

A Tale of Canada's Two Constitutions:

On the tension between Roman Catholic Education funding privileges enshrined in the Canadian Constitution Act, 1867, and equality rights of the Canadian Charter of Rights and Freedoms, 1982.

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Abstract

This paper is a review of literature concerning the tension between the egalitarian values of the Canadian Charter of Rights and Freedoms, and the privilege of Roman Catholic (RC) schools in Ontario to 100% state financing, which is formally protected by s.93 of the Constitution Act, 1867. The question of legal theory that stands behind this literature is whether the Canadian Constitution itself can be the subject of a constitutional challenge. In the paper I compare RC school funding in Ontario to non-RC religious schools in the province that receive no funding, and compare Ontario policy with other provincial jurisdictions. The review that follows focuses on a series of authors on either side of the debate. All of the authors surveyed here agree that the status quo is unequal and ought to be changed, but they disagree about what to do about it.

Introduction

This paper is a review of literature concerning the tension between the egalitarian values of the *Canadian Charter of Rights and Freedoms (Charter)*, and the entitlement of Roman Catholic (RC) schools in Ontario to 100% public financing, a privilege which is formally protected by s.93 of the *Constitution Act, 1867*. The question of legal theory that stands behind this literature is whether the Canadian Constitution itself can be the subject of a constitutional challenge. In the paper I compare RC school funding in Ontario to non-RC religious schools in the province that receive no funding, and compare Ontario policy with other provincial jurisdictions. The review that follows focuses on a series of authors on either side of the debate. All of the authors surveyed here agree that the status quo is unequal and ought to be changed, but they disagree about what to do about it.

Anne Bayefsky and Arieh Waldman (2007) were the principal applicants in *Waldman v. Canada*, a case decided in their favour by the United Nations Human Right Committee in 1999, and represent one side of the debate. They argue that the constitutional status of RC school funding privilege, coupled with the unlikelihood of constitutional change, mean that we should fix the problem of religious discrimination in this matter not by removing the RC school privilege, but rather by extending the privilege to all other religious groups (Bayefsky and Waldman 2007). Greg Dickinson and Rod Dolmage present a similar argument on this side of the debate, and highlight how the judicial reasoning in important Supreme Court of Canada cases and other litigation on the matter show that no court ordered legal remedy to the inequality is likely to be forthcoming. Their detailed legal analysis of litigation on the RC constitutional privilege demonstrates that the courts have foreclosed any possibility of a legal, court ordered remedy, leaving it to the elected legislatures to correct any injustice in the status quo (Dickinson and Dolmage 1996).

On the other side of the debate, Jerry Paquette argues that any state support for independent, separate or alternative schools, or any voucher system, is and would be inconsistent with the *Charter* because it would violate students' s.15 *Charter* equality rights (Paquette 2009). The resulting social fragmentation, Paquette argues, would lead to a situation in which some children would get a better or worse education from the state funding provided to them for that purpose, because of things beyond their control like family and economic class (Paquette 2009). Stephen B. Lawton also argues for the elimination of religious school funding, and derives a set of propositions about the school choice debate from a financial perspective (Lawton 1986). Lawton argues that in the Ontario case, school choice has meant exclusion, implied economic direction and transfer of resources, and depended sufficient access to information; choice was –and still is – uneven, increasing for some at the expense of others, awakens religious animosities, and when it comes down to it, it is the courts that decide who has choice (Lawton 1986).

The positions these authors represent illustrate the liveliness of the debate on this question of educational justice in modern Canadian society. Bayefsky and Waldman's argument, however, appears to represent the most popular position, and is the most widely reflected in the press and public debate. In this paper, I will outline the problem and the historical context in which it has developed. I will then outline the debate over how to reconcile the constitutional tension at the heart of the problem, and conclude by highlighting some of the theoretical questions the debate raises and the potential consequences of change for Canadian society.

The Problem

RC schools in Ontario have a constitutional right to their own state-supported separate RC school system. Moreover, they are the only group that has this constitutional protection. This privilege is conferred by s.93 of the *Constitution Act, 1867*. However, it is in tension (some might say outright contradiction) with the *Canadian Charter of Rights and Freedoms* that is also a part of Canada's Constitution, namely the *Constitution Act 1982*. Section 15 of the *Charter* stipulates equality rights of all Canadian citizens to equal treatment before and under the law. The problem is that the state cannot offer preferential treatment to one group of persons, especially the designated religious group, over and above the treatment of other groups. How is it that RC parents and RC families can have a right to a fully funded separate RC school system while no other religious group has this right given Canada's equality rights stipulated by s.15 of the charter?

