SEPARATION AND EQUALITY: AN ARGUMENT FOR RELIGIOUS SCHOOLS WITHIN THE PUBLIC SYSTEM

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La thèse défendue dans cet article est que les écoles des minorités religieuses peuvent et devraient tomber sous le régime d'écoles publiques. L'auteur passe en revue l'histoire de l'interaction de certaines minorités religieuses, soit les témoins de Jehovah, les doukhobors, les mennonites et les huttériens, avec le régime d'enseignement public du Canada. Il examine ensuite les droits relatifs aux écoles confessionnelles qui sont garantis par l'article 93 de la Loi constitutionnelle de 1867, *afin de démontrer comment tribunaux ont établi un équilibre entre les demandes d'autonomie de ces écoles confessionnelles et l'allégation de compétence des gouvernements provinciaux. Les valeurs enchâssées dans l'article 93 sont comparées et mises en contraste avec la protection constitutionnelle qui a été accordée récemment aux écoles des minorités de langue officielle et à la liberté de religion. Les leçons qu'on peut tirer de l'histoire et des dispositions constitutionnelles servent à cerner les intérêts légitimes des minorités religieuses et ceux de l'État. La liberté de religion et les droits à l'égalité sont des valeurs qui rendent légitime la reconnaissance d'un intérêt collectif au financement des écoles publiques pour les minorités religieuses. Le fait que*

That schools for members of minority religious groups can and should be accommodated within the public school system is the thesis of this article. The author reviews the historical examples of the interaction between the following minority religious groups and the public education system in Canada: the Jehovah's Witnesses, Doukhobors, Mennonites and Hutterites. Next, the guarantees for denominational schools contained in section 93 of the Constitution Act, 1867 *are examined to demonstrate how the courts have balanced the demands for autonomy by these denominational schools with the assertion of jurisdiction by provincial governments. The values entrenched by section 93 are compared and contrasted with the more recent constitutional protection of official language minority schools and freedom of religion. These historical and constitutional lessons are used to identify the legitimate interests of religious minorities, on the one hand, and the State, on the other hand. Freedom of religion and equality rights are values which legitimize the recognition of a collective interest in public education by minority religious groups. The State's refusal to recognize this interest amounts to discrimination which is indefensible within the framework of a liberal democracy. Reconciliation of the*

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l'État refuse de reconnaître cet intérêt constitue de la discrimination, ce qui est insoutenable dans le cadre d'une démocratie libérale. Il est possible de réconcilier les intérêts de la minorité et ceux de l'État si l'on fait certaines concessions. L'État doit abandonner son monopole de l'enseignement public et reconnaître le droit des minorités religieuses à fonder des écoles où elles peuvent transmettre leurs propres valeurs, dans un milieu favorable. Cependant, ces minorités doivent concéder à l'État, et par conséquent à la culture majoritaire, le pouvoir de choisir le programme éducatif de base, y compris la langue d'instruction.

interests of the minority and of the State is possible where certain concessions are made. The State must abandon its monopolistic control of public education and accept the right of minority religious groups to establish schools where their own values can be transmitted in a supportive setting. However, these groups must concede to the State — and therefore, to the majority culture — the authority to set the basic curriculum, including the language of instruction.

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I. INTRODUCTION

Control of education is control of the coming generation. Particularly in an immigrant society, where the spectrum of social values is wide, the power of education to transmit values presents opportunities and dangers. With such power to shape the future at stake, it is not surprising that tensions arise between the interests of the State, and the interests of minority communities with respect to their roles in the education system. Even if this principle does not always hold true (one thinks of the fall of Communism after two generations), it is an idea with a long history and is a necessary starting point for any discussion of public education.

This paper will argue that the accommodation of separate schools for religious minorities within the public education system is consistent with Canadian history and constitutional values, and not a danger to the valid objectives of the State with respect to education. The discussion will take place in three parts. First, four examples of the experiences of minority religious groups with the public school system will be examined to illustrate various approaches to accommodation of religious difference. Second, the Constitutional law of Canada with respect to denominational schools and religious freedom in the school system will be examined in order to identify the values relevant to religious minority education rights in Canada. Third, the interests of religious minorities and of the State will be examined in the light of these values.

This debate is timely due to the Supreme Court of Canada's recent decision[1] on the existence of a right to government funding for minority religion schools under the *Canadian Charter of Rights and Freedoms*[2]. Claims by minority groups for government funding face stiff opposition in a political climate which increasingly lauds fiscal austerity and criticizes official support for multiculturalism. This is not a new debate, yet the same arguments are continually posed against each other. Identifying the possibility for compromise must involve disposing of many of these old arguments.

II. SOME HISTORY

The four minorities presented in this paper represent various approaches to accommodation within the public education system, with varying degrees of success. The Jehovah's Witnesses sought to assert their religious freedom within the public schools of the majority by refusing to participate in patriotic or religious exercises. In contrast, the other three minorities sought to avoid the schools of the majority. The Doukhobors resisted compulsory public school education, and even questioned the value of formal education. The Mennonites tried and failed to retain control of the curriculum within their separate schools. Hutterites, while prepared to compromise more than the last two groups, succeeded in preserving separate schools which remained part of the public school system.

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[1] *Adler* v. *Ontario* (1994), 19 O.R. (3d) 1, 116 D.L.R. (4th) 1 (C.A.), aff'g (1992), 9 O.R. (3d) 676, 94 D.L.R. (4th) 417 (Gen. Div.), aff'd [1996] S.C.J. No. 110 (QL) [hereinafter *Adler* cited to O.R.].

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

A. *The Witnesses of Jehovah*

Jehovah's Witnesses are distinct from the following three minorities because their belief that they are the select, chosen to bring news of the end of the world to the lost majority, brings them into direct conflict with the wider community. Their belief that the Roman Catholic Church and the Government are instruments of Satan causes them to be defiant of authority and relentless in asserting their own rights. Unlike the other minorities we will study, they do not constitute an ethnic group within Canada, but convert members of other religions in order to expand.

Their most important clash with the public school system occurred in Ontario during the Second World War, at a time when Canadian nationalism was, understandably, rampant.[3] Ontario education law and regulations required religious exercises (reciting the Lord's Prayer and reading from Scripture) and patriotic exercises (singing the national anthem) which often included saluting the flag. The *Public Schools Act* included a provision for exemption from religious exercises but not from patriotic exercises.[4] Naturally, no Witness child could salute the 'flag of Satan'.

Children were routinely exempted from both religious and patriotic exercises until May 1940, when the War took a turn for the worse. The fall of France brought prosecutions in Pembroke and Hamilton against Witness children who refused to salute the flag or sing the anthem. In January 1941, the Ontario Department of Education sent instructions to school boards that dissenting children were not to be suspended; however, the Hamilton Board of Education continued to take a hard line. They refused to readmit children who had been suspended, and in February 1942 suspended a high school student, Robert Donald Jr.

The Witness community in Hamilton had established a private school in September 1940 in response to the suspension of their children from public schools, but that school could not accommodate high school students as well as elementary students. Having been declared an illegal organization under the *Defence of Canada Regulations*,[5] the Jehovah's Witnesses had few options. Donald's father took the Board to Court, suing for the cost of an alternative high school education and a writ of *mandamus* forcing the Board to readmit his son. At trial, the Donalds lost. The trial judge held that non-participation in the patriotic exercises was detrimental to the moral tone of the school, and that the reasons for objecting, although perhaps sincere, were irrelevant.[6] As authority for this latter point, he cited a recent U.S. Supreme Court case, *Barnette* v. *West Virginia State Board of Education*.[7]

On appeal, the *Donald* case was heard by Justice Gillanders.[8] He also cited *Barnette*; however, he apparently read it more carefully. He held that it was not for the

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[3] For the story of the Jehovah's Witnesses' encounter with the public school system, I am indebted to W. Kaplan, *State and salvation: the Jehovah's Witnesses and their fight for civil rights* (Toronto: University of Toronto Press, 1989) c. 5.

[4] R.S.O. 1937, c. 357, s. 7.

[5] Last revision at *Defence of Canada Regulations (Consolidation) 1942*, O.C. 8862 (1942 October 13).

[6] *Donald* v. *Hamilton Board of Education*, [1944] O.R. 475, 4 D.L.R. 227 (H.C.), Hope J.

[7] 319 U.S. 624 (1943), aff'g 47 F.Supp. 251 (Dist.Ct.) [hereinafter *Barnette*].

[8] *Donald* v. *Hamilton Board of Education*, [1945] O.R. 518, 3 D.L.R. 424 (C.A.), Gillanders J.A. [hereinafter *Donald* cited to D.L.R.].

Court to decide that the patriotic exercises were without religious significance, for this would be to deny the very religious freedom which the exemption provision of the *Public Schools Act* sought to protect. Patriotic exercises have a symbolic and therefore religious import for the Witnesses. Their beliefs are sincere and conscientious, and since they are, their nature and significance are not at issue. Leave to appeal to the Supreme Court was denied by Justice Rand on 23 October 1945. Only then did the Hamilton Board allow Witness children back into public schools.

The experience of the Jehovah's Witnesses in Ontario was similar to that in other Provinces. In Manitoba, an express regulatory exemption from patriotic exercises existed, but judicial enforcement was nevertheless necessary.[9] In Alberta, the decision in *Ruman* v. *Lethbridge School District*[10] that children must salute the flag or be suspended, was met with a legislative amendment providing an exemption.[11]

Since the War, saluting the flag and compulsory prayer have disappeared from Canadian schools and from public debate. This is in sharp contrast to the United States, where prayer in public school remains a live controversy.[12]

The Jehovah's Witnesses have challenged society on other issues. In *Chabot* v. *Lamorandière (Commission scolaire)*,[13] a local school commission run by the Catholic section of the Quebec Education Council was forced to accept the child of a Jehovah's Witness into its schools despite the refusal of the child to participate in religious exercises. During the 1950s, their attempts to proselytize in Quebec provided the facts for a number of Supreme Court decisions which defined freedom of speech and of religion in pre-*Charter* Canada.[14] More recently, the refusal of the Jehovah's Witnesses to accept blood transfusions has been influential in defining a right to refuse medical treatment.[15]

B. *The Doukhobors*

In contrast to the Jehovah's Witnesses' fight to be admitted to the public schools of the majority, the Doukhobors would have liked nothing better than to have been excluded. Their desire to live a communal, agrarian life did not include a need for government. Their conception of a "God within" did not require a formal education. It seems inevitable that they would have run afoul of the public school system.[16]

Originally from Russia, the Doukhobors came to British Columbia in 1909,

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[9] *R.* v. *Clark*, [1941] 4 D.L.R. 299 (Man. C.A.), rev'g [1941] 3 W.W.R. 228 (Police Ct.), interpreting Man. Dept. of Ed. Regulations (1938 September 23).

[10] (1943), [1944] 1 D.L.R. 360, [1943] 3 W.W.R. 340.

[11] *An Act to amend the School Act*, S.A. 1944, c. 46, s. 9.

[12] See e.g. C. S. Manegold, "Some on Right See A Tactical Misstep On School Prayer" *New York Times* (19 November 1994) 1 and 10.

[13] [1957] B.R. 707, 12 D.L.R. (2d) 796.

[14] *R.* v. *Boucher*, [1951] S.C.R. 265; *Saumur* v. *Québec (Ville de)*, [1953] 2 S.C.R. 299; *Switzman* v. *Elbling*, [1957] S.C.R. 285; *Roncarelli* v. *Duplessis*, [1959] S.C.R. 121; *Saumur* v. *Québec (A.G.)*, [1964] S.C.R. 252.

[15] This right has been codified at Art. 11 C.C.Q.

[16] For the full recounting of the Doukhobors' experience with the public education system, I am indebted to William Janzen. See W. Janzen, *Limits on liberty: the Experience of Mennonite, Hutterite, and Doukhobor Communities in Canada* (Toronto: University of Toronto Press, 1990) c. 6.

settling near Grand Forks. Their early acceptance of the public school system was upset when the Provincial government imprisoned some of their members for refusing to cooperate with the new civil registry system. To the Doukhobors, a civil registry was at best unnecessary, at worst a preparation for conscription. "All the human race registration we calculate unnecessary," they wrote in a letter to the government.[17]

Despite a Royal Commission report recommending accommodations such as teaching the Russian language in the Doukhobor public schools, the government was recalcitrant. Bodies were exhumed to prove non-compliance with the civil registry system. In response to vandalism, the *Community Regulation Act*[18] was passed in 1914, making the Doukhobor Community liable for any infraction by its members. In protest against convictions for violations of compulsory attendance laws, nine schools were burnt down in 1923. Rather than pursue the guilty individuals, the government taxed the Community under this Act.

After a change of leadership in 1925, most Doukhobors accepted the public school system, supplementing it with their own language and religion classes. However, a splinter group, the Sons of Freedom, called the public schools "nurseries of militarism and capitalism."[19] Public nudity was added to arson as means of protest. The Federal government amended the *Criminal Code* to provide for a mandatory three year sentence for public nudity.[20] In 1932, six hundred convictions were brought against the Sons of Freedom, requiring special detention facilities on Pier's Island, near Victoria. The 365 children of the convicts were taken into temporary government custody for one year.

In 1953, these events repeated themselves, but the new Social Credit government wanted to get tough. It arrested 148 Doukhobors for nudity and made 170 children wards of the Province. These children, some seized in the middle of the night, were placed in an old sanatorium surrounded by barbed wire in New Denver. The government justified itself on the basis of the children's right to get an education. The children were allowed to see their parents twice monthly, by permission only.

