ADLER v. *ONTARIO*: THE TROUBLING LEGACY OF A COMPROMISE

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In 1985 the government of the Province of Ontario referred Bill 30 to the Court of Appeal for Ontario.[1] Bill 30 proposed an amendment to the province's *Education Act* which would extend public funding through the secondary school level of the Roman Catholic school system. Supporters of the legislation argued that it merely fulfilled the province's commitment under section 93 of the *Constitution Act, 1867*. The Supreme Court, upholding the judgment of a majority on the Court of Appeal, agreed with this interpretation.[2] The *Education Act* was duly amended to extend funding. Opposition to the legislation has come from two different quarters. On the one hand, there are those, including a minority on the Court of Appeal, who have argued that any funding for denominational schools is inappropriate in a pluralist society with a fully accessible public school system. On the other, there are those who have argued that if funding is to be given to the Roman Catholic system then it should also be available to members of any religious faith who wish to establish sectarian schools. The recent Supreme Court decision in *Adler* v. *Ontario* deals with an objection of this second sort.[3]

The appellants in *Adler* were members of the Jewish (the Adler appellants) and Christian Reformed (the Elgersma appellants) faiths. While their claims were not identical, taken together they argued that by failing to provide for the public funding of denominational schools the Education Act, R.S.O. 1990 violated their rights under sections 2(a) and 15(1) of the Charter.[4] Although differing somewhat in the reasons given, the Court unanimously agreed that the legislation did not violate the guarantee of freedom of religion under section 2(a) but they disagreed over whether there was a violation of section 15(1). Writing for the majority Iacobucci J. (joined by Lamer C.J.C., La Forest, Gonthier and Cory, JJ.) concluded that funding for public schools and for Roman Catholic schools was immune from Charter attack because the Province of Ontario was exercising its plenary power under section 93 of the *Constitution Act, 1867*.[5] On the basis of a different reading of section 93, Sopinka J. (joined by Major J.) maintained that the Charter did apply to the funding of public schools but that the legislation did not create a distinction which violated section 15(1).[6] Justice L'Heureux-Dubé and McLachlin J. also agreed that the Charter applied and both found a violation of section 15(1). They disagreed however on the application of section 1 with McLachlin J. finding that the legislation was saved and L'Heureux-Dubé J. concluding that it was not.[7]

The majority in *Adler* followed the decision in the *Ontario Education Act Reference*. Writing for the majority in the *Reference* decision Wilson J. noted that

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1 *Education Amendment Act*, 1986 (Ont.), c. 21 (Bill 30).

2 *Reference Re Act to Amend the Education Act (Ontario)* (1987), 40 D.L.R. (4th) 18, 1 S.C.R 1148, aff'g (1986), 25 D.L.R. (4th) 1 (O.C.A.) [hereinafter *Ontario Education Act Reference*].

3 *Adler* v. *Ontario* (1996), 140 D.L.R. (4th) 385, aff'g, (1994), 116 D.L.R. (4th) 1 (O.C.A.), aff'g (1992), 94 D.L.R. (4th) 417 (O.C.J.) [hereinafter *Adler*].

4 Both appellants also made claims regarding the School Health Support Services Program but I will not be concerned with this issue in the present comment.

5 *Adler*, *supra* note 3 at 408.

6 Sopinka J. rejected the claim by Iacobucci J. that s. 93 set out a "comprehensive Code with respect to legislative powers in denominational schools." For Sopinka J. the subsections of s. 93 operate as restrictions on the plenary power granted by the opening words of the section; these words do not mandate the establishment of a public school system and a system of dissentient schools, they merely grant the Provinces the power to make "Laws in relation to Education." Such laws are subject to the Charter (*ibid.* at 432).