The Historic Compromise

In order to understand the debate it will be useful to consider the historical context in which this problem has arisen. It all began in the years leading up to confederation, and the so-called 'historic compromise' between the Roman Catholic majority in Quebec and the Protestant majority in Ontario. When used in the literature, the 'historic compromise' refers to the provision of privileges regarding the education of RCs in Upper Canada (Ontario) and Protestants in Lower Canada (Québec). It was a compromise without which there would be no Dominion of Canada.

At the time of confederation, RCs were a significant, and in some ways visible minority in Ontario. They routinely faced persecution in North America and tended to live together and educate their own children according to RC church doctrine. Religious discrimination in Canada's current education system arises from a framework of minority rights protection that was a product of the sociopolitical conditions of the time. They were, Bayefsky argues, designed for the nineteenth century. At the time of Confederation, the *Constitution Act, 1867* recognized the legal right for the minority RCs in Upper Canada (now Ontario) to receive public funding for separate schools. This recognition was part of the "historic compromise" that gave the same right to minority Protestants in Lower Canada (now Québec). The constitutional scholar Peter Hogg described the historic compromise this way:

At the time of Confederation it was a matter of concern that the new Province of Ontario (formerly Canada West) would be controlled by a Protestant majority that might exercise its power over education to take away the rights of its RC minority. There was a similar concern that the new Province of Québec (formerly Canada East), which would be controlled by a RC majority, might not respect the rights of its Protestant minority... With respect to religious minorities, the solution was to guarantee their rights to denominational education, and to define those rights by reference to the state of the law at the time of confederation. In that way, the existing denominational school rights of the RC minority in Ontario could not be impaired by the legislature; and the Protestant minority in Québec would be similarly protected. This is the reason for the guarantees of denominational school rights in s.93 [of the constitution]. (Hogg 1997)

Ontario at this time was a religiously bi-cultural society (tri-cultural if we include First Nations, which they usually did not) with a sizable Protestant majority, a significant RC minority and various other much smaller religious minorities (Bayefsky and Waldman 2007). In Québec, the reverse held true in respect of Protestants and RCs¹. There was no apparent intention or political will to create schools for other minority groups in either Upper or Lower Canada.

For the first fifty years, as more provinces entered confederation, it became commonplace for public funding of RC separate schools to be included as condition of becoming part of the Dominion of Canada. Such funding arrangements only ever included children of RCs because there was no need to guarantee the education funding rights Protestants outside of Lower Canada, as they were of the overwhelming majority as a rule, and the "public" schools were in practice Protestant (Bayefsky and Waldman 2007).

The Constitution Act, 1867, Section 93

From this we can see that the public funding of RC separate schools has deep roots in Canadian law. Foremost in this respect is s.93 of *The Constitution Act, 1867*. Section 93 establishes the exclusive jurisdiction of the provinces with respect to education within the Canadian federal system with respect to the enactment of law. This power, however, is formally limited by the constitutional requirements of historical denominational school rights stipulated in s.93 (1-4).

Section 93 of *The Constitution Act, 1867* is concerned primarily with stipulating that matters of education shall be within the jurisdiction of the provinces. However, it also contains the constitutional privileges afforded to RCs to receive state funding for the maintenance of their own separate education system and schools.

While s.93 only mentions what are now Ontario and Québec, the provinces of Alberta and Saskatchewan afford the same constitutional privileges in their founding acts, the *Alberta Act, 1905*, and the *Saskatchewan Act, 1905* respectively. The relevant sections of both Acts are identical, and read as follows:

17. Section 93 of *The Constitution Act, 1867* shall apply to the said province, with the substitution for paragraph (1) of the said s.93, of the following paragraph:

"(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the North-west Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances."

(2) In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29, or any

¹ This however, was taken by Quebec to be of no force or effect in the province with the amendment passed by the National Assembly of Quebec and the introduction of s.93A, which formally stated the religious rights riders of s.93 did not apply in the province.

Act passed in amendment be no discrimination against schools of any class described in the said chapter 29.