The parents appealed to the Court without success. In *Perepolkin* v. *British Columbia (Superintendent of Child Welfare)*[21] Justice Sydney Smith held that a minority could not claim religious freedom over any and all aspects of life which they chose to make part of their religion. Compulsory, secular education was enforceable by the Courts as well as by the State. In 1959, the parents acquiesced to the government, promising to send their children to the public school if they were returned home.

The harsh actions of the B.C. government may be a function of the unusually centralized system of education in B.C., which lacks the history of accommodation that most other Provinces have as a result of living with a French Canadian minority. It is ironic that the government's response to Doukhobor resistance involved an explicit recognition of their communal lifestyle: the *Community Regulations Act* was very much at odds with the government's individualist rhetoric.

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[17] *Ibid.* at 124.

[18] S.B.C. 1914, c. 11

[19] Janzen, *supra* note 16 at 133.

[20] S.C. 1930-31, c. 28, s. 2, adding s. 205A to R.S.C. 1927, c. 36.

[21] (1957), 23 W.W.R. 592, [1958] 27 C.R. 95 (B.C.C.A.) [hereinafter *Perepolkin* cited to W.W.R.].

C. *The Mennonites*

Mennonites are German-speaking immigrants who arrived on the Prairies from Russia in 1873.[22] Before arriving, they received the following guarantees from the Canadian government: exemption from military service, a reserve of eight townships to accommodate their communal lifestyle, religious freedom, separate schools, and the right to take affirmations rather than oaths of allegiance.[23]

The resolution of the 'Manitoba Schools Question' in 1897 was beneficial to the Mennonites because it provided for bilingual education in English and any other language, as well as time for religious instruction. The end of this policy came in 1915. The new Liberal government justified English-only education on the basis of the difficulties in administering the bilingual system, the need to instil a national identity that was "Canadian and British," the handicap which would face children failing to learn English, and the need for common standards across the Province.

Mennonite schools resorted to private status, the parents preferring to pay twice for education rather than send their children to schools aimed at assimilation. The government's efforts to enforce the public system included prosecutions of parents refusing to send their children to public school.[24] Mennonite protests regarding their need to retain control of the curriculum in their schools were lost on the majority. The *Free Press* adopted a hard, nationalist line: "The children are the children of the State of which they are destined to be citizens; and it is the duty of the State that they are properly educated."[25]

The same public debate was going on in Saskatchewan, where one supporter of assimilationist schools asked, "Are we to be a homogenous people on these plains or are we to repeat the tragic sufferings of polyglot Austria? This question must be solved in our elementary schools."[26] The response of the Deputy Minister of Education represented the minority: "Those who shout on platforms about Canadian citizenship being endangered because 800 children in Saskatchewan are being educated in Mennonite schools are hysterical fools."[27]

The inability of the Mennonites to retain control of their schools in the face of a majority favouring assimilation forced them to make a choice. Many of them eventually accepted the public school system. Six thousand left Canada in the 1920s for Mexico and Paraguay, where they were promised separate schools.

D. *The Hutterites*

Hutterites were more successful at keeping their own schools than the Mennonites had been. The Hutterites came from the United States in 1918 because they had been experiencing discrimination there. This experience may have made them more willing to compromise with their new government. They have a history of valuing education,

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[22] For the recounting of the story of the Mennonites, I am indebted to William Janzen. See Janzen, *supra* note 16, c. 5.

[23] Order-in-Council no. 957, 1873 August 13.

[24] See e.g. *R.* v. *Hildebrand*, [1919] 3 W.W.R. 286, 30 Man.R. 149, 31 C.C.C. 419 (C.A.).

[25] Janzen, *supra* note 15 at 97.

[26] *Ibid.* at 103-04.

[27] *Ibid.* at 107.

although this is limited to what is required for Biblical study and agrarian life. In all three prairie provinces they were able to preserve public schools on their colonies in the face of post-war government efforts to centralize education in larger urban centres.[28]

Agreements between the Hutterite colonies and local school boards provided that public schools on the colonies would not cost the board any more than the cost of educating the same students at the central school. These arrangements allowed the Hutterites to supplement the public school curriculum with language and religion classes offered after regular school hours. When they could not come to agreement with the local boards, the Hutterites preferred to establish private schools or take correspondence courses than send their children to the central school; however, they were remarkably successful in achieving agreement, usually with the assistance of the Province.

Alberta's attitude is representative of the post-war attitude of prairie governments to Hutterite relations. The Hutterite Investigation Committee, established in 1958, recommended maintaining the Hutterite public schools while encouraging assimilation with the majority. This was to be achieved by sending "stimulating teachers with plenty of personality" to the Hutterite schools.[29] This indirect strategy is in sharp contrast to that of the B.C. government which had, at the same moment in history, 170 Doukhobor children behind a barbed-wire fence.

The success of the Hutterites may be due to their acceptance of English as the language of public school instruction, and of the public school curriculum. They sought a separation from the majority that was less different than either the Doukhobors or the Mennonites.

The Hutterites did suffer discrimination, however. Because of a fear that the Hutterite colonies were growing too large, the Alberta *Land Sales Prohibition Act*[30] was passed during the Second World War to forbid the sale or lease of land to "enemy aliens and Hutterites."[31] Legal restrictions on the sale of land have now been replaced by consultative processes between the colonies and the surrounding community. This was proposed by the Hutterites themselves.[32]

The Hutterites' communal system of land-owning was recognized by the Supreme Court in *Hofer* v. *Hofer*.[33] A Manitoba Hutterite appealed to the Court for a share of his colony's wealth after the colony had expelled him. Chief Justice Ritchie found that the communal system of land-owning was part of their religious practice and way of life:

> [I]t 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...[34]

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[28] My recounting of the Hutterite experience with public education in Canada is taken from Janzen, *ibid.* at 142.

[29] *Ibid.* at 152.

[30] S.A. 1942, c. 16.

[31] *Ibid.* c.16.

[32] Janzen, supra note 16 at 68-75.

[33] [1970] S.C.R. 958, 13 D.L.R.(3d) 1, 73 W.W.R. 644 [hereinafter *Hofer* cited to D.L.R.].

[34] *Ibid.* at 13.

He held that the property belonged to the colony and not in trust for its members, that the Church and colony were so integrated as to require adherence to the faith in order to be a member of the colony, and that only the Church could decide its own membership. Justice Hall, concurring, would have put limits on the rights of the Church with respect to children and protected persons. Justice Pigeon dissented strongly, holding that freedom of religion includes the right to quit a religion, and that the decision of the Court would preclude the exercise of that right.

The difference between the majority and the minority in *Hofer* v. *Hofer* marks a disagreement over the scope of the collective aspect of religious freedom. Chief Justice Ritchie goes quite far in allowing the social values of a community to be justified by religious freedom, whereas Justice Pigeon is concerned that this collective aspect of religious freedom may limit individual freedom. It is interesting that Chief Justice Ritchie also justifies his decision in terms of the right of the individual to choose.

Parliament also recognized the communal nature of the Hutterite lifestyle by granting a special exemption for such groups in the *Canada Pension Plan Act*.[35] Both the Hutterites and Mennonites lobbied for such an amendment, which was granted in 1974 despite the personal opposition of Prime Minister Trudeau.[36] The Canada Pension Plan violated the Hutterites' vows of perpetual poverty, as well as being unnecessary in communities where mutual aid is the rule.

The successes of the Hutterites and of the Jehovah's Witnesses at achieving accommodation within the public school system may be seen as a consequence of the more limited goals which they pursued. Unlike the Mennonites and Doukhobors, they accepted the uniform Provincial curriculum and the pre-eminence of the English language. The Hutterites wished for separate schools, but were willing to accept the fundamental norms of the majority. The symbolic effect of this acceptance may have been as important as the practical importance.

III. CANADIAN CONSTITUTIONAL VALUES

A. *The Entrenched Minorities (Section 93)*

Two religious minorities are recognized in the Constitution as having guaranteed rights to their own publicly-funded schools. Roman Catholics and Protestants, each being the majority in different Provinces, agreed at Confederation to guarantee the rights to separate schools enjoyed by the minority in each Province in 1867. Examining the constitutional guarantees embodied in section 93 of the *Constitution Act, 1867*[37] serves two purposes: to demonstrate that protection of religious minority education is part of Canada's constitutional heritage; and to provide a working example of how religious minority education can be balanced with the competing claims of the State.

The introductory words of section 93 grant plenary jurisdiction to the Provinces to legislate with respect to education. The following four paragraphs constitute a guarantee of the rights of certain religious minorities. The basic guarantee in section

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[35] S.C. 1974, c. 4, s. 7, adding s. 10.1 to R.S.C., c. C-5.

[36] This lobbying effort is recounted by William Janzen. See Janzen, *supra* note 16, c. 10.

[37] (U.K.), 30 & 31Vict., c. 3 [hereinafter *Constitution Act, 1867*].

93(1) states that the Provinces may not pass any laws which "prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union." The rights guaranteed are therefore defined in terms of the legislation in force in each Province when it joined Confederation. It should be noted as well that as different Provinces joined the Union, the Acts of their Union each contained slightly varied versions of s. 93. The *Manitoba Act*, for example, substituted the words "law and practice" for "law".[38] No separate schools existed in British Columbia, making any such guarantee irrelevant.

The second paragraph of section 93 extends the rights of Catholics in Ontario to Protestants in Quebec. The third paragraph provides for an appeal to the Federal cabinet where any of these rights, or subsequently-acquired rights, have been affected. The Parliament of Canada has jurisdiction to pass remedial legislation in response to such an appeal by section 93(4).

The terms of section 93(1) are specific. It applies only to specified classes of persons as defined by religion. Therefore, the linguistic character of separate schools for French Canadians was not included, allowing the Ontario Parliament to impose English upon Franco-Ontarian Catholics.[39] Further important conditions are that it guarantees only those rights of denominational schools that existed in law in 1867. This led the Supreme Court to determine that control of the general curriculum was not part of the guarantee.[40] In 1928, it was held that funding for separate secondary schools was not a right existing in law at the Union.[41]

For our purposes, it is important to determine what the relationship is between the and separate schools under section 93, how much autonomy is guaranteed to the separate school system, and what is their relationship to the public education system as a whole. The first question can be answered with reference to the case law concerning section 93. Such an analysis also provides a starting point for analysis of the second issue.

Some knowledge of the history of section 93 jurisprudence is important when reading the recent decisions of the Supreme Court. In particular, it is important to recognize the historical ineffectiveness of the guarantee in protecting the culture of the minorities to which it applied.

Three incidents in Canadian history show the extent to which section 93(1) was ineffective in preventing the erosion of the rights of denominational schools: the Manitoba School Question, the banning of the French language from Ontario schools, and the withdrawal of funding from separate secondary schools in Ontario.

In 1890, the government of Manitoba passed a law abolishing the denominational school system in the Province and establishing an English-only, non-sectarian system

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[38] R.S.C. 1985, App. II, No. 8, section 22.

[39] *Ottawa Roman Catholic Separate School Board* v. *Mackell* (1916), [1917] A.C. 62, 32 D.L.R. 1, 86 L.J.P.C. 65 [hereinafter *Mackell* cited to D.L.R.].

[40] *Protestant School Board of Greater Montreal* v. *Quebec (A.G.)*, [1989] 1 S.C.R. 377, 57 D.L.R. (4th) 521, 92 N.R. 327, 20 Q.A.C. 241 [hereinafter *P.S.B.G.M.* cited to D.L.R.].

[41] *Tiny Roman Catholic Separate School Board* v. *Ontario*, [1928] A.C. 363, 3 D.L.R. 753, 2 W.W.R. 641 [hereinafter *Tiny* cited to D.L.R.]. This decision was overturned in *Re Bill 30*, see *infra* note 61.

of public schools.[42] A Catholic ratepayer refused to pay the school tax established under this Act, claiming that it violated the rights of the Catholic minority under section 93(1). This opinion was confirmed unanimously by the Supreme Court in *Winnipeg* v. *Barrett*.[43]

On appeal, the Privy Council overturned the decision of the Supreme Court, holding that no such tax exemption had existed in law at the time Manitoba was created.[44] Because it had not existed in law, it could not be protected by section 93, which only preserves rights existing in law at Confederation. The Privy Council ignored the addition of the words "or practice" which had been added to the *Manitoba Act*'s version of section 93.[45] The lack of a tax exemption may have been explained by the lack of a tax to be exempted from; however, their Lordships held that the Province retained the right to establish a national system of education as part of its plenary jurisdiction and to tax everyone in order to accomplish that goal.

The anger created by this decision was heightened when the Privy Council seemed to reverse itself. When asked whether an appeal lay to the Federal cabinet in this issue, their Lordships answered affirmatively.[46] An appeal was available because the new legislation was prejudicial to rights that the Catholics had obtained *after* Confederation.

The appeal created political controversy across Canada, resulting in the defeat of the Tory government which had proposed remedial legislation. Sir Wilfrid Laurier, the new Prime Minister, preached compromise. A deal was reached with the Manitoba government which allowed religious teaching and bilingualism in public schools.[47] This compromise lasted only until 1915, when a Liberal government was elected in Manitoba and repealed the section allowing for bilingual education.[48]

Ontario also sought to ban the French language from public schools, and to limit the expansion of the denominational school system.[49] Ontario Regulation 17 banned the French language from Ontario public schools from 1913 until 1926. When the Ottawa Separate School Board closed its schools rather than submit to the Regulation, the government passed legislation providing for the replacement of the school trustees.[50] The Privy Council held this to be an infringement of the rights of the minority under section 93(1);[51] however, Regulation 17 was upheld on the basis that the class of persons protected by the guarantee could not be defined by language but only by religion.[52] The Legislature passed a new act providing for the replacement of the trustees on a

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[42] D.A. Schmeiser, *Civil Liberties in Canada* (London: Oxford University Press, 1985) at 158-67; *The Public Schools Act*, S.M. 1890, c.38.

