive ideas was a “necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press and political freedom.”⁸¹ In other words, to exercise rights to expression in any meaningful way requires the right to access ideas – in this case, the right to access ideas through reading. If the School Board’s decision was based upon the intent to deny access to certain ideas with which they disagreed, then the decision was unconstitutional. While schools are entrusted with the duty to teach community values they must also encourage autonomy of thought. As the majority judgment further held:

Just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members. Of course all First Amendment rights accorded to students must be construed in light of the special characteristics of the school environment.⁸²

⁷⁸ [2000] 2 S.C.R. 1120.

⁷⁹ 102 S.Ct. 2799 (U.S. 1982). [*Island Trees*] (The nine books at issue were *Slaughter House Five*, by Kurt Vonnegut; *The Naked Ape*, by Desmond Morris; *Down these Mean Streets*, by Piri Thomas; *Best Short Stories of Negro Writers*, edited by Langston Hughes; *Go Ask Alice*, anonymous; *Black Boy*, by Richard Wright; *Laughing Boy*, by Oliver LaFarge; *A Hero Ain’t Nothin But a Sandwich*, by Alice Childress; and *Soul on Ice*, by Eldridge Cleaver).

⁸⁰ Sova, *supra* note 12 at 44.

⁸¹ *Island Trees*, *supra* note 79 at 2808.

⁸² *Island Trees*, *supra* note 79 at 2808.

While the “right to read” was considered integral to any meaningful expression rights, the modification of First Amendment rights in light of the special characteristics of the school environment is a particularly significant consideration when considering the possible limits upon a student’s freedom of expression rights. An earlier U.S. case points to a few of these characteristics. In *Zykan v. Warsaw (Indiana) Community School Corporation*, a high school student filed a claim seeking to reverse a school’s decision to remove certain books and subjects from the curriculum.⁸³ The U.S. Court of Appeals for the Seventh Circuit ruled that schools have the discretion to establish the curriculum, but they were prohibited from imposing a “pall of orthodoxy”⁸⁴ on the classroom. Students would have the right to complain but they would have to meet a very high threshold before a constitutional violation would be found. *Zykan* further suggested that the “right to know” might be limited by a student’s level of intellectual development.

In the classroom setting, the “right to know,” similar to any “right to express,” is vulnerable because of its limited practicability. Students can’t say whatever they want, and it is impossible for educators to teach everything; hence, where would the line be drawn? Furthermore, the availability of information elsewhere (in *Chamberlain* the books were always available for use in the library) complicates the scope of the right to access information. A significant mitigating factor in upholding the ban in *Virgil*, for example, was the fact that while banned from the classroom, the book remained available to students in the library.

In summary, not only are there limitations on general rights of freedom of expression, if American jurisprudence is any guide, it also seems likely that the courts will be willing to adopt further restrictions on any student’s right to the same. While students no doubt have freedom of expression rights and it obvious that a school cannot make decisions regarding curriculum based solely on one particular view, given the school’s interest in maintaining order and discipline, it seems clear that any expression that is deemed incompatible with these purposes will be restricted. In light of section 1 of the *Charter* and the Court’s recognition that expression on public property is different from expression elsewhere, it is probable that while student freedom of expression rights ex-

⁸³ 631 F.2d 1300 (7th Cir. 1980) [*Zykan*].

⁸⁴ *Ibid.*

ist, they will be balanced against a myriad of other interests. Moreover, Justice Lamer's approach in *Comité* is compatible with the approach taken by the court in *Hazelwood*.

Schools can limit expression if it is reasonable to do so in relation to their academic purpose. Although the judiciary did not engage in a discussion about expression rights, the decision in *Chamberlain* also supports this view. The three books were deemed pedagogically related to the curriculum requirements for K-1 classes. Hence, it was unreasonable for the School Board to refuse their approval. However, if the books had not been related to the reasonable educational needs of the curriculum, it is possible that the result in *Chamberlain* might have been different. The term "reasonable educational needs," however, is exceedingly vague and it is not clear where the line will be drawn between relevant and irrelevant resource materials.

