# THE SUPREME COURT AND EQUIALITY RIGHTS IN 1996: ADLER V. ONTARIO

BY LYNN SMITH

Following an active 1995 term, in which three decisions were released revealing a lively debate and deep division in the Supreme Court of Canada over the meaning and scope of the equality provisions in the *Charter*, there was an expectation that 1996 might bring more debate and some resolution of the division. However, that was not the case. The only significant section 15 equality decision in 1996 was *Adler* v. *Ontario*, which in the end turned on other (important) issues. However, it again revealed the differences of opinion in the Court about the equality provisions and indeed about the *Charter* itself.

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### FACTUAL CONTEXT

In Ontario, two school systems are fully funded by the provincial government—the secular system and the separate Roman Catholic schools. No other religious schools receive public funding, nor do they receive the health support services provided in the publicly funded schools.

The applicants in *Adler* v. *Ontario* challenged this situation under the *Charter*. Parents of children attending Jewish day schools and independent Christian schools, they argued that the non-funding of, and the absence of health support services in, their children's schools violated their section 2(a) freedom of conscience and religion rights,as well as their section 15(1) equality rights.

### CONSTITUTIONAL CONTEXT

Why does one system of religious schools receive public funding in some provinces, such as Ontario? The answer lies in section 93 of the *Constitution Act, 1867*. It gives the provinces the exclusive right to make laws in relation to education, subject to a number of conditions. One is that such laws may not prejudicially affect rights or privileges with respect to denominational schools which existed by law at the time of Confederation. Another is that the denominational schools for Protestants and Roman Catholics in Quebec are to be on the same footing as separate schools for Roman Catholics in Ontario. These conditions resulted from the negotiations leading up to Confederation.

How can this be squared with the *Charter*, enacted in 1982, which guarantees freedom of conscience and religion, and equality before and under the law and equal protection and benefit of the law without discrimination, including religious discrimination? In 1987, the Supreme Court of Canada said that these conditions were a fundamental part of the constitutional compromise and that their importance was recognized by the drafters of the *Charter* who provided, in section 29, that "nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools". Therefore, the *Charter*-based challenge to the Ontario government's decision to extend full funding to Roman Catholic schools was unsuccessful.

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### CHARTER CONTEXT

It was only a matter of time before the other shoe dropped—a challenge based not upon the decision *to fund* the Roman Catholic schools, but instead upon the decision *to refrain from funding* other religious schools.

With respect to freedom of religion, two arguments were made. The first was that, given the nature of the publicly funded schools, the requirement of compulsory education infringed freedom of religion. The second was that the failure to fund the minority religious school imposed a burden on the applicants not borne by persons of other religions or no religion, thus infringing the freedom of religion of the applicants. The applicants relied heavily on the Supreme Court decision in *R* v. *Edwards Books and Art*, a 1986 decision which held that the Sunday-closing laws imposed an economic burden on adherents of religions requiring different days of rest, infringing their freedom of religion (though the laws were upheld in the end as representing reasonable limits on the freedom.)

Given that it had already been decided in 1987 that the decision to fund the Roman Catholic schools was unassailable, the main argument the applicants made in relation to the equality rights was that, despite the fact that the provisions for public education were facially neutral, their effect was to discriminate against users of independent religious schools as compared with users of public secular schools. Here, they relied on cases under human rights legislation like *Bhinder* v. *Canadian National Railway*, in which the Supreme Court held that the facially neutral requirement that hard hats be worn on a construction site discriminated against Sikhs on the basis of religion, and cases in which the Supreme Court had imported this approach into the *Charter*.

### WHAT DID THE SUPREME COURT DO IN ADLER?

The applicants lost, as they had in both courts below. The Su-

preme Court unanimously held that the non-funding of private religious schools was not a violation of section 2(a). The Court rejected the applicants' first argument on the basis that the statute only made education mandatory, not school attendance. The applicants were not compelled to educate their children in the public school systems. The Court also rejected the applicants' second argument, for several different reasons: (1) section 93 was a comprehensive code and, since the applicants could not bring themselves within its terms, they had no claim to public funding (the five majority judges subscribed to this view); (2) freedom of religion does not include the right to state support of one's religion (a view expressed by four judges); and (3) the legislation did not have a disparate impact on different religious groups: all parents whose religion required them to send their children to private school were equally disadvantaged (a view held by two judges).

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The Court also found that there was no violation of the section 15 equality rights of the applicants, but there were significant differences in the judges' reasoning. The five-judge majority held that section 15 did not come into play at all: the non-funding of religious schools was immune from *Charter* review. Four members of the Court, however, held that section 93 insulates only the funding of Roman Catholic schools from *Charter* review, not the comparative funding of secular public schools. However, two of these judges found that there was no breach of section 15. Part of their reasoning was that the distinction made was between public and private schools, not between religious and non-religious schools, and that the adverse impact argument should fail. They said that the discrimination did not flow from the government's action, but from the applicants' religious beliefs. Finally, two judges found that there was an infringement of section 15; of these, one found that nevertheless it was a reasonable limit. Only one judge at the end of the day would have granted a remedy.

The Court also ruled 7-2 against the applicants' argument that, under section 15(1), students in their schools are entitled to receive such health services as physiotherapy, occupational therapy, and speech therapy. The majority held that School Health Support Services were educational services, not health services, and so were protected from *Charter* review. The two dissenting judges both found that failure to provide these services within the applicants' schools constituted a breach of section 15(1) which was not saved by section 1.

### SIGNIFICANCE OF THE DECISION FOR FUTURE EQUALITY CASES

The signals about equality are mixed and somewhat troublesome. First, the Court has reaffirmed the immunity from review under the *Charter* of certain kinds of legislation, where it is seen to be part of the "fundamental constitutional compromise". This does not bode well for claims by members of non-founding minorities (i.e., neither French nor English, Protestant or Roman Catholic) to accommodation of their needs in this or other contexts. Second, the

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Court unanimously concluded that there was no infringement of freedom of religion in this case, narrowing what it seemed to have said earlier in the *Edwards Books* case. Third, two of the members of the Court who considered the equality claim said that it was not made out because the problem stemmed from the applicants' religious beliefs, not from the legislation. If a majority ever adopted this approach, it would constitute a dramatic reversal of what has previously been decided about adverse impact discrimination. As one of the two judges who found an infringement of the equality rights (McLachlin J.) said, "By definition the effect of a discriminatory measure will always be attributable to the religion, gender, disability and so on of the person who is affected by the measure. If a charge of religious discrimination could be rebutted by the allegation that the person discriminated against chose the religion and hence must accept the adverse consequences of its dictates, there would be no such thing as discrimination."

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