The general idea was that since the RC minority in Ontario at the time of Confederation, and at the time of the creation of the provinces of Alberta and Saskatchewan in 1905, had an established practice of educating their own children in their own separate schools and according to their own religious doctrine, the practice was ‘grandfathered in’, so-to-speak. These constitutional provisions imply a commitment on the part of the state at the time that they would not swoop in and shut down the existing schools and force RC families to send their children to the public schools against their wishes. Considering the time these commitments were made this was a serious concern for the RC minority, as the practice of forced education against the wishes of the parents was not an uncommon practice in other parts of the world. Moreover, the RC majority in Quebec was concerned for the rights of minority Catholics in Ontario, and Protestants in Ontario were concerned for their minority counterparts in Quebec.

The Constitution Act, 1982, and the Canadian Charter of Rights and Freedoms

Giving due consideration to the state of affairs for the RC minority at the time of confederation and the turn of the 20th century is all well and good, but by the time the Constitution Act, 1982 was brought into effect over a century later, needless to say much had changed. RCs were no longer subject to widespread persecution and had largely assimilated completely into mainstream Canadian society. The Second Vatican Council of 1962-1965 ushered in a new era of sweeping modernization to the RC Church. Before this, there was also the end of the Second World War and the beginning of what is now often referred to as the ‘rights era’, exemplified by the United Nations and its *Universal Declaration of Human Rights, 1948*. John Peters Humphrey, a Canadian law professor, wrote the original draft of the Universal Declaration of Human Rights, a document that has been called “the international Magna Carta of all men everywhere” (Ishay 2008, 218). It is, therefore, unsurprising that with the introduction of the *Canadian Charter of Rights and Freedoms* in the *Constitution Act, 1982* that Canada formally embraced the egalitarian values that are the hallmark of this new era of human rights.

These s.93 guarantees have been subject to many disputes in the time since confederation. In recent years, challenges to these guarantees have most often been based on Canada's principal human rights law, the *Canadian Charter of Rights and Freedoms*, which has full constitutional status as the *Constitution Act, 1982*. Legislation that does not conform to the provisions of the *Charter* may be declared by the courts to be of no force and effect in accordance with s.52 of the *Constitution Act, 1982*. The charter provides:

“1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

a) freedom of conscience and religion ...

...

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

...

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.²

...

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Some provinces in Canada have replaced the “religious-based schools system” provisions of the constitution with alternatives (Bayefsky and Waldman 2007). Constitutional amendments in the last decade of the 20th century in Québec and Newfoundland that eliminated the denominational school system demonstrate that such change with in regard to denominational schools is possible given sufficient political will. In other provinces, resolutions of the discrimination problem and the RC constitutional privilege have resulted in equal or at least partial funding for both religious and non-religious independent schools. Such resolutions have been usually been framed as maximizing parental school choice and have usually enjoyed considerable public support.

All Canadian provinces except Ontario appear to have arrived at a consensus on the issue of public funding of religious education. Nondiscrimination in school funding is evidently the trend, whether by constitutional amendment or an extension of entitlement to all religious minorities (or otherwise independent) schools. Ontario, critics point out, is currently the only province in Canada that has the distinction of significantly advantages only one religious group, RCs, when it comes to school funding to the exclusion of all others minority groups.³

Dickinson and Dolmage point out, however, that the Supreme Court of Canada has effectively foreclosed the possibility of a legal remedy to the inequality in the system, asserting instead of the matter is fundamentally not within the jurisdiction of the courts but of the legislatures. In his decision in *Adler v. Ontario* (1992), Justice Anderson summed up the nature of the compromise thus:

² Note that the Supreme Court of Canada has ruled that part of the multicultural heritage referred to in s.27 includes the religious pluralism of Canadian society, and that therefore the Charter is to be interpreted in a manner consistent with the preservation and enhancement of the religious pluralism of Canadian society.

³ I am here assuming that secularism is not itself a religious group of the same kind as RC, Jewish, Muslim, *etc.* This is a controversial assumption, but nonetheless a common one which I will make for the purposes of this paper. Some authors argue, for example, that the secular character of the public schools does in fact reflect a religious position, namely that of secular humanism. I cannot explore this issue at any length here, but for an extended analysis see Taylor (2007), Bouchard (2012), and Braley (2011).

