

The Top Five - 2002

Each year Justice Stephen Goudge of the Ontario Court of Appeal identifies five cases that are of significance in the educational setting. This summary, based on his comments and observations, is appropriate for discussion and debate in the classroom setting.



***Adler v. Ontario* [1996] 3 S.C.R. 609**

http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol3/html/1996scr3_0609.html

Education funding in Ontario of Roman Catholic separate schools but not of other religion-based schools.

Section 93 of the *Constitution Act, 1867* requires the Ontario government to fund Roman Catholic separate schools. This section was the result of an historical compromise crucial to Confederation. Parents who, because of religious or conscientious beliefs, send their children to private religious (non-Catholic) schools sought a declaration that the non-funding of those schools by the provincial government infringed their religious and equality rights guaranteed in the Charter.

Five justices of the Supreme Court found that the government's choice to not fund other denominational schools does not infringe the equality rights of students in non-Catholic religious-based schools for two reasons. Section 29 of the Charter exempts rights and privileges guaranteed under the Constitution from a Charter based challenge, and one part of the Constitution cannot be used to interfere with rights protected in another part of the same document. The Court stated that the province is free to exercise its plenary power over education in whatever way it sees fit subject to the restrictions relating to separate school funding set out in Section 93(1). However, legislation with respect to education beyond the confines of the special mandate to fund public schools and Roman Separate schools could be subject to a Charter challenge.

Two justices of the Court in a concurring opinion stated that only the rights and privileges of separate schools were given constitutional protection, and the distinction between Roman Catholic schools and other religious schools was not subject to Charter challenge. Even though non-funding imposed an economic disadvantage on parents who chose to send their children to religious-based schools rather than secular public schools, this disadvantage was not due to the legislation requiring mandatory education. The *Education Act* allows for education within a religious school or at home and does not compel individuals to infringe their freedom of religion. The failure of the state to facilitate religious practice cannot be considered interference with freedom of religion. Any economic distinction was not due to the legislation but flowed exclusively from religious tenets and parental choice. The cost of sending children to private religious schools does not infringe freedom of religion protected by section 2(a) of the Charter.

That persons feel compelled to send their children to private school because of a personal characteristic (religion) with the effect that they are unable to benefit from public school funding is not an effect arising from the statute. The distinction between themselves and others is not the result of government action, and the threshold inquiry under section 15 of the Charter is not met.

One justice of the Court dissented in part. She did not agree that section 93 was immune from Charter attack, but she agreed that freedom of religion did not entitle one to state support for one's religion. Roman Catholic separate schools have a constitutional right to funding. However the government's decision to not fund other religious schools did infringe the students equality rights *vis a vis* secular schools. This justice found that the *Education Act* discriminates among individuals. The state cannot blame the individual for having or for having chosen a status that leads to discrimination. However, the state's infringement of section 15 of the Charter was justifiable in that the public school system represents the most promising potential for realizing a more fully tolerant society. Denying funding to private religious schools is rationally connected to promoting the goal of a more tolerant society and only minimally impaired Charter guarantees.

One justice dissented. Provinces exercising their plenary powers are subject to the Charter. Failure to fund other private religious-schools did not infringe religious rights guaranteed under the Charter but did infringe section 15 equality rights. The state discriminated on the basis of religion. The state cannot blame the individual for belonging to a discriminated group. Complete denial of funding was an excessive impairment. Partial funding could be provided without affecting the objectives of public school support.