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Comments

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"Once more unto the breach, dear friends, once more . . . ."

(King Henry V; III, i, 1)

Adler v. *Ontario:*[1] *The Context*

The problem of how much, if any, public support should be afforded to private parochial[2] schools might appear simple in principle: either fund them in a fashion similar to the "public" schools, or do not fund them at all. However, in the Canadian context, public funding of parochial schools has turned out to be extremely problematic in practice.

The unique nature of Canadian confederation necessitated an unusual complication – provision for publicly supported separate or dissentient schools. These schools were required in order to convince Roman Catholics in Upper Canada and the Maritime provinces, and Protestants in Lower Canada, that confederation would not threaten their religious and cultural heritage.[3] Even this complicated, dual-system model of education was, however, somewhat simplistic as it failed to account for those parents who, for reasons of religious conviction, could neither support, nor in good conscience send their children to, either generic (i.e., non-sectarian) Protestant or Roman Catholic schools.

Citizens who found themselves in provinces with no publicly supported separate or dissentient schools, or who could support neither, found that their only option was, and is, to establish their own denomina-

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1. *Adler* v. *Ontario* (1992), 9 O.R. (3d) 676 (Div.C.).

2. For purposes of clarity, in the following discussion parochial schools are defined as Canadian schools which have a religious affiliation, either particular or corporate, and which are currently considered private schools for the purposes of determining qualification for public funding. This definition would exclude all public and separate or dissentient schools (where appropriate, both of these types will be referred to as public, in the sense of publicly funded) and those private schools which have no religious affiliation.

3. T. E. Giles & A. J. Proudfoot, *Educational Administration in Canada,* 3rd ed. (Calgary: Detselig Enterprises, 1984) at 12-13.

tional schools, with or without public assistance. This has produced a uniquely Canadian problem. On the one hand we have provided for publicly supported denominational education, provided, of course, that the denomination is either generic Protestant or Roman Catholic. We have thereby conceded, at least federally, that a right to publicly supported denominational education exists in Canada. On the other hand, while religious instruction, or at least instruction about religion, is a local option in some of our pluralistic public schools, "it is a custom more honour'd in the breach than the observance."[4] Except in Newfoundland, true publicly supported denominational education is guaranteed, albeit not universally, to two denominations and is practised, where possible, by only one. Constitutional provision is not made for the public support of alternate denominational education. The historical justification for this state of affairs is not universally accepted. As Shapiro stated in his discussion of the Ontario context:

> On moral grounds, limiting public support to Roman Catholic schools seems indefensible, for the constitutional provisions usually advanced to justify the special status of such schools serve only to describe its history. They do nothing to inform us about what we *ought* to do .... The special status of Roman Catholic schools is discriminatory.[5]

Parents of students attending private denominational schools are acutely aware of this "fact".[6]

The arguments related to this issue have been discussed in such detail, in government reports[7] and in the academic literature,[8] that one might wonder whether there is anything left to debate. However, as long as this "discrimination" exists there will be groups who will feel aggrieved and who will appeal to the courts for relief. *Adler* v. *Ontario* represents the latest inevitable instalment in the saga surrounding private school funding in Canada and, more particularly, in Ontario.

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4. *Hamlet*, I. iii. 15-16.
5. B. J. Shapiro, "The Public Funding of Private Schools in Ontario: The Setting, Some Arguments, and Some Matters of Belief" (1986), 11 Canadian Journal of Education 264 at 269.
6. C. D. Gerrard, *Argument for the Appellants, before the Tax Assessment Review Board for the Province of Saskatchewan.* (Available from Dr. C. D. Gerrard, 2457 Eastview, Saskatoon, Saskatchewan, 1986) at 7. See also C. D. Gerrard, *Statement before the Board of Revision, City of Saskatoon, 18 February, 1986.* (Available from Dr. C. D. Gerrard, 2457 Eastview, Saskatoon, Saskatchewan).
7. See for example: *The Report of the Commission on Private Schools in Ontario* (Ontario: Queen's Printer, 1985) (Shapiro Report); *A Review of Private Schooling in Saskatchewan* (Regina: West-Con Management Services, 1987) (Dirks Report).
8. See for example: R. M. Miller, "Should There Be Religious Alternative Schools Within The Public School System?" (1986), 11 Canadian Journal of Education 278; R. F. Magsino, "Human Rights, Fair Treatment, and Funding of Private Schools in Canada" (1986), 11 Canadian Journal of Education 245; Shapiro, *supra*, note 5.

