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Moral and Religious Instruction in Quebec:
Some legal issues

Abstract

Students' and parents' freedom of conscience and religion and their right not to be discriminated against because of one's religious beliefs, enshrined in the Canadian Charter of Rights and Freedoms, *have been the subject of litigation in a number of provinces but not in Quebec. This article, after providing an overview of the major provisions of the Quebec* Education Act *governing the issue of moral and religious instruction in the province's public schools, seeks, first, to explain why these provisions have not been, and are unlikely to be, a focal point for litigation in the province similar to that which has been launched in other provinces; and, then to signal three other potentially contentious matters inherent in the foregoing provisions.*

Résumé

La liberté de conscience et de religion des élèves et de leurs parents et leur droit à ne pas être l'objet de discrimination exercée en raison de leurs croyances religieuses, qui sont enchâssés dans la Charte canadienne des droits et libertés, ont donné lieu à certaines polémiques dans un certain nombre de provinces, mais pas au Québec. Cet article qui commence par donner un aperçu des principales dispositions de la Loi sur l'éducation qui régit la question de l'enseignement moral et religieux dans les écoles publiques de la province, cherche tout d'abord à expliquer pourquoi ces dispositions ne sont pas et ne risquent pas de devenir un point litigieux au Québec, à la différence de ce qui s'est produit dans d'autres provinces canadiennes; il fait état ensuite de trois points potentiellement litigieux inhérents aux dispositions en question.

The denominational character of Canadian public education has been a fertile source of litigation over the years. Until 1985 the primary focus of much of the litigation concerning religious instruction and denominational schooling has been section 93 (the denominational school guarantee provision) of the *Constitution Act, 1867* (formerly the *British North America Act, 1867*). While section 93 litigation remains a fact of life of the Canadian educational scene, with the coming into force in 1985 of, *inter alia*, the guarantees enshrined in the *Canadian Charter of Rights and Freedoms* (the "*Canadian Charter*") to the "freedom of conscience and religion" (s.2[a]), and the right of "every individual . . . to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on . . . religion . . . " (s.15), a new focal point for litigation concerning religion in schools came into being.

To date, however, neither the issues of religious instruction and exercises in Quebec schools, nor the *prima facie* "discriminatory" practice of the provincial government of providing funding only to the public school boards of two privileged religious groups, the Catholics and the Protestants, have been the subject of litigation under sections 2(a) or 15 of the *Canadian Charter*. Other provinces have not been so fortunate. For example, successful challenges have been initiated: in Ontario, against religious instruction in schools (*Canadian Civil Liberties Assn.* v. *Ontario [Minister of Education]*,1990); and in Ontario and British Columbia, against religious exercises in schools (*Zylberberg* v. *Sudbury Board of Education [Director]*,1989, and *Russow* v. *A.G. [B.C.]*, 1989). Further, in Ontario litigation has been instituted with the goal of putting an end to that province's discriminatory practice of providing public funding only for Catholic public schools (*Adler* v. *Ontario*, 1992). While the plaintiffs in this case were unsuccessful at trial it is likely the decision will be appealed.

As is evident from the first section of this article the absence of litigation in the Quebec educational arena based on sections 2(a) and 15 of the *Canadian Charter* is not due to the fact that moral and religious instruction (MRI) is not offered in Quebec schools—all public schools are obliged to offer MRI. Nor is the lack of such litigation accountable by the fact that courses of MRI must be taught as an "academic" subject in a nondoctrinal manner catering to all religious faiths—schools are obliged to offer only Catholic and Protestant MRI. So what accounts for the absence of section 2(a) and 15 litigation? An answer to this question is provided in the second section of the article. Then in the third, and final section, the article identifies three potential legal problems which are inherent in the provisions of the Quebec *Education Act* (*Bill 107*) governing MRI.

Moral and Religious Instruction in Quebec

According to both *Bill 107* and the *Basic School Regulations* (*Régime Pédagogique*) for preschool and elementary and secondary school education, every school board in the province, in every year of the elementary and secondary programs, must offer Catholic or Protestant MRI and accompanying support services (*Bill 107*, ss. 224-227, *Régime Pédagogique* [Preschool and Elementary], ss. 5, 10, & 44, and *Régime Pédagogique* [Secondary], ss. 4, 9, & 35). However, as is evident from the terms of section 225 of *Bill 107*, every school board also must be prepared to offer mere moral instruction in every year of the elementary and secondary programs:

> Every school board shall provide Catholic or Protestant . . . [MRI], or moral instruction, according to the choice of the student or his parents (s.225, and see also *Régime Pédagogique* [Preschool and Elementary], s.44, and *Régime Pédagogique* [Secondary], s.35 .)