7 *Ibid.* at 461, 427.

she was concerned solely with the constitutional issue. She wrote that "it is not the role of the Court to determine whether as a policy matter a publicly funded Roman Catholic school system is or is not desirable."[8] It goes without saying that constitutions are documents written under the pressures of historical circumstance. Everyone agrees that section 93 represents a compromise reached by those who drafted the *British North America Act*. The result of the application of the distinction between policy and law in the *Ontario Education Act Reference*, an effect clearly in evidence in *Adler*, was to entrench in the constitution a policy developed in a very different political climate at the time of Confederation. The Preamble to Bill 30 contained the following characterization of the purpose of the legislation:[9]

> . . . whereas it is just and proper and *in accordance with the spirit of the guarantees given in 1867* to bring the provisions of the law respecting Roman Catholic separate schools into harmony with the provisions of the law respecting public elementary and secondary schools . . .

The "spirit of the guarantees given in 1867" was one of compromise. It is important, therefore, to consider the precise nature of this compromise and to ask whether legislation flowing from that compromise remains appropriate today. While the intentions of the framers of a constitution may be an important guide to understanding the provisions of such a document, it is also possible that the conditions which were the objects of those intentions no longer obtain.

While opponents of funding for Roman Catholic schools clearly occupy very different positions, they share in common the view that the current situation in Ontario is unprincipled insofar as it provides to members of one religious community something which it denies to all others. Religious education is a particularly troubling issue in a modern liberal state. It is important, therefore, to consider briefly the motives of those seeking to have their children educated outside the public school system. While the case did not directly involve education, the conflict between the liberal idea of membership in a religious community and the goals of religious education is evident in the following passage from the Supreme Court's judgment in *Hofer* v. *Hofer*.[10] Writing for the majority Ritchie J. made the following remark regarding the conditions of membership in a Hutterite community:[11]

> There is no doubt that the Hutterian way of life is not that of the vast majority of Canadians, but it makes manifest a form of religious philosophy to which any Canadian can subscribe and it appears to me that if any individual *either through birth within the community or by choice* wishes to subscribe to such a rigid form of life and to subject himself to the harsh disciplines of the Hutterian Church, he is free to do so. I can see nothing contrary to public policy in the continued existence of these communities living as they do in accordance with their own rules and beliefs, and as I have indicated I think that it is for the Church to determine who is and who is not an acceptable member of its communities.

By effectively equating 'birth' and 'choice' as ways of becoming a member of a religious community, and then claiming that "it is for the Church to determine who is and is not an acceptable member," the above passage highlights the fundamental problem posed by religious education in a secular society. While the adult male members of the Hutterite communities may claim to be there by choice, from the moment of their birth they were raised to be adult Hutterites.[12] Their

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8 *Ontario Education Act Reference, supra* note 2 at 38.

9 *Ibid.* at 31 [emphasis added].

10 *Hofer* v. *Hofer* (1970) S.C.R. 958.

11 *Ibid.* at 975 [emphasis added].
In his judgment in *Big M Drug Mart* Dickson J. defined freedom of religion as follows:
> The essence of the concept of freedom of religion is the right to entertain such religious beliefs *as a person chooses*, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. [Emphasis added].

Here too we find the problematic use of the idea of choice. If the goal of religious education is to perpetuate religious communities by reducing the chances that children raised in such communities will leave them, then it is difficult to escape the conclusion that religious education is explicitly directed toward curtailing the individual's ability to exercise the "right to entertain such religious beliefs as (the) person chooses." See *R.* v. *Big M Drug Mart Ltd.* (1985), 1 S.C.R. 295 at 336.

12 Brian Dickson was the original trial judge in *Hofer*. Commenting on the case he described the Hutterian Brethren as "an adaptation of medieval monasticism," a somewhat misleading comparison once one recalls that medieval monasteries were inhabited by celibate adult

upbringings were directed toward constraining that 'choice' as much as possible.[13] Yet, the adult male Hutterites believe that they have chosen, as adults, to belong to the community, a belief recognized by the Supreme Court of Canada as the basis for a voluntary association among them.