The Case

Adler involved two sets of applicants, both seeking similar forms of relief. The first group, referred to as the "Adler applicants," was composed of five parents of students attending Jewish day schools in Ontario.[9] The second group, referred to as the "Elgersma applicants," was composed of the Ontario Alliance of Christian School Societies (OACSS) and four parents of students attending private Christian schools which were members of OACSS.[10] To further complicate matters, a child of one of the Adler applicants and two of the children of the Elgersma applicants had physical or mental disabilities such that these children would have been identified as "exceptional" students, and would have been provided with special education services by the local school board and health support services at the school site by the Ministry of Health, if they had been attending either of the public school systems.

Intervener status was granted to the Ontario Federation of Independent Schools (OFIS)[11] supporting the applicants, and the Metropolitan Toronto School Board (MTSB), the Ontario Public School Boards Association (OPSBA) and the Canadian Civil Liberties Association (CCLA) supporting the respondents.

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9. There are now 25 Jewish schools in Ontario, of which 19 are in Metropolitan Toronto, two in Hamilton, two in Ottawa (one of which is a French language school), one in London, and one in Kitchener. Approximately 10,000 students attend these schools. *Adler* v. *Ontario*, *supra*, note 1 at 681.

10. There are currently 74 member Christian school societies which operate 75 schools — 73 in Ontario and two in the Maritimes. Eleven of the 75 schools are secondary schools, all of which are located in Ontario. In the 1991-92 school year, 11,614 students were enrolled in OACSS schools in Ontario, almost 2,000 of whom are enrolled in secondary schools. Membership in OACSS is open to any incorporated, non-profit society whose purpose is to provide to children a Christian education in the Calvinistic or Reformed Christian tradition. Most Society members are members of the Christian Reformed Church. *Adler* v. *Ontario*, *ibid.*, at 683.

11. OFIS represents approximately 114 independent schools in Ontario, having a total enrolment of approximately 7,000 students. It represents an association of religious schools of several denominations. While a substantial number of the schools which OFIS represents have been established for specific religious purposes and aim their program to instil religious values and beliefs, other member schools have as their explicit purpose a fostering and instilling of values and beliefs not specifically linked to any form of religion, but emphasizing certain pedagogical values and goals. *Adler* v. *Ontario*, *ibid.*, at 686.

Both applicant groups sought similar but not identical relief.[12] The core of their argument was that they were required by law to ensure that their children attend school but that they could not, for reasons of conscience and religion, send their children to either of the publicly funded school systems in Ontario. They claimed, therefore, that they were denied equal benefit of the law as required by s. 15 of the *Canadian*

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12. The Adler applicants requested the following:

(1) a declaration that the non-funding of Jewish day school education in Ontario is unconstitutional;

(2) a declaration that the Applicants and the parents or families of children in Jewish day schools in Ontario are entitled to the benefit of funding by the Province of Ontario on a basis equivalent to the funding provided to Roman Catholic separate schools and to public schools;

(3) an order that the Province of Ontario provide funds to the Applicants and to all parents or families of children in Jewish day schools in Ontario, by means of a per capita grant system or other system of funding based on the student population of those schools;

(4) in the alternative to (3) *Supra*, an order that the Province of Ontario provide funds to the Applicants and to all parents or families of children in Jewish day schools in Ontario, by means of a capita grant or other system of funding to cover the secular portion of the education provided in those schools;

(5) an order that the Province of Ontario extend school health support services to the children in the Jewish day schools.