While different contextually, *M.R.M.*'s stated interest in the protection of others as a justification for limiting student rights is compatible with the reasons outlined in *Bethel* for a limitation on student speech. Although perhaps not explicitly stated, *M.R.M.* clearly implies that students do not have the same rights as adults. Moreover, as *Chamberlain* suggests, any student rights to expression and/or right to access information will be balanced against the interests of parents and the interests of those with religious beliefs. While students can challenge these decisions, the threshold for proving a violation of student rights may be high.

Any time a book is banned from a classroom, a student's freedom of expression right is threatened. Nevertheless, there is obviously a fine line between censorship and legitimate discretion in selecting materials. Henry Reichman argues that the difference between censorship and selection lies in the fact that:

The censor seeks reasons to exclude materials while those engulfed in the process of selection look for ways to include the widest possible variety of textbooks, library materials and curricular supplements....⁸⁵

⁸⁵ Reichman, *supra* note 4 at 7.

While the selector takes into account a variety of concerns, the censor's judgment "is that of the individual."⁸⁶ This is not to say that objections to certain materials in the classroom aren't important. Indeed as Reichman articulates:

Objections made by parents and others to school classroom and library materials must be seen as an important and valuable part of the democratic and educational process. Although many, if not most, challenges to such materials do amount to little more than censorship attempts—and should therefore be rejected—the challenge process itself is a legitimate and very important avenue for communication.⁸⁷

If *bona fide* curriculum selection does not necessarily infringe expression rights, and if the input of parents and community members is still a valuable part of the process, why are students' freedom of expression rights still important to recognize and define? It is this author's view that the recognition of a broadly defined freedom of expression right for children can provide an additional tool for educators when grappling with difficult curriculum choices.

IV: THE BENEFITS OF RECOGNIZING A STUDENT'S FREEDOM OF EXPRESSION INTEREST

1. Freedom of Expression Rights Further the Purpose of the Educational System

As previously discussed, freedom of expression, specifically the exchange of ideas, is of fundamental importance to a democratic and pluralistic culture. One of the primary purposes of education is the inculcation of values necessary for participation in society. As the Supreme Court of Canada has previously acknowledged:

A school is a communication center for a whole range of values and aspirations of a society. In large part, it defines the values that transcend society through the educational medium. The school is

⁸⁶ Reichman, *supra* note 4 at 7.

⁸⁷ Reichman, *supra* note 4 at 7.

an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate.⁸⁸

Promoting a student's right to freedom of expression enhances the democratic function of the education system. It encourages students to explore many different points of view, both good and bad, and allows a rights discourse to permeate the classroom. If the goal of education is to provide the very foundation for good citizenship,⁸⁹ then receiving treatment consistent with the values that the education system seeks to instill is vital to the maintenance of a democratic society.⁹⁰ Children can learn as much from a teacher's actions as they do from the actual course material. As McKay posits quite succinctly:

Children learn what they live, and if we wish to prepare them to exercise democratic rights and freedoms in adulthood, they should experience such rights in the schools. By so doing, they can learn by example and experience what it is to have rights and obligations. They also can learn to respect and treat others fairly, because they can perceive that they themselves receive respect and fairness from the people that guide them in their day to day surroundings. Students can also learn that rights have limits and must be balanced against the rights of others.⁹¹

Consequently, if a teacher is permitted to remove material without contemplating a child's expression interest, the child will learn that ignoring the rights of others is permissible, thus undermining the principles of tolerance and diversity that are the foundation of a democratic system. This is something that the courts have previously admonished.⁹²

Allowing for recognition and discussion on a student's freedom of expression rights would, additionally, counteract the 'chilling effect' that occurs when books are removed from classrooms.⁹³ As discussed, teachers may self-censor materials that may or may not be objection-

⁸⁸ *Ross, supra* note 3 at 856.

⁸⁹ *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955).

