

Education, Religion, and the Courts in Ontario

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Several Charter cases have addressed the tension between the linguistic and religious privileges built into the Constitution Act, 1867 and the egalitarianism and multiculturalism contained in sections 15 and 27 of the Canadian Charter of Rights and Freedoms. Three of these cases, *Zylberberg et al. v. Sudbury Board of Education*, *Canadian Civil Liberties Association v. Ontario (Minister of Education)*, and *Adler v. Ontario*, involve challenges to educational regulations or policies resting on traditional assumptions about the religious nature and purpose of schooling. We show how these cases, along with two more recent examples, help clarify the meaning of multiculturalism in the post-Charter context and in particular, whether a consistent, principled approach and a particular theory of ethnic relations are embraced by the courts in resolving such matters.

Plusieurs cas se fondant sur la Charte canadienne des droits et libertés soulignent la tension entre les privilèges linguistiques et religieux enchâssés dans la Loi constitutionnelle de 1967 et l'égalitarisme et le multiculturalisme contenus dans les articles 15 et 27 de la Charte canadienne. Dans trois de ces cas, *Zylberger et al. v. Sudbury Board of Education*, *Canadian Civil Liberties Association v. Ontario (Minister of Education)* et *Adler v. Ontario*, les règlements ou politiques en matière d'éducation reposant sur des postulats traditionnels au sujet de la nature et du but religieux de l'enseignement sont contestés. Les auteurs démontrent comment ces trois cas, ainsi que deux exemples plus récents, aident à clarifier la signification du multiculturalisme après l'adoption de la Charte canadienne des droits et libertés; ils se demandent en outre si les tribunaux font appel à une approche cohérente, reposant sur des principes, et à une théorie particulière des relations ethniques pour régler ces cas.

In 1979, Young predicted that issues in multiculturalism would pose serious questions of purpose in Canadian society and consequently require responses from the school system. His words became all the more prescient with arrival of the Canadian Charter of Rights and Freedoms. By guaranteeing traditional rights and freedoms within a broad endorsement of multiculturalism, the Charter has highlighted the Canadian struggle to reconcile often competing old and new constitutional values—the linguistic and religious privileges characterizing the two founding nations principle of the British North America Act, 1867 (now the Constitution Act, 1867), with the modern notions of egalitarianism and multiculturalism contained in sections 15 and 27 of the Charter.

Several Charter cases, a number involving education, have addressed this tension.¹ Perhaps the best known, at least in Ontario, are: *Zylberberg et al. v. Sudbury Board of Education* (1988) (hereafter, *Zylberberg*); *Canadian Civil Liberties Association v. Ontario (Minister of Education)* (1990) (hereafter, *Elgin County*); and *Adler v. Ontario (Minister of Education)* (1994) (hereafter, *Adler*). All involved challenges to educational regulations or policies resting on traditional assumptions about the nature and purpose of schooling, especially in the context of religion. In all three cases, minority groups invoked freedom of religion and equality rights under the Charter to attack religious or financial policies practised by the state in its schools. The later case of *Bal v. Ontario* (1994) (hereafter, *Bal*) is an extension of the *Adler* challenge to the province's refusal to provide public funding for independent religious schools. A fifth case is *Islamic Schools Federation of Ontario v. Ottawa Board of Education* (1994), wherein the applicants argue that the school board's failure to accommodate the religious holidays of the Islamic faith, while observing Christian holidays in its schools, violates their religious freedom and equality rights under the Charter.

Although there are common issues among the cases, there is a discernible transition from *Zylberberg* to the *Adler* and *Bal* cases. Begun initially to remove Christian biases in opening exercises and instruction, the challenges have become more concerned with structural issues, namely, the financing of the system. Moreover, interesting paradoxes have emerged. Although the applicants in *Elgin County* succeeded in gaining judicially mandated excision of religious indoctrination from Ontario schools, the *Bal* and *Adler* applicants found themselves left out in the cold by the secularization of the school system put in place by the government after the *Elgin County* case.

THEORIES OF ETHNIC RELATIONS AND THE MEANING OF CULTURAL PLURALISM

How a state defines the relations among its citizens, especially how it treats its minorities, typically is premised on whether a persistent and visible ethnic mix in the body politic is viewed as either a good thing (to be protected and enhanced) or a bad thing (to be discouraged and even eradicated). In its crudest form, the debate is a contest between, on the one hand, melting down the citizenry into a nation of "Americans" or "Canadians," people who will largely share nationally defining characteristics and attributes, and, on the other hand, balkanizing them into officially structured units within the state, each with their own defining characteristics, attributes, and values. Ethnic relations in modern states, however, are much more complex than that. The U.S. "melting pot" sprang long ago, when African-Americans, U.S. First Nations peoples, and Hispanic-Americans refused to be homogenized and the fallacy of a melting-pot principle in a nation with serious, deep-rooted racial and ethnic divisions became increasingly obvious. The failures of balkanization (the attempted political unification

of ethnically determined enclaves) are all too horribly familiar in the former Yugoslavia.

The problems associated with ethnic relations are among the most confounding problems to study. Developing precise definitions of such terms as “culture,” “ethnicity,” and “race” is problematic, and becoming embroiled in such intricacies would not particularly advance our central purpose in this article. We treat ethnicity in Canada as membership in non-Aboriginal, non-English, and non-French groups. This treatment is based not on any sociological or anthropological models but rather on the historical-political reality of Canada and its consequent constitutional anomalies. Moreover, we believe it consistent with what most Canadians would call ethnicity. Our treatment is also influenced by the fact that Canada’s policy of multiculturalism was born largely in answer to large-scale immigration of non-Aboriginal, non-English, and non-French people. We also adopt a wide definition of culture, which we take to be a collection of values, as well as the personal and group relationships and institutional arrangements common across a society or particular sub-groups within a society.