Adler v. *Ontario, supra*, note 1 at 682.

The Elgersma applicants requested relief in the following terms:

(1) a declaration that the non-funding by the Minister of Education of independent Christian schools which are members of the Ontario Alliance of Christian School Societies infringes rights of the applicants guaranteed under sections 2(a) and 15(1) of the *Canadian Charter of Rights and Freedoms*;

(2) a declaration that the Applicants, and parents or families of children in independent Christian schools which are members of the Ontario Alliance of Christian School Societies, are equally entitled to the benefit of educational funding by the Province of Ontario as are parents or families of children in public schools and Roman Catholic separate schools;

(3) an order that the Province of Ontario provide funds to the Applicants and to all parents or families of children in independent Christian schools which are members of the Ontario Alliance of Christian School Societies by means of a per capital grant system or other system of funding based on the student population of those schools;

(4) a declaration that s.1 of the Ontario Regulation 638/84 (s.44a of Reg. 452, R.R.O. 1980, as amended) made under the *Health Insurance Act* infringes rights guaranteed under ss. 2(a) and 15(1) of the *Canadian Charter of Rights and Freedoms* by reason of its failure to provide school health support services to students in OACSS member schools who require such services and an order that the Province of Ontario extend school health support services to any student enrolled in an OACSS member school who requires such services.

Adler v. *Ontario, ibid.*, at 685.

Charter of Rights and Freedoms[13] and that there was interference with their freedoms of religion and conscience which are guaranteed in s. 2(a) of the *Charter*.

Section 15 Claims

Both Adler and Elgersma applicants submitted that the existence of public funding for Roman Catholic separate schools in Ontario was germane to their argument in that they were denied equal benefit of the law. However, Anderson J. ruled that the existence of separate school funding in Ontario was ". . . a constitutional anomaly, with its roots in a historic political compromise made as an incident of the Confederation of 1867."[14] He supported his argument with reference to the *Bill 30 Reference* case[15] in which the Supreme Court of Canada found that public funding of Catholic education in Ontario was constitutionally guaranteed and therefore could not infringe *Charter* rights. Anderson J. found, therefore, that such funding was not relevant to whether the applicants' s. 15 rights had been violated.

No doubt anticipating this finding, the intervener OFIS did not base its argument of a s. 15 violation on the existence of public funding for Ontario Roman Catholic schools. Rather, the OFIS argued that a substantial benefit is bestowed upon persons whose religious beliefs are consistent with the publicly funded education provided in the Ontario public school system. This benefit is denied to individuals who, for reasons of conscience and religion, cannot send their children to the public schools.

Anderson J. applied the framework for s. 15 claim analysis set out in *R.* v. *Swain*[16] and found that the Ontario *Education Act*[17] has created a distinction between those whose children receive the benefit of a free education in the public systems and those who, for religious reasons, cannot send their children to public schools. Since the requirement of paying tuition clearly places a burden and/or disadvantage on these parents, this distinction is discrimination within the meaning of s. 15. Religion is one of the grounds enumerated in s. 15; therefore, failure to

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13. Being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11.
14. *Adler* v. *Ontario, supra*, note 1 at 693.
15. *Reference re Act to Amend the Education Act*, [1987] 1 S.C.R. 1148.
16. *R.* v. *Swain*, [1991] 63 C.C.C. (2d) 481 (S.C.C.) at 520-521. Within the *Swain* framework, the court must first determine whether one of the four basic equality rights defined in s. 15 has been denied; second, the court must determine whether such denial can be said to result in discrimination; finally the court must determine whether the personal characteristic upon which the discrimination is based falls within the grounds enumerated in s. 15 or within analogous grounds.
17. *Education Act*, R.S.O. 1980, c. 129 [now *Education Act*, R.S.O. 1990, c.E.2].

fund private parochial schools while funding public schools does result in a violation of the applicants' s. 15 rights.