⁹⁰ A. Wayne McKay & Kimberly Lewis, "Teaching citizenship by example: Student's Rights in the School Context" (N.p.).

⁹¹ *Ibid.*

⁹² See *M.R.M., supra* note 44.

⁹³ Joan DelFattore, *What Johnny Shouldn't Read: Textbook Censorship in America*, (New Haven: Yale University Press, 1992) at 108.

ble. This is particularly problematic since the extent to which it occurs is difficult to account for. If a teacher is faced with the dilemma of whether or not he should present potentially controversial material and does not wish to face an ordeal similar to Mr. Chamberlain's, it is likely that he will quietly reject the impugned materials. In a more discreet way, the opportunity for students to explore a wide range of ideas is lost and the potential for creating a more informed, and hence more tolerant, society is undermined. When certain ideas are prohibited from dissemination, it supports the view that those ideas are unacceptable, and it also denies children the opportunity to develop skills necessary for participation in a democratic society:⁹⁴

To be able to participate in an active, conscious way with other people in a democratic decision-making process, children must be able to comprehend that others may have different points of view, different feelings, and different reactions than their own.⁹⁵

If a teacher is aware of the need to consider a child's freedom of expression rights, he or she may be more willing to use materials that represent a wide variety of perspectives. This in turn may decrease the perceived threat of self-censorship in schools.

2. Freedom of Expression Rights Prevent Indoctrination

While it is possible that the lack of litigation in Canada regarding book banning in schools indicates a greater tolerance toward state limitations,⁹⁶ in the United States one of the pervading philosophies fueling censorship litigation in schools is the anti-indoctrination theory. Many individuals view the education system itself as a threat to freedom of thought. As one author posits:

In the public school context, agents of government play a far more dominating and censoring role in the thought development process

⁹⁴ Shariff, Case & Manley-Casimer, *supra* note 32 at 81. See also *Pratt v. Independent School District No. 831*, 670 F. 2d. 771 (8th Cir. 1982).

⁹⁵ Natalie Hevener Kaufman & Malfrid Grude Flekkay, "Participation Rights of the Child"(1998) 18 *Child. Legal Rts. J.* 15 at 19.

⁹⁶ McKay, *supra* note 76 at 215.

than government is permitted to play within the broader confines of a democratic society.⁹⁷

If the American public education system produces citizens whose minds have been consciously molded in a particular manner, the exercise of free expression by those citizens cannot really be free in any meaningful sense.⁹⁸

Since education is compulsory and students are in some ways a “captive audience” of the state, they are more susceptible to being told what to think.⁹⁹ Freedom of expression rights, including the freedom to access a wide variety of ideas, would counteract this process of indoctrination and promote independent thinking. In order to prepare students for participation in the democratic political process, they must learn that there are a wide range of viewpoints and that not all people agree. As Karen Daly argues:

The right to hear dissenting voices is necessary to counteract the generally orthodox nature of compulsory education, and will support a model of tolerance and participation in a pluralist democracy.¹⁰⁰

3. Freedom of Expression Rights as a Tool for Negotiating Between Competing Interests

Freedom of expression, as previously discussed, is a right that allows for the meaningful exercise of all other freedoms. It is not a shared value; it is borne of a disability to agree.¹⁰¹ In light of this origin, freedom of expression should be able to play a vital role in reconciling competing interests within the education system. As Michael Manely-Casimer suggests, conflict in the school system usually revolves around which values are taught, hence the law can be an “authoritative means for the inter-

⁹⁷ Martin H. Redish & Kevin Finnerty, “What Did You Learn in School Today? Free Speech, Values Inculcation and the Democratic-Educational Paradox” (2002) 88 Cornell L. Rev. 62 at 64.

⁹⁸ *Ibid.* at 67.

⁹⁹ Robert Gordon, “Freedom of Expression & Values Inculcation in the Public Schools Curriculum” (1984) 13 J.L. & Educ. 523 at 535.