While the Hutterites are an admittedly extreme example of the extent to which religious communities endeavour to ensure their continuation through the education of their children, they illustrate in a striking way the conflict between the legal conception of a religious community as a voluntary association and the use of religious education to minimize the chances that individuals brought up within a religious community will regard non-participation in their religion as a choice.[14] In her dissent in *Adler*, L'Heureux-Dubé J. picks up this theme when she draws attention to the conception of the link between education and community membership held by those who were seeking funding for religious schools:[15]

> Evidence submitted by the appellants and accepted by the trial judge establishes that to remain a member of the particular religious communities in question, and to act in accordance with the tenets of these faiths, the appellants are required to educate their children in a manner consistent with this faith and therefore outside of the public or separate schools. Also established by the appellants' evidence according to the judgment of the first instance was the finding that *control over the education of their children was essential to the continuation of the religious communities in question.*

Thus, the communities represented by the appellants in *Adler* believe that they must use their school system to keep their children from abandoning their parents' faith when they reach adulthood.[16]

The communal goal of self-preservation was also present in the minds of those responsible for the guarantees regarding minority education contained in section 93 of the *Constitution Act*. In *Brophy* v. *Attorney General of Manitoba* the motives of the supporters of a separate Roman Catholic school system at the time of Confederation were characterized as follows:[17]

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males. See B. Dickson, "The Role and Function of the Judges" (1980) XIV The Law Society of Upper Canada Gazette 138 at 152..

13 "We must determine whether the individual in question, in the circumstances, would consider him- or herself to have a choice. For members of religious communities, particularly those of the appellants, this is clearly not the case. What might be termed an objective choice of a particular religion from the court's point of view, will, from the religious adherent's perspective, entail a moral imperative. Also, commitment and adherence to the beliefs and practices of one's religion define one's membership in the particular religious community" (per L'Heureux-Dubé J. in *Adler supra* note 3 at 414).

14 This goal of the religious educator was set out with particular force by David Hume in the opening pages of his *Dialogues Concerning Natural Religion*. The following statement is made by a proponent of the religious education of children:

> To season their minds with early piety is my chief care; and by continual precept and instruction and, I hope, too, by example, I imprint deeply on their tender minds an habitual reverence for all the principles of religion. While they pass through every other science, I still remark the uncertainty of each part; the eternal disputations of men; the obscurity of all philosophy; and the strange, ridiculous conclusions which some of the greatest geniuses have derived from the principles of mere human reason. Having thus tamed their mind to a proper submission and self-diffidence, I have no longer any scruple of opening to them the greatest mysteries of religion, nor apprehend any danger from that assuming arrogance of philosophy, which may lead them to reject the most established doctrines and opinions.

Hume wrote this passage to reflect the views of a particularly strident Protestant but its counterpart can be found in the educational writings of the defenders of numerous other religious faiths. See D. Hume, *Dialogues Concerning Natural Religion* (New York: Hafner Press, 1948) at 5-6.

15 *Adler*, *supra*.note 3 at 413 [emphasis added].

16 There is a deep irony here. Jacob Huter, the founder of the Hutterite communities, was, like Martin Luther and John Calvin, an adult and, also like them, a dissenter. Indeed, all first generation Protestants were adult converts from Roman Catholicism. Similarly, all first generation Christians, the disciples being but the first in a very long line, were adult converts from Judaism or from one of the pagan sects in the classical world. In all of these cases converting adults who had took their children with them into their new faiths. The adults then set out to deny their children the freedom to convert. As the above passage from Hume so clearly states, one of the means whereby adults attempt to deprive their children of the freedom to choose their own religious faith is religious education (see *Hume, supra* note 14). Yet, all of these converts in whose names the various faiths continue to be practised can be offered as evidence of the failure of their parents to pass their faith on to their children successfully.

17 *Brophy* v. *Attorney-General of Manitoba*, [1895] A.C. 202 at 214 [emphasis added].