Section 2 Claims

The applicants also argued that compulsory attendance laws, when coupled with the failure to provide funding for parochial schools, constituted a violation of their rights under s. 2(a) of the *Charter*.[18] In finding that there had been a violation of s. 2(a) Anderson J., following *R.* v. *Big M Drug Mart Ltd.*,[19] *R.* v. *Edwards Books and Art Limited*,[20] and *Zylberberg* v. *Sudbury Board*,[21] determined that while it might appear that it was the applicants' religious belief which imposed a burden or constraint on them, and not the law, to his mind it was government action (i.e., Ontario's *Education Act*[22]) which created this burden or constraint. Following this logic, Anderson J. found that the applicants' s. 2(a) rights had been infringed by the government's failure to fund their schools.

Application of s. 1 of the Charter

The applicants' claim foundered, however, on the shoals of s. 1 of the *Charter*.[23] Anderson J. employed the test enunciated by Dickson C.J.C. in *R.* v. *Oakes*[24], reaching the following conclusions.

First, the nonfunding of private parochial schools in Ontario was a direct result of a sufficiently important government objective, that is, the development and maintenance of a healthy system of public schools. Second, the means used (i.e., nonfunding of private schools) was found to be rationally connected to this objective. Third, since the means chosen

18. Section 2(a) of the *Charter* states:
    2. Everyone has the following fundamental freedoms:
    (a) freedom of conscience and religion;
19. *R.* v. *Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295.
20. *R.* v. *Edwards Books and Art Limited*, [1986] 2 S.C.R. 713.
21. *Zylberberg* v. *Sudbury Board* (1988), 65 O.R. (2d) 641 (Ont. C.A.).
22. *Education Act*, R.S.O. 1980, c. 129 [now *Education Act* , R.S.O., 1990, c.E.2].
23. Section 1 of the *Charter* states:
    1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
24. *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

by the government did not coerce parents into subjecting their children to an education inconsistent with their religious beliefs and did not deny them the right to educate their children as they saw fit, it was found to impair as little as possible the rights of the applicants. Finally, it was determined that the adverse effects on the applicants were not out of proportion to the government's objective of providing a universally accessible secular public education.

Therefore, while *Charter* rights had been violated, these violations were found to be reasonable limits on the applicants' rights, limits which were demonstrably justified in a free and democratic society.

Adler v. *Ontario and The "Political Question" Doctrine*

Most significant however, from my point of view, is Justice Anderson's addendum to his discussion of the application of s. 1 of the *Charter* to the s. 2 and s. 15 questions in this case. Anderson J. stated:

> . . . it is only proper to acknowledge that throughout my deliberations I have been influenced by the thought that I have been considering, particularly in the case of s. 1, matters better suited to consideration by the legislature.[25]

In making this point, Anderson J. explicitly joined a growing number of Canadian jurists[26] who are tactfully expressing their concern with the legislatures' apparent abdication of political responsibility which has, with increasing frequency, confronted the courts with choices which properly belong in the hands of politicians. In other words, he suggested that the legislatures should not be downloading the responsibility for politically difficult decisions to the courts.

Anderson J. points out, albeit obliquely, that in an area like education, where even the experts cannot agree on the correct policy, judges are certainly not qualified to be making sensitive policy decisions. To make this point he cites the U.S. Supreme Court decision in *San Antonio* v. *Rodriguez*, where the court argued:

> The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the Judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever changing conditions.[27]

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25. *Adler* v. *Ontario*, *supra*, note 1 at 707.
26. See for example: *Reference re Public Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at 392 per Le Dain J.; *Irwin Toy Ltd.* v. *Quebec*, [1989] 1 S.C.R. 927, at 993 per Dickson, C.J.
27. *San Antonio* v. *Rodriguez*, 411 U.S. 1 (1973), at 43.