Following Wirth (1945), Young (1979, p. 7) identifies four ways an ethnic group can deal with living in a state in which it is a minority. First, it can be *assimilated*, effectively abandoning its cultural identity; second, it can work for *pluralism*, seeking tolerance by the majority for minority values and differences; third, it can attempt to *secede* and exist independently; and, fourth, it can *adopt militant tactics*—non-violent or otherwise—to wrest power from the majority. Given the context of a Canadian policy of multicultural promotion and the legal focus of our analysis, we are concerned primarily with pluralism.

Pluralism presupposes the maintenance of the cultural identity of ethnic groups through either passive tolerance by or active support of the state. Young (1979) explains that pluralism is used as both a descriptive and a normative concept. Descriptively, pluralism may refer to either *cultural pluralism* or *structural pluralism*. A culturally pluralist society is one in which ethnic groups have languages, religions, kinships, tribal affiliations, and traditional norms and values setting them apart from one another. Structural pluralism, however, describes a society in which different cultures are “segmented into ‘analogous, parallel, non-complementary, but distinguishable sets of institutions’” (p. 8). As such, structural pluralism can be said to be the institutional expression of cultural pluralism.

Normative pluralism, on the other hand, speaks to the way a society *should* conduct its ethnic relations. In particular, it addresses questions concerning what laws, policies, and institutional arrangements should be effected to determine access to social rewards, for example, education. Two constructs are used to explain the two different approaches that may be adopted towards normative pluralism: *liberal pluralism* and *corporate pluralism*.

Liberal pluralism is consistent with a traditional antidiscrimination model of human rights and ethnic relations. It provides for an absence, indeed legal

prohibition, of distinctions — whether by law or governmental policy or action — based on race, religion, national origin, ethnicity, and so on (Young, 1979, p. 8). Under liberal pluralism, groups have no official standing in legal or governmental affairs because of their ethnicity, thus precluding both prejudicial and preferential treatment of them by the state. Conversely, in a state embracing corporate pluralism, ethnic groups are accorded official or even legal standing as corporate entities. Whereas Young speaks of corporate pluralism as a model promoting the favourable or preferential treatment of ethnic groups — for example, in the allocation of social-economic benefits, often in a quota system based on their proportionate representation in society — there seems to be no reason to exclude from the definition a system of apartheid that identifies ethnic groups and assigns them official status only to exclude them from social rewards (or worse). Unfortunately, once a philosophy sanctioning the official recognition of groups according to their ethnicity is adopted, the only factors distinguishing corporate pluralism from assimilationist, indeed annihilationist, policies are the governmentally determined purposes for which the ethnic classification can be used.

Constitutional guarantees, however, like section 15 of the Canadian Charter of Rights and Freedoms, may ensure the legitimacy of the former uses of racial, ethnic, and similar classifications, while outlawing the latter. But the simple irony ought not be lost: the more a state subscribes to a corporate-pluralist, indeed, even a liberal-pluralist, model, the more it is driven necessarily to classify its citizens by race and ethnicity, an activity viewed with great suspicion, if not outright dread, by civil libertarians. Merely enforcing the antidiscrimination laws of a liberal-pluralist state requires recognition of race, colour, and ethnicity as categories under the law. In fact, some members of ethnic minorities cynically view policies of corporate pluralism as governmental “divide and conquer” ploys to hyphenate society into African-Canadians, Chinese-Canadians, Japanese-Canadians, Italian-Canadians, and so on, thus preserving a disunited and relatively impotent body politic. For example, in 1978, Laura Sabia, a Canadian feminist and journalist of Italian descent, stated:

How come . . . we have all acquired a hyphen? We have allowed ourselves to become divided along the lines of ethnic origins, under the pretext of the “Great Mosaic.” A dastardly deed has been perpetrated upon Canadians by politicians whose motto is “divide and rule.” I, for one, refuse to be hyphenated. I am a Canadian, first and foremost. Don’t hyphenate me. (cited in Bissoondath, 1994, p. 224)

In many respects, the distinction between liberal and corporate pluralism mirrors modern equality discourse, which distinguishes between formal equality (or equality of treatment) and substantive equality (or equality of results) (Shepard, 1993). Advocates of formal equality aspire to a colour-blind society in which the state and its laws treat all people the same, regardless of race, colour,

ethnicity, religion, and so on. Equality of treatment, though retaining popularity among political conservatives, has been firmly rejected by centrist and left-of-centre thinkers, in favour of an equality-of-results model designed to redress the past exclusion of minority groups from power and social rewards, and to ensure the immediate redistribution of such goods among all groups according to their numerical representation in society. This form of equality of results or condition can only be achieved, they believe, by granting official or legal status to groups based on their ethnicity (or other visible characteristic). The use of racial or ethnic categories for “good” purposes is protected from claims of reverse discrimination by non-qualifying groups by provisos built into human rights legislation and the Constitution itself (section 15[2] of the Canadian Charter of Rights and Freedoms being an obvious example). In addition, the antidiscrimination provisions in both human rights codes and the Charter (section 15[1]) are there to prevent the state’s use of corporate-pluralist categories for “bad” purposes.

