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Assessing *Adler*: The Weight of Constitutional History and the Future of Religious Freedom

Benjamin L. Berger*

INTRODUCTION

On most surveys of the constellation of cases that contribute to the image of Canada's distinctive constitutional history, *Adler v Ontario*¹ appears very faintly, if at all. This is not because the ruling in *Adler* was trivial. The case was a significant holding on the interpretation of s 93 of the *Constitution Act, 1867*, and helped build the world of denominational education funding in which Ontarians continue to live. It also contributed to the development of certain intriguing constitutional principles, including the notion that one part of the Constitution cannot be used to challenge another. Interesting though those points may be in their own way, in the hands of most, *Adler's* significance ends there. It is not treated as one of the touchstone cases in Canadian constitutional history and is often passed over in introductory constitutional law classes. Even within the narrower horizon of Canada's law and religion jurisprudence, it has a

* Professor and Associate Dean (Students), Osgoode Hall Law School, York University. I wish to thank Jamie Shilton for his superb research assistance and insightful comments on earlier drafts of this paper, as well as Kate Glover Berger and the participants in the Asper Centre Constitutional Roundtable in the Fall of 2017 for their generous and helpful engagement with this text and my ideas.

¹ [1996] 2 SCR 609 [*Adler*].

modest profile compared to pre-*Charter* cases like *Saumur v City of Quebec*² and *Chaput v Romain*.³ And treatments of post-*Charter* developments tend to move swiftly from key early rulings on s 2(a), like *Big M*⁴ and *Edwards Books*,⁵ to the rich contemporary jurisprudence interpreting and applying that right, touching only lightly on *Adler*. In other words, on most accounts, *Adler* is largely a case of boutique significance to those interested in the history of religion and education in Canada.

Adler might thus seem something of a curious choice for a collection looking at key cases in Canada's constitutional history; if one were searching for a defining case in the interaction of law and religion, one would be wholly forgiven for looking past *Adler*. It did not establish new principles of general importance or steer a new course for any aspect of Canadian constitutional law; indeed, it was an essentially conservative outcome. When attention is turned to *Adler*, it is as part of the perduring (and often heated) political debates about Catholic school funding in Ontario and analysis tends to focus either on whether *Adler* was rightly decided or on how the ruling can be overcome by policy change or constitutional amendment.⁶ My purpose in looking again at *Adler* is not to contribute to that debate (though I will return to the question of whether the ruling is vulnerable at the end of this paper), nor am I seeking to generate a "eureka moment" in which the reader will discover that the holdings in *Adler* are much more significant to contemporary constitutional lives than we otherwise recognized. They are not.

My more modest claim is that certain features of the decision make *Adler* a distinctively useful perch from which to look backwards and forwards in time at the constitutional interaction of law and religion. The case provides a good line of sight on certain themes central to our

² [1953] 2 SCR 299 [*Saumur*].

³ [1955] SCR 834.

⁴ *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 [*Big M*].

⁵ *R v Edwards Books*, [1986] 2 SCR 713.

⁶ For an account of these political debates, and a political argument for the funding of some religious schools based on a "right to culture," see Linda A White, "Liberalism, Group Rights and the Boundaries of Toleration: The Case of Minority Religious Schools in Ontario" (2003) 36:5 *Canadian Journal of Political Science* 975.

constitutional history with religion, and offers a clear view of issues that would define the religion jurisprudence post-*Adler* and that we can see on the path ahead. My case for *Adler*'s importance is, thus, more as lens than as linchpin.

Given its lesser stature, before outlining those themes and issues that I want to draw out using *Adler*, a brief refresher might be helpful. At issue was whether the educational funding scheme in Ontario offended the appellants' religious freedom and equality rights. The decision was released 9 years after *Reference Re Bill 30*,⁷ in which the majority of the Court upheld Ontario legislation that extended public funding to Catholic separate schools. Justice Wilson, writing for the majority of the Court in that case, found that the legislation was a valid exercise of provincial power under s 93 that made good on the requirement to fully fund Roman Catholic schools. And although the public funding of Catholic schools but no other separate schools "sits uncomfortably with the concept of equality embodied in the *Charter*," Justice Wilson explained, the legislation was "immune" from *Charter* review under ss 2(a) and 15 because "[i]t was never intended...that the *Charter* could be used to invalidate other provisions of the Constitution, particularly a provision such as s 93 which represented a fundamental part of the Confederation compromise."⁸ The appellants in *Adler* drew the Court's attention back to *Charter* questions surrounding educational funding in Ontario, arguing first that s 2(a) requires public funding for independent religious schools and, second, that funding Catholic and public schools but not other separate religious schools offended the equality guarantee in s 15.⁹ Justice Iacobucci, writing for the majority of the Court, rejected the s 2(a) argument, holding that any claim of public support for religious education had to be found in s 93, and that s 2(a) could not "be used to enlarge upon s. 93's constitutionally blessed scheme for public funding of denominational schools",¹⁰ which he

⁷ [1987] 1 SCR 1148 [*Bill 30*].

⁸ *Ibid* at 1197-1198.

⁹ The appellants also raised a question regarding the provision of health support services only in public schools, but this claim was similarly rejected by the majority of the Court.

¹⁰ *Adler*, *supra* note 1 at para 28.

described as a “‘comprehensive code’ of denominational school rights.”¹¹ With respect to the equality claim, Justice Iacobucci leaned on the *Bill 30* case, holding that “funding for public schools is insulated from *Charter* attack as legislation enacted pursuant to the plenary power granted to the provincial legislatures as part of the Confederation compromise.”¹² Although the province has the power to extend funding to other denominational schools if it so chooses, “the funding of public schools coupled with the non-funding of private religious schools is immune from *Charter* attack”.¹³

There were three other sets of reasons in *Adler*. Justice Sopinka (with Major J) concurred, but, rather than relying on the arrangement’s immunity from *Charter* scrutiny, reasoned that the appellants’ s 2(a) rights were not breached because the costs incurred by the appellants associated with sending their children to private religious schools “is a natural cost of the appellants’ religion and does not, therefore, constitute an infringement of their freedom of religion.”¹⁴ With respect to s 15, the public school legislation was making no distinction on the basis of religion – these were secular schools open to all, irrespective of religion, and any distinction thus flowed from the appellants’ choices – so there could be no *Charter* equality problem. Justice McLachlin (as she then was) also found no breach of s 2(a),¹⁵ but would have found a breach of s 15 on the basis that “while secular schooling is in theory available to all members of the public, the appellants’ religious beliefs preclude them from sending their children to public schools.”¹⁶ The burdens thereby imposed on the

¹¹ *Ibid* at para 27.

¹² *Ibid* at para 47. He later clarifies that this is not to say that “no legislation in respect of public schools is subject to *Charter* scrutiny”. It is just “the fact of their existence... that is immune from *Charter* challenge. Whenever the government decides to go beyond the confines of this special mandate, the *Charter* could be successfully invoked to strike down the legislation in question.” (para 49)

¹³ *Ibid* at para 50.

¹⁴ *Ibid* at para 176.

¹⁵ She based this conclusion on the fact that the scheme involved no compulsion or prohibition, which she understood as central to the protections afforded by s 2(a) of the *Charter*. See *ibid*, paras 198–200.

¹⁶ *Ibid* at para 209.

appellants based on their religion offended s 15, but McLachlin J would have justified this breach under s 1 on the basis that denying funding to separate religious schools (beyond the constitutionally-mandated funding of Catholic schools) is necessary and proportionate to protect the public education system, the purpose of which, she explained, is to encourage “a more tolerant harmonious multicultural society”.¹⁷ In a decision that laid significant weight on the role of religious education in the continuation and health of communities that she regarded as insular and vulnerable, Justice L’Heureux-Dubé dissented. She too found a breach of s 15 but, unlike Justice McLachlin, she would not have saved the breach under s 1. In her view, the government had not discharged its burden of showing that partial funding for these religious schools was not a less-impairing alternative, and the deleterious impacts of complete non-funding on these communities outweighed the largely financial benefits of this policy.