¹⁰⁰ Karen Daly, “Balancing Act: Teacher’s Classroom Speech and the First Amendment” (2000) 30 J.L. & Educ. 1 at 30.

¹⁰¹ Joseph Heath, “Citizenship Education & Diversity” (2002) 42 Education Canada 3.

pretation of values” and the *Charter* can be a “fundamentally important vehicle for adjudicating competing claims.”¹⁰² In a book banning case, there are usually many competing interests at stake. In *Chamberlain*, for example, the interests of parents, students and the state were implicated. As McKay argues, and as the *Chamberlain* case demonstrates, where there is conflict between parental interests and the interests of the school authorities, a student’s interests can get lost in the shuffle.¹⁰³ The recognition of student’s expression rights can militate against other competing interests by putting student rights in the forefront. As McKay further suggests:

Total parental dominance, where the child’s legal status or personality is subsumed completely within that of the parent, no longer seems commensurate with many of the values of the Charter. The interests of parents and their children do not always coincide, and the Charter offers some potential for direct access to justice for the young, as well as providing a model for practice of both autonomy and fairness.¹⁰⁴

If there is a presumption that students have more access to ideas, or that their expression rights are paramount in the context of book banning, it will require competing interest groups to meet a higher threshold of proof as to why a particular material should be removed from a classroom. Any decision to remove materials based upon competing interests would necessarily be balanced against a student’s right to access the information. Further, the implementation of a “rights discourse” resulting from the recognition of student expression rights will encourage discussion of “legal rights” in classrooms. For example, schools can teach messages of tolerance (*e.g.* that being gay is legally permissible without teaching that it is morally okay). This distinction would be less intrusive to those with particular religious convictions. Similarly, freedom of expression rights may require that students have access to a wide variety of religious viewpoints. This is consistent with the *Elgin County* case, which suggested that teaching about religion and fostering moral values without indoctrination into a particular faction would not

¹⁰² Michael E. Manley-Casimer & Pat Pitsula, “The Charter, Culture and the Public School” (1988-89) 1 *Educ. & L.J.* 37 at 41-42.

¹⁰³ McKay, *supra* note 76 at 185.

¹⁰⁴ McKay & Lewis, *supra* note 90.

be a breach of the *Charter*.¹⁰⁵ In essence, recognizing the freedom of expression interest of children would mean that they were exposed to more ideas, not fewer. Finally, the recognition of freedom of expression rights for students would provide school authorities with the use of section 1 of the *Charter* as a decision-making tool. Section 1 allows for the “reconciling of individual and community rights”¹⁰⁶ and as such could be a valuable tool for educators in balancing the effects of a book ban on the interests of each of the parties involved. As one author suggests, “[s]ection one allows [a] contextual approach...it goes beyond a strict technical analysis to a careful consideration of whether school policy promotes or unduly impedes a democratic society.”¹⁰⁷

4. The Importance of Freedom of Expression to the Individual

The recognition of a student’s freedom of expression right serves another more personal function within the education system. Not all instances of censorship in schools carry the weight of other potential *Charter* violations, as was the case in *Chamberlain*. Sometimes, a book is banned for other reasons. In 1995, a group of parents in Halifax, N.S. demanded the removal of R.L. Stine’s *Goosebumps* and *Fear Street* series because the books depicted excessive violence and illustrated a lack of respect for parental authority.¹⁰⁸ In 2000, John Steinbach’s *Of Mice and Men* was attacked by the Reform Party in Winnipeg because of the book’s use of profanity.¹⁰⁹ In 1991, Judy Blume’s *Blubber* was challenged because it contained no moral message and because the “bully” in the novel was never punished.¹¹⁰ While those advocating for these removals were interested in protecting children from harm, exposure to new ideas promotes independent thinking for the sake of the individual’s own personal growth and fulfillment:

¹⁰⁵ *Re Corporation of the Canadian Civil Liberties Association et. al v. Ont. Minister of Education* (1990), 65 D.L.R. (4th) 1 at 4 (Ont. C.A.).