FROM THEORY TO PRACTICE

Although the cases we discuss are all from Ontario, it would be a mistake to assume that their implications are limited to that jurisdiction. The decisions in these cases represent judicial interpretations of rights and freedoms guaranteed in the Canadian Charter of Rights and Freedoms. The Charter is the supreme law in Canada and supersedes all other legislation. If prayer in a public school is found to be unconstitutional in Ontario, for example, it is probably equally unconstitutional in all other public school jurisdictions. In fact, the reasoning used by the Ontario Court of Appeal in striking down religious opening exercises (*Zylberberg*) was adopted in its entirety by the British Columbia Supreme Court in a parallel case (*Russow v. British Columbia [Attorney General]*, 1989). The fact that other school acts, for example, Saskatchewan’s Education Act (1978) (section 181), still permit the use of the Lord’s Prayer in opening exercises in public schools does not constitute evidence that the Ontario decision has no influence in other provinces; it demonstrates merely that the legislation has yet to be challenged.

The constitutional foundation for the following jurisprudence is, of course, section 93 of the Constitution Act, 1867. Although this may be obvious, it is, nevertheless, important for two reasons. Section 93 formally limits the immediate jurisdiction of the decisions in these cases. These are Ontario cases and, so far, their impact has been felt, primarily, in the Ontario context; for this reason it is probably fair to conclude that their importance has been underestimated in other jurisdictions. Section 93 also separates the existence, public funding, and religious nature of Roman Catholic Separate Schools in Ontario from the arguments raised in these cases. Drawing on the Supreme Court decision in Reference Re Bill 30 (1987), in which the court was asked to rule on the constitutionality of

the extension of public funding to Catholic secondary schools in Ontario, Justice Anderson, in his decision in *Adler v. Ontario* (1992), summed up the distinction:

In my view and conclusion, the funding of Roman Catholic separate schools in Ontario is a constitutional anomaly, with its roots in a historic political compromise made as an incident of the Confederation of 1867. As such, I am not prepared to give it any weight in the disposition of the issues which I must decide. I reach that conclusion aware of what must be the popular view that the anomaly represents inequality and a want of equity. This was fully recognized and dealt with by the judges in the Supreme Court of Canada. (p. 693)

This conclusion was accepted, with additional support from the Supreme Court decision in *Mahé et al v. Her Majesty the Queen in Right of the Province of Alberta* (1990), in the *Adler* appeal decision in the Ontario Court of Appeal (1994). Thus, an important element of the foundation upon which these cases rest is the understanding that the nature, existence, and funding of Catholic schools in Ontario are not relevant, at least in a legal sense, to the issues determined in any of the cases summarized below.

Zylberberg

Zylberberg et al. v. Sudbury Board of Education (1988) concerned the provision for religious exercises in Ontario public schools, as required by section 28(1) of Regulation 262 (1980) under the Education Act (1980) (now Regulation 298 [1990] under the Education Act [1990]). Section 28(1) required public schools to begin or end each school day with a reading of the Christian "Lord's Prayer," Scripture readings, and, in some cases, the singing of hymns. The applicants in this case (parents representing non-Christian and atheistic religious philosophies) claimed that the requirement of a religious exercise was a violation of section 2(a) of the Canadian Charter of Rights and Freedoms, which guarantees freedom of conscience and religion.

Although the Sudbury Board of Education conceded that section 28(1) was *prima facie* an infringement of section 2(a), it maintained that the infringement was justifiable under section 1 of the Charter because the purpose of the law, to teach important moral values, justified the violation. Christian religion was used simply as a vehicle for teaching morality and, therefore, did not constitute indoctrination. If a violation of section 2(a) did exist, the board argued, such a denigration of minority rights was insubstantial. In addition, it contended that the existence of an exemption provision eliminated any element of coercion. To determine this question the court employed the section 1 test developed by the Supreme Court of Canada in *R. v. Oakes* (1986) (hereafter, *Oakes*).

In brief, the *Oakes* test states that for a violation of Charter rights to be found to be a reasonable limit, prescribed by law, which can be demonstrably justified

in a free and democratic society, such a violation must meet certain criteria. First, it must be logically connected to the accomplishment of some legitimate and significant government purpose. Second, the degree to which the right or freedom is infringed upon must be proportional to the importance of the governmental purpose. Third, the law must limit the right or freedom as little as possible. Finally, it must be demonstrated that the same purpose cannot be achieved in some other way which would result in less infringement on the right or freedom.

In *Zylberberg*, the Ontario Court of Appeal held that section 28(1) of Regulation 262 (1980) under the Education Act (1980) failed the proportionality element of the *Oakes* test, in that the denigration of minority rights was not insubstantial and did not impair “as little as possible” the rights of the minority students. In addition, they found that the exemption clause did not eliminate coercion; it stigmatized minority students as nonconformists and, whether intentionally or otherwise, created peer pressure for the minority students to conform to the religious practices of the majority. Therefore, section 28(1) was held to be of no force or effect.

In response, Regulation 262 was amended to permit opening or closing exercises which may include a variety of inspirational readings but which must not promote or emphasize any particular faith.

Elgin County

In many ways, the *Elgin County (Canadian Civil Liberties Association v. Ontario [Minister of Education]*, 1990) case was a logical extension of *Zylberberg*. Whereas in *Zylberberg* the applicants sought to remove religious exercises from Ontario public schools, the applicants in the *Elgin County* case sought the complete removal of religious education.

Specifically, they claimed that section 28(4) of Regulation 262, which mandated that two periods of one-half hour each per week must be devoted to religious education in each Ontario public school, violated section 2(a) of the Charter because it coerced minority children into participating in religious education classes intended for members of the majority religion—Christianity—even though, as in *Zylberberg*, there was provision for exempting pupils in section 28(10–13), and teachers in section 28(14). The respondent school board argued that religion was used simply as a vehicle for teaching moral lessons and that the beliefs of other religions besides Christianity were part of the religious education curriculum; therefore, the practice did not constitute indoctrination. Any violation of religious rights was trivial and, given the importance of moral education, a reasonable limit on this freedom.