That description of the case in mind, I now turn to my reading of *Adler* that positions it at a provocative place in the arc of the development of the constitutional interaction of law and religion in Canada. In what follows I draw from both the majority and the minority and dissenting reasons in *Adler* to expose and explore some themes that shape not only our religion jurisprudence, but Canadian constitutionalism more generally. I begin in the next section by examining the powerful role played in the majority’s reasons by the historical interaction of law and religion at the origins of the country, and what this suggests about the competing logics at work in Canadian constitutional life. That discussion leads, in turn, to a reflection on the central place of claims about law and religion in Canadian nation-building and federalism, a role that it turns out is abiding, not just historical. Part III of the paper then looks forward from *Adler*, first exploring an issue that the case foreshadowed as a central vehicle for the future development of the law and religion jurisprudence in the subsequent 20 years: education and, in particular, the education of children. I then turn to consider the group or collective aspect of religion, an issue that was exposed in the reasons in *Adler*, but that would lie in relative abeyance until very recently, when it reemerged as a central question for the future of law and religion in Canada. The piece concludes

¹⁷ *Ibid* at para 215.

with a return to the doctrinal points decided in *Adler*, asking whether the future of *Adler* might itself be in question.

LOOKING BACKWARD

Constitutional Logics and the Durability of Origins

One of the most notable features of the majority reasons in *Adler* is the way that they invoke constitutional history as not just informative but dispositive of the issues before the Court. The heart of Justice Iacobucci's reasons is the telling of a story about the constitutional origins of the country and an appeal to certain self-evident consequences of that narrative. Section 93, he explains, is a "child born of historical exigency";¹⁸ it is "the product of an historical compromise which was a crucial step along the road leading to Confederation."¹⁹ Justice Iacobucci's claim about origins is ambitious. Indeed, he ultimately casts s 93 as more than "crucial". In his telling it is, in fact, a *sine qua non* for the existence of the country: "Without this 'solemn pact', this 'cardinal term' of Union, there would have been no Confederation."²⁰ Whatever the historical accuracy of this account, what is most revealing is the set of implications that he draws from it. In Justice Iacobucci's hands, this origin story serves as a complete answer to the appellants' claims in *Adler*: the educational funding arrangement established by s 93 is simply exempt from *Charter* review. As though it is a logical proof, Justice Iacobucci explains that "the public school system is an integral part of the Confederation compromise and, consequently, receives a protection against constitutional or *Charter* attack."²¹

¹⁸ *Ibid* at para 30.

¹⁹ *Ibid* at para 29.

²⁰ *Ibid* at para 29.

²¹ *Ibid* at para 46. Cossman and Schneiderman describe Iacobucci J's approach as "something of a dodge" in that "[h]e preferred not to take McLachlin J's path of assessing the weight of the *Adler* parent's constitutional claim. Instead, he chose the more formalistic path, in which he was barred constitutionally from considering their

Of greatest interest to me is what is involved in that rhetorically overburdened word “consequently.” The weakness of Justice Iacobucci’s argument on this issue is pointed out by Justices Sopinka and McLachlin, who both observe in their reasons that immunity from *Charter* review does not follow naturally from the fact that a matter was part of the Confederation constitution.²² Justice Sopinka makes the convincing argument that, apart from the guarantee to fund Roman Catholic schools, the plenary power over public education “is entrenched only to the same extent that other powers in s. 92 are entrenched. It is in the Constitution and like other powers can be exercised only in conformity with the *Charter*.”²³ That being so, the interesting question is how we understand the peculiar weight that the majority gives to the constitutional history surrounding law, religion, and education. What does this point to?

One answer is that this somewhat frail reasoning is a consequence of the majority’s concern to stay away from the significant budgetary and political issues that it felt would flow from subjecting this unequal arrangement to *Charter* scrutiny. If the five judges in the majority could not see a path of reasoning that avoided a breach or could save that breach, perhaps a little bit of tortured reasoning was a small price to pay. Even if part of the answer, this is not a full or satisfying explanation of why this reasoning carried the day. There is something else, something larger, going on here.

I have elsewhere argued that to understand Canadian constitutional culture, at both a structural level and also in the finer strokes surrounding given issues, one must appreciate that Canadians are children of two constitutional logics: that of the local, the particular, and of harmonious relations between diverse communities achieved through political compromise; and that of the universal and faith in the reason of legal principle.²⁴ These competing logics are not pure forms of some sort

claims on the merits.” Brenda Cossman & David Schneiderman, “Beyond Intersecting Rights: The Constitutional Judge as ‘Complex Self’” (2007) 57:2 UTLJ 431 at 440–441.

²² See *Adler*, *supra* note 1 at paras 143 and 194, respectively.

²³ *Ibid* at para 143.

²⁴ Benjamin L Berger, “Children of Two Logics: A Way into Canadian Constitutional Culture” (2013) 11:2 International Journal of Constitutional Law 319.

but, rather, imaginative formations about the nature of government, community, and authority that pull on one another at all points. Tracking the abiding relationship between these two logics of constitutionalism is crucial to understanding the nature of Canadian constitutional culture.

Prior to the *Charter*, the heart of the Canadian constitutional project was the logic of compromise, relativism, and local interest, negotiated into workable configurations that bound communities together. Nobility lay in making government work *here*, in this place, given local conditions, and the specific interests of given communities. Canadian constitutionalism was an exercise in the logic of the particular; it was consummately political. With the *Charter*, the culture of Canadian constitutionalism shifted. The logic of universal human rights and freedoms, focused on the relationship between state and citizen, migrated to the centre of public consciousness about what Canadian constitutionalism entails. This is a constitutionalism in which the all-purpose reason of proportionality balancing is the lodestar of good governance, just as it is across the Western world.²⁵ One cannot appreciate Canadian constitutionalism without recognizing that this second, powerful logic has never entirely displaced the first.²⁶ When we find that the particular or political resists annexation by the logic of the

²⁵ For a sense of the dominance of ideas of proportionality in modern thinking about constitutionalism, see, e.g., Robert Alexy, "Constitutional Rights, Balancing, and Rationality" (2003) 16 *Ratio Juris* 131; David M Beatty, *The Ultimate Rule of Law* (Oxford; New York: Oxford University Press, 2004); Aharon Barak, "Proportional Effect: The Israeli Experience" (2007) 57 *UTLJ* 369. For a critical discussion of the descriptive sufficiency of such theories, see Grégoire CN Webber, "Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship" (2010) 23 *Can JL & Jur* 179; Benjamin L Berger, "The Abiding Presence of Conscience: Criminal Justice Against the Law and the Modern Constitutional Imagination" (2011) 61:4 *UTLJ* 579.

²⁶ In an article exploring the so-called "no hierarchy of rights doctrine," of which he sees Iacobucci J's reasons serving as an example, Mark Carter explains the majority reasons as reflecting a view "that the Constitution is a somewhat fragile amalgam of responses to political and historical contingencies and curious normative mandates." Mark Carter, "An Analysis of the 'No Hierarchy of Constitutional Rights' Doctrine" (2006) 12:1 *Review of Constitutional Studies* 19 at 40. "It is no surprise, therefore," Carter explains, "that parts of the Constitution that guarantee rights and privileges in a manner that reflects various historic exigencies — e.g., denominational school guarantees of the confederation period, language education rights of the patriation period — may not measure up to the particular rational demands of the universal human rights values that are contained in the *Charter*" (*ibid*).

universal we have our hands on something important. At such points the obduracy of the particular is expressing something essential about constitutional identity.