In my view and conclusion, the funding of RC 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 and a want of equity. This was fully recognized and dealt with by the judges in the Supreme Court of Canada. (p. 693)

A Tale of Two Constitutions – a History of Litigation

The new values of egalitarianism and multiculturalism expressed in s.15 and s.27 of the *Charter*, respectively, are, however, in tension with the values expressed in the privileges of the founding peoples principle that informs much of *The Constitution Act, 1867*, especially the education privileges afforded to RCs. With the introduction of the *Charter*, this tension became the subject of many disputes in the first decade of the *Charter* era.

Part of what the Charter does is it is an attempt to formalize the unwritten constitution as it has evolved in the first century of Canadian history. There are the linguistic and religious privileges of *The Constitution Act, 1867*, and then there are the more modern values of egalitarianism and multiculturalism of s.15 and s.27 of the *Charter*. When we consider these changing values as expressed in Canada's two constitutions, especially in the context of education, what the courts have been forced to attempt to reconcile are precisely these values and what they have to say about the nature of education, religion, and religious education.

In the various *Charter* challenges that were launched from its introduction in 1982 to *Adler* in 1992. During these early years for the *Charter*, minority groups used the equality rights of the *Charter* to attack state financial policies with respect to the financing of the education system. Dickenson and Dolmage note in his article that there is a “discernible transition from *Zylberberg* to *Adler*” (Dickinson and Dolmage 1996). The early cases were launched as a way of removing Christian biases that were evident in things like the opening exercises and instruction of the public schools, but that later they became concerned with more structural issues such as the financing of the system (Dickinson and Dolmage 1996).

Dickinson and Dolmage point to a paradoxical trend: the more the state subscribes to and institutionalize a pluralist model, the more it is “driven necessarily to classify citizens according to race or ethnicity of religious belief and affiliation, which is an activity viewed with great suspicion if not outright dread by civil libertarians” (Dickinson and Dolmage 1996). The problem seems to be that the more the Canadian state attempts to embrace equality and multiculturalism through its institutions, the worse things get for groups that want to express their distinctiveness in the education system.

In the cases that deal with state funding of separate RC schools in Ontario, Alberta and Saskatchewan, it should be noted that while those are the only three provinces in which this constitutional question formally arises, nevertheless the Supreme Court decisions set precedent because the *Charter* supersedes all provincial legislation.⁴ If prayer in Ontario public schools is ruled unconstitutional on

⁴ (Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 c.11 (U.K.) n.d.)

Charter rights grounds, then it is unconstitutional in every Canadian jurisdiction. The fact that some provincial legislation may still provide or call for school prayer during opening school exercises is merely evidence that the legislation in question has yet to be formally challenged. (Dickinson and Dolmage 1996)

As stated above, s.93 of *The Constitution Act, 1867* is the constitutional foundation for the Charter challenges to religious practice in the public schools and the judicial question regarding funding of religious schools. This is important because it formally limits the immediate jurisdiction of the decisions. As Justice Anderson notes, the decision of whether to extend funding to non-RC religious schools is first and foremost a political question, not a legal question. It is not the place of the courts to mandate the extension of funding. This question must be decided by the democratically elected legislatures. Therefore any injustice that we may view as continuing to be the case on this question is not the fault of the courts, but of the people and their elected representatives. The reason this is so important is because explicitly mentioned in s.93 are the existence, nature, and public funding of RC separate schools in Ontario.

Zylberberg, Elgin County, and the secularization of the public school system

The first two cases, the *Zylberberg* case (*Zylberberg et al. v. Sudbury Board of Education, 1988*) and the *Elgin County* case (*Canadian Civil Liberties Association v. Ontario 1990*) began the secularization of the public school system. This created a situation in which RC schools were the only schools that were funded by the state that incorporated religion. The trend sets up the conditions of differential financial burden under which the claims of inequality were launched.