> They regarded it as essential that the education of their children should be in accordance with the teaching of their Church, and considered that such an education could not be obtained in public schools designed for all the members of the community alike, whatever their creed, but could only be secured in *schools conducted under the influence and guidance of the authorities of their Church.*

It is readily apparent that this is precisely the same attitude toward religious education that motivated the parents seeking public support for sectarian schools in *Adler*. Yet, they are to be excluded from the benefits conferred upon Roman Catholic schools because they were not present to make their case at the time of the "political compromise" that lies at the heart of section 93.

On the surface, at least, this compromise looks like an agreement between supporters of a secular school system and those who want their children to receive a religious education. When conceived in this way the parallels between the motives of religious minorities in the nineteenth century and those in the latter part of the twentieth century seem self-evident. Yet, a superficial resemblance can mask a more significant difference, something that turns out to be the case when one examines the historical context in which the compromise was reached. In his history of Protestantism in nineteenth century Ontario, William Westfall remarks upon the close links that existed between education and religion:[18]

> In the first decades of the Victorian era, the established church lost its favoured position at almost all levels of education as the state took control of the instruction of the youth of the colony. This process of "secularization," however, reorganized rather than rejected the close relationship between religion and education. . . . Even at the elementary levels of education, where the new state reigned supreme, the advance of secularism was met by a stern defence of the importance of instilling an unshakeable religious code in the minds of youth. Egerton Ryerson, to whom is ascribed such praise for creating the system of public education, never questioned the necessity of religious instruction in his schools. Indeed, he hoped the creation of a system of public education would expand the place of religion in the classroom by removing special privileges and creating "a common patriotic ground of comprehensiveness and avowed Christian principles."

Seen from this point of view, the Roman Catholic minority in Ontario at the time of Confederation were not just opposed to secular education, they were opposed to a model of secular education which rested upon "avowed Christian principles" defined by Protestants. Ryerson's seemingly casual reference to "Christian principles" is disingenuous because it masks the fact that the differences among the various Christian sects, both Protestant and Catholic, derive in large part from the difficulties in defining precisely what these principles are. Furthermore, as the evidence of the project of the residential schools amply demonstrates, education can be used not only to perpetuate the beliefs of a religious community, it can also be used as a means of destroying the beliefs of members of other religious communities.[19] Religious minorities justifiably feared, therefore, that a religious majority might use a supposedly public school system as a means of indoctrinating their children in the tenets of an alien faith. It is against this background that one should understand the following remark by Dubin C.J.O. about the contemporary situation in Ontario:[20]

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[18] W. Westfall, *Two Worlds: The Protestant Culture of Nineteenth-Century Ontario* (Montreal and Kingston: McGill-Queen's University Press, 1989) at 6.

[19] The use of schools as a means of destroying the religious beliefs of the aboriginal nations of Canada was already well under way at the time of Confederation. In the 1840s James Beaven, an Anglican clergyman, and one of Canada's first full time professors of philosophy, undertook a journey from Toronto to Sault Ste Marie to investigate the conditions at the various missions in what would become Northern Ontario. The task of civilising the heathens was very much on Beaven's mind. He advocated the kidnapping of children from their families so that they might be "trained up as Christians." The task of civilizing the Indians would proceed "co-ordinately with conversion, and as a means to it." Beaven's recommendation regarding the Indians was in accord with the policy advocated by the Bagot Commission in 1842. See J. Beaven, *Recreations of a Long Vacation, or, A Visit to the Indian Missions in Upper Canada* (London: James Burns, 1946; Toronto: H. and W. Rowsell, 1846) at 161; J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*, rev'd ed. (Toronto: University of Toronto Press, 1991) at 104ff.

[20] *Adler* v. *Ontario* (1994), 116 D.L.R. (4th) 1 at 24; cited by Iacobucci J., *Adler*, *supra* note 3 at 398.

> [The] public school system is solely secular and, in my view, because it is secular, it cannot found a claim of discrimination because it does not provide public funds for religious education under private auspices.