Adler marked one such point in Canadian constitutional history and can be read as an expression of a constitutional system shaped by competing logics. When Justice Iacobucci invokes the solemnity and historical centrality of s 93 he is appealing to the durability and force of the older logic of the constitution as political compromise. And yet the appellants were correct: this historical compact could not be squared neatly with a principled commitment to religious freedom and equality.²⁷ As the UN Human Rights Committee put it so evocatively in its decision of the same year, finding Canada in violation of article 26 of the International Covenant on Civil and Political Rights for this educational funding arrangement, “the fact that a distinction is enshrined in the Constitution does not render it reasonable and objective.”²⁸ Quite so. But the UNHRC is not embedded in Canadian constitutional culture or responsible for reflecting core features of our constitutional experience. As I read it, the majority reasons in *Adler* are seeking to capture an intuition that this part of the Constitution and the *Charter* are simply up to different things, each giving expression to different aspects of our constitutional identity. The Catholic schooling question participates in one of the grand narratives of Canadian self-understanding. The story of Canada as built on two foundational cultures – the English and the French – has been, despite its under-inclusivity, basic to Canadian self-understanding, and

²⁷ In his discussion of *Adler* and section 93, Richard Moon seeks to square this, proposing “a liberal or principled interpretation of the provision – a reading of the provision as a minority right”. This is a reading, he suggests, that, given historical change and the contemporary “non-denominational” nature of public schools, would support either “the ending of separate school rights in Ontario now that the reason for these rights has ceased to exist”, or the extension of this right to other religious groups in the province.” (*Freedom of Conscience and Religion* (Toronto: Irwin Law, 2014) at 166–167.) I return to the plausibility of a reinterpretation of section 93 in the conclusion of this article, but for now it is worthwhile noting that Moon’s interpretation depends precisely on overwriting the historical logic of community specificity with the a modern liberal logic. My argument is that, apart from the *possibility* of doing so, it is the *resistance* to doing so that is of interest for one interested in understanding constitutional identity.

²⁸ *Waldman v Canada*, HCROR, 76th Sess, Annex, Communication No 694/1996 (1996).

the question of Catholic and Protestant schooling, particularly Catholic schooling in Ontario, is a kind of synecdoche for this larger narrative.²⁹ These origins were not something that the Court was willing to see as wholly digestible by the reason of the *Charter*.

Perhaps one way of understanding this role for constitutional history in *Adler* using concepts more recently invoked by the Court itself is that the majority in *Adler* was describing the particular funding arrangement surrounding religion and education as a part of Canada's "constitutional architecture."³⁰ Not a policy or systemic design question like others, this compromise had to be understood in fundamentally historical terms and as expressing a distinctive political arrangement. Thus established, a change would have to be a matter of amendment that follows on a new political self-understanding.³¹ If a change is to occur — and it may — it will signal a change in the basic narratives of the constitutional culture, not a sudden realization of the unreasonableness of the prior arrangement. Indeed, in all of these dimensions, including in the overarching narrative of nation-building to which the Court appeals, there are resonances between *Adler* and the *Supreme Court Reference* in which the Court recently leaned on this idea of "constitutional architecture".

Looking back — and watching as the Court itself looked back — *Adler* perhaps reflects a moment at which religion, and its historical role in the formation of Canada, became the occasion for exposing something deep about Canadian constitutional identity and the relationship between the two constitutional logics that we all inhabit. But this conclusion pushes us to further questions: what precisely is the relationship between law, religion, and Canadian nation-building, and does that relationship persist?

²⁹ On the role of appeal to grand narratives in the persuasive task of reason-giving, see Paul W Kahn, *Making the Case: The Art of the Judicial Opinion* (New Haven: Yale University Press, 2016).

³⁰ *Reference re Supreme Court Act*, ss 5 and 6, 2014 SCC 21 [*Supreme Court Reference*]; *Reference re Senate Reform*, 2014 SCC 32.

³¹ As, of course, it was in both Québec and Newfoundland.

Religion, Nation Building, and Federalism

In a 2003 article, Talal Asad observed that “[a]ll modern states, even those committed to promoting ‘tolerance,’ are built on complicated emotional inheritances that determine relations among its citizens.”³² The heavy reliance on constitutional history in the majority reasons in *Adler* points to some of the deep “emotional inheritances” that have shaped the Canadian state and, as I argued above, constitutional identity. Asad’s statement was part of a reflection on the French debates of the time surrounding the wearing of the so-called “Islamic Veil” (the *hijab*). He argued that the invocation of *laïcité* – a particular brand of secularism with political currency in France shaped by its distinctive emotional inheritances – could be understood as part of the process by which the French state asserted its republican personality or identity. Asad’s piece is an important reflection on the way in which, in these debates, the French state made use of its relationship with religion to establish and defend – to “confirm,”³³ in Asad’s words – its sovereignty.

I suggest that the majority’s heavy reliance in *Adler* on the historical constitutional relationship with religion can be taken as an invitation to see the ways in which Asad’s description was historically true in Canada as well, and continues to be true in important ways. In our constitutional lives, religion is not simply a social fact to be managed, or something that is *acted upon* constitutionally; it is part of the material that is manipulated in nation-building, informing the politics of sovereignty and federalism in continually important ways. It is easier for Canadians to see the role of religion as part of the raw material for nation-building when we look elsewhere in the world. Appreciation for the role of religion in constituting the sovereign state is unavoidable when one considers states like India or Israel. Turkey and Pakistan also spring to mind as contemporary cases in which religion is stitched deeply into the formation and constitutional politics of the modern state. Benjamin Schonthal has shown how this

³² Talal Asad, “French Secularism and the ‘Islamic Veil Affair’” (2003) 8 *The Hedgehog Review* 93 at 102.

³³ *Ibid* at 101.

continues to work itself out in complicated ways in Sri Lanka.³⁴ But this relationship between religion and nation-building is equally, though differently, apparent in Canada, as the *Adler* majority's *Charter*-immunizing appeal to constitutional history indicates.

An important part of the story of the role of religion in the constitution (in both senses of that word) of Canada is a narrative about colonialism and Indigenous peoples. Religion – both its use and its suppression – was central in shaping the foundational relationship between the Canadian state and Indigenous peoples. The early colonial project was one in which religious missionaries played a crucial role, sometimes extending state power and sometimes aligning with Indigenous communities in advocating for the recognition of Aboriginal rights and sovereignty.³⁵ With the expansion westward of the Canadian state and its claims for sovereignty, the Federal government banned Indigenous religious rituals and practices such as the potlatch as part of its effort to consolidate political and economic control over Indigenous people and their territories. There is a dialectic here between denials of religion and denials of sovereignty, and thus between denials of religious freedom and the yearning to transform a wish for colonial sovereignty into political and constitutional fact.

One sees these links between religion and the flexing of political sovereignty clearly, though tragically, in the history of the residential school system in Canada. In a devastating project aimed at cultural extinguishment, the Canadian state worked with the churches in administering this system. Indigenous communities are still, inspirationally, overcoming its ruinous effects, which continue to condition the political and legal relationship between the Canadian state and Indigenous peoples.³⁶ This history is the subject of increasing

³⁴ Benjamin Schonthal, *Buddhism, Politics and the Limits of Law: The Pyrrhic Constitutionalism of Sri Lanka* (Cambridge: Cambridge University Press, 2016).

³⁵ Hamar Foster & Benjamin L Berger, "From Humble Prayers to Legal Demands: The Cowichan Petition of 1909 and the British Columbia Indian Land Question" in Hamar Foster & Benjamin L Berger, eds, *The Grand Experiment: Law and Legal Culture in British Settler Societies* (Vancouver: UBC Press, 2008) 240.

³⁶ For an essential history, see JR Miller, *Shingwauk's Vision: A History of Native Residential Schools* (Toronto: University of Toronto Press, 1996). For recent scholarship examining what a reconstructed constitutional relationship might look like, see, e.g.,

understanding and study amongst scholars of Indigenous law and politics in Canada, but it is rarely meaningfully analyzed as part of the history of religious freedom and difference in Canada. The story of religion, state, and Indigenous peoples must be excavated and studied as a central part of the distinctive history – the emotional inheritances – of law and religion in Canada; and central to that story is the relationship between political identity, religion, and claims to sovereignty.