The *Zylberberg* case concerned a provision for religious exercise in Ontario public schools, which was at the time required by s.28 (1) of regulation 262 of the Ontario *Education Act, 1980*. This regulation required public schools in the province to begin and end each day with a reading of the reading of the Lord's Prayer, other Scriptural readings, and in some cases singing of Christian hymns. (Zylberberg 1988) The applicants in that case, the Zylberbergs, who represented non-Christian parents argues that the requirement was a violation of their freedom of religion as guaranteed by s.2(a) of the *Charter*, as well as their s.15 equality rights. In the case, the respondent school boards argues that while the regulation was *prima facie* a violation of the kind claimed by the applicants, that it nonetheless constitutes a reasonable and justifiable violation of those rights under s.1 of the *Charter*, which states that rights and freedoms may be sometimes be reasonably limited in a free and democratic society. The purpose, it was claimed, was not religious but was rather to serve as a vehicle for the teaching of important moral values. The respondents argued that the Christian religious elements were being used merely as a vehicle for teaching morality, and that it did not constitute any kind of religious indoctrination. The board argued, moreover, that if a violation of s.2 (a) did obtain, then such a denigration of minority rights was insubstantial at best. The board also argued that since exemptions from participation in the activities in question were routinely granted upon the request of parents, that this eliminated any element of coercion that might have otherwise obtained. (Zylberberg 1988)

The court applied the *Oakes* test, which is the test used to determine whether s.1 of the *Charter* applies. The test determines whether an infringement of rights can be considered reasonable and demonstrably justified in a free and democratic society.⁵ In the *Zylberberg* case, the Ontario Court of

⁵ To pass the test, a violation must meet four criteria: it has to be logically connected to the accomplishment of some significant government objective or purpose, the degree to which the right is infringed must be proportional to the importance of the

Appeal held that the violation of the right to freedom of religion failed the proportionality requirement of the test, and that therefore the denigration of the minority rights was not insubstantial as the respondents had argued, and did not impair as little as possible the rights of the minority students (Zylberberg 1988). They noted also that even though exemptions were routinely granted, that nevertheless the practice put undue peer pressure on the minority students to conform to the religious practices of the majority, and that this was a violation of their s.15 equality rights (Zylberberg 1988). Therefore, the regulation was struck down and held to be of no force or effect henceforth. In response, the Ontario public school system updated the regulation so that the opening and closing ceremonies of the schools would instead involve non-religious inspirational readings.

Elgin County, Dickinson and Dolmage note, was in many ways a logical extension of the *Zylberberg* case (Dickinson and Dolmage 1996). The cases resulted in the total secularization of the state funded public school system. The logical extension was that while the earlier case removed the necessity of the reading of the Lord's Prayer from public school activities, it still allowed school official's discretion to use religious elements in school activities if they chose to do so with the approval of a majority of the parents at the school. The result of the *Elgin County* case was that this discretion was removed, leading to the complete secularization of the public school curriculum and the public school system (Dickinson and Dolmage 1996). The updated regulations allowed the schools to offer elective courses on religious education and world religions but specifically forbade indoctrination into any one religion. In short, public schools became completely secular.

The result of the litigation in these two cases was a situation in which all state funded schools in Ontario were either secular or RC. All other options received and continue to receive no state funding.

***Adler v. Ontario* and the argument for extending public funding to non-RC religious schools**

In the case of *Adler* (*Adler v. Ontario*, 1996) the applicants claimed violation of their freedom of conscience and religion under s.2 (a) and of their equality rights under s.15. In this case, however, the applicants maintained that the violation was because of the Ontario government's failure to provide public funding for private religious schools that were not RC in religious orientation (Adler 1996). The applicants claimed that because they were not RC that they were subject to unjustified differential treatment at the hands of the government in their wanting to send their child to a school that would be conducive to their religious orientation according to the convictions of their conscience. They noted that as it was a requirement of the state to send their children to a state-approved school, the requirement of their consciences to raise their children according to their own faith created a situation in which they were disadvantaged, vis-à-vis the state, by their religious beliefs (Dickinson and Dolmage 1996). The parents were disadvantaged as compared to on the one hand RC parents in the province who could send their children to a school in keeping with their religious convictions with full state financial support, and on the other hand non-religious parents who could send their children to the non-religious secular public schools that similarly received full state financial support (Dickinson and Dolmage 1996) (Paquette 2009).