The Ontario Court of Appeal found that the purpose of section 28(4) was indoctrination and, as such, it constituted a clear violation of section 2(a) of the

Charter. Indeed, in *obiter dicta*, the court held that even if the law had been found to be non-indoctrinational in purpose, it would still have failed because it was, nevertheless, indoctrinational in effect. As in *Zylberberg*, the court held that section 28(4) of Regulation 262 failed both the rational connection and proportionality elements of the *Oakes* test, and therefore could not be considered a reasonable limit on the applicants' section 2(a) rights. Consequently, the court ordered that the Elgin County board cease requiring or permitting the religious education curriculum to be offered in its schools.

The Ministry of Education responded through *Memorandum 112/1991* (Ontario Ministry of Education, 1991), ordering public schools to cease all indoctrinational religion classes and other activities promoting a particular religious faith. Indeed, *Memorandum 112/1991* quoted the *Elgin County* decision's definition of the difference between "education about religion" and "religious education." Later amendments to sections 28 and 29 of Regulation 298 (the successor to 262) permitted school boards to offer courses about religion and world religions, but specifically forbade any form of indoctrination in any one religion. In short, public schools were to be secular.

*Adler*²

The applicants in *Adler v. Ontario (Minister of Education)* (1994) also claimed a violation of their rights to freedom of conscience and religion as guaranteed in section 2(a) of the Charter. In this case, however, the applicants maintained that the violation was created by the Ontario government's failure to provide public funding for private religious schools in the province. Further, the applicants claimed that because parents who wished to send their children to the public schools or to the Roman Catholic separate schools received a substantial benefit by not having to pay tuition, there was also a violation of the applicants' section 15(1) rights to equal benefit of the law, since they were required personally to finance their children's education. For reasons of conscience, they argued, they could not send their children to public or separate schools which taught, at least implicitly, beliefs or moral values incompatible with those taught in the home. At the same time, compulsory attendance required the parents to send their children to school. The requirements of their consciences, coupled with the requirement that their children attend school, created a situation in which they were disadvantaged by their religious beliefs.

The Ontario Court of Appeal found that these parents were free to send their children to public secular schools; however, they were not required to do so. In fact, Ontario's compulsory attendance provisions allow a child to be excused from attendance, providing the child is receiving "satisfactory instruction at home or elsewhere" (Education Act, 1990, section 21[2][a]). The court found that the applicants' decision to send their children to private schools was the result of

their convictions, not the result of government action. Indeed, the court found that what was being complained of was state “inaction” (i.e., not funding private religious schools) rather than state “action,” and that state “inaction” cannot be subject to a Charter challenge. The court held that the government’s failure to fund private religious schools did not interfere with freedom of religion because it did not prevent the parents from acting according to the dictates of their consciences.

The court also found that the Ontario government’s policy was to refuse to fund all private schools, religious or otherwise. Therefore, the distinction that resulted in differential treatment in this case was based on “private” versus “public” schools, and not on religion. This distinction did not constitute a prohibited ground for discrimination under section 15 of the Charter. Thus, the Court of Appeal determined that the government is not required to fund private schools, including private religious schools.

It would be a different matter if the government *chose* to fund private schools. However, whether or not to fund private schools (religious or otherwise) is first a political question, then, perhaps, a legal one. As Chief Justice Dubin stated in the *Adler* decision:

It is not necessary in this case to determine whether it would be open to the government, in the absence of specific constitutional authority (such as s. 93 of the Constitution Act, 1867), to provide public funding for all private, religious-based independent schools. This will be dealt with by the courts in the event that such a situation arises and is challenged. (*Adler v. Ontario [Minister of Education]*, 1994, p. 18)

Bal

The issues in *Bal v. Ontario* (1994) evolved directly from the decisions in the previous three cases. The applicants in *Bal* were parents representing Sikh, Hindu, Christian Reformed, Muslim, and Mennonite communities in Ontario. They were parents who, prior to these decisions, had their children enrolled in religious schools within the public school system in Ontario, or parents who, although they had not done so in the past, would have liked to enroll their children in a religious school within the public school system.

The applicants claimed that the judicial decisions in the original trilogy of cases described above, which resulted in Ministry of Education and Training *Memorandum 112/1991*, and the subsequent amendments to Regulation 298 under the Education Act (1990), removed boards’ discretion to provide for alternative minority religious schools if they wished to do so. The applicants claimed that removal of this discretion restricted their freedom of religion and conscience as guaranteed under section 2(a) of the Charter and their freedom of expression as guaranteed by section 2(b).

The applicants' counsel attempted to distinguish this case from those preceding it. He argued that the fact that the applicants sought only that public school boards be permitted, rather than required, to support religious-based education distinguished this case from *Adler*. He also stated that the *Zylberberg* and *Elgin County* decisions removed majority dominance only and were not intended to limit minority opportunity. Nevertheless, arguments similar to those considered in the previous cases were advanced.

The applicants contended, for example, that Ontario's attendance requirements compelled dissenting parents to pay tuition for private education, resulting in their being treated differently from public school supporters, to their detriment, on the basis of religion, a prohibited ground under section 15 of the Charter. They argued that the public schools, to which they would be compelled to send their children if there were no options available, were not really non-denominational; that, in fact, these schools actually promoted a particular religious perspective—secular humanism—incompatible with the beliefs and values being taught in the home.

The respondents' counsel, on the other hand, maintained that the answer to the question presented in this case could be stated only in one of three ways: (1) The Government must permit publicly funded denominational schools; (2) The Government may permit publicly funded denominational schools if it wishes to do so; or (3) The Government cannot permit publicly funded denominational schools.