But the majority reasons in *Adler* also point directly to the way in which this tethering of religion and sovereignty was also core to the development and identity of Canadian constitutional federalism. The *Treaty of Paris*,³⁷ which marked the end of the Seven Years' War and imperial hostilities in Canada, acknowledged the political and practical realities of British rule over a substantial French Catholic population with the following guarantee, something of an early protection of religious freedom: "His Britannick Majesty, on his side, agrees to grant the liberty of the Catholick religion to the inhabitants of Canada: he will, in consequence, give the most precise and effectual orders, that his new Roman Catholic subjects may profess the worship of their religion according to the rites of the Romish church, as far as the law of Great Britain permit." The *Quebec Act, 1774*,³⁸ another crucial step in the constitutional history of Canada, included similar provisions providing special rights to the Roman Catholic Church, and the *Constitutional Act, 1791*³⁹ extended privileges and protections to the Anglican Church in recognition of its special status in England.⁴⁰ This history of the formative

John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto and Buffalo: University of Toronto Press, 2017); Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016); John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto; Buffalo; London: University of Toronto Press, 2016).

³⁷ (1763) France, Britain, and Spain, 10 February 1763.

³⁸ (UK), 14 Geo III, c 83.

³⁹ (UK), 31 Geo III, c 31.

⁴⁰ Janet Epp Buckingham, *Fighting over God: A Legal and Political History of Religious Freedom in Canada* (McGill-Queen's University Press, 2014); MH Ogilvie, *Religious Institutions and the Law in Canada*, 4th ed, *Essentials of Canadian law* (Toronto: Irwin Law, 2017).

relationship between French and English communities, refracted through their constitutive religious identities, found expression at confederation with s 93. It is that politico-religious dynamic that Justice Iacobucci invokes when he speaks of s 93 as a ‘solemn pact’ without which “there would have been no Confederation”;⁴¹ historically, both our federal structure and the development of a sovereign state are tightly imbricated with religious identity. As in the case of Indigenous peoples – but with such a fundamentally difference valence – sovereignty and nation were forged in part using particular claims about the state’s relationship with religion and attitude towards religious difference.

But this link between religion, sovereignty, and nation is not merely a matter of the mists of our constitutional history. We see the enduring expression of this genetic link in our most prominent contemporary debates. In the fall of 2013, a minority sovereigntist Parti Québécois government introduced Bill 60, a bill referred to as the “Charter of Québec Values” or, as it was called in much of the debate that ensued, the “Charter of Secularism.”⁴² The Bill sought to respond to one of the most contentious political issues within Québec at the time, the accommodation and management of religious difference. It did so by declaring the religious neutrality and secular nature of the state and with a contentious prohibition on employees of public bodies from wearing “ostentatious” or conspicuous religious symbols, such as turbans, kippot, and headscarves. With this proposed ban, the Parti Québécois government charted out a form of secularism for Québec quite at odds with Canadian constitutional wisdom and thereby ignited a fierce debate, both inside and outside of Québec. Most agreed that if it were passed and challenged in the courts, this Bill would be declared unconstitutional in light of the Canadian *Charter*, as well as inconsistent with Québec’s own human rights commitments. For a variety of reasons, the Parti Québécois suffered a resounding defeat in a snap election at the centre of which they placed this proposal. Owing to that defeat, the “Charter of Secularism” moved

⁴¹ Adler, *supra* note 1 at para 29.

⁴² *Charter affirming the values of state secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests*, 1st Sess, 40th Leg, Québec, 2013.

temporarily to the political background, though echoes of it have reappeared in recent years.⁴³

This unfolding of events is illuminating for my purposes because of the different stories that can be told about this proposed charter and why it emerged in Québec.⁴⁴ One story is about the progressive stripping of religion from Québec culture and politics – the “secularization” of Québec. Since the 1960s and the “Quiet Revolution,” the Catholic Church had been ousted from its former position of overt cultural and political influence.⁴⁵ From a highly Catholic society since prior to Confederation, Québec had become less and less overtly religious and its strong identity with the Catholic religion had been replaced with something more akin to a pervasive antipathy. The “Charter of Secularism” sought to formalize a French form of *laïcité* that (however anachronistically) was felt to be more natural and fitted to Québec society than the multiculturalism found elsewhere in the country. And so one way of reading this proposed charter is as the next move in this progressive marginalization of religion in Québec’s political life. This is a story of discontinuity and change from a Catholic past to a secular present, the artefact of a fundamental shift in the role of religion in Québec’s legal and political life. And there is much that is true about this story.

⁴³ See Catherine Porter, “Behind Quebec’s Ban on Face Coverings, a Debate Over Identity”, *The New York Times* (25 October 2017), online: <<https://www.nytimes.com/2017/10/25/world/canada/quebec-ban-face-coverings.html>>; Philip Authier, “‘Public services should be given and received with an open face’: Couillard”, *Montreal Gazette* (20 October 2017), online: <<http://montrealgazette.com/news/quebec/despote-controversy-bill-62-on-state-neutrality-sails-into-law-in-a-badly-split-vote>>.

⁴⁴ I explore these contending stories and the lessons that can be drawn from them at more length in Benjamin L Berger, “Faith in Sovereignty: Religion and Secularism in the Politics of Canadian Federalism” (2014) 35:4 *Istituzioni del Federalismo* 939.

⁴⁵ For more on the Quiet Revolution, see Gregory Baum, “Catholicism and Secularization in Quebec” in David Lyon & Marguerite Van Die, eds, *Rethinking Church, State, and Modernity: Canada Between Europe and America* (Toronto; Buffalo; London: University of Toronto Press, 2000) 149; David Seljak, “Why the Quiet Revolution was ‘Quiet’: The Catholic Church’s Reaction to the Secularization of Nationalism in Quebec after 1960” (1996) 62 *Historical Studies* 109.

But another (and I think deeper) account reads the “Charter of Québec Values” as a story of *continuity* in the structural relationship whereby a distinctive relationship with religion has consistently been invoked as a dimension of the politics of federalism in Canada and an emblem or standard for Québec’s political sovereignty. In the early years, Roman Catholicism was the foundation of the religious uniqueness of Québec, a singularity that was part of the basis for securing political identity within the Canadian state; today, the terms that mark that difference have shifted from “Roman Catholicism” to “*laïcité*,” but the essential role played by appeal to a unique relationship with religion has remained. At a time at which there was an apparent lack of general appetite on questions of sovereignty, the assertion of a distinctive relationship to religion – here, a different conception of the secular – served political purposes in invigorating a debate about Québec’s unique place in the federation. The preamble to the “Charter of Québec Values” is revealing: “Whereas equality between women and men and the primacy of the French language as well as the separation of religions and state and the religious neutrality and secular nature of the state *are fundamental values of the Québec nation...*”⁴⁶ Defining a distinctive relationship with religion has always been a key aspect of how Québec has distinguished its political character from that of the rest of Canada and this has very much survived the Quiet Revolution. Federalism is fundamentally concerned with the construction and negotiation of political identity. And given the historically central role that religion has played in the definition of community belonging and national identity in Canada, it would be surprising, indeed, if contemporary debates about religion and contemporary debates about federalism did not converge and interact.

Reading *Adler* is, thus, an evocative way of looking back and seeing the relationship between religion, sovereignty, and nation building in Canadian constitutional history. The story that Justice Iacobucci tells in his majority reasons, and the dispositive force that he gives to these historical dynamics, speaks to only part of the “complicated emotional inheritances” surrounding religion and the state in Canada. But hearing that story, we are invited to broaden our gaze and think about the other ways in which the management, invocation, and suppression of religion

⁴⁶ Emphasis added.

has been key to shaping the constitutional and political order in which we live. It also directs us forward, suggesting ways in which religion and the encounter with religious difference continues to be an important force shaping our constitutional politics even – indeed, especially – in a political and legal world committed to some vision of secularism and state neutrality. With that nudge forward, I now turn to the ways in which *Adler* not only shed light on our constitutional history of law and religion, but anticipated key axes of debate in our law of religious freedom in the years to follow.

LOOKING FORWARD

The Role of Education

Adler was, of course, not the first case under the *Charter* that engaged questions of freedom of religion and the education of children. *Zylberberg v Sudbury Board of Education*⁴⁷ saw the Ontario Court of Appeal conclude that the recitation of the Lord’s Prayer at the start of school days in public schools was an unjustified limitation on s 2(a). The Court ruled that the purpose of the practice was religious (offending the principles set out in *Big M*) and, moreover, that the effect of the practice was to impose a form of religious coercion on students, inconsistent with freedom of religion. Similarly, in *Canadian Civil Liberties Association v Ontario (Minister of Education)*,⁴⁸ the same court held that a provincial regulation that required periods of religious education in public schools was incompatible with s 2(a) because it pursued a form of Christian religious indoctrination incompatible with freedom from religious coercion.