[43] (1891), 19 S.C.R. 374

[44] [1892] A.C. 445, 5 Cart.B.N.A. 32 [hereinafter *Barrett*, cited to A.C.].

[45] R.S.C. 1985, App. II, No. 8, s. 22.

[46] *Brophy* v. *Manitoba (A.G.)*, [1895] A.C. 202, 5 Cart.B.N.A. 156.

[47] *The Act to amend "The Public Schools Act"*, S.M. 1897, c. 26.

[48] *The Public Schools Act*, S.M. 1916, c. 87, repealing R.S.M. 1913, c. 165.

[49] Schmeiser, *supra* note 42 at 141-46.

[50] *An Act respecting the Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa*, S.O. 1915, c. 45.

[51] *Ottawa Roman Catholic Separate School Board* v. *Ottawa (City)* (1916), [1917] A.C. 76, 32 D.L.R. 10, 86 L.J.P.C. 73, rev'd 30 D.L.R. 770, 36 O.L.R. 485 (S.C.C.), aff'g (1915), 24 D.L.R. 497, 34 O.L.R. 624 (S.C.(Ont.)) [hereinafter *Ottawa (City)* cited to D.L.R.].

[52] *Mackell, supra* note 39.

temporary basis only,[53] which was upheld by the Court of Appeal.[54]

In 1915, separate schools were told that they would no longer be allowed to offer education at the secondary level. The Privy Council, in *Tiny*, held that the power of the legislature to regulate the grading system included a power to limit what grades the separate schools could offer:

> It is indeed true that power to regulate merely does not imply a power to abolish. But the controversy with which this Board has to deal on the present occasion is a long way from abolition.[55]

It can only be hoped that their Lordships recognize the abolition of the House of Lords when it occurs.

These incidents demonstrate that the presence of section 93(1) in the Constitution was not an effective guarantee of the broader culture of the religious minority, particularly that of French Canadian Catholics. Recent cases concerning this minority's rights show a more generous, wider interpretation of the guarantee than that which was given by the Privy Council; however, they cannot escape from the limitations of the provision itself. There is a reluctance to admit a connection between the right of separate schools to exist and a policy that encourages the flourishing of the community served by those schools. As Justice Beetz wrote in *P.S.B.G.M.*, "While it may be rooted in notions of tolerance and diversity, the exception in section 93 is not a blanket affirmation of freedom of religion or freedom of conscience."[56] Admittedly, the text of section 93 discourages a broad interpretation.

In some respects, the terms of the guarantee in section 93(1) are quite clear. It was not, for example, so difficult for the Court to determine that the class of persons intended to benefit by Quebec Protestant schools legislation did not include Jews.[57] In other respects the provision requires significant interpretation, which makes possible different conclusions about the scope of the guarantees. The phrase "with respect to denominational schools" is particularly open to different interpretations. Furthermore, pre-Confederation statutes, as written, cannot be applied to modern situations – the science of drawing solutions to modern disputes from old laws is an inexact one.

The potential differences of interpretation are indicated by the debate in recent cases over the correct method of interpretation to be applied. Justice Beetz is careful to qualify section 93 as a political compromise rather than a fundamental legal right. He sees section 93 not as an affirmation of freedom of religion, but as an attempt to guarantee the continued coexistence of the Founding Peoples by preserving their

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[53] *An Act respecting the Appointment of a Commission for the Ottawa Separate Schools*, S.O. 1917, c. 59.

[54] *Re Ottawa Separate Schools* (1917), 40 D.L.R. 465, 41 O.L.R. 259 (C.A.).

[55] *Supra* note 41 at 772.

[56] *Supra* note 40 at 535.

[57] *Hirsh* v. *Protestant Board of School Commissioners of Montreal*, [1928] A.C. 200, 1 D.L.R. 1041, 48 B.R. 115, var'd [1926] S.C.R. 246, 2 D.L.R. 8. The confusion in this case was caused by the fact that in Montreal and Quebec City the denominational schools are also common schools obligated to accept all students.

educational rights. Citing his own judgement in *Société des Acadiens*,[58] he calls for judicial restraint in the interpretation of rights founded upon political compromise. This may be a wise call to avoid the type of judicial legislation that the U.S. Supreme Court was drawn into after their decision in *Brown* v. *Topeka (Board of Education)*,[59] but deference to the political process may lead to the abandonment of the minority, such as occurred with respect to Manitoban Catholics in *Winnipeg* v. *Barrett*.[60] With such history, one cannot help but become nervous when a Supreme Court justice denies that section 93 is a "small bill of rights for the protection of minority religious groups."[61]

Rather than giving it a liberal or restrictive interpretation, Beetz wishes section 93 to be interpreted historically, according to the terms of the provision itself. Justice Beetz is correct in insisting that the scope of the guarantees not be widened beyond what is contained in the terms of section 93 itself;[62] however, the implication that a purely historical, textual analysis will suffice is unconvincing. Underlying the legal, historical analysis must be some values external to it by which the laws as they existed in 1867 are converted into rights applicable to the reality of denominational schools in 1994: some bench-mark is needed as a reference point for the conversion of 19th Century laws into 20th Century rights and privileges. As Justice Beetz himself notes, "[T]he law in force "at the Union" cannot on its own set the content of the constitutional right in section 93(1)."[63]

This was demonstrated in *Reference re Bill 30, an Act to amend the Education Act (Ont.)*,[64] in which the Privy Council's previous interpretation of the pre-Confederation *Scott Act*[65] was overturned by the Supreme Court. Using much more expansive language than Justice Beetz, Justice Wilson's majority decision in *Reference re Bill 30* describes section 93 as a principle of Confederation into which the Court must breathe life. In reopening the issue of a constitutional guarantee of separate secondary schools in Ontario, Justice Wilson goes far beyond what is necessary to answer the question before the Court. She finds Bill 30 to be a valid exercise of provincial jurisdiction under the opening words and third subsection of section 93, then goes on to overturn a judgement of the Privy Council and find that public funding for such schools was actually required under s. 93(1). In doing so she acknowledges Beetz' warning about the nature of constitutional guarantees based upon political compromise, and the danger of imposing positive obligations on the government; however, she seems more worried by the consequences of reading s. 93(1) too narrowly, thereby limiting the protection of the minorities, than by the consequences of reading it too widely.

The flexibility of the 'purposive approach' adopted by Justice Wilson is

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[58] *Société des Acadiens du Nouveau-Brunswick Inc.* v. *Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549, 27 D.L.R. (4th) 406, 66 N.R. 173 [cited to D.L.R. at 425-26].

[59] (1954), 347 U.S. 483.

[60] *Supra* note 43. See also Schmeiser, *supra* note 42 at 162.

[61] *P.S.B.G.M., supra* note 37 at 535.

[62] *Ibid.* at 535-36.

[63] *Ibid.* at 536.

[64] [1987] S.C.R. 1148, 77 N.R. 241, 40 D.L.R. (4th) 18, 22 O.A.C. 321 [hereinafter *Reference re Bill 30* cited to D.L.R.]. This decision overturned the precedent set in *Tiny, supra* note 41.

[65] *An Act to restore to Roman Catholics in Upper Canada certain rights in respect to Separate Schools*, 1863 U.C., c. 5.

particularly apparent in her reasons for supporting a right to public funding. The approach makes possible additional arguments – arguments not based upon the *Scott Act* itself. For example, she finds that the right of the separate school trustees to offer secondary education requires that the government provide an adequate level of funding.[66] Further on, she refers to the Supreme Court decision in *Greater Hull School Board* v. *A.G. (Que)*[67], which indicated that such funding was guaranteed in Quebec, as support for a similar finding concerning Ontario.

The difference in interpretation between Justices Beetz and Wilson reflect a difference of opinion which we shall see throughout the jurisprudence regarding schooling. That is, whether denominational schools are an integral part of the education system, or merely an exception to the secular public system. Justice Beetz, by focusing on the political compromise which led to section 93, implies that it is merely an historical anomaly. Such an analysis could, of course, be given to any right; the *Magna Carta* was also a result of political compromise. Rather than questioning the status of section 93 as a legal right, Justice Wilson seeks to fulfil the spirit of the political compromise. Justice Wilson's decision can also be seen as seeking to support the political consensus which the Peterson government was attempting to achieve with regard to secondary separate school funding. A previous attempt to extend funding by Hepburn's Liberals had to be withdrawn in the face of nationalist opposition in 1936.[68]

Justice Wilson's statement of the purpose of section 93 is as follows: "to provide a firm protection for Roman Catholic education in the Province of Ontario and Protestant education in the Province of Quebec."[69] But this, although offering a wider conception of section 93 than is apparent in the earlier cases, leaves open the central questions posed by section 93: to what extent is the autonomy of the minority protected, and how are the positive obligations of the government towards them to be quantified?

The autonomy of the groups protected by section 93 is raised in three recent cases. In *Reference re Education Act (Que.)*[70], the reorganization of the public school system from school boards defined by religion to ones defined by language was held not to violate section 93. In *Hull*,[71] legislation providing for a new system of school funding for all publicly funded schools was struck down because it made new taxes subject to approval in referenda of the entire population. Finally, the application of a uniform provincial curriculum to separate schools was held to be valid despite the objections of the minority in *P.S.B.G.M.*[72]

The "firm protection" which Justice Wilson announced as the purpose of section 93 does not mean protection of the status quo. In the *Quebec Education Act Reference*, section 93 was held not to prevent the conversion of denominational school boards in Quebec into linguistic boards, so long as minorities desiring a denominational school continued to have that option. The reorganization in Quebec was intended to create two

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[66] *Reference re Bill 30, supra* note 64 at 59.

[67] [1984] 2 S.C.R. 575, 15 D.L.R. (4th) 651, 28 M.P.L.R. 146 [hereinafter *Hull* cited to D.L.R.].

[68] *Supra* note 3 at 123-24.

[69] *Reference re Bill 30, supra* note 64 at 58.

[70] [1993] 2 S.C.R. 511, 105 D.L.R. (4th) 266, 56 Q.A.C. 1 [hereinafter *Quebec Education Act Reference* cited to D.L.R.].

[71] *Supra* note 67.

[72] *Supra* note 40.

school boards in each district: one in which Francophone Catholics form a majority, and another in which Anglophone Protestants are a majority. The result is that most members of both religions will belong to a school board in which they are a majority. Outside of Montreal and Quebec City, where denominational schools are guaranteed by section 93, the right to dissent for religious reasons will be effectively removed because neither religious group will be a minority within their board – secular schools organized by language will have replaced denominational schools. Justice Gonthier explained that:

> In view of the purpose and reasons for the right to dissent, they will not have need of it because they will constitute the religious majority, and consequently the school board will probably meet their needs and aspirations. Of course one can conceive of cases where this theoretical situation will not reflect the real needs of certain parents, but section 93 of the Constitution and the *1861 Act* it crystallizes are also not a perfect solution. It should also be recalled that outside the two major cities, section 93 provides the religious majority with no form of protection.[73]

Although Justice Gonthier's decision assimilates the interests of the Protestant minority to that of the anglophone minority (which may not be fair where the question of religious exercises in school is concerned), the interests of the Protestant community are protected by the fact that they continue to have control over their own schools.

The importance of control of the schools by the minority was made clear by the Supreme Court in *Hull*.[74] A new funding scheme for all publicly-funded schools was struck down because the power to impose new taxes was made subject to a referendum in which the entire population could vote, thereby raising the possibility that the religious minority would be outvoted by the majority.

In *P.S.B.G.M.*[75] the Supreme Court was asked to declare that the protection of section 93 extends to the entire curriculum of minority schools. Protestant schools in Montreal were contesting the power of the Province to impose a uniform curriculum. They claimed that a uniform curriculum could not properly reflect the pluralism at the heart of Protestantism. In rejecting their action, Justice Beetz narrowed the range of non-denominational aspects covered by section 93 to only those necessary to give effect to the denominational guarantees.[76] The concerns of the Protestant board over the non-religious aspects of the curriculum were characterized as pedagogical—not denominational—concerns and therefore left unprotected by section 93(1).

Justice Wilson, in concurring reasons, pointed out that the text of section 93(1) does not contain such a narrow meaning, but rather includes all rights and privileges "with respect to Denominational Schools"[77] and not merely denominational rights. Her interpretation could allow the minority more autonomy over non-denominational aspects of education in certain situations; however, her conclusion remained the same as that of Justice Beetz: the Province has the power to regulate all non-denominational aspects of curriculum.

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[73] *Quebec Education Act Reference, supra* note 70.

[74] *Supra* note 67.

[75] *Supra* note 40.

[76] *Ibid.* at 545-47.

[77] *Ibid.* at 552.

Underlying the debate in *P.S.B.G.M.* about the meaning "with respect to denominational schools" is the issue of how much autonomy was intended by section 93(1). Was it intended merely to separate the minority from the majority and allow them to practice their religion? Or was it to allow the minority to define and implement their own educational objectives? Although the recent decisions of the Supreme Court preserve the right of section 93 minorities to run their own schools, the high volume of provincial regulation reveals that the wider cultural interests of the religious minority were not included in the analysis. In this respect, the position of separate schools has not changed greatly since 1915, when Chief Justice Meredith justified provincial regulation of separate schools by saying, "[S]eparation in no wise affects the public purposes of the schools, or makes the one, any more than the other, the less a public school..."[78]

This apparently contradicts the attitude of the Court with respect to the education rights of official language minorities as protected by section 23 of the Canadian *Charter*. In *Mahe* v. *Alberta*, Chief Justice Dickson wrote, "The general purpose of section 23 is clear: it is to preserve and promote the two official languages in Canada, and their respective cultures, by ensuring that each language flourishes..."[79] He continued:

> My reference to cultures is significant: it is based on the fact that any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.[80]

This recognition that section 23 includes a cultural purpose seems to imply a level of autonomy for the linguistic schools going beyond that required in order to simply offer education in their own language.