Option 1, it was argued, was disposed of by the *Adler* decision, which held that the Ontario government is not bound, beyond its constitutional obligations to Roman Catholic Separate schools, to provide support for denominational education. Further, option 3 was disposed of by the *Zylberberg* and *Elgin County* decisions, which determined that Ontario public schools must be non-denominational. Finally, counsel argued, if option 2 was correct, then the government of Ontario has *chosen* not to fund denominational schools in either the private sector or the public school system. This, they contended, was a political rather than a legal decision and, therefore, not justiciable.

The respondents' counsel also pointed out that permitting independent religious schools within a public school system could create a situation in which parents would find themselves in a community in which the only school, or the nearest school, was denominational. If this were to occur, they would find themselves back in the same situation that the *Zylberberg* and *Elgin County* decisions attempted to eliminate. Minority students would be stigmatized as nonconformist and could not escape peer pressure to conform to the religious practices of the school's religious majority. That this is not permissible had already been determined.

Adopting the *Adler* line of reasoning, Justice Winkler found that although the state cannot deny or limit the citizen's exercise of religious freedom, it is not

required to support the exercise of that freedom through public funding for religious schools either inside or outside the public school system.

The court also found that Ontario's public schools are secular (i.e., religiously neutral) and not humanist. Thus, attendance at a public school would not create coercive pressures for students to adopt religious views incompatible with those of the home. *Memorandum 112/1991* and the amendments to Regulation 298, which banned denominational and indoctrinational education, did not constitute state action restricting religious rights; on the contrary, these changes removed religious distinctions rather than creating them. Like all others, these parents were free to send their children to the secular public schools; they chose not to, thereby incurring the expense of private schooling.

In the end, the court determined that it was not possible to distinguish this case by arguing that it did not really concern itself with funding—funding was obviously central to the question of the government's obligation. Funding minority religious schools within the public system could not be distinguished from funding private religious schools. The decision in *Adler* found that the government is not required to do this. Like the Court of Appeal in *Adler*, the *Bal* court held that in Ontario the government is not required to fund denominational schools (except, of course, Roman Catholic schools) within the public system. It would be a different matter if the government chose to do so. However, that decision is political first, and perhaps legal, second. Finally, the court found that the applicants' freedom of expression had not been violated because they were denied the opportunity to promote their religious beliefs within the public schools. The court held that parents, teachers, and students could hold and express whatever religious views they wished; however, they could not use the public schools to promote these beliefs.³

Islamic Schools Federation of Ontario v. Ottawa Board of Education

The latest in the ensemble of cases dealing with religious relations in Ontario education is one in which the Islamic Schools Federation of Ontario and a student of the Islamic faith, Abdul-Kareem Abdul-Aziz, are challenging the Ottawa Board of Education's refusal to recognize Islamic holidays in some of its schools and, in the alternative, the Ontario school system's traditional recognition of Christian holy days in the establishment of school holidays. In a Notice of Constitutional Question dated 18 November 1994, the applicants stated their intention to question the constitutionality of paragraphs 4, 7, and 8 of subsection 2(4) of the School Year and School Holidays Regulation (Regulation 304, R.R.O. 1990), which effectively adopts Christmas Day, Good Friday, and Easter Monday as school holidays.

The applicants had requested the Ottawa board "to consider and make reasonable accommodation of one or more religious holidays of the applicants in the

school or schools within the respondent's jurisdiction where the number of students of the Islamic faith justify such accommodation" (Notice of Constitutional Question, 1994, p. 1). The board's refusal to accede to this request, although it nevertheless "recognizes and observes" Christian religious holidays, the applicants claim, amounts to a denial of their freedom of religion and equality rights under sections 2(a) and 15, respectively, of the Charter. The applicants seek⁴ the following remedies:

- (i) an appropriate and just remedy under Section 24(1) of the . . . Charter . . . for a breach of their freedom of conscience and religion and their equality rights guaranteed under Sections 2(a) and 15, respectively, of the Charter;
- (ii) a declaration that the respondent has a duty, pursuant to the law of Ontario, including the Education Act . . . and the Human Rights Code . . . to consider and make reasonable accommodation of one or more religious holidays of the applicants . . . where the number of students of the Islamic faith justify such accommodation; or alternatively,
- (iii) a declaration that paragraphs 4, 7 and 8 of subsection 2(4) of The School Year and School Holidays Regulation . . . are invalid, being inconsistent with Sections 2(a) and 15 of the Charter. (Application in *Islamic Schools Federation of Ontario v. Ottawa Board of Education*, 1994, p. 3)

It seems clear that the catalyst for this constitutional challenge was the decision of the Ottawa board, along with other boards (including most of Metro Toronto's) to delay the start of the 1994–1995 school year by two days to accommodate Rosh Hashanah, a Jewish religious holiday (Daly, 1994; Sarick, 1994). A relevant question then becomes, of what legal significance was the boards' accommodation of the Jewish holiday? The boards' ostensible reasons for delaying the school year were secular—to avoid wide-scale absenteeism on critical orientation days and the cost of hiring supply teachers to replace absent Jewish teachers, who, subsequent to the Supreme Court of Canada's decision in a recent Quebec case (*Syndicat de l'Enseignement de Champlaine v. Commission Scolaire Régionale de Chambly*, 1994), had a clear legal right to leave with pay.

The fundamental question the court will have to address in this case is whether freedom of religion is, in fact, being violated. The situation does not, at first, seem analogous to *Zylberberg*. Neither the Jewish accommodation nor the Christian holiday schedule appears to work any coercion or stigmatization on other religious group members, of the sort found by the court in *Zylberberg*. They are not singled out or identified, and hence indirectly coerced, through any need to claim an exemption from a religious activity. In the present context, this situation would arise only should they attend school on the Christian or Jewish holidays and, of course, that would not be possible as the schools are closed. It is not until the students choose to absent themselves for their own holy days that they are identified as different from the group whose holidays are officially recognized by the state. Being forced to choose between missing school and

observing the most important of the holy days of one's religion is arguably a state-imposed disincentive to the free practice of one's religion. Moreover, it is not unreasonable to suggest that granting official recognition to the holidays of certain religions and not to others is tantamount to the state's establishing an order of importance of religious groups.