The project of secular education in the closing years of the present century cannot simply be identified with the idea of secular education which was dominant at the time of Confederation. A "solely secular" school system is a relatively recent development in the Province of Ontario.[21]

When examining the issue of denominational schooling there are two different sorts of dispute that may arise between the state and religious minorities. The first dispute is inter-denominational while the second is between the religious and the secular. Each of these disputes requires taking a different approach to the problem of religious minorities. In a state in which there is no clear separation of church and state, or in a putatively secular state in which one religious community exercises *de facto* control of the instruments of government, the protection of religious minorities is necessarily a matter of protecting the rights of those who do not share the religious beliefs of those in power.[22] Such was the situation in Ontario in the middle years of the nineteenth century.[23] While none of the Protestant denominations in Ontario had succeeded in becoming the established church in the province, the public education system was clearly in the hands of the Protestant majority.[24] Read in this context, Section 93 can be understood to be a protection of a particular religious minority, the Roman Catholics, from the control of a religious majority.[25] It was the need for this protection that led to the great compromise. This situation can hardly be said to obtain today.

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21 In his dissenting opinion in *Adler*, Sopinka J. notes that "[while] education in common schools [in the nineteenth century] might have been classed as non-denominational, it certainly did not conform to the model" of public schooling in the present. He then traces the history of secularization in the public school system in Ontario in the years since the Second World War. He notes that the Hope Commission in the early nineteen fifties "endorsed the existing system of religious education in public schools, in particular the teaching of 'honesty and Christian love.' The McKay Report ... released in 1969, ... concluded that the religious curriculum was designed to indoctrinate students in the Christian faith and way of life ..." Elsewhere he cites this remark from the decision by Winkler J. in *Bal* v. *Ontario*:

> "[the *Elgin County* decision] signifies] the end of an era of majoritarian Christian influence, and mark[s] the beginning of a period of secularism in education, based on an awareness of a changing societal fabric and Charter protection for minority rights to freedom of religion".

See *Adler*, *supra* note 3 at 438-9, 450; *Bal* v. *Ontario (Attorney-General)* (1994), 121 D.L.R. (4th) 96 (Ont. Ct. (Gen. Div.)); *Canadian Civil Liberties Assn.* v. *Ontario (Minister of Education)* (1990), 65 D.L.R. (4th) 1 (Ont. C.A.) (the *Elgin County* case).

22 Writing with reference to the circumstances in which s. 93 was drafted Sopinka J. notes "[the] majority was in control of the legislature and had no need to have special guarantees in the Constitution Act, 1867." *Adler*, *supra* note 3 at 438.

23 In Ontario in 1881 Roman Catholics made up 16.7% of the population; the combined total for the various different Protestant denominations was 76.9%. In 1951 the corresponding percentages were Roman Catholic, 24.8%, and Protestant, 66.1%. By 1981 the percentage of Protestants had declined to 44.2% while the percentage of Roman Catholics had increased to 33.3%. The largest growth between 1951 and 1981 was in the combined categories of 'Other Religions' and 'No Religion' which climbed from 7.2% in 1951 to 18.1% in 1981. This latter figure is almost certainly higher today.

The figures for 1881 are from G. Stevenson, *Ex Uno Plures* (Montreal & Kingston: McGill-Queen's University Press, 1993) 35; the figures for 1951 and 1981 are from *Report of the Ministerial Inquiry on Religious Education in Ontario Elementary Schools* (Toronto: Government of Ontario, 1990) 24-5.

24 It is in light of this that one should understand the following remarks by Wilson J. in the *Ontario Education Act Reference*:

> The protection of minority religious rights was a major preoccupation during the negotiations leading to Confederation because of the perceived danger of leaving the religious minorities in both Canada East and Canada West at the mercy of overwhelming majorities.

The 'overwhelming majorities' referred to by Wilson J. were not secularists, they were Catholics and Protestants. Wilson went on to note that "it seems unbelievable that the draftsmen of [s. 93] would not have made provision for future legislation conferring rights and privileges on religious minorities in response to new conditions." The problem with this is that it misconstrues s. 93 as an example of religious tolerance when, in fact, it served to protect a privileged minority in Quebec by extending education rights to a minority in Ontario who had significantly less influence in the political life of that province. It is unlikely that the draftsmen of 1867 even considered the prospect of "conferring rights and privileges" on non-Christian minorities. See *Ontario Education Act Reference, supra*, note 2 at 42.