In *Reference re Public Schools Act (Man.) (ss 79(3), (4) & (7))*, the notion of minority schools as cultural centres was used to justify a general right to distinct physical settings as an integral part of the section 23 right.[81] But this use of the cultural purpose of section 23 can hardly be called revolutionary when measured against the rights guaranteed by section 93. Distinct physical settings are simply not at issue with respect to separate schools – they are assumed.

One provincial regulation concerning curriculum was struck down in *Mahe*.[82] The Court held that an Alberta government regulation requiring three hundred minutes a week of English instruction in Francophone minority schools violated section 23. The province had not tried to justify it under section 1. Obviously, regulation of the language of instruction itself goes to the heart of the section 23 guarantees. It is a protection of the linguistic aspects of the minority school which is analogous to the

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[78] *Ottawa (City), supra* note 51 at 500.

[79] [1990] 1 S.C.R. 342 at 362, 68 D.L.R. (4th) 69 at 82 [hereinafter *Mahe* cited to D.L.R.].

[80] *Ibid.*

[81] [1993] 1 S.C.R. 839, 100 D.L.R.(4th) 723 at 733-34 [hereinafter *Manitoba Public Schools* cited to D.L.R.].

[82] *Supra* note 79, at 107, striking down *French Language Regulation*, Alta. Reg. 490/82.

section 93 guarantee of autonomy over denominational aspects of separate schools. But the words of Chief Justice Dickson cited above[83] invite an assertion of rights by the linguistic minority beyond the right to teach in the language of Molière, even beyond the right to teach Molière instead of Shakespeare.

It is not difficult to imagine a case in which a linguistic school uses its role as promoter of the minority culture to assert jurisdiction over matters of curriculum otherwise regulated by the province. For example, following the current reform of the Quebec education system, public schools will be organized upon linguistic lines. One of the Protestants who contested the imposition of a uniform provincial curriculum in *P.S.B.G.M.*[84] is surely a lawyer who will see the possibility of challenging that uniform curriculum on the basis of section 23. What happens when the anglophone minority school board in Sherbrooke decides that it wishes to teach more Canadian history and less Quebec history? Or that the history text offered by the Province is unacceptable because it is insufficiently federalist? Or that the Province-wide examination in history is unacceptable because it is based upon that text?

Determining the furthest extent of the cultural role of linguistic schools is not our present purpose. Rather, the issue is why such broad language was used to define section 23, and whether such a role could be applied to religious guarantees under section 93 now that the link between minority education and minority culture has been made by the Supreme Court.

While the wording of section 23 itself does not demand that it be given a cultural purpose, the Court found such a purpose in the history of the official-language minorities. Referring to the Regulation 17 cases and other instances demonstrating the failure of section 93 to protect the language of the denominational minorities, the Court attributed a remedial purpose to section 23:

> [T]he framers of the [1982] Constitution manifestly regarded as inadequate some – and perhaps all – of the regimes in force at the time the *Charter* was enacted, and their intention was to remedy the perceived defects of these regimes by uniform corrective measures, namely those contained in section 23 of the *Charter*...[85]

Section 93 shares a common goal with section 23: the protection of the right of the Founding Peoples to minority education has been entrenched twice in the Constitution, once as defined by religion and then again as defined by language. The protection of these cultures in provinces where they are the minority is one of the fundamental objectives of Canada. In the case of section 93, this purpose is evidenced by the reciprocal nature of the guarantees: Protestant Ontario agreed to preserve the educational rights of its Catholic minority and Catholic Quebec extended similar rights to its Protestant minority.

The application of section 23 jurisprudence to section 93 must take into account the differences between schools defined by language and those defined by religion, but the principles should be the same. If section 23 can be read widely as protecting the culture of the minority, then section 93 should be open to the same interpretation. In

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[83] See *supra* note 79 and *supra* note 80.

[84] *Supra* note 40.

[85] *A.G. (Que.)* v. *Quebec Association of Protestant School Boards,* [1984] 2 S.C.R. 66 at 79, 10 D.L.R. (4th) 321 at 331-32 [hereinafter *Q.A.P.S.B.* cited to D.L.R.].

fact, religion is more open to a broad "cultural" role than language. Unlike language, religion seeks to establish social norms which define a culture, not merely provide a way of communicating it.

In most respects the protection offered by the two provisions is very similar given the different realities they were meant to address. Most of the cases on section 23 concern the creation of new school boards (the assertion of the basic right to have a minority school system), rather than the regulation of school boards that have existed for decades. A discussion of management and control is simply not necessary in section 93 cases because the management and control of section 93 schools is an established fact.[86]

As under section 93, the minority language education rights in section 23 do not lead to complete autonomy – minority language school boards remain subject to general provincial regulation of content and qualitative standards.[87] As under section 93, there is no right to a particular institutional structure.[88]

Furthermore, it was established in *Mahe* that linguistic schools are to provide a quality of education which is, in principle, equal to that of the majority, and that "the funds allocated for the minority language schools must be at least equivalent on a per student basis to the funds allocated to the majority schools."[89] As we shall see, this is also a principle in section 93 jurisprudence.

Without the addition of a cultural purpose such as that given to section 23, section 93 is limited to protection of the minority's right to determine the denominational aspects of their schools, as well as the administrative autonomy necessary to ensure the operation of those schools. This is the essence of section 93 protection of minority communities: the right to run a school system including religious instruction in the religion of the minority, but subject to provincial regulation in its non-denominational aspects.

While denominational schools may have their autonomy limited by the provincial regulation of all public schools, there are advantages to being part of the public system. For members of the religious denomination, the most significant advantage may be the right to direct their schools taxes to the school of their religious belief. For the schools, funding is also an important issue because it ensures them the means to offer a quality of education equivalent to that of the majority school system.

Provision of services to the minority is based on a principle of approximate proportionality with schools of the majority. This is a theme that runs through the cases concerning funding. For example, in *Hull* it does not matter whether the system of proportional funding is applied in a manner identical to its historical application: it is the principle that must be preserved.[90] The government's new funding scheme is struck down because it does not impose a duty of proportional distribution of grants to school

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[86] Management and control are central issues in *Mahe, supra* note 79. Of course, the independence of separate schools was not always so secure, as we saw in *Barrett, supra* note 43 and *supra* note 44, *Tiny, supra* note 41 and *Ottawa (City), supra* note 52.

[87] *Mahe, supra* note 79 at 96.

[88] *Manitoba Public Schools, supra* note 81 at 732.

[89] *Mahe, supra* note 79 at 95.

[90] *Hull, supra* note 67 at 663.

boards, as the 1861 Act did.[91]

By contrast, in *Quebec Education Act Reference* the same question of funding is answered differently, but in keeping with the same principle. The Court upheld legislation[92] which gave some discretion to the non-denominational Conseil Scolaire to make allocations on other than a strictly proportional basis:

> [F]undamentally what matters is having the financial and physical resources to operate school boards. The taxing power is only one possible means of attaining this end. If it can be done otherwise, such as by an equal, or at least appropriate and equitable, allocation of financing resources, it is hard to speak of a prejudicial effect.[93]

In *Re Bill 30*, the preamble to the Bill made equal funding with the majority system a goal of the legislation. The case is decided on the basis of the historical legislation, the purpose of which was held to be ensuring proportional funding of the two systems.[94]

Proportional funding or non-discrimination is guaranteed constitutionally in the denominational schools provisions of the *Alberta Act*,[95] the *Saskatchewan Act*[96] and the Newfoundland Terms of Union.[97] These provisions, the most recent reenactments of the principles of section 93, demonstrate the importance that has been given to the principle of proportional treatment of separate schools.

Approximate equality with the majority, or equitable treatment, is a significant consideration when defining section 93 rights. The reasons for seeking such a principle would seem obvious. First, it helps to eliminate arbitrariness in the historical analysis: the evolution of the majority school system serves as a basis for determining how the rights of the minority have evolved. But more importantly, the purpose of section 93 must be held to involve the delivery of a quality of education comparable to that of the majority, otherwise the guarantee would be empty. As Chief Justice Meredith held, "It was never meant that the separate schools, or any other schools, should be left forever

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[91] *An Act respecting Provincial Aid for Superior Education, – and Normal and Common Schools*, C.S.L.C. 1861, c. 15, ss. 73, 74 & 131.

[92] *Education Act*, S.Q. 1988, c. 84, s. 439(2).

[93] *Quebec Education Act Reference, supra* note 70 at 321-22.

[94] *Reference re Bill 30, supra* note 64 at 57.

[95] S.C. 1905, c. 3, R.S.C. 1985, App. II, no. 20, s. 17.

[96] S.C. 1905, c. 42, R.S.C. 1985, App. II, no. 21, s. 17.

[97] S.C. 1949, c. 1, R.S.C. 1985, App. II, no. 32, Schedule, s. 17. A provincial referendum proposing that this section of the Terms of Union be repealed received a narrow majority last year: see "Newfoundlanders vote to reform education: Wells to study narrow result before proceeding with plans to end church domination of systems" *The Globe and Mail* (6 September 1995) A1, A2. The House of Commons has voted to support the required constitutional amendment, although Senate approval has been slower: see "Province's entry terms amended: Commons vote puts Newfoundland closer to reforming church-run education system" *The Globe and Mail* (4 June 1996) A1, A6. One should perhaps question the value of a simple referendum as a basis for repealing minority rights, but in the case of Newfoundland, where the entire education system was denominational (thereby excluding the right to send one's child to a secular school), a majority vote may be defensible. Minority rights are not intended to prevent the majority from pursuing their own preferred option, but neither should the majority be able to eliminate denominational schools that are supported by a minority.

in the educational wilderness...."[98]

In summary, section 93 does not protect the culture of the minority or grant it complete autonomy, but only guarantees the denominational aspects of the minority's school system, and the non-denominational aspects of the school system which are essential to its continued functioning. This gives the minority control of the religious curriculum but not the general curriculum, and a right to an equitable share of the available resources so as to operate a school system comparable to that of the majority. We can conclude that the purpose of section 93 is to ensure the continued existence of a publicly funded school system administered by the minority and offering the religious education of the minority, but subject to extensive provincial regulation including of the general curriculum and of institutional structures.

Comparing this constitutionally-entrenched system to the *de facto* separate schools of the Manitoban Hutterites, we note that a similar accommodation between the claims of the religious minority and those of the state has taken place. Schools dedicated solely or mostly to the education of the minority community are maintained within the public system. They are subject to the uniform provincial curriculum, to which is added religious and language instruction of the minority culture. The similarities even extend to the fact that Hutterites, like Franco-Ontarians, had to fight for the right to preserve their own language (although the Hutterites eventually accepted English as the principal language of their schools). Of course, the Hutterites do not always administer their own schools, but are often attached to a local school board. This does not have to be seen as a sacrifice - as was noted in *Mahe*, administrative partnerships with the majority school system can provide great advantages to small minorities.[99]

B. *Constitutional Protection of Other Religious Minorities (the Canadian* Charter*)*

As we have seen, the guarantees for religious education in section 93 are the result of the political compromises that made Confederation possible. As such they are limited to the Roman Catholic and Protestant minorities which, as majorities in Canada East and Canada West, were parties to those negotiations. Other minorities were left to fight for accommodation within the public school system without the benefit of constitutional guarantees. We have seen examples of this in the Jehovah's Witness' fight for access to public schools (the *Donald* case[100]), in the refusal of Doukhobor parents to submit to compulsory public schools, in the choice of many Mennonite colonists to leave Canada rather than accept a uniform provincial curriculum, and in the continuing struggle of the Hutterites to have the schools in their colonies remain part of the public education system.

The arrival of the *Charter of Rights and Freedoms* entrenched education rights for two new minorities, this time defined in terms of official languages. But more importantly for those practising other minority religions, the *Charter* announced a new focus upon the rights of individuals and of previously unrepresented groups. The freedom of conscience and religion guaranteed by subsection 2(a) and the equality rights

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[98] *Ottawa (City)*, *supra* note 51 at 501 (S.C.).

[99] *Supra* note 79 at 91-92 (citing the *Royal Commission on Bilingualism and Biculturalism*, Book II, c. 10, paras. 425-26, 437).

[100] *Supra* note 8.

asserted in s. 15(1) have both been invoked by religious minorities in attempts to assert education rights.

Freedom of religion has been the subject of a number of Supreme Court judgements. Soon after the *Charter* came into force, a series of cases challenging Sunday closing laws provided the Supreme Court with the occasion to define the scope of subsection 2(a). In *R.* v. *Big M Drug Mart*[101] the Canadian *Lord's Day Act*[102] was struck down because its purpose was to force the observance of the Christian Sabbath. In *R.* v. *Edwards Books and Art Ltd.*[103] the Ontario *Retail Business Holidays Act*[104] was upheld because it had the secular purpose of providing a common pause day which justified an infringement of the rights of those who do not observe a Sunday Sabbath.

Freedom of religion was defined in *Big M Drug Mart* as being significantly broader than merely the freedom to believe and to worship. Education, business and culture are all open to the application of subsection 2(a). As Justice Dickson wrote:

> 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 belief by worship and practice or by teaching and dissemination ....Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.[105]

The reference to teaching, although relevant to our discussion, was *obiter* in the context of *Big M Drug Mart.* Justice Dickson was not referring to a right to denominational schools; however, this statement does point out the intimate link between religion and education.