These arguments, or variations of them, are familiar. In *Adler*, the applicants claimed that the government's failure to fund private schools interfered with their freedom of religion because it financially penalized them—effectively forcing them to choose between free public education and the tuition costs associated with sending their children to schools which reflected their religious views. The Court of Appeal was unimpressed by the argument, as was the Supreme Court of Canada when it considered an analogous issue in *Robertson and Rosetanni v. The Queen* (1963), and later in *R. v. Edwards Books* (1986), in which the court held that the religious effect of mandatory Sunday closing legislation on Saturday-observing retailers was too indirect to be deemed an impermissible intrusion on religious freedom.

However, an important point distinguishes the *Adler* and Ottawa cases. In *Adler*, the court went to lengths to emphasize the secularism, or religious neutrality, of the public school system. If, in the *Adler* and *Bal* cases, the courts had been faced with the fact that the government had chosen to fund some private religious schools or to permit some religious schools to operate within the public system, in our opinion, all bets on the outcome would be off. The essential question is whether the degree of religious neutrality required by *Zylberberg*, *Elgin County*, *Adler*, and *Bal* can be satisfied in a system that grants school holidays for some religions but not others.

As for the Ottawa applicants' equality rights claim, it is difficult to see how the Regulation and the board's accommodation of Rosh Hashanah (even though not formally part of this litigation) could not be construed as discrimination within the definition established in *Andrews v. Law Society of British Columbia* (1989). Differential treatment of Christian (and Jewish) and Islamic students is undeniable; there is no question that the ground of distinction is a prohibited one under the Charter. And, it is quite simple to see how it can be argued that the distinction imposes a burden on (or denies an opportunity or benefit to) students who miss school to observe their religious holidays. On closer consideration, however, the alleged differential treatment of Islamic versus Jewish students may not be so clear-cut. The difference between the Jewish and secular calendars means that Rosh Hashanah will coincide with the first two days of school only every 20 to 30 years; in contrast, Moslem holy days do not fall on the first two days of the school year. Moreover, as already noted, public schools remain open on all other Jewish holidays, including Yom Kippur.⁵ Much stronger evidence of differential treatment exists in the case of Christian holidays.

It is conceivable, then, that this case, like those preceding it, will depend on a section 1 Charter analysis for its resolution. Presumably the government's

position is that the holiday regime in Regulation 304, despite its religious referents and antecedents, has a secular rather than religious purpose. It simply sets out a schedule that has become traditional and consistent with the general social calendar of the province. Closing down the schools for holidays has many purposes that have nothing to do with governmental celebration or approval of the religions whose holy days happen to coincide with the school holidays. Although perhaps originally religiously conceived, school holidays have become simply convenient social benchmarks consistent with the expectations of Canadian society. However, the Supreme Court of Canada clearly rejected the “shifting purpose doctrine” in *R. v. Big M Drug Mart Ltd.* (1985). Hence, any contention that the Regulation should be viewed as having a secular, rather than a religious, purpose because of altered social circumstances between the time it was proclaimed and now, is destined to fail. If, after examining evidence relevant to the government’s intention in proclaiming the Regulation, the court concludes that its original purpose was religious, then the purpose remains religious, notwithstanding that it may be viewed differently today by the government and the majority of citizens.

In considering the issue of legislative intention, it is important to bear in mind the distinction between *origin* and *purpose*—a distinction discussed by Chief Justice Dickson of the Supreme Court in the course of his finding, in *R. v. Edwards Books* (1986), that Ontario’s Retail Business Holidays Act had a secular, rather than religious, purpose. The Chief Justice stated:

It is beyond doubt that days such as Sundays, Christmas and Easter were celebrated as holidays in Canada historically for religious reasons. The celebration of these holidays has continued to the present partly because of continuing, though diminished, religious observances of the largest denominations of the Christian faith, partly because of statutory enforcement under, inter alia, the now unconstitutional Lord’s Day Act, and partly because of the combined effect of social inertia and the perceived need for people to have days away from work or school in common with family, friends and other members of the community. These, in my view, are the social facts which explain the selection by individuals, businesses, school boards, and others of particular days as holidays.

It is important to keep in mind, however, that the Court is not called upon to characterize the historical origins, or even the continuing cause for the selection by individual members of the community of particular holidays. To do so would be to characterize social facts rather than characterizing the impugned law. The question in the present cases therefore cannot be reduced to a mathematical exercise of computing the number of holidays prescribed by the Act which have a religious origin. Our society is collectively powerless to repudiate its history, including the Christian heritage of the majority. (*R. v. Edwards Books*, 1986, pp. 742–743)

The Chief Justice also observed that the mere fact that legislation distinctly deals with days having particular religious significance does not necessitate characterizing the legislation as religious in nature.

The essence of the religious purpose issue in the Ottawa case is precisely as stated by Chief Justice Dickson in *R. v. Edwards Books*: “whether [the Regulation] was a carefully drafted colourable scheme to promote or prefer religious observance by historically dominant religious groups” (p. 744). In *R. v. Edwards Books*, the court found it noteworthy that the impugned legislation included clearly secular days as holidays, namely, Victoria Day, Canada Day, and Labour Day, and it was not prepared to view their inclusion as a governmental ruse to disguise a religious purpose. By analogy, Regulation 304 contains more holidays of a secular nature than ones of an imputedly religious nature. Absent some startling and unexpected evidence of religious purpose in the creation of Regulation 304, the real issue would seem to be whether the Regulation has an impermissible religious effect.