25 For a variety of reasons the situation in Quebec was not precisely parallel but, as Garth Stevenson has noted, "[the] Roman Catholic Church enjoyed a quasi-official status in Quebec, where its primacy had been recognized in the Quebec Act of 1774" (G. Stevenson, *supra* note 23 at 34).

The second type of dispute arises between a 'solely secular' state and those who reject the idea that a secular state can provide their children with the type of education required by their religion.[26] They are not seeking protection from a religious majority, they are seeking an exemption from a requirement to educate their children in a non-religious environment. The appellants in *Adler* are clearly involved in this second type of dispute.[27] When understood in this way it is possible to distinguish their claim from that of the supporters of a Roman Catholic school system at the time of Confederation, but not from that of the supporters of a contemporary separate school system. It might seem as if proponents of religious education are seeking protection from the secular majority and that their situation is, therefore, analogous to that of religious minorities seeking protection from a religious majority. Such an interpretation would, however, rest upon a fundamental misunderstanding of the idea of secularism.

Secularism is not, by itself, a complete world view. It is a response to the political problem of democratic government in a pluralist society. Such a society may, of course, contain atheists as well as those for whom religion is a matter of complete indifference, but such individuals are not secularists. The notion that secularism (or liberalism for that matter) is an alternative to religion is mistaken. Commitment to the idea of secularism is not, in and of itself, antithetical to religious faith. Strictly speaking secular institutions are neutral regarding denominational disagreements unless those disagreements threaten the social order. The point of secular institutions is to prevent members of one religion from using the instruments of state power to the disadvantage of members of other religious communities. The modern secular state provides a framework within which different religious minorities, as well as those with no religious beliefs at all, can coexist but such coexistence will only be peaceful if no religious minority is seen to exercise a disproportionate share of power within the institutions created to maintain and promote the secular ideal. One of the goals of public education in a secular state must be the articulation of the idea of secularism in an environment designed to illustrate the viability of the idea. Such an environment is difficult, if not impossible, to achieve in a denominational school.[28]

If, as I have suggested, "the spirit of the guarantees given in 1867" was the protection of a religious minority from a religious majority which had *de facto* control of a supposedly secular school system, then Bill 30 may have been a consequence of that compromise but it had little or nothing to do with its spirit. Moreover, at a time when other provinces (Newfoundland and Quebec) are in the process of rejecting the type of arrangements set out in section 93, Ontario's funding of a separate school system looks increasingly anachronistic. Although one may disagree with the reasoning of the majority in *Adler*, the decision to withhold funding from denominational schools was the appropriate one. On the other hand, we are left with the public funding of the Roman Catholic system. Supporters of non-Catholic religious schools, like the appellants in *Adler*, are correct in seeing this as the favouring of one religious minority over others. There is no reason, in principle, why Roman Catholic schools should have access to public funds while such funding is denied to other minorities. It is unfortunate that an historically conditioned compromise at the time of Confederation continues to haunt debates over school funding in an era when a truly secular system of education requires all the support that it can muster.❑

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[26] Since numerous Christian denominations also reject the separation of religion and politics this dispute may ultimately call into question the very foundations of the secular state.

[27] "Insularity has become necessary to maintaining the religious lifestyle practised by the appellants by virtue of the powerful economic and other forces of secularization in society" (per L'Heureux-Dubé J. in *Adler*, *supra* note 3 at 417).

[28] "The decision to fully fund public secular schools . . . is at base a political decision. Its objective, the record shows, is to foster a strong public secular school system attended by students of all cultural and religious groups. Canada in general and Ontario in particular is a multicultural, multi religious society" (per McLachlin J. in *Adler*, *supra* note 3 at 458).