The quotation gives subsection 2(a) both a negative and a positive role: it protects believers against coercion, while it assures individuals the right to manifest their beliefs. The freedom from coercion with respect to religious belief was further elaborated in *Edwards Books* as including even indirect burdens on the exercise of religious belief.[106] The positive aspect of subsection 2(a), the right to manifest one's beliefs, is subject to the important qualification that the burdens imposed by religion itself cannot be compensated for through subsection 2(a). In *Edwards Books*, Chief Justice Dickson stated, "the state is normally under no duty under s. 2(a) to take affirmative action to eliminate the natural costs of religious practices."[107] The strength of this principle is, however, put in question by the Court's section 1 analysis of the impugned Act. The fact that Ontario's Sunday closing legislation provided a religious exemption for most Saturday Sabbath observers was very important to the Court. This will be particularly important when we discuss the issue of public funding of denominational schools.

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[101] [1985] 1 S.C.R. 295, 18 D.L.R.(4th) 321, 3 W.W.R. 517 [hereinafter *Big M Drug Mart* cited to D.L.R.].

[102] R.S.C. 1970, c. L-13.

[103] [1986] 2 S.C.R. 713, 35 D.L.R.(4th) 1 [hereinafter *Edwards Books* cited to D.L.R.].

[104] R.S.O. 1980, c. 453.

[105] *Big M Drug Mart, supra* note 101, at 353-54.

[106] *Supra* note 103 at 34.

[107] *Ibid.* at 39.

In the context of education, subsection 2(a) has been used in three rather different ways. First, members of minority religious groups have invoked freedom of religion to prevent the teaching of religion, or the holding of religious exercises in common schools. Second, subsection 2(a) has been used to revindicate the right to choose the moral and religious education of one's children. Third, private denominational schools have invoked subsection 2(a), sometimes in combination with section 15, to assert their rights with respect to the provincial government. This has been attempted in both the negative sense, such as in *R.* v. *Jones*,[108] where a denominational school asserted its independence from provincial regulation, and in the positive sense, such as in *Adler*,[109] where denominational schools brought a claim for a right to public funding.

Within common schools, the *Charter* has meant that religious minorities have become much more free of the religious practices and teachings of the majority. In *Zylberberg* v. *Sudbury Board of Education (Director)*[110] the Ontario Court of Appeal held that religious exercises used to open the school day violated subsection 2(a) even where students were allowed to exempt themselves. This case takes religious freedom a step further than the Court was able to in *Donald*,[111] previous to the *Charter*. It recognizes, following *Edwards Books*, that religious exercises have a coercive effect even upon those who exempt themselves. Indirect or unintentional burdens, such as the exclusionary effect of exempting oneself from the religious exercises of the majority, are within the ambit of subsection 2(a).

In *Canadian Civil Liberties Association* v. *Ontario (Minister of Education)*[112] the Ontario Court of Appeal struck down the entire religious education curriculum of Ontario because it was, in practice, Christian indoctrination. The Court went further than necessary in deciding that the legislation in question violated subsection 2(a). The legislation itself was religiously neutral, but put into practice by the school board in a manner which constituted indoctrination into Christianity.

The effect of these decisions is to eliminate religious instruction from secular common schools unless it is carried out in a completely neutral and academic fashion. This solves the problem of accommodating groups such as the Jehovah's Witnesses, who wish to send their children to the common school without participating in the religion of the majority. A programme of comparative religious instruction would be free of moral authority and therefore not impinge upon the students' religious freedom. The aim of such a programme would be to encourage understanding of various religions, rather than to teach any one religion. The distinction is that rather than providing a moral and religious education, a comparative course may be taken as endorsing moral relativism. The price of a common school acceptable to all is that parents who want their children to receive moral and religious instruction can no longer look to the common school system to provide it, unless they belong to a minority protected by

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[108] [1986] 2 S.C.R. 284, 31 D.L.R.(4th) 569, 28 C.C.C.(3d) 513 [hereinafter *Jones* cited to D.L.R.].

[109] *Supra* note 1.

[110] (1988), 65 O.R. (2d) 641, 52 D.L.R.(4th) 577 (C.A.) [hereinafter *Zylberberg* cited to D.L.R.].

[111] *Supra* note 8.

[112] (1990), 71 O.R. (2d) 341, 65 D.L.R.(4th) 1, 3 O.A.C. 93 [hereinafter *Canadian Civil Liberties*, cited to D.L.R.] rev'g (1988), 64 O.R. (2d) 577 (Div. Ct.).

section 93.[113] Given that the right to choose the moral and religious education of one's child is recognized in international law[114] and by the Quebec *Charter of Human Rights and Freedoms*,[115] this would seem to be a significant failing of the public education system.

It should be noted that *Zylberberg* and *Canadian Civil Liberties* are aimed at preventing religious observance by the school as an institution, not voluntary observance by students in the school. Hence, in *Peel Board of Education* v. *Ontario Human Rights Commission*[116] the Board policy of prohibiting the wearing of the *kirpan* (Sikh ceremonial dagger) in school, was held to violate freedom of religion under the Ontario *Human Rights Code*,[117] and was not justified by any safety considerations. In this sense, religion remains present in secular schools but free of government coercion. This solution may be contrasted with the effort by public schools in France to ban the wearing of the veil by female Muslim students on the basis that such "ostentatious signs" of religious affiliation threaten the secular nature of public schools.[118]

Secularization of common schools in Canada under subsection 2(a) is similar to what has occurred in the United States as a result of judgements under the First Amendment to the U.S. Constitution; however, U.S. jurisprudence has developed much further in demanding the complete elimination of religion from public schools. For example, in *Engel* v. *Vitale*[119] non-denominational prayers, written by the legislator, were held to violate the First Amendment. In *Wallace* v. *Jaffree*[120] a period of silence was held to violate the First Amendment.

In distinction from the right to attend a common school free of religious indoctrination, another line of cases has dealt with the right to choose not to attend the school of the majority. In *Perepolkin* the right to withdraw one's children from the secular public school system was denied to Doukhobor parents.[121] Since that case was decided in 1957, the right to choose a denominational school over a common school has been recognized in Canadian jurisprudence largely as a result of new Bills of Rights.

In *R.* v. *Wiebe*,[122] the Three Hills Provincial Court held, on the basis of the religious freedom provision of the Alberta *Bill of Rights*[123] that a Mennonite could withdraw his child from a public school in order to send the child to a denominational school. In this case, the denominational school was not even certified by the Province, but the judge was satisfied of the religious importance which education had for the Mennonites, and that the alternative education being provided by that community was adequate. The judgement recognizes that compulsory education laws may violate

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[113] H. Côté, *Le droit à l'éducation élementaire publique au Québec* (Cowansville: Yvon Blais, 1984) at 128.

[114] See *infra.* notes 141-142 and accompanying text.

[115] R.S.Q. c. C-12, arts. 41 & 42.

[116] (1991), 3 O.R.(3d) 531 (Div.Ct.).

[117] S.O. 1981, c. 53.

[118] For a description of this issue, see "La saga des foulards" *Le Monde* (13 October 1994) Supplément V.

[119] 370 U.S. 421 (1962).

[120] 472 U.S. 38 (1985).

[121] *Supra* note 21.

[122] [1978] 3 W.W.R. 36 (Alta. Prov.Ct.) [hereinafter *Wiebe*].

[123] S.A. 1972, c. 1.

religious freedom where the opposition to publicly-enforced schooling is sincere and fundamental to the religious group, and where alternative education is being provided. A limit is thereby put on the power of the province to insist on any particular form of education.

Wiebe followed the U.S. Supreme Court case *Wisconsin* v. *Yoder*[124] in which Amish parents were allowed to withdraw children from school at the age of fourteen, contrary to the State law. In *Yoder*, the cultural and religious concerns of the Amish were held to outweigh the State's interest in enforcing compulsory education. This recognition that the nature and extent of education may be determined by the minority culture gives effect to Chief Justice Dickson's statements in *Mahe* that schools serve a cultural role.[125]

However, these cases do not signal complete autonomy for denominational schools outside of the public system. In *Jones*[126] the right of the Province to enforce compulsory attendance of students and to license private schools was upheld despite the religious character of the private school in question. The claim of the school's director that he could answer to no one but God for the management of his school was rejected by the Court as ignoring the legitimate interests of the state in regulating education. The Alberta *School Act*[127] was described as a flexible piece of legislation seeking only to ensure that all children receive an adequate education. The ability of private schools to exist under the Act was held to be a sufficient guarantee of religious freedom, which the Province's regulatory powers did not infringe in more than a trivial way. The statement of the right of religious freedom in *Jones* indicates that in another situation such as *Wiebe*, where the province attempts to force members of a religious minority to attend majority schools, subsection 2(a) would allow the establishment of alternative education by the minority instead.

The coexistence of the right to choose a school other than the common school, and the right of the state to regulate all schools illustrates the balancing that must occur between the interests of the state, parents and religious communities. The state has a right to regulate, but may not refuse to allow denominational schooling where it meets public norms. The state has a right to regulate all schools in order to ensure that norms of teaching, building standards, etc. are maintained; however, this does not extend to refusing to allow denominational schools to exist.

The Supreme Court of Canada came close to declaring a constitutional right to withdraw from public school in *Jones*. The statements of the Court in this case, along with the decisions in *Wiebe* and *Yoder*, prefigure the result in any future case under subsection 2(a) of the *Charter*. The right to choose a religious education over secular public schools is protected.[128]

The presence of section 93 in the Canadian Constitution leads to some issues with which the U.S. Supreme Court is not confronted. In *Jacobi* v. *Newell No. 4 (County)*[129]

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[124] 406 U.S. 205 (1975) [hereinafter *Yoder*].

[125] *Supra* note 79.

[126] *Supra* note 108.

[127] R.S.A. 1980, c. S-3.

[128] See E.L. Hurlbert & M.A. Hurlbert, *School Law Under the Charter of Rights and Freedoms*, 2d ed. (Calgary: University of Calgary Press, 1992) at 176.

[129] (1994), 150 A.R. 34, 112 D.L.R. (4th) 229, 5 W.W.R. 93, 16 Alta.L.R.(3d) 373 (Q.B.) [hereinafter *Jacobi* cited to D.L.R.].

a Roman Catholic family asked the Medicine Hat Court of Queen's Bench for a declaration allowing them to send their children to the local common school rather than to the new separate school created in their county. The Jacobi children were assigned to the newly established local separate school board by the Alberta *School Act*[130] which assigns membership in the separate and public school systems on the basis of religion and without providing for choice. To raise the right to choose in this context would have created a confrontation between the individual right to choose the religious education of one's children and the collective right of the section 93 minority to the means necessary to operate a separate school board (in this case, a compulsory attendance and tax base). As we shall see, the present state of the law is that section 93 is an exception to the individual freedoms and equality rights in the Canadian *Charter*. However, this position has been formed in cases where collective rights have been compared, rather than situations such as that faced by the Jacobis.

Unfortunately, the *Jacobi* case did not address the right to choose, but rather decided the dispute on the basis that the separate school district in question was not protected by section 93 because it did not offer, or have plans to offer, a denominational education. The new separate school was declared unconstitutional under sections 2(a) and 15 of the Canadian *Charter*, with the result that the Jacobi children could continue to attend the secular school.

It has been observed at many instances that the existence of separate schools would be contrary to sections 2(a) and 15 of the *Charter* if not for the specific grant of power to legislate with respect to separate schools which is contained in section 93. This was stated clearly by Justice Estey in *Reference re Bill 30*: "It is axiomatic...that if the Charter has any application to Bill 30, this Bill would be found discriminatory and in violation of ss. 2(a) and 15 of the Charter of Rights."[131] However, the Court unanimously held that even if the rights conferred by Bill 30 were not guaranteed under subsection 93(1), they were not subject to *Charter* review because they stemmed from an explicit grant of power to the Province to enact legislation in favour of separate schools. (Justice Wilson, writing for the majority, preferred to save Bill 30 using the exemption for denominational, separate and dissentient schools contained in section 29 of the *Charter*, although she also held, like the minority, that section 29 may not have been necessary in order to achieve this result).[132] Chief Justice Dickson reached a similar conclusion with respect to s. 23 in *Mahe*.[133]

This question was addressed again in *Adler*,[134] when members of certain religious minorities (Jewish, Christian Reformed, and Calvinist) sought a declaration that their rights under sections 2(a) and 15 were infringed by the lack of public funding for denominational schools. Chief Justice Dubin, for the majority of the Ontario Court of Appeal, held that the provincial *Education Act*[135] accommodated religious freedom by allowing denominational schools to exist, and that the choice to forego the benefits of a publicly-funded education in favour of a denominational education was a response to religious beliefs, not to government action. Further, the Court held, citing *Reference re*

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[130] S.A. 1988, c. S-31, s. 207(6).

[131] *Supra* note 64 at 27.

[132] *Ibid.* at 59-60.

[133] *Supra* note 79 at 87-88.

[134] *Supra* note 1.

[135] R.S.O. 1990, c. E-2.

Bill 30 and *Mahe*, that the existence of section 93 and section 23 could not found a claim under section 15, and that a secular public education system could not be held to create inequality according to religion. The irony in this decision is that the Protestant majority in Ontario should use section 93 to claim their own right to religious instruction – in 1867 it was not thought necessary to provide constitutional protection for the majority religion.