If a violation of religious freedom is found, the case will likely be determined according to the proportionality component of the section 1 (*Oakes*) test. In particular, the court will have to determine whether there is any other way of meeting the government’s legislative objective that is less intrusive on minority rights. Assuming the government articulates the need for school holidays to coincide with the religious celebrations and holy days so widely observed that massive absenteeism could be expected, then the question of what group is to be accommodated becomes a numbers game. Indeed, the Ottawa applicants are seeking accommodation only “where numbers warrant.” However, it is anybody’s guess where the line should be drawn: at what number, and at what unit of the system—the province, the board, or the school. Reduced to these questions, the overall issue is potentially a logistical nightmare. Presumably anticipating increased claims by its employees for paid leaves for religious holidays, in the wake of the Supreme Court decision in *Syndicat de l’Enseignement de Champlaine v. Commission Scolaire Régionale de Chambly* (1994), the Government of Ontario created a list of *bona fide* religious holidays for which leave might have to be given during 1994 (Sarick, 1994). It is worth noting that more than 50 of these days occurred within the school year.

What options are open to the court in solving this problem? First, it could uphold the *status quo*, falling back on the *Adler/Bal* line of reasoning that the public school system is essentially secular and concluding that the coincidence of Christian holy days and school holidays is merely the remnant of religious origins and today nothing more than a matter of social convenience. Hence, there is no religious purpose to the Regulation, and its religious effect, if any, is trivial. Such a ruling would preserve Regulation 304 and surely please parliamentary sovereigntists, but it would fail to answer the question of whether school boards remain free to proclaim school holidays coinciding with the holy days of particular religions, and, if so, on what criteria. It is difficult to believe that such practices would not provoke a string of challenges by disgruntled and unaccommodated minority religious groups.

The other plain option is for the court to find in the Regulation a religious purpose or a serious enough religious impact to warrant declaring its offending parts invalid under section 52 of the Constitution Act, 1982. Thus, Christmas Day, Good Friday, and Easter Monday would cease to be stated *per se* as school holidays. This result would arguably complete the secularization of the public school system and leave in place a school calendar in which religious holidays did not form the basis for school holidays. Any overlapping of school holidays and religious days would be incidental. Such an equal-treatment model—equal through the recognition of no religious holidays—is, at most, liberal-pluralist in nature. The official recognition of minority religious groups countenanced by corporate pluralism is nowhere to be seen. The removal of the state's hand from the active preservation and fostering of minority cultures would seem to fly in the face of the rhetoric of the Canadian policy of official multiculturalism.

CONCLUSION

In a speech to Parliament during his February 1995 visit to Ottawa, U.S. President Bill Clinton delighted the federalist camp in the Quebec secession debate by proclaiming Canada's inter-ethnic relations a model of success worthy of emulation by the rest of the world. Putting aside how deserved the compliment was, there is no doubt that for the last quarter-century Canada has sought a national identity by cloaking itself in a policy of official multiculturalism. Yet it is a policy that has not sat easily on the shoulders of a nation founded on principles more consonant with official or corporate dualism. Indeed, a policy of religious and linguistic dualism, and a policy supporting the principles of multiculturalism both may be, in the Canadian context, laudable objectives. Unfortunately, they are also mutually exclusive; inevitably, the more we have of the one, the less we have of the other.

Ontario's education system reflects an uneasy relationship between the corporate dualism (linguistic and religious) of the Constitution Act, 1867 and the cultural pluralism of federal and provincial policies of official multiculturalism. There are plenty of examples of a liberal-pluralist, and even a corporate-pluralist, agenda in Ontario education, especially in proliferous Ministry policies on antiracism and ethnocultural equity. Moreover, policies on curriculum and opening exercises are consistent with the language of cultural pluralism, as they aspire to non-discrimination, sensitivity, inclusiveness, appreciation, and ethnic pride.

A degree of corporate pluralism exists in the Ontario curriculum in the form of enhanced opportunities for learning heritage languages for credit within the school system. The clearest evidence of hard-core corporate pluralist philosophy existed in the province's affirmative action program set out in the Employment Equity Act (1993), which at least implied, and probably necessitated, the legal

classification of employees by race and/or ethnicity. In December 1995, however, legislation repealing the Act was passed by a newly elected Tory government (Job Quotas Repeal Act, 1995). But the persistence of the essential structure of the education system itself—a dichotomy composed of a public and a separate (Roman Catholic) system—provides strong evidence of the diffidence of successive provincial governments regarding the place of corporate pluralism in education, a diffidence no doubt heightened by dwindling government coffers. Although the Rae NDP (New Democratic Party) government seemed most ideologically attuned to a corporate-pluralist agenda in general, it adopted the policy of previous governments in refusing to fund private religiously based schools or religious schools within the public system, thus fuelling the *Adler* and *Bal* challenges.

Given the decisions in the four cases first considered above, it is probably fair to propose the following generalizations:

First, the existence, nature, and funding of Roman Catholic separate schools in Ontario represent an anomaly resulting from a political compromise struck in order to create the Canadian confederation. As such, this unique constitutional provision does not provide a legally useful precedent for other religious denominations.

Second, Ontario public schools are to be secular. Although it is permissible to teach about religion in public schools, it is not permissible to support or promote any particular religious view; to do so would inevitably violate the religious freedom of students who do not share the view being supported or promoted.

Third, the Ontario government is not required to provide public financial support to any religious school (apart from its constitutional obligations to Roman Catholic Schools), either inside or outside the public schools system.

Finally, given the ruling in *Elgin*, and *obiter* in *Adler*, it is not clear whether the government has the constitutional authority to fund religious schools.