¹⁰⁶ Lorraine Eisenstat Weinrib, “The Supreme Court of Canada and Section One of the Charter” (1988) 10 Sup. Ct. L. Rev. 469 at 438.

¹⁰⁷ Watkinson, *supra* note 59 at 55.

¹⁰⁸ Schools Case Study, *supra* note 16.

¹⁰⁹ *Ibid.*

¹¹⁰ Sova, *supra* note 14 at 53.

Encountering new ideas that may be foreign, frightening, infuriating or repulsive and forming opinions about those ideas distinct from those of one's family or community is part of the learning process that occurs by reading books.¹¹¹

When students are restricted from accessing certain ideas and themes that don't fall within a protected sphere under the *Charter*, or under the requirements of education legislation, they are denied access to ideas that may be vital to their own self-realization. Moreover, the motivations for the protection of children illustrated in *M.R.M.*, while still relevant in terms of school safety, may have no place in matters of curriculum selection and freedom of expression, as it restricts a child's self-fulfillment. While dissenting at the justification stage of a 2(b) violation in *Irwin Toy*, Justice McIntyre's insights are still relevant:

Freedom of expression is too important to be lightly cast aside or limited. It is ironic that most attempts to limit freedom of expression and hence freedom of knowledge and information is justified on the basis that the limit is for the benefit of those whose rights will be limited. It was this proposition that motivated the early church in restricting access to information, even to prohibiting the promulgation and reading of the scriptures in a language understood by the people. The argument that freedom of expression was dangerous was used to oppose and restrict public education in earlier times. The education of women was greatly retarded on the basis that wider knowledge would only make them dissatisfied with their role in society.¹¹²

Protecting children from "harmful" ideas is an outdated basis upon which to make curriculum decisions, and is contrary to the *Charter*. A broad and liberal interpretation of a student's freedom of expression right properly rejects the protectionist model and recognizes the importance of reading to a child's self-fulfillment, augmenting the position of the child at the centre of the educational process. This last point is directly tied to a student's participatory role in the education system.

¹¹¹ Swindler, *supra* note 30 at 121.

¹¹² *Irwin Toy*, *supra* note 34 at 1008.

5. Freedom of Expression Enhancing the Participatory Role of Children

Related to the purposes of enhancing the democratic nature of schools and avoiding indoctrination, is the goal of increasing participation of children in the education process. Recognizing a student's freedom of expression interest in book banning or curriculum selection decisions puts the child's interest at the centre of the decision-making process. This, in turn, augments the participatory nature of the school environment by giving students a stake in this process. Moreover, it is consistent with an approach advocated by the Supreme Court of Canada in *Eaton v. Brant County Board of Education*.¹¹³ In *Eaton*, the Court recognized the need for a child-centred approach in considering the educational needs of a disabled child. However, this approach is applicable to all children in matters of educational decision-making:

The requirements for respecting these [equality] rights in this setting are decided by adults who have authority over this child. The decision-making body, therefore, must further ensure that its determination of the appropriate accommodation for an exceptional child be from a subjective, child-centred perspective—one which attempts to make [equality] rights meaningful from the child's point of view as opposed to that of the adults in his or her life¹¹⁴

For older children, a child-centred approach could mean that the students' own views be heard in matters affecting them. For younger children, a "best interests of the child" approach would ensure their participation in the educational process. As one author notes, "[t]he challenge for schools and for the education system is to develop structures and to establish practices such that the right to participation can be exercised."¹¹⁵ A clearly defined freedom of expression right is one way to implement a procedure wherein both student participation and student needs are central to the decision-making process.

Recognizing a student's interest in potential book banning situations is also consistent with Canada's international obligations. The United Nations *Convention on the Rights of the Child* came into force in Sep-

¹¹³ [1997] 1 S.C.R. 241 [*Eaton*].

¹¹⁴ *Ibid.* at 277-78.