And yet *Adler* marked a shift in the focus of these education cases, one that would presage a key current in the development of the law of religious freedom in Canada over the subsequent two decades. Early cases like *Zylberberg* and *CCLA*, and even the *Bill 30* case, were essentially concerned with using section 2(a) to challenge the continued presence of historical Christian elements within the public education system. They

⁴⁷ (1988), 65 OR (2d) 641 (CA) [*Zylberberg*].

⁴⁸ (1990), 71 OR (2d) 341 (CA) [*CCLA*].

were cases in which claimants were, in one form or another, asserting freedom from the vestiges of religious privilege embedded in the education system. *Adler* presented a different kind of claim and, with it, a different kind of problem: within a public education system, understood as “secular” in one way or another,⁴⁹ what space can be occupied by religion? Rather than a claim about the liberty found in freedom from religion, this species of concern about the meeting of religion and education focused on the freedom to exercise religion within an overarching secular school system. Following *Adler*, cases exploring this style of claim would, in fact, serve as a — if not *the* — principal vehicle for the exploration of key issues in the modern relationship between law and religion in Canada. There are, of course, many important cases that are not part of this current — cases like *Amselem*,⁵⁰ *Wilson Colony*,⁵¹ *Bruker*,⁵² and *NS*⁵³ — but the number and prominence of such religion and education cases within the jurisprudence since *Adler* is both notable and telling.

The case of *Chamberlain v Surrey School District No 36*⁵⁴ involved the question of the role that the religious views of the community and of school board members could play in making decisions about books appropriate for the public school curriculum, here books depicting same sex parented families for a Kindergarten-Grade 1 class. *Chamberlain* remains the Court’s most extended discussion of the meaning of “secularism.” *Trinity Western University*⁵⁵ raised the issue of whether a private religious university that has a code of conduct that discriminates against gay, lesbian, and queer students and faculty can have their teacher training program publicly accredited. The case was a key moment in the Court’s effort to delineate a boundary between private belief and public

⁴⁹ And the understanding of “secularism” within both the Supreme Court’s jurisprudence and the scholarly literature is extremely unstable and always shifting.

⁵⁰ *Syndicat Northcrest v Amselem*, 2004 SCC 47 [*Amselem*].

⁵¹ *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Wilson Colony*].

⁵² *Bruker v Markovitz*, 2007 SCC 54 [*Bruker*].

⁵³ *R v NS*, 2012 SCC 72 [*NS*].

⁵⁴ [2002] 4 SCR 710 [*Chamberlain*].

⁵⁵ [2001] 1 SCR 772 [*TWU 2001*].

conduct in matters of religion. Although the next installment in the Trinity Western story did not involve the education of children, the Court's decisions regarding the accreditation of TWU's proposed law school engaged similar questions of religious freedom as they were expressed in the relationship between religious education and public authorities.⁵⁶ *Multani v Commission scolaire Marguerite-Bourgeois*⁵⁷ famously called on the Court to decide whether a Sikh student could carry his kirpan at public school. The Court's decision became a principal touchstone for national debates about the nature and boundaries of religious accommodation. And the recent case of *Loyola High School v Quebec (Attorney General)*⁵⁸ posed the question of whether and how a private religious high school is bound to implement a "neutral" program of education about world religions and ethics. That decision is now the leading case on the fraught question of the protection of group or community rights under section 2(a), an issue about which I will have more to say in the next section.

The list is longer, but the point is clear from the foregoing: after *Adler*, many of the chief issues in the contemporary law of religious freedom in Canada has been worked out through debates about the relationship between religion and public education in Canada. Indeed, combining these decisions with the early *Charter* cases, *Adler* itself, and the pre-*Charter* history explored above, both the deeper and the modern histories of the legal relationship to religious diversity in Canada could be told quite ably through a story about education.

My purpose in this section is not to rehearse the law flowing from these cases. Instead, what interests me here is the question of why education has served as a crucible for the relationship between law and religion, such a dominant source of issues that raise axial questions in the area.⁵⁹ I want to explore two elements of an answer, one flowing directly from the other, and the reasons given in *Adler* are my point of entry.

⁵⁶ *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 [TWU 2018]; *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33.

⁵⁷ 2006 SCC 6 [*Multani*].

⁵⁸ 2015 SCC 12 [*Loyola*].

⁵⁹ I explore some of these ideas at greater length in Benjamin L Berger, "Religious Diversity, Education, and the 'Crisis' in State Neutrality" (2014) 29:1 *Canadian Journal of Law and Society* 103. For an account of some of the features that make religious

In their respective reasons, Justice McLachlin and Justice L’Heureux-Dubé map out the key elements of the first part of the answer. As a step towards finding that there is an unjustified breach of the *Charter*, Justice L’Heureux-Dubé describes “[t]he interests at stake for the appellants” in the case as “the recognition and continuation of these communities”.⁶⁰ For her, the case presents a case involving “the efforts of small, insular religious minority communities seeking to survive in a large, secular society.”⁶¹ She accepts that “control over the education of their children [is] essential to the continuation of the religious communities in question,”⁶² and that “it is the very survival of these communities which is threatened”⁶³ by the distinction under the *Education Act*. By contrast, Justice McLachlin, in her section 1 analysis, lays emphasis on the interest that the state has in fostering, “a strong public secular school system attended by students of all cultural and religious groups.”⁶⁴ She notes the “multicultural, multireligious” nature of Canadian society and observes that “[a] multicultural multireligious society can only work, it is felt, if people of all groups understand and tolerate each other.”⁶⁵ “The goal of fostering multiracial and multicultural harmony,” she explains, “is of great importance in a society as diverse as ours.”⁶⁶

Both the state and the religious community have a deep interest in the formation of the child. For religious groups and the state alike, education is the means by which culture, tradition, value, and community are affirmed and sustained. All education is thus a political act, concerned with inducing a child into a social world. It is true, as Justice L’Heureux-Dubé, notes, that the continuation of the religious community — of a social

accommodation and toleration particularly fraught and vexing in educational contexts, see Colin Macleod, “Toleration, Children and Education” 42:1 *Educational Philosophy and Theory* 9.

⁶⁰ *Adler*, supra note 1 at para 84.

⁶¹ *Ibid* at para 86.

⁶² *Ibid* at para 68.

⁶³ *Ibid* at para 86.

⁶⁴ *Ibid* at para 212.

⁶⁵ *Ibid* at para 212.

⁶⁶ *Ibid* at para 224.

world — is at stake in the process of education. Education is an important means by which religious beliefs, practices, and identity can be sustained intergenerationally.⁶⁷ But the state is similarly interested in the production of a particular social world and the formation of an individual ethically fitted for that world; as Justice McLachlin emphasizes, society also depends on the cultivation of a certain type of citizen and education is its principal tool in equipping the child with the knowledge and skills necessary for critical and sensitive engagement in a diverse society.⁶⁸ And, of course, part of the state's interest in education is in the formation of individuals who have political and personal freedom and autonomy that extends beyond the religious identity of their community.⁶⁹

The fact of these deep, competing interests in the education of children points to the second part of an answer to the question, “why is education so central to the working out of issues of law and religion?” The topic of education overflows and, in the process, erodes one of the principal conceptual devices central to any aspiration to neatly “manage” religion in a liberal constitutional order: the public/private divide. The overlapping of community and state interests reflects the fact that education is always both intensely private and intrinsically public in character. We acknowledge the core role of the community and the family in education at the same time that we recognize the consummately public implications of any private decisions made about the education of children. Nor does the distinction between belief and conduct offer much to help in resolving issues that arise in matters of education: education is keenly interested in and has implications for both. Denied easy recourse to otherwise soothing divides, we are forced to contend with the deeper and more difficult questions about the relationship of law and religion, including the character of state neutrality, the relationship between religious freedom and other constitutional rights, the boundaries of

⁶⁷ For a discussion of the role of education in preserving and sustaining cultures, see White, *supra* note 6.