In this case, however, unlike the previous cases of *Elgin County* and *Zylberberg*, the applicants lost. The court decided that they were free to send their children to a public school in which they would receive a secular education, but that the ministry of education was not thereby required extending funding to non-RC religious schools in order to meet the Adlers' s.15 equality rights. The reasoning was that there was no government action that discriminated against the parents, rather it was because of the parents own

government purpose, the right or freedom must be limited as little as possible, and it must be demonstrated that the same purpose cannot be achieved in some alternative way that would result in less infringement.

convictions that the parents were put at a self-imposed disadvantage. Crucially, the court determined that government inaction could not be held as discrimination and violation of the parents' s.15 equality rights (Dickinson and Dolmage 1996). The court explicitly ruled that what the Adlers were complaining about was state inaction, rather than action, and that state inaction cannot be the subject of a charter challenge. This is odd, given that later in the Supreme Court case of *Vriend v. Alberta*, the issue was legislative omission of protection from discrimination based on sexual orientation. In that case, the court held that the omission, arguably a kind of state inaction, did in fact violate the applicant's s.15 equality rights (Dickinson and Dolmage 1996). This apparent inconsistency in the reasoning of these two cases has never been taken up, but was noted in the United Nation Human Rights case in *Waldman v. Canada* where the applicants of *Adler* took their case to the UN and won (Bayefsky and Waldman 2007). The reasoning of the court in *Adler* was that it would be a different matter if the provincial government chose to fund some private religious schools and not others on the basis of religion. In the words of Chief Justice Dubin,

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 1996, 18)

Therefore, the court decided that this was a political decision and that it was therefore up to the legislatures to decide whether funding ought to be extended to non-RC religious schools. Therefore, according to the ruling, no legal requirement to extend funding to other religious schools obtains given the law as it currently stands.

The Debate in the Literature

Given the current state of affairs regarding the state funding of religious schools in Canada, there appear to be at least two possible ways to correct the constitutional tension between the privileges of *The Constitution Act, 1867* and the egalitarianism of the *Charter*. Removing the privilege, or extending it.

Extension of state funding for separate non-RC schools

On this side of the debate, the most notable advocate, according to Paquette, is Fahmy, who insists that the courts, and in particular the Supreme Court of Canada, "got it wrong" on the question of provincial obligation to fund private religious schools (Paquette 2009). Building on a broad spectrum of case law, Fahmy argues that notwithstanding *Adler*, provinces ultimately do have a positive obligation under the *Charter* to fund private religious schools.

Fahmy invokes three major lines of argument. First, she argues that freedom of religion is impaired, and in a way that cannot rightly be saved under s.1 of the *Charter*, by failure of the state to provide financial support to non-RC religious private schools (Paquette 2009). Second, she contends that s.27 of the *Charter*, the multicultural interpretation clause, should be used more aggressively as an anti-discrimination interpretive principle and that doing so and giving s.27 its proper weight in the balance of judicial decision-making, would have led to a conclusion different from that arrived at in *Adler* on the key question of government obligation to fund religious independent schools (Paquette 2009).

Finally, Fahmy believes that the majority's s.1 analysis in *Adler* was flawed and that the dissenting opinion of Justice L'Heureux-Dube was much closer to the mark (Paquette 2009). She specifically cites the following comments of L'Heureux-Dube in this respect: "The complete denial of funding is the most excessive impairment possible [of freedom of religion], not one of a range of possible alternatives" (Paquette 2009). Moreover, Fahmy notes the following:

Based on the evidence, L'Heureux-Dube J. found that partial funding, as is currently provided outside Ontario, would achieve the objectives of the legislature and infringe equality rights to a lesser degree. In her view, "[p]artial funding would actually further the objective of providing a universally accessible education system and promote the value of religious tolerance in this context where some religious communities cannot be accommodated in the secular system." Justice L'Heureux-Dube's dissenting opinion on this issue is both compelling and equally applicable to an alleged violation of s.2(a). That is, the religious freedom of Ontario's religious minorities [*sic*] communities could be impaired to a lesser degree should the government decide to offer partial funding to independent faith-based schools, and, for this reason, the s.2(a) violation cannot be justified in a free and democratic society." (Paquette 2009)

Bayefsky and Waldman provide a comparative analysis of each jurisdiction in Canada that demonstrates Ontario to be the only province in Canada which extends public funding to only one religious group, to the complete exclusion of all others. RCs receive 100% direct public funding and all other religious denominations receive 0% funding, whereas in most other provinces provide at least a level of funding to other religious schools, even if not to the same level as is given to RC and Protestant schools (Bayefsky and Waldman 2007).

In Ontario, the provincial jurisdictional powers provided under s.93 of the *Constitution Act, 1867* is exercised through the *Ontario Education Act, 1980*. The Act governs all legislation and regulations respecting education funding. It requires that such legislation, regulations or other policy "operate in a fair and nondiscriminatory manner" (Ontario Education Act, 1980 n.d.).