¹¹⁵ R. Brian Howe & Katherine Covell, "Schools and the Participation Rights of the Child" (2000) 10 *Educ. & L.J.* 107 at 113.

tember 1990 and has been ratified by Canada.¹¹⁶ In general, it recognizes that children have fundamental rights as individual persons. As R. Brian Howe and Katherine Covell note, the Convention is based upon principles of non-discrimination, best interests of the child, and age appropriate participation,¹¹⁷ and includes the right to freedom of expression.¹¹⁸ Among the provisions of the Convention, Article 28 provides a child with the right to an education and Article 29 gives direction with respect to what that education should accomplish. Specifically, Article 29 provides that education should develop:

- (a) A child's personality, talents and mental and physical capabilities
- (b) A child's respect for human rights and fundamental freedoms
- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.¹¹⁹

The Convention clearly states that ratifying countries should teach children about human rights and freedoms, diversity, and tolerance. Using freedom of expression to create a rights discourse and expose children to a wide variety of view points will go far towards achieving this purpose; however, as Howe and Covell further articulate, the signing of the convention also puts the rights of children at the centre of public policy:

It officially puts to rest older assumptions about primary rights of parents and the role of the paternalistic state in protecting the interests of children, who were regarded as immature "not yet's" rather than rights-bearing persons in the here and now. With the signing of the Convention, the rights of children are now to be the central objective of public policy.¹²⁰

¹¹⁶ *International Convention on the Rights of the Child*, U.N. Doc. A/RED/44/25 (1989) [*Convention*].

¹¹⁷ Howe & Covell, *supra* note 115 at 109.

¹¹⁸ *Convention*, *supra* note 123 at Art 13.

¹¹⁹ *Convention*, *supra* note 123 at Art 29.

¹²⁰ Howe & Covell, *supra* note 115 at 109.

Recognizing a student's freedom of expression rights in possible book banning situations puts the child at the centre of educational policy decisions by ensuring a section 2(b) analysis, and a determination that those rights are infringed as minimally as possible.

V. CONCLUSION

In terms of thwarting incidences of book banning, *Chamberlain* was in many ways a success. However, where freedom of expression interests were so clearly implicated, it is remarkable that the Court found against the book removals without engaging in a discussion on the nature and scope of such rights in the classroom. Arguably, they would not have been able to do so had the case not also called into question the meaning of "secularism" in the *School Act*. As discussed, in order to combat book banning cases without religious implications, a dialogue on the freedom of expression rights of children in classrooms is crucial.

It is still uncertain what a student's right to freedom of expression might look like. The Canadian jurisprudence on section 2(b) rights suggests that there will be both inherent and external limits on such rights in the educational sphere. American case law supports this estimation and proposes further limitations. This would be a most undesirable approach to follow, first due to the lack of clarity in the actual language of the limitations, but more importantly because freedom of expression rights are of fundamental importance to a democratic society, and are critical in fostering a democratic classroom environment. Moreover, a clear and liberal interpretation of a student's expression rights offers substantial benefits to educational policy-makers as they struggle with potentially contentious curriculum selection issues. Such a definition may become valuable in assuaging competing interests and ensuring a child-centred approach in educational decision-making. While it is beyond the scope of this paper, defining the expression rights of students would also be beneficial to educators and students beyond the context of book banning. Current debates surrounding Internet filtering in schools and the online communications of students raise freedom of expression issues that demand resolution. A clear and liberal definition of a student's expression rights in Canada could not be more timely.

William Butler Yeats once wrote “[e]ducation is not the filling of a pail but the lighting of a fire.” Presumably, he meant that the education system should be less concerned with the mechanics of reading, writing, and arithmetic and more concerned with provoking thought and inspiring students to learn. This desire to learn can only be sparked through exposure to a variety of ideas and points of view. Clearly recognizing and liberally defining a student’s right to both expression and access to information, and engaging students in a dialogue on their rights and the rights of others, will help light that fire. Moreover, freedom of expression is an essential way of bridging the divide between conflicting points of view. If we don’t allow this in our schools, we are burning the very bridges that the education system should seek to build.