⁶⁸ This interest would be echoed years later by Justice Deschamps decision in another religion and education case, in *SL v Commission scolaire des Chênes*, 2012 SCC 7, when she explained, at para 37, that “[p]arents are free to pass their personal beliefs on to their children if they so wish. However, the early exposure of children to realities that differ from those in their immediate family environment is a fact of life in society.”

⁶⁹ This is a theme that I develop in Berger, *supra* note 59.

accommodation, and the nature and status of community or collective rights. And so it ought to come as no real surprise that issues of public education and religious difference continue to produce some of the most fraught questions in freedom of religion. In the issues that it raised, and in the divisions within the Court, *Adler* thus anticipated that education would be a principal vehicle for working out central issues in the contemporary interaction of law and religion in Canada.

The Question of the Collective

Adler's foreshadowing of the key role that education would play in the development of the constitutional jurisprudence surrounding religion contains within it the seed of another dynamic that would unfold in the subsequent *Charter* law. At the heart of Justice L'Heureux-Dubé's insistence on the equal treatment of religion in her dissenting decision was a concern for the relationship between religion and the collective. She acknowledged that the religious interest at work for the appellants in *Adler* was connected to the "continuation of the religious communities in question"⁷⁰ and characterized the essence of the case as centred on a group-based concern: "the efforts of small, insular religious minority communities seeking to survive in a large, secular society."⁷¹ Although framed within a section 15(1) equality analysis rather than under section 2(a), the group or collective dimension of the constitutional protection of religion was very much at the heart of her analysis. Justice Iacobucci gave much less regard to the collective interests of the claimants in the case, though by emphasizing the Confederation compromise, he could be understood as privileging the political settlements as between religious groups over the claims brought by individual claimants under the *Charter*. And Justice Sopinka, who so emphasized the choices of parents as the root of any pernicious effects suffered through the educational funding scheme, gave no meaningful regard to groups and collective interests. The decision was a "loss" for the religious communities concerned with the education funding scheme in Ontario, but Justice L'Heureux-Dubé had, in

⁷⁰ *Adler*, *supra* note 1 at para 68.

⁷¹ *Ibid* at para 86.

her dissent, sounded a clear call for attention to the interests of religious communities and groups under the *Charter*.

Notes of regard for the collective dimensions of religious life, and the salience of those dimensions in constitutional rights analysis, predated *Adler*. Recall Justice Rand's statement in *Saumur* that freedom of religion ought to be understood as one of the "original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order."⁷² Freedom of religion, for him, included concern both for the individual and the "conditions of their community life". But in the post-*Charter* section 2(a) jurisprudence the overwhelming tendency has been to prioritize the individual and his or her personal religious freedom, rather than – and sometimes at the expense of – understanding religion as inherently tied to communities and collectivities.⁷³ The path was laid out in *Big M*, in which Justice Dickson explained that "[w]ith the *Charter*, it [had] become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be."⁷⁴ But the individualist rendering of religious freedom was doctrinally solidified in *Amselem*,⁷⁵ in which the Court adopted its subjective sincerity test for section 2(a). Focussing on religion as being, in essence, "about freely and deeply held personal convictions or beliefs,"⁷⁶ the Court held that to gain access to the protection of section 2(a) a claimant need only "demonstrate that he or she sincerely believes in a practice or belief that has a nexus with religion."⁷⁷ The practice or belief need not accord with the dogma or positions of religious officials or communities; if this subjective sincerity exists, no matter how idiosyncratic, section 2(a) protects against non-trivial interferences with those practices and beliefs.

⁷² *Saumur*, *supra* note 2 at 329.

⁷³ I discuss this in Benjamin L Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto; Buffalo: University of Toronto Press, 2015) at 66-78.

⁷⁴ *Big M*, *supra* note 4 at 351.

⁷⁵ *Supra* note 50.

⁷⁶ *Ibid* at para 39.

⁷⁷ *Ibid* at para 65.

A series of cases decided under section 2(a) bear the imprint of this individualism, but the high-water mark came with the Court's decision in *Wilson Colony*,⁷⁸ in which a small Hutterite community objected that the requirement for a photograph on their drivers' licenses unjustifiably offended their right to religious freedom. Though she accepted that religion has a "collective aspect," Chief Justice McLachlin, writing for the majority explained that the "broader impact of the photo requirement on the Wilson Colony community" was relevant only at the proportionality stage of the analysis and did not "transform the essential claim... into an assertion of a group right."⁷⁹ The collective religious interests at play in the case thus became simply "costs" associated with the limitation on the right, to be weighed against the benefits of the universal photo requirement to society at large.

As in *Adler*, a strong call for regard for the collective dimensions of religion came in the dissenting reasons, here given by Justice Abella. She laid substantial weight on the collective aspects of the claim, emphasizing the community's concern with self-sufficiency and autonomy and noting that these commitments were inextricable from the nature of the claim in this case — they were the heart of the religious freedom and equality claims. She cited Justice Ritchie's statement in *Hofer v Hofer* explaining the religious character of the community lifestyle for Hutterites: "[T]he activities of the community were evidence of the living church."⁸⁰ The collective dimension of the religious interests thus foregrounded, Justice Abella would have found that the limitation on the right was unjustified. The dynamics between the reasons in *Adler* were, in this respect, replicated in *Wilson Colony*.

The solicitousness for the individual's beliefs and choices that we have seen in the *Charter* protection of religion is to be expected: liberal constitutionalism sees the individual far more clearly than it does the group, treating the individual as the primary unit of constitutional

⁷⁸ *Supra* note 51.

⁷⁹ *Ibid* at para 31.

⁸⁰ [1970] SCR 958 at 969.

analysis.⁸¹ But when put into practice, an insistent individualism in the legal understanding of religion effaces significant dimensions of religion as experienced and lived outside the courtroom. Religion troubles the law's individualism; phenomenologically, much of what gets categorized as religion has an irrepressibly collective dimension and is anchored in the lives of communities, complicated though those lives – and heterogeneous though the practices and beliefs within those communities – might be.⁸² Even when framed by a priority on the individual, religion cannot really be analyzed or understood without regard for the communities in which it is lived and that sustain it over time. Perhaps the law can only tolerate for so long such a dissonance between the social world as it imagines it and the social world as we find it.

A case would eventually emerge in the section 2(a) jurisprudence in which the Court would seek to find space for regard for the collective interests engaged by religion so forcefully urged in the 1996 dissent in *Adler*; and for the reasons that I explored above, it was entirely unsurprising that the case would be one involving education.

The central question in *Loyola*⁸³ was how a provincially mandated “ethics and religious culture” program applied in the context of a private Catholic high school. The program prescribed a curriculum exposing students to the beliefs and ethics of different world religions and required that the instruction on these topics be conducted from a “neutral and objective perspective.” *Loyola* objected that requiring a Catholic school to teach about Catholicism and the ethics of other traditions in a “neutral way” impaired religious freedom. In finding that *Loyola* could not be

⁸¹ This has been a critique leveled against *Charter* adjudication since its early days. See, e.g., Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto; Buffalo: University of Toronto Press, 1997).

⁸² On the collective and institutional dimensions of religion and their implications for the analysis of religious freedom claims, see, e.g., Victor Manuel Muñoz-Fraticelli, *The Structure of Pluralism: On the Authority of Associations* (Oxford: Oxford University Press, 2014); Victor Muñoz-Fraticelli & Lawrence David, “Religious Institutionalism in a Canadian Context” (2016) 52:3 *Osgoode Hall Law Journal* 1049; Dwight Newman, *Religious Freedom and Communities* (Toronto: LexisNexis, 2016); Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Oxford; Portland, OR: Hart Publishing, 2011); Ogilvie, *supra* note 40.