In addition, *Bill 107* expressly permits (but does not require) all school boards to provide MRI in a faith other than Catholic or Protestant:

> A school board may, after consultation with . . . [a school's] orientation committee and the school committee, provide . . . [MRI] of a religious denomination other than Catholic or Protestant . . . (s.228).

In light of the foregoing provisions it is evident that students are not obliged to follow one or other of the courses of Catholic or Protestant MRI because the express right to elect moral instruction in lieu of MRI is conferred. In fact *Bill 107* requires that school boards ensure that a student or his/her parents, every year at the time of registration, indicates whether he/she is to receive Catholic MRI, Protestant MRI, MRI in another faith (if offered), or moral instruction, as the case may be (*Bill 107*, ss. 5 & 241). Should the student or his/her parents fail or refuse to indicate their choice then the student is to receive that course of instruction which he/she chose in the preceding year or, if no prior choice has been made, moral instruction (*Bill 107*, s.241).

What is of particular interest is the fact that *Bill 107* views the right to choose between a course of MRI and a course of moral instruction as belonging to the student and not to the parents:

> **Every student . . . has a right to choose**, every year, between either Catholic or Protestant . . . [MRI, or MRI in another faith where provided] or moral instruction (s.5—emphasis added).

However, *Bill 107* also stipulates that

> [i]n elementary school and in the first two years of secondary school, the parents shall exercise the right of choice on behalf of their child (s.5).

Three further points need to be mentioned here. First, some importance is attached by the provincial government to MRI and moral instruction for, to obtain a Secondary School Diploma, a student must have accumulated at least two credits in one or other of the courses of instruction (*Régime Pédagogique*, section 69).

Secondly, *Bill 107* expressly protects the freedom of religion and conscience of teachers in that no teacher may be compelled to give MRI of any religious affiliation (s.20). Indeed, with respect to Catholic and Protestant MRI, it can be provided only by teachers who have the qualifications required by the Catholic or Protestant committees established under the *Act Respecting the Conseil Supérieur de l'Éducation* (s.49).

Thirdly, and perhaps most importantly for present purposes, the foregoing provisions concerning the teaching of MRI and moral instruction apply to all publicly funded school boards in the province irrespective of their denominational status; that is, the provisions, without exception, apply to:

1) the five ***dissentient*** school boards (i.e., the equivalent of ***separate*** school boards in other provinces);
2) the four ***confessional*** (two Catholic and two Protestant) school boards located in the cities of Montreal and Quebec (for which there are ***no equivalents*** in the other provinces); and
3) the ***de facto*** denominational school boards which from a strictly legal point of view are ***common*** school boards of non-denominational status (i.e., the equivalent of ***public*** school boards elsewhere in Canada).

Why the "Religious Peace" in Quebec's Public Schools?

Why have the issues of religious instruction and exercises in Quebec schools, and the *prima facie* "discriminatory" practice of the provincial government of obliging all publicly funded schools to offer only Catholic and Protestant MRI not been the subject of litigation under sections 2(a) or 15 of the *Canadian Charter*?

The explanation for the apparent peace which appears to reign on the *Canadian Charter* "front" with respect to religion in Quebec schools cannot be attributed to the fact that the right of students and parents to opt out of

MRI provides adequate protection to their *Canadian Charter* rights under section 2(a) and 15. Such "opting out" provisions, even when coupled with the provision of an alternative educational experience, will not in themselves insulate the teaching of MRI of particular faiths in schools from a successful *Charter* challenge if the decisions in *Canadian Civil Liberties Assn.* v. *Ontario (Minister of Education)*, 1990; *Zylberberg* v. *Sudbury Board of Education (Director)*, 1989; and *Russow* v. *A.G. (B.C.)*, 1989, are any guide.

Rather, the simple, though apparently not widely known, explanation for the "religious peace" on the Quebec educational scene with respect to the teaching of MRI is the fact the province's residents do not have the opportunity to assert fully their guaranteed rights either to freedom of religion and conscience (and all it entails) or to non-discriminatory treatment on the basis of religion in an educational context. Why? For the simple reason that in section 727 of *Bill 107* is to be found the following stipulation:

> The provisions of this Act which grant rights and privileges to a religious affiliation shall operate notwithstanding the provisions of paragraph (a) of section 2 of the . . . [*Canadian Charter*], and section 15 of that Act.

That is, through the invocation of the "notwithstanding clause" provided for in section 33(1) of the *Canadian Charter*, the Quebec government, to a considerable degree, has insulated its educational policies and practices with respect to religion in schools from potential suits based, at least, on sections 2(a) and 15 of the *Canadian Charter*.