Bayefsky and Waldman sum up their essential objection to Ontario's differential treatment of RCs and non-RCs is essentially in the following way:

"The extreme financial burden imposed on raising children in a matter which preserves and promotes their religious heritage and identity in the case of all non-RC religious minorities in Ontario, as compared with the lack of financial burden on RCs having the same goals and interests for their children, violates the fundamental obligation of nondiscrimination." (Bayefsky and Waldman 2007)

Another objection to the status quo in Ontario, noted by Bayefsky and Waldman, is that a religious education in independent religious schools is integral to the conduct of the basic affairs of many minority religions (Dickinson and Dolmage 1996). Emil Fackenheim, expert witness in the *Adler* case expressed the concern in the following way:

“... Jewish day school education is indispensable to the survival of Jewish communities in Canada and throughout the world. In the post-Holocaust era, this has become a matter of absolute urgency, as the Jews are survivor people for whom it is necessary that they and their children understand their religious heritage. It is imperative the Jews know who they are and why they are here.

...[S]ending children to weekend or after schools to learn about their Jewish religion is not an adequate approach to Jewish education. Psychological impact of having Jewish education, afterschool hours rather than during the school day is such that it makes Jewish education a burden for them rather than a natural part of their life. Jewish education is intimately linked with Jewish cultural survival and in order to be effective it must be pursued together with secular portion of the children's education in a full-time, day school setting.”⁶

On the other side of the debate, authors such as Paquette (2009), Macleod (2010), Long and Magsino (2007) argue that extending nondiscriminatory public funding to religious non-RC denominations is antithetical to a tolerant, multicultural, nondiscriminatory society. But then it would appear, however, that the status quo of selectively discriminatory funding of only one religious denomination's schools is also a hindrance to the cultivation of a tolerant, nondiscriminatory society. As Bayefsky and Waldman put it,

“public funding of religious schools predicated on privileged and exclusive religious affiliation encourages the very hierarchical, imbalanced, and divided society along religious lines that it claims to defeat.” (Bayefsky and Waldman 2007, 15)

Singling out one religious denominational social group, namely RCs, does not appear to be conducive to the promotion of social cohesion in the rest of the public school system, to say nothing of the wider society itself. It encourages discord in society and is perceived by the remainder as favoring one religious denomination based on historical conditions that simply do not obtain any longer. In her dissenting opinion in the *Adler* case, Madam Justice L'Heureux-Dube describes what she sees as the denial of equality:

“... At issue here are the efforts of small, insular religious minority communities seeking to survive in a large, secular society. As such, the complete non-recognition of this group strikes at the very heart of the principles underlying s.15. This provision, more than any other in the Charter, is intended to protect socially vulnerable groups from the discriminatory will of the majority as expressed through state action. The

⁶ *Affidavit of Emil Fackenheim*, sworn 21st of December 1991, in support of *Adler v. Ontario*, (General Division), paragraphs 2-3, in Bayefsky and Waldman, *State Support of Religious Education: Canada versus the United Nations*, pp. 771-772, document # 33.

distinction created under the Education Act gives the clear message to these parents that their beliefs and practices are less worthy of consideration value than those of the majoritarian secular society. They are not granted the same degree of concern, dignity and worth of their parents.”⁷ (Adler 1996)

The second way to remedy the inequity would be to change the constitution to remove the privilege and therefore the state funding of the separate RC schools. Any legal approach has been ruled a non-starter by the Supreme Court, and therefore is not a viable possibility given the legislative and constitutional situation as it currently stands.

Elimination of Public Funding for RC schools

Paquette argues on the other side of the debate that the extension of similar treatment to non-RCs would cause social fragmentation due to the insulating effects of the separate school model. He argues that religious ostracism given that children of minority faiths would have little socialization with children of other faiths, and on a more practical level, that it would amount to an inefficient duplication of services already offered in the Ontario school system. (Paquette 2009) However, the vast bulk of the fragmentation of Ontario school system already exists by virtue of the division of the publicly funded school system into RC schools and non-RC schools (currently 31.6% of the total publicly funded school population), or Ontario support of the division of the population in their entitlements into RCs (currently 34.3% of the population) and non-RCs (Bayefsky and Waldman 2007).