⁸³ *Supra* note 58.

compelled to teach about Catholicism “in terms defined by the state rather than by its own understanding of Catholicism,”⁸⁴ Justice Abella (now in the majority) explained that “[r]eligious freedom under the *Charter* must... account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions”.⁸⁵ She acknowledged that “[t]hese collective aspects of religious freedom – in this case, the collective manifestation and transmission of Catholic beliefs through a private denominational school – [were] a crucial part of Loyola’s claim.”⁸⁶ In its regard for the collective dimensions of religion and in its recognition of the central role of education in the sustenance of the religious community, *Loyola* can be viewed as the coming of age of the dissent in *Adler*.

Loyola is, to this point, the strongest statement from the Court recognizing the collective and group aspects of religious freedom. Indeed, the minority decision in *Loyola*, written by Chief Justice McLachlin and Justice Moldaver, would have gone even further, holding that religious organizations themselves could enjoy religious freedom under section 2(a). And yet there remains substantial uncertainty about the nature and scope of this recognition and what it will mean for religious freedom claims on the part of groups and institutions in the coming years.

It is uncertain, for example, how independent the protection of these “collective aspects” of religion really is of the *Charter*’s traditional focus on the individual. Justice Abella’s describes the collective aspects of religion as “manifestations” of individual religious belief and she frames the liberty interests involved as those of the “members of the community,”⁸⁷ not the group itself. On this account, the collective dimension of religious freedom is indexed to the individual: she justifies the need to give weight to the collective on the grounds that “individuals may sometimes require a legal entity in order to give effect to the constitutionally protected communal aspects of their religious beliefs and

⁸⁴ *Ibid* at para 63.

⁸⁵ *Ibid* at para 60.

⁸⁶ *Ibid* at para 61.

⁸⁷ *Ibid* at paras 61-62.

practices.”⁸⁸ This is true even of the more ambitious minority in *Loyola*, who explain that “[t]he freedom of religion of individuals cannot flourish without freedom of religion for the organizations through which those individuals express their religious practices and through which they transmit their faith.”⁸⁹ Diagnostically, the key test will come when the collective religious interests are at odds with the individual’s religious freedom. I suspect that in such a case, the liberal commitments underwriting the constitutional culture will admit of only one outcome. And, of course, the subjective sincerity test established in *Amselem* is designed precisely to incline the system in that direction.

Owing in part to this conceptual uncertainty, it is unclear how robust and consequential the courts’ regard for the collective dimension of religious freedom will prove to be. The way that the Court has treated the collective aspects of religion since *Loyola* suggests that both the engagement and the effect may be modest.

In *Ktunaxa*,⁹⁰ an Indigenous nation sought to prevent a ski resort development in a part of British Columbia on the basis that the establishment of permanent overnight accommodation would drive Grizzly Bear Spirit from the valley in question (*Qat’muk*), fundamentally disrupting their religious beliefs and practices and, with this, “the vitality of their religious community”.⁹¹ Thus seeking to establish a novel form of s 2(a) protection – one based on the interrelationship between land and

⁸⁸ *Ibid* at para 33. In *TWU* 2018, *supra* note 56, discussed in relation to these ideas more fully below, Justice Rowe’s separate concurring reasons display what an approach to the collective or communal dimensions of religious freedom fully indexed to the individual would look like. He is entirely perspicuous in this: “While acknowledging this communal aspect, I underscore that religious freedom is premised on the personal volition of individual believers. Although religious communities may adopt their own rules and membership requirements, the foundation of the community remains the voluntary choice of individual believers to join together on the basis of their common faith” (para 219). Accordingly, he explains, if *TWU* possessed any religious freedom rights *qua* community or institution, “these would not extend beyond those held by the individual members of the faith community” (*ibid*).

⁸⁹ *Supra* note 58 at para 94.

⁹⁰ *Ktunaxa Nation v British Columbia (Forests, Lands and National Resource Operations)*, 2017 SCC 54 [*Ktunaxa*].

⁹¹ *Ibid* at para 59.

the metaphysical — the Ktunaxa emphasized the communal aspects of religion and religious freedom recognized in *Loyola*. A majority of the Court found that there was no breach of the Ktunaxa’s religious freedom because the “[t]he state’s duty under s. 2(a) is not to protect the object of beliefs, such as Grizzly Bear Spirit.”⁹² In arriving at that conclusion, the majority acknowledged the collective dimension of the right, but swiftly circumscribed its implications, explaining that “the communal aspects of freedom of religion do not, and should not, extend s. 2(a)’s protection beyond the freedom to have beliefs and the freedom to manifest them.”⁹³

In *TWU 2018*, in which the Court considered the Law Society of British Columbia’s decision to deny accreditation to TWU’s proposed law school because of TWU’s discriminatory community covenant, the majority professed the need to “account for the socially embedded nature of religious belief, as well as the ‘deep linkages between this belief and its manifestation through communal institutions and traditions’”,⁹⁴ as established in *Loyola*. And yet these ideas did little work informing the analysis. The majority framed the nature of “the religious belief or practice implicated by the LSBC’s decision” in essentially individualistic terms: “that members of TWU’s community sincerely believe that studying in a community defined by religious beliefs in which members follow particular religious rules of conduct contributes to their spiritual development.”⁹⁵ This framing — one that did not draw out the communal and group dimensions of the claim — cleared the way for the majority not only to find that the LSBC’s decision was reasonable, but (even more significantly, to my mind) that the effect of the decision on religious

⁹² *Ibid* at para 71. For critiques of this decision, see Howard Kislowicz and Senwung Luk, “Re-contextualizing *Ktunaxa Nation v British Columbia*: Crown Land, History, and Indigenous Religious Freedom”, *Supreme Court Law Review* [forthcoming in 2018]; Benjamin L Berger, “Liberal Constitutionalism and the Unsettling of the Secular” in Rex Adhar, ed., *Research Handbook on Law and Religion* (Northampton, Mass: Edward Elgar) [forthcoming in 2018].

⁹³ *Ibid* at para 74.

⁹⁴ *TWU 2018*, *supra* note 56 at para 64.

⁹⁵ *Ibid* at para 70.

freedom was “of minor significance”⁹⁶ and not “a serious limitation”.⁹⁷ Justices Coté and Brown, writing in dissent and who would have characterized the interference with religious freedom as “profound,”⁹⁸ pointed to this thinness in the majority’s engagement with the collective dimension of religious freedom: “In our view, ensuring full protection for the ‘constitutionally protected communal aspects of religious belief and practice’ requires more than simply aggregating individual rights claims under the amorphous umbrella of an institution’s ‘community’.”⁹⁹

We are at an intriguing moment in the development of our religious freedom jurisprudence, wrestling with and wondering what it means to give regard to the collective, communal, and institutional aspects of religious freedom. And we watch with interest as other countries explore the implications of granting collective and corporate religious rights.¹⁰⁰ Along with others, I have found it useful to think about the individual, private, and choice-based understanding of religion evidenced in religious

⁹⁶ *Ibid* at para 87.

⁹⁷ *Ibid* at para 102. Though she similarly found that the LSBC’s decision was reasonable, Chief Justice McLachlin took issue with this characterization of the impact of the decision on freedom of religion as “of minor significance,” in large measure because it was the product of an inadequate engagement with the associational dimension of the religious interests at play in the case. “The issue here,” she explains, “is that the majority fails to acknowledge the significance that all members abiding by the same code of conduct has for a religious community” (para 131). Her reasons in the case show that giving serious regard to the collective dimension of religious freedom does not lead inexorably to overweening solicitousness of a community’s interests and positions.

⁹⁸ *Ibid* at para 268.

⁹⁹ *Ibid* at para 315, citing to *Loyola* at paras 33 and 130. With their greater focus on these communal dimensions of the religious freedom claim, Coté and Brown JJ concluded that “the LSBC approval decision... is a measure that undermines the core character of a lawful religious institution and disrupts the vitality of the CWU community” (at para 324).

¹⁰⁰ For the cases at the heart of the US experience on this point, see, e.g., *Hosanna-Tabor v EEOC*, 132 S Ct 694 (2012); *Burwell v Hobby Lobby Stores, Inc*, 134 S Ct 2751 (2014); *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. ____ (2018). For reflection on this phenomenon in the US, see Micah Schwartzman, Chad Flanders & Zoë Robinson, eds, *The Rise of Corporate Religious Liberty* (New York: Oxford University Press, 2016).

freedom jurisprudence as a “protestant” approach to the kind of religion that attracts constitutional protection.¹⁰¹ If that is an edifying framing, one wonders whether the emerging, if tentative, concern for the collective dimensions of religion marks something of a “catholic turn” in religious freedom in Canada; and how ironic that we might trace the intellectual origins of that shift to the dissent in *Adler*.