It is pertinent to note in passing that the Quebec *Charter of Human Rights and Freedoms* ("*Quebec Charter*") also guarantees to every person, *inter alia*, the freedoms of conscience and religion (s.3) and "the right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on . . . religion . . . "(s.10). However, this fundamental freedom and right fare no better than their equivalents in the *Canadian Charter* since they also have been overridden in *Bill 107*, section 726, which provides:

> The provisions of this Act which grant rights and privileges to a religious affiliation shall apply despite sections 3 and 10 of the . . . [*Quebec Charter*] . . . .

In light of the foregoing, it appears, for the time being at least, that Catholic and Protestant MRI in **all** of Quebec's publicly funded schools, by the grace of the "Canadian compromise" in the Canadian and Quebec Charters, is alive and well.

Three Potential Problems

While the privileged treatment meted out to Catholic and Protestant MRI cannot not be the subject of a challenge under section 2(a) or 15 of the *Canadian Charter*, the provisions of *Bill 107* concerning the teaching of MRI in Quebec schools raise at least three issues which have constitutional dimensions and which yet have to be addressed by the courts.

Teaching of both Catholic and Protestant MRI in all schools

It must be asked, can the Quebec government require, as it purports to do in section 225 of *Bill 107*, that "every school board . . . provide Catholic or Protestant" MRI according, not to the choice of the school board, but "according to the choice of the student or his parent"?

This requirement is unobjectionable in so far as it is directed to common, legally nondenominational school boards which form the majority of school boards in the province (Burgess, 1991). They are not entitled to the protection accorded denominational schools by section 93 of the *Constitution Act, 1867*, from laws which "prejudicially affect any Right or Privilege with respect to Denominational Schools . . .".

But section 225, on its face, is not restricted in its application to these boards. It appears to apply to "every school board" including the four confessional and five dissentient school boards (expressly identified in sections 122 and 125 of *Bill 107*) which, by virtue of section 93 of the *Constitution Act, 1867*, are immune to any laws which prejudicially affect a right or privilege touching on a denominational aspect of schooling. The immunity accorded these denominational schools by section 93 of the *Constitution Act, 1867*, from legislative interference with respect to denominational matters cannot be displaced by recourse to the "notwithstanding clause" in section 33(1) of the *Canadian Charter* for section 29 of the Charter expressly states that:

> Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

Consequently, to the extent that section 225 of *Bill 107* is seen to direct these legally denominational school boards to provide, at the request of a student or parent, a course in MRI catering to a religious faith other than that to which the denominational board is dedicated, the section must be viewed as a provision prejudicially affecting a denominational aspect of schooling. Therefore, in light of section 93 of the *Constitution Act, 1867*,

section 225 must be viewed as *ultra vires* the powers of the provincial government.

Teaching of Moral Instruction in confessional and dissentient schools

To what extent can the Quebec government require, as it also does by implication in section 225 of *Bill 107*, that the legally denominational (that is, the confessional and dissentient) school boards provide mere "moral instruction"? Does this legislative provision also prejudicially affect a denominational aspect of schooling and, therefore, is *ultra vires* the powers of the provincial government?

Prima facie an affirmative answer would appear clearly to be warranted to this latter question with respect to the dissentient school boards. These boards have the inherent right to exclude students of other faiths (*Renvoi relatif à la loi sur l'instruction publique, L.Q. 1948, c. 84* (1990)). To require them to offer mere moral instruction could be perceived as "polluting" their denominational ethos. Moreover, given that the dissentient school boards occupy the same territory as common, nondenominational, school boards, persons seeking instruction in mere moral education can attend a common school.

The answer, however, is not so obvious with respect to the four confessional school boards in the province in whose territories, at present, there exist no common, nondenominational schools. These confessional boards have served and, for the time being at least, continue to serve as common school boards for non-Catholics and non-Protestants and do not possess the right to refuse access to students of other or no religious affiliation. Thus, it would appear to be within the powers of the government to require that Catholic **or** Protestant MRI **and** moral instruction be offered by them and that students and parents annually be given the right to elect that course of instruction which they wish to follow. After all, it has long been accepted in Quebec that it is a fundamental right of parents to control the religious education of their children (*Chabot* v. *School Commissioners of Lamorandière*, 1958)—a right now embodied in the *Quebec Charter*:

> Parents or the persons acting in their stead have a right to require that, in public educational establishments, their children receive a religious or moral education in conformity with their convictions, within the framework of the curricula provided for by law (s.41).

However, if and when (i) common, nondenominational school boards are super-imposed on the territories of the confessional school boards, and (ii) access to the confessional school boards is restricted to members of the denomination they serve (as is envisaged by sections 111 and 206 respec-

tively of *Bill 107*), the terms of section 225 of *Bill 107* will become open to challenge by confessional school boards on the same grounds as it is open to challenge by dissentient school boards.