Anderson J. also suggests that most of the difficult policy decisions in education are choices between competing values; and that such policy decisions are inherently political and belong in the hands of politicians, not judges. In support, he cites La Forest J. in *McKinney* v. *University of Guelph*:

> Decisions on such matters must inevitably be the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society, and other components. They are decisions of a kind where those engaged in the political and legislative activities of Canadian democracy have evident advantages over members of the judicial branch. . . .[28]

In the end, Anderson J. appears to express regret that he cannot help the applicants; that his role is to interpret the law as it is defined by legislators and that this does not necessarily allow him to undo injustice:

> I am much in sympathy with the position of the applicants. There are few things which touch a concerned parent more closely than the appropriate education of children. To feel oneself at a disadvantage in giving effect to that concern produces a very real sense of grievance.[29]

Anderson J. suggests that in a case such as that presented by the applicants, the court is being asked to direct the Government of Ontario to radically revise its system of educational finance through a means yet to be defined and with results both undetermined and indeterminable. Judges, he concludes, are not the right people to be making such decisions:

> Notwithstanding my sympathy with the position of the applicants and with their sense of grievance, I am in doubt that the court is the appropriate forum for relief.[30]

Anderson J.'s solution to such judicial angst is to suggest:

> Perhaps the time has come for the courts to enunciate something analogous to the "political question" doctrine or the "public purpose" doctrine which have evolved in the U.S.A. I do not purport to do more than raise the question. The answer must be provided at some other level of the judicial hierarchy.[31]

What Anderson J. meant by his reference to the "public purpose" doctrine is unclear; the term does not appear to be in common usage in the context of American constitutional law, and Anderson J. does not elaborate. On

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28. *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229, at 304-305.
29. *Adler* v. *Ontario*, *supra*, note 1 at 709.
30. *Ibid.*
31. *Ibid.*, at 707.

the other hand, the "political question" doctrine, which is anything but the simple concept this statement would seem to imply, deserves some serious consideration in the Canadian context.

Though politicians would no doubt deny it vehemently, Canadians have nevertheless observed in recent years a distinct lack of political courage on the part of many officials who will one day face re-election. This lack of "backbone" has resulted in what appears to be a relentless "downloading" or perhaps "sideloading" of responsibility, wherever possible, for decisions which might be considered politically unpopular.

In the area of education, provincial governments have found the *Charter* to be an exceptionally useful instrument for "passing the buck" to the courts. Rather than, for example, forcing a recalcitrant school board to provide French language high school programs and facilities equal in quality to those offered in the English language schools, Ontario was content to let local parents use the *Charter* to carry the battle through the provincial court system.[32] It can be argued that Alberta,[33] Saskatchewan,[34] and Nova Scotia,[35] also side-stepped making decisions relating to French language education in much the same way.

The public funding of parochial schools would appear to be another sensitive issue politicians would rather avoid. It is interesting to note in this regard that Dirks, in his report on the public funding of private schools in Saskatchewan, advised that, "*until such time as the courts rule on the constitutionality of present funding arrangements*, in the opinion of this review it would not be prudent to proceed with a major public funding initiative for private schools".[36] In other words, the government should do nothing until the courts require it to act; when this happens the government can tearfully announce that it has been forced to take this unpopular step.

What Anderson J. suggests is that, in order to counter this sideloading of responsibility, his colleagues in Canada's higher courts should consider the possible adoption of what in the United States is referred to as the "political question" doctrine. According to Tribe, there are at least three interpretations of what this doctrine might mean:

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32. *Marchand* v. *Simcoe County Board of Education* (1986), 55 O.R. (2d) 638 (Ont. H.C.J.).
33. *Mahe* v. *Alberta*, [1990] 1 S.C.R. 342.
34. *Commission des Ecoles Fransaskoises Inc. et al.* v. *Saskatchewan* (1988), 64 Sask. R. 123 (Q.B.).
35. *Lavoie* v. *Nova Scotia* (1988), 84 N.S.R. (2d) 387 (S.C.).
36. Dirks Report, *supra*, note 7 at 66. [Emphasis added.]