The *Adler* decision rests upon two distinctions: first, the distinction (fundamental to *Charter* litigation) between government action and inaction; and second, the distinction advanced in *Edwards Books*[136] between burdens caused by law and burdens resulting from religion. The two notions are linked in Chief Justice Dubin's conclusion:

> In this case, in my opinion, there was no government action that compelled the appellants to send their children to private, religious-based independent schools. They were free to send their children to secular public schools maintained at public expense. Their decision not to do so was solely a response to their religious beliefs and not a result of any government action.[137]

Chief Justice Dubin concluded by commenting that the cost of such funding was prohibitive and that such funding would fundamentally change a legislative scheme based upon universal accessibility of public schools. Ordering such a remedy was therefore beyond the role of the Court.

Charter litigation with respect to religion and schools has recognized a place for both the secular public school system, and the denominational system. Freedom of religion has been held to prevent secular common schools from imposing religious education where it is preferential of any one religion. In this respect, subsection 2(a) preserves the ideal of the universally accessible common school. At the same time, the right to opt out of the public school system for religious reasons is recognized. This gives effect to the right to choose the religious education of one's children. The right of private denominational schools to exist is implicit in this recognition. However, denominational schools remain subject to government regulation, even though they have no right to government funding.

Freedom of religion has a collective aspect[138] which was recognized in *Wiebe* and *Jones*. This reinforces the general finding in *Mahe* that there is an important cultural role in education. Any move towards providing access to denominational public schools must build upon this reasoning. Looking at cases such as *Ford* v. *Quebec (A.G.)*[139] one is tempted to generalize that the *Charter* favours individual rights over collective rights. However, a better analysis is that it protects both individuals and groups from the coercive power of the state. As the brief look above at the history of religious minorities in Canada showed, religious minority schools have often suffered for lack of entrenched rights, and sometimes despite having entrenched rights. An extension of the *Charter* into the sphere of minority-religion schools would provide religious minorities with a new source of security.

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[136] *Supra* note 103.

[137] *Supra* note 1 at 18.

[138] *Edwards Books*, *supra* note 103 at 50, Dickson C. J.: "freedom of religion, perhaps unlike freedom of conscience, has both individual and collective aspects."

[139] [1988] 2 S.C.R. 712, 54 D.L.R.(4th) 577, 19 Q.A.C. 69.

What was not answered in *Adler* is whether legislation providing for denominational schools within the public system on a non-discriminatory basis would violate the Charter. It is hard to imagine that it would. As religious freedom and equality have been defined by the Supreme Court, the principle of proportional public funding to all schools, whether secular or denominational, presents no violation of sections 2(a) or 15. Peter Hogg states, "[i]t is hard to see why s. 2(a) should be regarded as infringed by a programme of state aid, provided all religions are treated equally."[140]

Legislation which permitted denominational schools to take advantage of public funding would not constitute coercion of any particular religion, but rather support for denominational education in general. In the absence of a principle in Canadian constitutional law requiring the complete separation of Church and State (which is impossible given the presence of section 93), the power of the government to support religion in general would appear to be left untouched by the *Charter*.

The constitutionality of such a scheme would depend upon the details of the implementing legislation. So long as no direct or indirect burden was imposed upon members of other faiths, the non-denominational purpose of the legislation should be characterized as facilitating, rather than derogating from, freedom of religion. Provided that the legislature succeeded in establishing objective criteria for the distribution of public money to denominational schools, any *Charter* claim would seem impossible. Objective criteria could be framed which promote the valid interests of the state in education, but leave room for the enjoyment of the right to choose one's education and the demands of religious minorities to have their cultural interests reflected in the education system.

IV. RELIGIOUS MINORITIES AND THE STATE

Our survey of the history and constitutional aspects of minority religious education in Canada has shown that accommodation of religious minorities has been possible both with and without special constitutional protection. The existence of section 93 of the *Constitution Act, 1867* is the result of political compromise, but is also indicative of an ideal of tolerance and respect for difference which has allowed other minority groups to find a place within the public education system without abandoning their religion and culture. While the autonomy of minority religious schools within the public system is not complete, the control which the state exercises over them leaves room for the distinctive denominational aspects of the minority to be preserved in the school. This allows an important practical expression of the culture of the religious minority.

Choosing the education of one's children is a right accorded to parents in the Quebec *Charter of Human Rights and Freedoms*[141] as well as in the *Universal Declaration of Human Rights*[142] and the *International Covenant on Economic, Social and Cultural Rights*.[143] The common law also recognized the educational right of

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[140] P. W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at s. 39.8.

[141] R.S.Q., c. C-12, arts. 41 and 42.

[142] U.N.G.A. Res. 217 (III), 3 U.N. GAOR Supp. (No. 13) 71, U.N. Doc. A/810 (1948), art. 26(3).

[143] Annex to G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316, (1966), art. 13(3)-(4).

parents, grounded in natural law, in *Re Meades Minors*.[144] While giving control of a child's education to its parents is probably the most appropriate legal solution, it is important to recognize that competing interests are present. The state, the minority community, and professional educators all have interests, and each may assert a right to determine what is the best educational system.

The best educational system is usually defined in terms of that which best prepares the student for adult life. Therein lies a problem: the interested parties assert the right to choose what is best for the growing child. This problem is especially difficult for those espousing liberal views of education. If the aim of education is individual fulfilment, how can one person choose the education of another? This problem is further complicated by the likelihood that the interested parties will each have self-interested reasons for their interventions. Yael Tamir suggests that there is no justification for a right to education, but that we should examine the problem from the perspective of a right to be educated, thereby focusing attention on the child.[145] His analysis leads to the conclusion that a non-exclusive authority over education is preferable.[146] The conclusions that there are a number of parties interested in education, and that there are a number of legitimate manners of providing education, does not fit easily with the notion of a state monopoly over schools.

By examining and contrasting the interests of religious communities and the state in the education system, the ideal balance of autonomy and state regulation should become clearer. Identifying the legitimate interests of the state in education also makes it possible to refute some of the more common arguments against allowing minority-religion public schools.

A. *The Interests of Religious Minorities*

Religious minorities have a very real and sometimes urgent interest in the existence of accessible denominational schools: the future of their way of life may depend upon it. An autonomous educational system is a powerful tool in the transmission of values that are often different in fundamental ways from that of the majority. We saw in the cases of the Doukhobors, Mennonites and Hutterites that their values of communal life and pacifism were in conflict with those of the surrounding community. Their conception of religion includes aspects of daily life, in the same way that the Augustine Sisters, in their monastery across the street, live their life in devotion to God. Such a comprehensive system of beliefs is best learned in an environment which practises those beliefs.

For the majority in Canada, religion is a much less pervasive part of life, if it plays any role at all. Religion is viewed as a private matter which does not extend to daily social, economic and political interaction. The statements of Justice Sydney Smith in *Perepolkin* reflect this view:

> I, for my part, cannot feel that in this case there is any religious element involved in the true legal sense. It seems to me that religion is one thing; a code of ethics,

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[144] (1871), 5 I.R. Eq. 98 at 103 (cited in *Chabot* v. *Lamorandière, supra* note 13.)

[145] Y. Tamir, "Whose Education is it Anyway?" (1990) 24 *Journal of Philosophy of Education* 161 at 161.

[146] *Ibid.* at 168.

> another; a code of manners, another. To seek the exact dividing line between them is perhaps perilous but I absolutely reject the contention that any group of tenets that some sect decides to proclaim form part of its religion thereby necessarily takes on a religious colour.[147]

The twentieth century has seen a continual expansion of the domain of life considered to be secular, and the public education system has mirrored this change. The very fact that the majority school system in Ontario is now forbidden to offer Protestant education is evidence of this – education itself has become part of the secular domain for the majority of the population.

It is important to realize that we are not simply speaking of new immigrants and non-Christians when we discuss the funding of denominational schools. The curious result of social evolution, the *Charter* and section 93 is that members of the religious majority do not have the same right to denominational schools that members of the religious minority are guaranteed under section 93. Our analysis of the *Quebec Education Act Reference* showed how anglophone Protestants would become the majority in new, presumably secular, common schools, and lose their right to denominational education. The same situation is true of the Protestant majority in Ontario, where Catholic schools are publicly funded but Protestants wishing a denominational education must pay for a private school. Section 93 now offers better protection to certain minorities than are enjoyed by members of the majority religions: "There were two sides to the Confederation bargain and the *status quo* has changed for one, not both."[148] Secularization of the mainstream of Canadian society, including common schools, has left denominational school supporters in the minority whatever their religion. The result is that even groups within the majority religion must fight to preserve religious schooling, as the Christian Reformed and Calvinist churches did by joining the *Adler* litigation.

If education is intended to prepare a child for adult life in his or her community, then the expectations and demands of religious minorities may be very different from the majority. In the case of devout religious minorities, a good schooling will involve imparting the principles of their religion: in the case of the majority, preparation for a mostly secular society is achieved in a secular education while "religion" is confined to the private sphere. Whether there is room for accommodation of these two concepts of religion within the public education system is the central question in this debate.

Examination of the separate school system established under section 93 provided us with an example of just such an accommodation. Of course this example may not seem so convincing given that the Catholic and Protestant minorities are not at the fringes of modern society. The existence on the Prairies of public schools dedicated to Hutterites, and the acceptance by most Mennonites and Doukhobors of a similar system of public schools supplemented by religious classes, offer more convincing examples. When given the opportunity to take advantage of the public school system without being asked to integrate into the secular schools of the majority, these groups opted in.

Isolation of the minority in their own schools is often raised as a serious failing of any plan to allow religious minorities their own public schools. However, when

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[147] *Supra* note 21 at 599.

[148] J.W. Burton, "The Legal Status of Religion" in W.F. Foster, ed., *Education and Law: a Plea for Partnership* (Welland, ON.: Soleil, 1992) 202 at 210.

discussing groups such as the Hutterites and Doukhobors, the alternative is not the secular public school, but the creation of their own private schools. This was recognized by the Alberta Hutterite Investigation Committee,[149] and was apparently behind the efforts of the Manitoba Department of Education to encourage agreement between divisional school boards and Hutterite colonies allowing public schools in the colonies.[150] With the comments of the Supreme Court in *Jones*[151] pointing towards a constitutional right for religious minorities to operate private schools, this consideration becomes much more important.

The disadvantages for minorities of establishing private schools were pointed out by the Hutterites themselves in their submissions to the Manitoba Department of Education: the quality of teaching would inevitably fall as a result of the difficulty in attracting qualified teachers and the lack of support from the Department for the teacher.[152] The advantage of access to the resources of the broader public system is discussed in *Mahe*, where Chief Justice Dickson suggests that completely separate school boards may not be the best means of fulfilling minority language education rights under section 23.[153] Nor is it in the government's interest to see religious minority private schools: the level of control that the government could exercise over a private school would be much less than over a public school. Nobody would win from such a result.

Those minority communities which could not establish viable private schools would be forced to assimilate, but those that did would actually become more divorced from the mainstream as a result of their separation. The added sacrifice of those who succeed in creating a private denominational school could strengthen their feelings of separateness, and could create more extremism than would otherwise be the case.[154] As an example of this, the Sons of Freedom Doukhobors in British Columbia, the most violent group we examined, may have gained strength from the fact that the government refused to negotiate with the moderate members of the Doukhobor community.[155]

Taking a place in the public education system means more for a minority than economizing on good education. Nigel Blake proposes that ethnic minorities learn the rules of public discourse by engaging in formal relations with the government as a means of modernization without 'cultural impoverishment.' His thesis is that a minority which learns the rules of public discourse will gain the ability to engage in rational debate with the majority regarding the terms of its 'sociation' in the majority culture. Because modern society imposes its culture in a systemic fashion, notably through the welfare state, the best defense for ethnic subcultures is to take part in public discourse so as to preserve their own values within the system.[156] Negotiating a place in the public education system, and following the uniform provincial curriculum is one effective way

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[149] Janzen, *supra* note 16 at 152.

[150] *Ibid.* at 158-59.

[151] *Supra* note 108.

[152] Janzen, *supra* note 16 at 158.

[153] *Supra* note 79 at 92.

[154] M.W. McConnell& R.A. Posner, "An Economic Approach to Issues of Religious Freedom" (1989) 56 U. Chi. L. Rev. 1 at 58.

[155] Janzen, *supra* note 16 at 140.

[156] N. Blake, "Modernity and the Problem of Cultural Pluralism" (1992) 26 *Journal of Philosophy of Education* 39 at 47-48.

of learning those rules of discourse.

The success of such a strategy may be demonstrated by the effectiveness of the Hutterites in defending their values through administrative, legislative and judicial action. They were successful in coming to agreements with divisional school boards which continued the existence of public schools on their colonies.[157] They fought for and won an exemption to the *Canada Pension Plan Act* for their members.[158] And in *Hofer* v. *Hofer*[159] they won recognition from the Supreme Court of their collective system of property-holding. Such successes could not have come without some knowledge of how to engage in political discourse. The willingness of the Hutterites to adopt the public school and its curriculum can be seen as a desire to learn the rules of public discourse, not for the purpose of assimilation, but in order to preserve their own culture in the modern world.

Blake's argument does not depend upon the existence of common schools assimilating minorities into the majority, but rather upon learning the rules of public discourse. This has consequences for the role of the government in minority education. Rather than seeing government regulation as necessarily incompatible with the interests of the minority school system, the provincial power over separate schools may be seen as aiding the role of separate schools in so far as they fulfil the role of common school in their community, and possibly in the wider community as well.