These generalizations lead to the inevitable conclusion that the courts favour a liberal-pluralist approach. Although such a position clearly does not support an assimilationist or indoctrinational approach to education (it supports educational programs that encourage students to learn and appreciate other cultures and cultural institutions), it has, to this point, fallen distinctly short of any active attempt to promote ethnic and cultural diversity. It is probably also fair to conclude from these cases that the courts have supported an individual rights, as opposed to a group rights, approach to the resolution of these issues. When individuals' religious freedom was perceived to be threatened by educational policy (e.g., *Zylberberg* and *Elgin County*), the courts found for the applicants; when group rights were claimed (e.g., *Adler* and *Bal*) these rights were not extended.

There is sparse evidence of judicial support for the corporate-pluralist agenda of court-ordered official recognition of ethnic or religious groups within the

education system. In fact, *Adler* and *Bal* seem to reject outright such a role for the courts. The *Adler* court refused to mandate public funding for ethnically or religiously oriented independent schools, whereas the court in *Bal* refused to legitimize the operation of such schools or programs within the public system, which the court characterized as having been “secularized” by the *Elgin County* case. In the Divisional Court decision in *Adler*, Justice Anderson went out of his way to characterize such questions as political ones to be answered by the legislature.

Is the pending application by the Islamic Schools Federation doomed by the reasoning in *Adler* and *Bal*? Perhaps it is. Insofar as the applicants are asking for official recognition of particular religious holidays within the school system, they appear to be seeking the introduction of a religious purpose into educational policy and, concomitantly, the extension of a minority group’s rights. This contradiction of the secularism underpinning *Adler* and *Bal* would seem to determine the issue. However, it is conceivable that the court will characterize the Regulation’s singling out of Christian religious holidays for special treatment as an impermissible religious remnant requiring excision in order to complete the secularization of the public school system. Quite possibly, then, the Ottawa board’s accommodation of Jewish holidays opened the Pandora’s box that appeared to have been firmly nailed shut by *Adler* and *Bal*. Perhaps it was naïve to think the box could stay shut. The Ottawa challenge may thus end in the court’s adopting the most pragmatic, and probably the best, solution—the complete removal of any explicit religious referents in the public school holiday regime. Certainly, *Globe and Mail* columnist Michael Valpy (1994) thinks this would be the best alternative. Drawing on the ideas of Kymlicka (1989), Valpy rejects the view that the state should promote an institutionalized culture, save perhaps a shared history, and certainly not one encompassing religion, which, he says, should be a matter of “private culture”:

Everyone’s history is not Canada’s history. The history of settlement, of how the instruments of social existence were constructed—the law, government, commerce, education and so forth, is the history of Canada and should be the history of every one of us who lives here.

Only with this shared history are we given a language to talk to each other about how the country works, and only with it are we given reference points to enable us to make decisions on the country’s future direction.

But religion?

University of Ottawa philosopher Will Kymlicka argues that, in a liberal society, culture is a private matter. “The state,” he says, “does not oppose the freedom of people to express their particular cultural attachments, but nor does it nurture such expression—rather . . . it responds with benign neutrality.”

Should schools close for religious holy days, which they do now for Christmas and Easter? Should they close for Christian days and not for Jewish or Islamic or Orthodox? I don’t think so. I think it’s time religion was relegated to private culture—or by consent,

and good planning, shared culture. . . . If you want your family to observe your own religious holy days, pull your kids out of school—which is what the Jews have been doing forever. It’s a no-fuss, no-muss idea. (p. A2)

In the context of a liberal-pluralist paradigm, in which the courts have consistently supported the rights of the individual and refused to extend rights to particular groups, no matter how small or large, this seems to be the only reasonable solution. The four cases dealing with religion in Ontario’s public schools reveal a clear judicial predilection towards enforcing a “benign neutrality” on the part of the state. Where the government’s laws, policies, or practices appeared to give prominence to the religion of the majority, violations of the religious freedom and equality rights of minority persons were found. By requiring the public system to be entirely secular, the courts have removed the temptation—and indeed the very ability—to argue from a corporate-pluralist platform that neutrality should be achieved by the state’s permitting and funding religious education and schools, for *all* religious groups, both inside and outside the public system, neutrality through balance. If anything is clear from these cases, it is that Ontario courts are not about to order changes to the structure of the Ontario education system to promote corporate pluralism. They were willing implicitly to require structural changes to enforce French minority-language educational rights (*Marchand v. Simcoe County Board of Education et al.*, 1986; *Reference Re Education Act of Ontario and Minority Language Education Rights*, 1984) but that was within the corporate-dualistic mould of section 23 of the Charter. If the Ontario educational system is to be reconstituted on corporate-pluralist lines, at least in regard to religion in the schools, it will need to be done by the government itself. And, even then, it would be anybody’s guess whether such a system would withstand constitutional scrutiny by a judiciary that has shown itself increasingly wedded to the secularism of a church-state separation.

NOTES

- ¹ This article is based on a paper we presented at the sixth annual conference of the Canadian Association for the Practical Study of Law in Education (CAPSLE), held in Ottawa, Ontario on 23–25 April 1995.
- ² The Supreme Court of Canada granted leave to appeal the Ontario Court of Appeal decision in *Adler*. On 21 November 1996, the Supreme Court released its decision dismissing the appeal (*Adler v. Ontario*, 1996).
- ³ The applicants appealed the decision of Winkler J. to the Ontario Court of Appeal. No judgment appears to have been rendered as of November 1996.
- ⁴ As of November 1996 no decision had been reached in the case.
- ⁵ We are indebted to Robert Charney, counsel for the Ontario Ministry of the Attorney General, for pointing this out to us.

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