Paquette uses the test developed by the Supreme Court of Canada in *Law v Canada (Minister of Employment and Immigration)* which was later refined in *Falkiner v Ontario (Ministry of Community and Social Services)* to argue that public funding of private schools through vouchers and tax-credit programs is a clear violation of s.15 of the *Charter*. He argues that “vouchers and tax credits requiring parents to top-up their value to pay private school tuition fees unconstitutionally excludes poor parents and children from access to private schools” (Supra note 1 at 8). From this, he concludes that in order to increase access to quality education for marginalized groups such as the poor, the public education system has to be improved.

Bayefsky responds that if the goal was only to maximize public funding for the secular public school system a withdrawal of special funding for RCs would be the logical course of action. Waldman also notes that the discriminatory funding in the province is in marked contrast to the demographic realities of modern Ontario. The actual composition of religious minorities in Ontario has changed dramatically since Canada was founded in 1867. 2001 census, which collected information on religious affiliation, indicates that RCs are essentially no longer a minority in the province (Bayefsky and Waldman 2007). RCs now number approximately the same as Protestants, or around 30% of the population which is the same percentage that is Protestant. After RC, “no religion” was the second most frequent religion response to the census question (at 16% of the population) in 2001 (Bayefsky and Waldman 2007). In Canada as a whole, RCs are the largest religious group, accounting for 43% of the Canadian population. Indeed, in the last decade of the 20th century the number of RCs in Canada increased nearly 5% while at

⁷ *Adler v. Ontario*, supra note 8, at para. 86. Madam Justice L’Heureux-Dube was dissenting on the issue of whether the *Constitution Act, 1867* was immune from *Charter* review. The majority of the Court did in fact recognize the incompatibility of the 1867 constitutional provisions and the *Charter*’s equality rights.

the same time the number of Protestants fell by over 8%, continuing the long-term trends of both groups (Bayefsky and Waldman 2007).

The religious affiliation of Ontario residents reveals a multicultural society in which there is no clear majority (unless Christianity is seen as a monolithic group) and in which there are significant minorities. Nevertheless, it is a historical anomaly of protecting only RCs and extending no similar provision to other religious minorities, such as the Jewish community, which comprises nearly 2% of the Ontario population. Contrary to the 1867 rationale for protecting only a small Ontario RC minority, there are currently other minority religions in Ontario that are in for more vulnerable positions today than our RCs.

The other passible way to correct to tension would be to extend funding to other separate and alternative schools, whether religious, faith-based, or otherwise different from the public model. This, it is worth noting, seems to be the trend in the literature in terms of arguments. This is the most common position expressed in popular media and public debate, and authors such as Dickinson, Dolmage, Bayefsky and Waldman argue that this is likely the only viable way forward on this matter, even though this raises difficult questions regarding the value of a common v. a separate school system model. This is also the position taken by the United Nations Human Rights Council on the matter, which has led it to repeatedly condemn Ontario's current practice and implore the province to update its legislation to extend funding in this way.

Theoretical questions?

The debate raises a number of noteworthy theoretical questions, in particular questions that overlap with the debate over common versus separate school models in liberal democratic societies. Which approach better reflects and serves the purposes of such a society: The common school approach and the elimination of the RC school financial constitutional privilege, or the separate school approach and the extension of state funding to a wider variety of religious and otherwise independent schools? What does it mean for a child's right to education? Would this right be infringed upon with either of these approaches? What does it say about political legitimacy? I cannot answer these questions here, but I do want to highlight that this debate does raise such questions.

Conclusion

In this paper, I have outlined the problem of tension between the privileges of the founding peoples principle that informs the Constitution Act, 1867, with the egalitarian values of the *Charter*. I have outlined the legislative and sociopolitical history of the time leading up to confederation and the years between confederation and the *Charter*. Following Dickinson, Dolmage, Bayefsky, Waldman, and Lawton I have outlined the history of litigation over the tension and highlighted the judicial reasoning that led to where we are now. Finally, I have outlined the debate in the literature over what to do about the inequity: whether to eliminate or extend the privilege. The trend in the literature is towards reconciliation of the tension, but there is no consensus on how to do it. The extension of funding approach, however, does seem to be the stronger of the two arguments, primarily on the practical grounds that neither legal nor political remedy is likely to be forthcoming in the form of elimination of the privilege, and the status quo is unlikely to go unchanged in an era of ever great and deeper diversity in Canadian society.

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