There is no reason why the teaching of public discourse cannot occur outside of secular public schools. Indeed, one U.S. author asserts that Catholic schools in that country do a better job of imparting this knowledge, and therefore have a better claim to being 'common schools' in the traditional meaning of the term:

> Although the common school ideal inspired the formation of American public education for over one hundred years, it is now the Catholic school that focuses our attention on fostering human cooperation in the pursuit of the common good. While the Catholic school, like the Catholic Church itself, has become increasingly public, the public schools have become increasingly private, turning away from the basic social and political purposes that once lent them the title of "common school."[160]

The sense of community instilled by a denominational school may encourage the kind of social responsibility that is desired from a common school.

The role of the minority community, particularly in the case of smaller minorities, is to provide the framework of community within which social morality becomes meaningful.[161] It is, for example, hard to argue that a Doukhobor, living a communal life devoted to God, has a less developed sense of social morality than the law student who takes loans from his or her parents and the state in order to secure a good job in Place Ville-Marie that will allow him or her to buy a house in Outremont. Most arguments against religious minority schools are not really focused on social morality,

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[157] Janzen, *supra* note 16, at 158-59.

[158] See *ibid.* at 265-69.

[159] *Supra* note 33.

[160] A.S. Bryk, V.E. Lee & P.B. Holland, *Catholic Schools and the Common Good*, (Cambridge: Harvard University Press, 1993) at 11.

[161] See W. Feinberg, "The Public Responsibility of Public Education" (1991) 25 *Journal of Philosophy of Education* 17 at 21 (citing MacIntyre).

but rather upon commitment to the national debate, that is, loyalty.

But the desire of a minority to have separate schools is not necessarily a sign of isolationism. An analogy to Quebec is apt: isolationism is a charge which was often made against Quebec separatists but has been effectively removed from the agenda by their repeated manifestation of a desire to take part in international commerce and politics. Different values may justify separate institutions without being a sign of isolationism. As a corollary, even irreconcilably different beliefs may coexist where there is a will to coexistence, rather than an insistence upon the universal acceptance of one set of beliefs. The problem is to distinguish between groups whose aim is coexistence with the majority, and groups whose aim is to deny the possibility of dialogue.

Such a distinction may be made on the basis of the minority's willingness to recognize the principle of freedom of religion itself. The recognition of the religious freedom of others amounts to a willingness to accept that accommodation must be made with others on the basis of equal rights.[162] This would separate the Hutterites from the Jehovah's Witnesses, who deny the legitimacy of other religions.

Because education involves making decisions for others about what is in their best interests, the Courts would probably accept a limitation on the rights of these isolationist groups to their own schools. The protection of the child's right to freedom of religion would justify the violation of the minority's right to equal treatment in a programme of denominational public education. Such reasoning is analogous to that involved in cases allowing blood transfusions to the children of Jehovah's Witnesses: the child's rights to life and security of the person is protected by the Court against the parent's claim of religious freedom.[163] Enforcement of such a restriction may pose practical problems, but a means could be found if there was the will to adopt such a system. For example, denominational schools may be required to post the *Charter* in every classroom, or a mandatory course in comparative religion could be taught in all schools with the aim of eliminating religious and cultural stereotypes.[164] Furthermore, adherence to a uniform, provincial curriculum and to provincial standards would make it difficult for any school to avoid presenting their students the opportunity for rational thought.

It may be argued that non-isolationist churches, those whose members accept that their religion is only one way to Salvation among many, should have no need to run their own school. Such an argument ignores the consideration, present in *Wiebe*,[165] that the role of education in some religious minority communities is so great as to require that they be allowed to operate their own schools. The purpose of a separate school system is to protect the values associated with the religion. Because religion is a system of normative social values, it needs a community in which to reach fruition. As has already been argued, protection of minority values can be consistent with a respect for the rights of others to hold different values; this is the basis for religious freedom and

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[162] See L. Lachance, "L'État doit ériger des normes pour les sectes" *Le Soleil* (10 December 1994) A-15.

[163] See *B. (R.)* v. *Children's Aid Society of Metropolitan Toronto* (1992), 10 O.R.(3d) 321 (C.A.), appeal dismissed (1994 March 17) (S.C.C.).

[164] Such initiatives could be seen as violations of s. 2(a) of the Canadian *Charter of Rights and Freedoms*, but given that they would be done in order to promote human rights, they should be found to be justifiable under s. 1.

[165] *Supra* note 122.

for the existence of minority religion schools.

There is no reason why a minority religion should not be accommodated within the public school system to the extent that its adherents accept the religious freedom of others. The ability of the province to impose a uniform public school curriculum would ensure this basic adhesion to the broader polity. The distinctive values of some of the groups studied in this paper - pacifism, communism and an opposition to moral relativism - are not barriers to learning the public school curriculum. If the principle that governments may not coerce the beliefs of citizens is to be respected, a minority's difference of opinion with the majority over certain issues, fundamental though they are, should not be used as a justification for depriving them of the advantages of public school.

B. *The Interests of the State*

The education interest of the State is to create citizens who contribute to society. An authoritarian manifestation of this was behind the requirement of the Hamilton Board of Education that all students, including Jehovah's Witnesses, take part in patriotic exercises.[166] The argument that one cannot be loyal to the state while at the same time holding true to one's religion has a rich history, which includes many examples in Canada[167]—but it is an argument that has been justly repudiated as incompatible with a liberal, democratic society. In rejecting the position of the Hamilton Board of Education, Justice Gillanders cited the U.S. Supreme Court case *Barnette* in which Justice Jackson held that coerced patriotism was a violation of the First Amendment:

> Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.[168]

What holds true for patriotic exercises should hold more true for religious schooling; education in the values of a minority religion does not prevent loyalty to the State.

Public schools are no longer permitted to impose the values of the State in such a coercive manner; however, the goal of creating good citizens remains. The Conseil supérieure de l'éducation of Quebec considers it to be both an end in itself and a part of every student's personal development:

> L'établissement scolaire devrait être un lieu où s'aprennent la participation, l'engagement, le respect de l'autre et la façon de composer avec les contraintes de la vie en société. Et plus largement encore, il devrait être un instrument de cette éducation civique, porteuse des valeurs d'équité, de partage, de responsabilité, de respect des libertés, d'acceuil des différences et de participation à la vie de la communauté nationale...

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[166] See *Donald, supra* note 8.

[167] See examples in *Roach* v. *Canada (Minister of State for Multiculturalism and Citizenship)*, [1994] 2 F.C. 406 (C.A.) at 423, Linden J.A.

[168] *Supra* note 7 at 640.

> Effectivement, l'éducation est aussi au service du développement de la société dans toutes ses dimensions.[169]

The State has legitimate democratic and economic interests in regulating education which must be separated from moral and religious interests which are the domain of freedom of religion. The denominational vocation of a school is beyond the scope of State regulation. State intervention to ensure minimum standards and a common, non-denominational curriculum is justified even in denominational schools protected by section 93; however, "[the State's] power does not extend to permit the standardization of children."[170]

Care must be taken not to fall into a simple characterization of the State as the Godfather of all its children. Such an assumption may sometimes appear attractive, but is essentially anti-democratic. It led Jean-Jacques Rousseau to propose the separation of children from their parents in order that they may be raised by the State:

> If the reason of each individual is not allowed to be the sole judge of his duties, still less should the education of children be left to the ignorance and prejudices of their fathers ... The State abides: the family passes.[171]

The internment of Doukhobor children by the B.C. Government may be seen as the logical extreme of this line of reasoning.

Parental choice acts as an important limit upon the power of the government in educational matters. It is a principle that has been consecrated in international law, and seems to have won the approval of the Supreme Court in *Jones*.[172] The importance of choice in a democracy is reflected in many aspects of our public life. Analogies may be drawn to other instances where the government has intervened in order to provide a public good:

> Medicare makes health care services available to all, but patients may choose their doctors and perhaps also their hospital. To a limited degree, legal aid makes services available to those who cannot afford a lawyer; yet some choice is possible with respect to who will be consulted. Traditionally in Canada, no choice was available to parents in the schooling of their children unless they wished to pay for the education provided by a private school.[173]

In metropolitan areas, the public school system is becoming increasingly diverse, but the choice of curriculum offered to students and parents does not extend to choice

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[169] *Rapport annuel 1992-1993 sur l'état et les besoins de l'éducation : le défi d'une réussite de qualité* (Publications du Québec, 1993) at 2.2.1.

[170] N. Finkelstein, "Legal and Constitutional Aspects of Public Funding for Private Schools in Ontario" in B. J. Shapiro, *The Report of the Commission on Private Schools in Ontario* (Ontario, October 1985) App. D, 81 at 90.

[171] B. Almond, "Education and Liberty: Public Provision and Private Choice" (1991) 25 *Journal of Philosophy of Education* 193 at 197 (citing "Political Economy").

[172] *Supra* note 108.

[173] J. J. Bergen, "Private Schools and Other Alternatives: A Response to Magsino, Shapiro, and Miller" (1987) 12 *Canadian Journal of Education* 229 at 230.

between competing religious visions of education:

> In the public sector, parents are increasingly free to choose among mathematics and science academies; among schools that focus on fine arts, drama, modern languages; and among a diverse array of pedagogical alternatives such as open classrooms and Montessori. In the realm of moral vision, however, freedom is constrained.[174]

We would not consider democratic a country that funded only certain political parties, yet we accept – often in the name of democracy – a situation in which only one religious viewpoint, secularism, is given access to education funding.

If freedom of religion includes a right to choose the religious education of one's children, denominational schools must be available in order to make that choice meaningful. Making such schools accessible by bringing them within the public education system is not an attack upon the foundations of democratic society, but the fulfilment of the belief that coexistence is possible despite diversity.

Diversity is present in the existing school system not only through the existence of section 93 schools, but also through the local administration of public schools. The choice of a decentralized administration can be seen as a recognition by the State that schools must accommodate differences. In this way the public school system must be distinguished from some other areas in which minority groups have sought separate institutions. Legislatures and courts, for example, have always functioned at a national level, responding to the concerns of the State as a whole. The local function of public schools has always been recognized through the existence of local school boards. Creation of denominational schools and school boards would be an extension of this function from geographic to religious accommodation – a recognition of communities of interest defined by religion rather than geography.

Of course, the existing system of local school boards does not remove the State from education, but merely provides for delivery of the service in a way that accommodates local needs. The State preserves the power to set curriculum and regulate the material aspects of the school. This would be true under a system of religious public schools as well: the religious schools could be bound to offer the public curriculum.

But simply imparting the public school curriculum in a manner that may be tested at the end of a session is not what many people hope for from the public education system. The description of a common school often goes beyond being a school open to all (as the term has been used in this paper) to include the mission of serving as the incubator of a common citizenship. This role is a natural consequence of the belief that education can shape the coming generation. Coercive attempts to use education as a tool for social engineering have already been examined and rejected as incompatible with Canadian notions of freedom of conscience and religion. What of the experiential learning that can result from attending a common school, the growth in tolerance and understanding for other cultures? In a country like Canada, founded in diversity, this aspect of education policy cannot be ignored.

It should be remembered that this paper does not argue for the replacement of the secular, public school system, but merely for the existence of denominational schools alongside them. Given that denominational schools could only be made available where

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[174] *Supra* note 159 at 341.

numbers warranted, the secular public school system would remain strong despite the right of minorities to establish denominational schools. As McConnell and Posner point out, "a secular public school system [is] the powerful second choice of virtually everyone."[175] But if there is an argument to be made that discouraging denominational education could create a more tolerant society for religious minorities, it must be examined carefully.

In an early Canadian study of this issue, exactly such a claim was made. In 1838, Arthur Buller received a commission from Lord Durham, then Governor General, to inquire into the state of education in Lower Canada.[176] His comments and proposal are worth citing at length:

> In Canada, the child of French extraction is brought up out of sight and hearing of the child of British parents. They never meet under the same roof; they are sent to separate schools; and they are told that the reason of this separation is, that the children of the rival schools are heretics, or belong to another nation. They have no common hopes or fears, or pleasures or dangers – none of those kindly associations so easily born out of the familiarities of comradeship, and so faithfully retained throughout the vicissitudes of life. In short, upon entering into this world, they find no tie to bind them together, and all things around them inviting to hatred and hostility. But how different would be their feelings towards each other, were they brought up at the same schools; were they to play together, and receive the same punishment! They would then form friendships which would soften, if not altogether subdue, the rivalries of after life. A scheme by which the children of these antagonist races should be brought together, were it only for purposes of play, would be preferable to one by which they received a good education apart; but one, by which both union and instruction were assured to them, would be the first and most important step towards the regeneration of Canada.[177]

Buller went on to describe a system of common schools including Christian educational materials acceptable to both Catholics and Protestants. Once past the religious division, the linguistic divide would be crossed through the Anglification of the French.[178] Both the Catholic and Anglican churches in Lower Canada were hostile to the proposed common school system,[179] and it was never implemented.

Modern advocates of the common citizenship argument would probably recoil from the association with such blatant cultural imperialism. Their argument is based upon the need to create a society in which democracy can take full form by instilling in the coming generation the principles of public discourse (to use Blake's term). This view, sometimes called liberal republicanism, is based upon the creation of a procedure for democratic discussion that is said to be culturally neutral. Blake would agree with this possibility of cultural neutrality. He draws the distinction between modernization and assimilation; learning the principles of public discourse is not necessarily a process of assimilation, but one of modernization which could occur in any culture or

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[175] *Supra* note 153 at 56.

[176] Sir C. Charles, ed., *Lord Durham's Report on the Affairs of British North America* vol. 3 (New York: Augustus M. Kelley, 1970) at 238.

[177] *Ibid.* at 273-74.

[178] *Ibid.* at 288-89.