(In passing, it should be noted that in fact the provisions of *Bill 107* concerning MRI and moral instruction in Quebec's schools are not complied with by all school boards. Some school boards neither annually give their students and parents the right to elect between MRI and moral instruction, nor do they offer both MRI and moral instruction. Yet these boards, while offering no meaningful course of moral instruction, exempt students from MRI when they or their parents object to their having to pursue such a course of studies and still certify that these students have fulfilled all of the requirements of the *Régime Pédagogique* for the granting of a Secondary School Diploma.)

The freedom of conscience and religion: Whose freedom?

A further potential constitutional problem posed by the provisions of *Bill 107* relating to MRI and moral instruction in schools lies in the provision which views the right to choose between a course of MRI and a course of moral instruction as belonging to students and not to students' parents, and explicitly confers on students the right of choice after the first two years of secondary school (s.5).

This provision:

1) appears to be in conflict with section 41 of the *Quebec Charter*, referred to above, unless in that section the words "in conformity with their [the parents'] convictions" are interpreted to mean "in conformity with their [the parents'] ***or their children's*** convictions" as the case may be;
2) *prima facie* is in conflict with the Quebec Court of Appeals decision in *Chabot* v. *School Commissioners of Lamorandière* (1958), which considers it a natural and fundamental right of parents to guide the religious education of their children; and
3) appears to be an unwarranted interference with a parent's liberty interest under section 7 of the *Canadian Charter* which interest, as suggested by Bala and Redfearn (1983) and Wilson J. in *R.* v. *Jones* (1986), may include the right of a parent "to bring up and educate one's children . . . in accordance with . . . [one's] conscientious beliefs".

Having said that, it also is accepted that children are persons who enjoy the freedoms and rights guaranteed under both the Canadian and Quebec Charters. They too have the freedom of conscience and religion and the right to the protection of their liberty interests. Indeed, completely to

deny to children these constitutionally protected freedoms and rights because they are children would be to engage in conduct, discrimination on the basis of age, against which they are protected by the Canadian and Quebec Charters.

Thus, it may well be that a conflict may arise between the freedoms and rights of parents, on the one hand, and of children, on the other, where they disagree over the matter of MRI.

Undoubtedly such conflicts are relatively common place in families throughout Canada; but, in the main, they do not have as their source legislative or government action and, therefore, are not justifiable under the *Canadian Charter*. However, this clearly is not the case in Quebec with respect to potential intrafamily conflicts concerning MRI which have their basis in the provisions of *Bill 107*. Thus, a court may well be asked to determine whether the relevant provisions of *Bill 107* constitute "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (*Canadian Charter*, s.1) on the freedoms and rights of: (i) parents, to the extent that *Bill 107* confers on children the right to exercise their right to elect between MRI and moral instruction; or (ii) children, to the extent that *Bill 107* postpones their exercise of their right to make such election until their third year of secondary school.

One may agree that society should be reluctant to interfere with the private ordering of family life, and that the constitutionally protected rights of children should be defined somewhat differently from those of adults (Bala *et al.*, 1988). But in the field of education the state has seen fit to interfere with the private ordering of family life. Moreover, in *Bill 107*, Quebec, to a degree, has rejected the traditional paternalistic position with respect to the religious education of children. In so doing, the government appears to subscribe to the not unreasonable notion that all "rights do not mature and come into being magically only when one attains the state-defined age of majority" (*Planned Parenthood of Missouri* v. *Danforth*, 1976). Consequently, no longer can it be safely assumed, in Quebec at least, that

> [i]n spite of the fact that the freedom of "religion and conscience" is guaranteed to "everyone" by section 2 of the . . . [*Canadian Charter*], it is the rights of the parents that are protected . . . . [Or that a]lthough religion is conceptually an option right involving an independent choice, with respect to children it is treated as a welfare right exercised by parents on behalf of their children (MacKay, 1984).

That being said, the question still remains, do the relevant provisions of *Bill 107* constitute "reasonable limits prescribed by law as can be

demonstrably justified in a free and democratic society" (*Canadian Charter*, s.1) on the freedoms and rights of parents and children.

In reflecting on this question it should be born in mind that the provisions of section 5 of *Bill 107* are consistent with:

> 1) the dictates of Article 14 of the United Nations *Convention on the Rights of the Child* (1989) which provides (a) "States Parties shall respect the right of the child to freedom of thought, conscience and religion," and (b) "States Parties shall respect the rights and duties of the parents . . . to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child;"
>
> 2) the trend in other areas of the law to regard children deemed to be mature as autonomous persons for certain important purposes rather than as mere adjuncts to the family; and
>
> 3) the fact that no individual, adult or child, can totally be deprived of their constitutionally protected freedoms and rights under the *Canadian Charter*.

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