1. *The Classical view:* ". . . the court finds, purely as a matter of constitutional interpretation, that the Constitution itself has committed the determination of the issue to the autonomous decision of another agency of government."[37]

2. *The Prudential view:* ". . . the Court's role would treat the 'political question' doctrine as a means to avoid passing on the merits of a question when reaching the merits would force the Court to compromise an important principle or would undermine the Court's authority."[38]

3. *The Functional view*: ". . . the Court would have to consider such factors as the difficulties in gaining judicial access to relevant information, the need for uniformity of decision, and the wider responsibilities of the other branches of government, when determining whether or not to decide a certain issue or case."[39]

All three interpretations appear to agree on the following:

> There are certain constitutional questions which are inherently non-justiciable. These "political questions," it is said, concern matters as to which departments of government other than the courts, or perhaps the electorate as a whole, must have a final say. With respect to these matters, the judiciary does not define constitutional limits.[40]

In straightforward terms, a "political question" doctrine would give the court a basis from which to decide that an issue brought before it was not really appropriate to a legal forum because it involved political decisions made by arms of government constitutionally empowered and functionally suited to make such choices. This does not argue that there are certain parts of the Constitution to which the courts should be blind. Rather, courts would retain the power to determine whether government action had remained within the constitutional grant of authority. While the notion of "non-justiciability" may be relatively new to many Canadians, the principle of non-justiciability is clearly present in certain sections of the *Charter*, notably s. 29 which protects existing denominational, separate and dissentient school rights, and s. 33, the notwithstanding clause.

Anderson J.'s suggestion is understandable; he would hope that adoption by Canadian courts of something analogous to the "political question" doctrine might provide a number of benefits. Among these might be the following:

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37. L. H. Tribe, *American Constitutional Law* (Mineola, NY: The Foundation Press, 1978) at 71.
38. *Ibid.*
39. *Ibid.*
40. *Ibid.*, at 72.

1. By invoking such a doctrine the court would be refusing to "do the government's dirty work." The court would, in effect, be telling parliament or the legislature in question that it was responsible for the creation of the political issues erroneously brought before the court and that any solution to the problems raised would have to be provided by the appropriate forum – the legislature. In theory at least, this should force governments to accept the political consequences of their political decisions.

2. Because it would be much easier to identify spheres of responsibility, groups wishing to challenge existing legislation would know which avenue to pursue. As it currently stands, aggrieved groups frequently seek relief through both political and legal avenues, sometimes simultaneously. Most groups do not have the resources to maintain a battle on two fronts. Groups such as those involved in the *Adler* case could avoid wasting valuable resources pursuing their grievance through a court system which simply cannot provide the relief they desire, regardless of the apparent justice of their claim.

3. Judges would be relieved of the responsibility of making political decisions which are inevitably based on value choices. Certainly, judges can and do make value-judgements; however, judges cannot be held accountable if their values are inconsistent with the values society wishes to have promoted. Politicians are made accountable to the electorate on a regular basis.

4. Judges would be relieved of the responsibility of making decisions in areas in which they have very limited, if any, expertise. Education is a paradigm example.

Adoption of a doctrine similar to the "political question" doctrine would appear to offer at least a partial solution to these problems because it would provide an avenue through which the courts could avoid making decisions which should be the responsibility of elected officials.

Unfortunately, such a solution may be too quick and easy. As the different interpretations of the concept indicate, the "political question" doctrine has never worked particularly smoothly in the United States. Not only has the doctrine been interpreted in different ways at different times, the U.S. Supreme Court has found it quite easy (fortunately, from a civil rights perspective) to simply ignore the doctrine when it saw fit. For example, in *Brown* v. *Board of Education*[41] the Supreme Court ruled that schools were to be desegregated even though elected, and therefore accountable, politicians had made the political decisions which had permitted segregation.