[179] *Ibid.* at 239.

subculture.[180]

Cynthia Ward offers the following characteristics of a liberal republicanism that is based upon "certain beliefs, centring on the view that deliberation among a virtuous citizenry can lead to general agreement on the common good": a social momentum towards political connectedness rather than separation, the existence of an imaginative empathy between citizens, willingness by the citizens to revise even their most fundamental commitments, non-confrontation, and a restriction on the use of the coercive power of the State to shape the values of the citizenry.[181]

There are tensions in this theory which are apparent at the outset. The social momentum towards connectedness is to come from the fact that the political community is "geared toward the assimilation of difference";[182] however, this is to occur without the interference of the State, because "[s]tate coercion is used not to shape the values of the republican citizenry, but rather to implement values selected through universal, undominated citizen participation."[183] Agreement on common values is to result from "free and open interaction"[184] but is to be predicated on the belief, shared by all, that "change that creates or results in greater equality must be welcomed."[185] If liberal republicanism is to be seen as more than just an argument for procedural fairness and neutrality in public discussion, it must be said to rest on some fairly shaky assumptions about the willingness of the citizenry to put the common good ahead of the defense of their own values.

Ward's article addresses the problem of group-based remedies to social and economic inequality, particularly racial and sexual inequality. Her argument is focused on the challenge to social connectedness which is posed by groups claiming rights or entitlements on the basis of membership in their particular group. This issue is different in significant ways from the issue of minority religious education. First, religion is different from race or sex because the very purpose of a religion is to establish a set of substantive norms for its members.[186] Where these differ from the majority, the disagreement does not result from the treatment of the group by the majority (usually a form of exclusion from the mainstream), but is rather a disagreement about what are proper social values. Second, education is not a remedy (although it may be used as such), but a public good which is, in principle, available to all. Provision of public education to religious minorities is not an effort to remedy an injustice, but the granting of a public good to a group that would otherwise be burdened by the task of providing private education at the same time that they were paying public school taxes.

Missing from Ward's article is a discussion of the possibility that agreement to be different may be the ideal solution in many cases. The problem presented in *Hofer* v.

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[180] *Supra* note 155 at 44 (citing Habermas).

[181] C. Ward, "The Limits of 'Liberal Republicanism': Why Group-Based Remedies and Republican Citizenship Don't Mix" (1991) 91 Colum. L. Rev. 581 at 584-89.

[182] *Ibid.* at 585.

[183] *Ibid.* at 588.

[184] *Ibid.* at 585.

[185] *Ibid.* at 586.

[186] See S. van Praagh, "The Youngest Members: Harm to Children and the Role of Religious Communities" in M.A. Fineman & R. Mykitiuk, *The Public Nature of Private Violence* (New York: Routledge, 1994) 148 at 157.

Hofer[187] may offer a good example of accommodation of difference rather than insistence upon finding a common solution. Liberal republicanism would ask the Hutterites to put their system of communal ownership of property up for discussion. This would be a fair demand if the majority was also prepared to question its own system of property-holding. However, the Canadian commitment to private property is not open to discussion. This means that any public discussion of the matter must violate the rules of public discourse upon which liberal republicanism is founded. The solution, found by the Court, is to admit the existence of a normative standard applicable to the minority community but different from that of the majority.

Religious communities set normative standards which are as real for their members as the standards imposed by the State. As such, religious communities should be seen as embodying political cultures which will seek to express themselves in autonomous institutions in the same way that the French Canadian and Aboriginal minorities have sought self-government within the Canadian Dominion. Of course, the level of autonomy given to small religious minorities will not be as vast as that sought by 'national' minorities, but in an important way, their situations are the same. Their minority position leads them to seek out an area in which their own values will be dominant. This argument has been described as follows:

> If the recognition of minority cultures is confined to the level of the individual, political equality will not be furthered (aboriginal peoples, for example, will not feel more at home in political institutions). Rather, the political system will be dominated by the culture of the majority. Thus, each society should have its own measure of autonomy so that it can have a public sphere within which its culture will be dominant.[188]

This applies to education as well as to any other forum in which community values are debated and defined.

The recognition of such autonomous communities of interest within the State does not necessarily contradict the liberal republican argument. The importance of public discourse in which all parties strive to achieve consensus on the public good can be recognized as applying to different communities of interest in respect of different issues, rather than demanding that minorities abandon other loyalties in favour of the Nation-State.

It should also be questioned whether secular public schools actually create a common citizenship or simply promote individualism while ignoring cultural ideals which are the basis of religious differences. In this sense, it is important to recognize

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[187] *Supra* note 33.

[188] J. Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Montreal: McGill-Queen's University Press, 1994) at 90.

that all education imparts a set of values, even if it claims to be religiously neutral:

> *[A]ll* education conveys religious understandings, that is, a set of beliefs, values, and sentiments that order social life and create purpose for human activity. These may be comprehensive ideals that ennoble the person and reach out broadly to others, or they may narrowly focus only on advancing material self-interest.[189]

It may be easier for a school founded upon a belief in the Godliness of humanity to inculcate community-positive values, than it is for a secular school which is often called upon to justify itself in terms of the economic value it adds to each individual student.

In summary, the State has important practical interests in regulating the public school system. These include ensuring adequate levels of teaching, a curriculum which prepares students for contemporary life, and health and safety standards. But the interests of the State do not extend to imposing the social values of the majority culture where this would violate the faith of a religious minority. In this matter, religious groups have a different claim than racial or sexual groups, because they are asserting their own system of social norms. Arguments based upon the need for a common citizenship often mask a desire to assimilate minorities, but this is inconsistent with the very principles of public discourse that are usually used to justify a common citizenship.

C. *Arguments Against Religious Public Schools*

There are some other important arguments opposing the inclusion of religious schools in the public system which are based upon interests other than those of the State, or of the minority. The most important are the arguments based on the individual rights of the children, and those relating to cost.

Although this paper has focused upon the collective rights of religious minorities to have access to public schools reflecting their beliefs, we must return to those who are the immediate subject of the right to be educated—the children. Opposition to religious minority education often takes the form of defending the individual rights of the child, as opposed to the parents or the community. It is said that the child's right to receive an education which will allow him or her to make independent judgements as an adult is infringed by a separate educational system. There are a couple of presuppositions to this argument.

First, such an argument assumes that a religious education prevents individual enlightenment. However, once one admits that an enlightened individual may choose religion, it becomes impossible to claim that a religious education prevents individual enlightenment. Religion is a window through which one may learn about the world and give meaning to what one learns. Like any other frame of reference (humanism, nationalism, etc.) it may be used in a positive or a negative manner. Arguments against religious minority schooling are often simply arguments against religion as a way of approaching the world. Freedom of religion excludes such an argument.

Second, this argument presupposes an isolationist motive on the part of the minority. It has already been advanced that the wish for separate schools need not be

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[189] *Supra* note 159 at 341 [footnote omitted, emphasis in original].

taken as a desire to isolate the community from the majority. Separate schools allow the minority to modernize and to integrate with the majority by preserving a sphere of public discourse in which this transition may take place. In the case of groups such as the Hutterites, the radically different values which they hold may stand in the way of much practical integration; however, a recognition of difference does not have to be characterized as isolationism. For example, Quebec cannot be said to engage in isolationism by insisting upon the survival of French as a public language. Rather, it is defending a valuable aspect of its own identity.

As has already been mentioned, it may actually be in a child's best interests to receive a moral and religious education grounded in the practice of his or her community. There is an important argument to be made that secular schools do not teach tolerance, but rather ignore cultural diversity by removing whatever is controversial from discussion. In order to accommodate freedom of religion, the discussion of religious values has been removed from secular education. Moral relativism may be an extreme charge to bring against secular schools, but cultural impoverishment is not. By leaving the student without any religious education, secular schools encourage the abandonment of cultural values in favour of those values which are advanced by a capitalist economy and the welfare state.[190]

Cost is another major factor in most arguments against denominational public schools. By leaving denominational schools in the private sector (with the exception of section 93 schools), the State is saved the cost of providing education to those children. The cost of extending public funding to denominational schools was raised by Chief Justice Dubin in *Adler* as a factor in rejecting it as an appropriate remedy.[191] But funding of only secular schools imposes a burden on supporters of denominational schools because they receive no benefit from their own tax dollars.[192] Such taxation without benefit was recognized as prejudicial by the Supreme Court in *Barrett*.[193] However, in *Adler* the Ontario Court of Appeal considered it to be a burden imposed by the religion, not the State.[194]

McConnell and Posner propose a number of formulas for analysing the issue of separate school funding, but they find the U.S. Supreme Court inconsistent in the application of any single theory. This is particularly true of the cases dealing with funding for the non-educational aspects of denominational schools, such as bussing (which was permitted) and building maintenance (which was not).[195] If non-discriminatory State support for religious schooling is seen as consistent with subsection 2(a), the Canadian courts will avoid entering into a similar game of trying to distinguish the religious from the non-religious aspects of education. Given that much of the difficulty with this issue stems from disagreement about what is 'religious', the courts would be wise to avoid placing themselves in a position where they must provide a definition.

Implementation of equal funding could be by proportional grants, or by giving the minority the right to tax its own membership. These systems work in the existing

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[190] *Supra* note 155 at 47-48.
[191] *Supra* note 1 at 28.
[192] *Supra* note 153 at 18.
[193] *Supra* note 44 at 388.
[194] *Supra* note 1 at 18.
[195] *Supra* note 153 at 25-26.

separate school system. A voucher system would be a better system, in which public aid would be distributed exactly according to the choices made by parents and students. A voucher system may be the most effective way to introduce funding to denominational schools without risking *Charter* challenges. By giving the role of allocating funds to parents and students, a voucher system prevents the possibility of government or administrative favouritism which could be seen as a violation of section 15.

Funding education for all students, in both secular and denominational schools, may not create the huge added cost that is feared. Much of the cost would simply be transferred from secular schools as many switched to denominational schools. Provision for such a transfer of resources was provided for in Bill 30 when funding for the Ontario separate school system was extended to secondary schools.[196] McConnell and Posner point out that partial funding of private, denominational schools could even create savings for the province by encouraging parents to spend their own money in order to pay tuition at a denominational school. For example, a $1000 per student subsidy may be sufficient to convince a parent to pay the $3000 tuition fee at a denominational school, thereby saving the province that amount in public school costs. Although partial funding would not remove the relative burden upon denominational school supporters, it would make it easier for them to exercise their religious preference. For this reason, it would be preferable to a complete lack of funding.

Finally, I must reject one further, minor argument: that the public education system has no impact upon freedom of religion because it is secular. Premier Martin of Saskatchewan used this argument when telling the Mennonites that he would enforce compulsory public school attendance laws: "[T]he sending of children to school where they will acquire a proper education cannot in any way interfere with your religion."[197] This argument presumes a very narrow definition of religion, which has been contested already in this paper. Furthermore, it contradicts many of the other arguments used to oppose minority religious schooling. If education and religion can be separated in their effects, there is no reason to fear that a good denominational school education would fail to instil the values necessary to good citizenship. One cannot sustain both arguments—either education is important in instilling values or it is not. The better view is that it is, and that the accommodation of the minority in society requires that they be given some means to instil their own values in the coming generation.

V. CONCLUSION

Religious minorities have a long history of accommodation within the Canadian public education system which serves as a model for future accommodation. The balance of the interests of the State and minority communities, which is found in the examples of the Hutterites and of separate schools established under section 93, shows a concern for the ability of the State to ensure that a common curriculum is followed in areas of concern to secular society, balanced by a respect for the need of the minority to transmit their own values.

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[196] *An Act to Amend the Education Act*, S.O. 1980, c. 21, s. 136(l); see *Reference re Bill 30*, *supra* note 64 at 31.

[197] Janzen, *supra* note 16 at 108.

This accommodation of interests is consistent with Canadian constitutional values, which guarantee the rights of certain entrenched minorities, protect religious belief from government coercion, and provide for choice in the matter of religious education. Jurisprudence under section 93 has established a space for extensive government regulation of denominational schools, but this is based upon the secular interests of the State and leaves aside aspects of the schools that are directly related to religion. Religious freedom cases, in particular *Wiebe*[198] and *Jones*,[199] show the balance between government regulation of education, necessary to ensure that certain standards are met, and the right of parents to choose a religious education in order to pass on values essential to their religious beliefs.

Aside from purely secular concerns such as the concern that education meet the economic needs of the country, a democratic state has an interest in encouraging the values necessary to public discourse. The interests of the State in education are therefore extensive, but do not extend to the coercive imposition of beliefs, whether religious or patriotic. Public discourse is by definition culturally neutral, demanding only that citizens be willing to communicate their interests in a manner that is open to compromise through a consensual process. The values essential to public discourse can be instilled effectively in schools with any religious or cultural background, so long as those schools reflect a belief in coexistence and the toleration of diversity.

By bringing the schools of religious minorities into the public education system rather than leaving them in the private sector, the State encourages religious minorities to engage in public discourse. This occurs through the continuing power of the State over curriculum in all public schools, as well as by the very process of negotiating a place within the public system. Religious minorities gain by having a forum in which to preserve their own values. This is not a static process, but also involves putting their minority values in the context of the modern society to which they are exposed through their participation in the public education system.

Participation of minority religious schools in the public education system therefore respects the interests of the State, including the encouragement of the values of public discourse, while providing a home for the values of the minority. It is a win-win solution to a disagreement on social values that has often become confrontational. If Canada is to abide by its beliefs in freedom of religion, then it must accept the challenge to majority values which these minorities represent. In giving access to the public education system to these groups, the state would express its faith in the strength of our democracy to accommodate real difference rather than simply seeking to assimilate everyone to the lowest common denominator.

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[198] *Supra* note 122.

[199] *Supra* note 108.