CONCLUSION: REASSESSING ADLER?

In this paper I have used *Adler* as kind of vantage point from which to survey the past of the constitutional protection of religion in Canada and the future that lay ahead. Reading *Adler* this way directs our gaze backward, showing the durable role of origins in our contemporary constitutional lives. Concerned as it was with the interaction of the historical compromise surrounding religion and religious education found in section 93 and the modern rights-protecting focus of ss. 2(a) and 15(1), the reasons in *Adler* – and, in particular, their analytical weaknesses – demonstrate the way in which our contemporary constitutional identities are not exhausted by the logic of the universal. *Adler* also invites us to consider the complicated but formative use of religion in Canadian nation-building and in claims about sovereignty, matters in which religion continues to serve an evocative role.

Adler, we saw, would also anticipate much. Looking forward, *Adler* pointed to the abidingly central place that education would occupy in debates about the constitutional protection of religion in Canada. In particular, *Adler* opened up the question of what place religion could or should have within an otherwise non-religious system of public education, a question that would be – in one form or another – at the heart of the section 2(a) jurisprudence in the years to come. And although, in the intervening years, the individualism that comes so naturally to *Charter* analysis would take centre stage, the forceful call made in the dissent in *Adler* for attention to the collective and group dimensions of religious

¹⁰¹ See Berger, *supra* note 72 at 100–101; Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton, N.J.: Princeton University Press, 2005) at 7–8.

freedom prefigured the ineluctable salience of the interests of the community in matters of religious freedom and equality.

In short, in *Adler* we can find themes and tensions that have defined our constitutional history in regard to religion, as well as markers for what would (and still does) lie ahead. But in closing I want to return briefly to a question that I alluded to at the outset of this piece: what of the future of the *Adler* decision itself? Specifically, is the majority's holding that the *Charter* has nothing to say about the constitutionality of the denominational school funding scheme in Ontario still good law? In my view, after two decades during which that outcome seemed wholly secure, the decision may now be vulnerable.¹⁰²

We are now living in a post-*Bedford*,¹⁰³ post-*Carter*,¹⁰⁴ precedential ecosystem, in which the Supreme Court's openness to revisiting past decisions is very much on the minds of advocates and scholars. *Bedford* established that a trial judge can revisit a decision of a higher court, including the Supreme Court, "if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate."¹⁰⁵ Applying this test in *Carter*, the Court explained that the trial judge was justified in revisiting the Court's decision in *Rodriguez*¹⁰⁶ because of changes both in the "matrix of legislative and social facts"¹⁰⁷ and because of material changes in the law of section 7. In particular, the Court noted that "the law on overbreadth, now explicitly recognized as a principle of fundamental justice, asks whether the law interferes with

¹⁰² I am conscious of the unsuccessful attempt to revisit *Adler* made in *Landau v Ontario (Attorney General)*, 2013 ONSC 6152, but that case predated the key jurisprudential changes that I am relying upon in these comments. In *Landau* the applicant's arguments focused on UNHRC decisions issued after to *Adler* and the post-1996 constitutional amendments regarding religious education in Québec and Newfoundland.

¹⁰³ *Canada (Attorney General) v Bedford*, 2013 SCC 72 [*Bedford*].

¹⁰⁴ *Carter v Canada (Attorney General)*, 2015 SCC 5 [*Carter*].

¹⁰⁵ *Bedford*, supra note 103 at para 42.

¹⁰⁶ *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519.

¹⁰⁷ *Carter*, supra note 104 at para 47.

some conduct that has no connection to the law's objectives.... This different question may lead to a different answer."¹⁰⁸ And indeed it did.

A future applicant might well be able to point to changes in the circumstances or evidence relevant to considering the issues raised in *Adler*.¹⁰⁹ But changes in the evidence and circumstances are not necessary; they are just one path to revisiting a past precedent. The case for developments in the law significant enough to reassess the s 2(a) outcome in *Adler* — the other path — is a strong one. Earlier in this article I canvassed one jurisprudential piece that is newly in motion in a way that might have implications for a fresh look at *Adler*, namely the rise of regard for group and collective interests within the section 2(a) analysis. I have argued elsewhere that serious attention to the interest of the group, regard of the sort found in Justice L'Heureux-Dubé's dissent, would have made the result in *Adler* more difficult to reach.¹¹⁰

But perhaps the even more material change in the applicable legal framework is the emergence of a state duty of religious neutrality as a component of the section 2(a) protection. Crystallized in *Mouvement laïque québécois v Saguenay (City)*,¹¹¹ this duty is one that the Court acknowledged is not expressly imposed by section 2(a) but, rather, has arisen "from an evolving interpretation of freedom of conscience and religion."¹¹² The core of this duty is the requirement that "that the state neither favour nor hinder

¹⁰⁸ *Ibid* at para 46.

¹⁰⁹ Two areas of development in the "matrix of legislative and social facts" come to mind: first, the increased religious diversity of the population in Ontario (though this fact might cut in either argumentative direction); and, second, the experience over the last two decades of denominational funding schemes in other provinces that have not degraded or imperiled the public system. This latter fact might be most germane in meeting the kind of s 1 argument that was the basis for Justice McLachlin's decision in *Adler*. Her worries about extending a denominational funding scheme have not been borne out in other provinces. The persuasive force of arguments about relevant changes in the social circumstances would depend heavily on the evidence that an applicant could adduce.

¹¹⁰ Berger, *supra* note 73 at 74.

¹¹¹ 2015 SCC 15 [*Saguenay*].

¹¹² *Ibid* at para 71.

any particular belief, and the same holds true for non-belief".¹¹³ Drawing inspiration for this duty from the jurisprudence subsequent to *Adler*, Justice Gascon, writing for an 8 person majority explained that this duty means, in part, that "[t]he state may not act in such a way as to create a preferential public space that favours certain religious groups and is hostile to others."¹¹⁴ He summed up as follows:

When all is said and done, the state's duty to protect every person's freedom of conscience and religion means that it may not use its powers in such a way as to promote the participation of certain believers or non-believers in public life to the detriment of others.¹¹⁵

The tensions between this emergent doctrine and the funding scheme considered in *Adler* might be palpable enough to invite, at least, a fresh hard look. To paraphrase the Court's reasons in *Carter*, the duty of state neutrality, now explicitly recognized as an aspect of section 2(a), asks a new question about the constitutionality of state action. "This different question may lead to a different answer."¹¹⁶

One might object that these developments, significant though they may be, say nothing that displaces Justice Iacobucci's core finding for the majority in *Adler* that section 93 is a "complete code" for denominational funding and therefore simply "immune from *Charter* attack."¹¹⁷ Perhaps so, but it must be recalled that four judges rejected this approach to the issues and instead relied on an interpretation of section 2(a) whereby, they agreed, there was no breach. The three reasons that took this path focused on the absence of a prohibition or coercion and the fact that religious freedom does not include a positive right to funding.¹¹⁸ There is simply far more to section 2(a) today. Can the unanimous ruling in *Adler* that the

¹¹³ *Ibid* at para 72.

¹¹⁴ *Ibid* at para 75.

¹¹⁵ *Ibid* at para 76.

¹¹⁶ *Carter*, *supra* note 104 at para 46.

¹¹⁷ *Adler*, *supra* note 1 at para 50.

¹¹⁸ With Justice Sopinka relying on the now very suspect reasoning that the disadvantage experienced by the applicants flowed from their religious tenets and choices, not from the statutory scheme.

denominational funding scheme did not offend section 2(a)'s protections survive these notable changes in the law of religious freedom?

Exploring these points more fully is the burden of another piece. For now, all of this is to suggest that, in addition to serving as an entry point into understanding key elements of the history and development of law and religion in Canada, reassessing *Adler* might itself be part of our constitutional future.