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41. *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

Anderson J. suggests that he does not "... purport to do more than raise the question [of whether Canada needs a "political question" doctrine]. . . . The answer must be provided at some other level of the judicial hierarchy."[42] Perhaps that answer has been provided, at least partially, by Wilson J.'s discussion of the doctrine in *Operation Dismantle* v. *The Queen*.[43] In her decision Wilson J. pointed out that Canadian courts are frequently asked to "decide questions of principle and policy"[44] and concluded that she could not "... accept the proposition that difficulties of evidence or proof absolve the court from making a certain kind of decision if it can be established on other grounds that it has a duty to do so."[45] What must be kept in mind, however, is that:

> . . . judicial review is not the same thing as substitution of the court's opinion on the merits for the opinion of the person or body to whom a discretionary decision-making power has been committed. The first step is to determine as a constitutional matter who has the decision-making power; second is to determine the scope (if any) of judicial review of the exercise of that power.[46]

If, in the first instance, the court is being asked to pass judgement on the wisdom of a government decision which was made as part of that government's exercise of constitutionally assigned powers, the court should decline to intervene. If, however, the court is asked to determine whether a government policy violates the *Charter* rights of citizens, then she argues that it is not "open to [a court] to relinquish its jurisdiction either on the basis that the issue is inherently non-justiciable or that it raises a so-called 'political question'."[47] After all, she points out, s. 24(1) of the *Charter* states unequivocally that such decisions are the responsibility of "a court of competent jurisdiction."

However, this does not leave minorities without an avenue of relief when they find themselves subject to the tyranny of the majority, nor does it make the state hostage to the peculiar values of a small group of individuals. As Wilson J. points out, *Charter* rights are not unfettered; *Charter* guarantees are subject to s. 1:

> [This] is the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it [sic]. It embodies through its reference to a free and democratic society the essential features of our constitution including the separation of powers,

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42. *Adler* v. *Ontario*, *supra*, note 1 at 707.
43. *Operation Dismantle* v. *The Queen* (1985), 18 D.L.R. (4th) 481 (S.C.C.).
44. *Ibid.*, at 499.
45. *Ibid.*, at 500.
46. *Ibid.*, at 503.
47. *Ibid.*, at 504.

> responsible government and the rule of law. It obviates the need for a "political questions" doctrine and permits the court to deal with what might be termed "prudential" considerations in a principled way without renouncing its constitutional and mandated responsibility for judicial review.[48]

The *Adler* case exemplifies a situation in which citizens' rights are being violated by government action; therefore, according to Wilson J.'s argument, the court is obligated to review the government's policy. This review is not an arbitrary procedure; the court has a test (the *Oakes* test) which it uses to determine whether the state's purpose, the effects of which violate the rights of citizens, justifies the violation. The court is required to defer neither to the individual nor to the state but must weigh the relative costs and benefits to each and reach a determination concerning whether the violation is a "reasonable limit". Obviously, in *Adler*, Anderson J. concluded that the non-funding of parochial schools was reasonable in light of the government's purpose.

Given Anderson J.'s heartfelt sympathy for the Adler and Elgersma applicants and his obvious concern for justice and fair play (both laudable in their own right), it is not difficult to understand his frustration. He would rather not have to tell the applicants that the court could not provide the relief they desired; however, he was obligated to reach a decision (the first step in the review process, as Wilson J. has pointed out) and he did so. The second part of process was to determine the scope of judicial review; s. 1 defined the scope of the review and the *Oakes* test provided the means. Anderson J. employed each appropriately in reaching his decision in the *Adler* case.

If Anderson, J. believed that the violations of the applicants' freedoms of conscience and religion were not justified by the government purposes presented in evidence, he could have ruled that the impugned legislation failed the proportionality section of the *Oakes* test and found in favour of the applicants. He did not reach this conclusion. Anderson J. was at liberty to employ the *Oakes* test either liberally or conservatively; he chose to employ it conservatively.

The fact that Anderson J. was not comfortable with the decision he reached in *Adler* does not suggest that a mechanism such as the "political question" doctrine is the solution to this age-old problem.

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48. *Supra*, note 43 at 518.