File No. 567/86

SUPREME COURT OF ONTARIO

COURT OF APPEAL

Brooke, Lacourcière, Blair, Goodman and Robins *JJ.A.*

BETWEEN:

PHILIP ZYLBERBERG, MORA GREGG, BRYNA COPPEL-PARK, HARVEY WYERS, AND SAM ENVER

Applicants (Appellants)

- and -

THE DIRECTOR OF EDUCATION OF THE SUDBURY BOARD OF EDUCATION

Respondent (Respondent in Appeal)

C. M. CAMPBELL for the Appellants

BRUCE H. STEWART, Q.C. and MICHAEL HINES for the Respondent

S. J. ADLER for League for Human Rights of B'nai Brith Canada (Intervenor)

J. B. LASKIN for Canadian Civil Liberties Association (Intervenor)

JOHN I. LASKIN for Canadian Jewish Congress (Intervenor)

BLENUS WRIGHT, Q.C. and

ROBERT E. CHARNEY for Attorney General of Ontario (Intervenor)

Heard: February 17, 18 and 19, 1988

RELEASED: September 23, 1988

BROOKE, BLAIR, GOODMAN AND ROBINS *JJ.A.:*

The issue in this appeal is whether religious exercises, prescribed for the opening or closing of each school day in the public schools of this province, infringe the freedom of religion and

conscience guaranteed by s. 2(a) of the Canadian Charter of Rights and Freedoms. This is an appeal from a decision of the Divisional Court, now reported

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at 55 O.R. (2d) 749, which by a majority held that they did not.

1. STATUTES AND REGULATIONS

The statutory authority for religious exercises in public schools is found in s. 50 of the Education Act, R.S.O. 1980, c. 129 (the Act) which reads as follows:

> Religious Instruction
>
> 50.-(1) Subject to the regulations, a pupil shall be allowed to receive such religious instruction as his parent or guardian desires or, where the pupil is an adult, as he desires.
>
> (2) No pupil in a public school shall be required to read or study in or from a religious book, or to join in an exercise of devotion or religion, objected to by his parent or guardian, or by the pupil, where he is an adult.

Only s-s. (2) which deals with religious exercises is relevant to this appeal. The provisions regarding religious instruction in s. 50 and the regulations made thereunder were held not to infringe the Charter by the Divisional Court in *a* split decision released after the hearing of this appeal: The Corporation of the Canadian Civil Liberties Association et al. v. The Minister of Education and the Elgin County Board of Education, released March 28, 1988, unreported (the Elgin County case). It is not necessary for the purpose of our decision to refer to the Elgin County case. We consider any

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discussion of it here to be inappropriate because it is under appeal to this court.

Power to make regulations under s. 50 is conferred by para. 18 of s. 10(1) which reads:

> 10.-(1) Subject to the approval of the Lieutenant Governor in Council, the Minister may make regulations in respect of schools or classes established under this Act, or any predecessor of this Act, and with respect to all other schools supported in whole or in part by public money,
>
> …
>
> 18. governing the provision of religious exercises and religious education in public and secondary schools and providing for the exemption of pupils from participating in such exercises and education and of a teacher from teaching, and a public

school board or a secondary school board from providing, religious education in any school or class;

Religious exercises in public schools are governed by s. 28 of O.Reg. 262/80 (the Regulations) made pursuant to s. 10(1), the relevant parts of which provide:

RELIGIOUS EXERCISES AND RELIGIOUS EDUCATION IN THE PUBLIC SCHOOLS

28.-(1) A public school shall be opened or closed each school day with religious exercises consisting of the reading of the Scriptures or other suitable readings and the repeating of the Lord's Prayer or other suitable prayers.

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(2) The readings and prayers that form part of the religious exercises referred to in subsection (1) shall be chosen from a list of selections approved for such purpose by the board that operates the school where the board approves such a list and, where the board does not approve such a list, the principal of the school shall select the readings and prayers after notifying the board of his intention to do so, but his selection is subject to revision by the board at any time.

(3) The religious exercises under subsection (1) may include the singing of one or more hymns.

…

(10) No pupil shall be required to take part in any religious exercises or be subject to any instruction in religious education where his parent or, where the pupil is an adult, the pupil applies to the principal of the school that the pupil attends for exemption of the pupil therefrom.

(11) In public schools without suitable waiting rooms or other similar accommodation, if the parent of a pupil or, where the pupil is an adult, the pupil applies to the principal of the school for the exemption of the pupil from attendance while religious exercises are being held or religious education given, such request shall be granted.

(12) Where a parent of a pupil, or a pupil who is an adult, objects to the pupil's taking part in religious exercises or being subject to instruction in religious education, but requests that the pupil remain in the classroom during the time devoted to religious exercises or instruction in religious education, the principal of the school that pupil attends shall permit the pupil to do so, if he

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maintains decorous behaviour. [Emphasis added.]

Sub-sections 4 to 9 deal with religious education and are not relevant to this appeal.

The appellants seek a declaration that s. 28(1) of the Regulations is of no force or effect because it interferes with the appellants' freedom under s. 2(a) of the Charter which declares:

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

This necessarily would include s-ss. (2) and (3) of s. 28. The appellants refrain from asking for any declaration with respect to s-ss. (10), (11) and (12) of s. 28 or s. 50 of the Act because they do not wish to impair the rights to exemption from religious exercises or instruction which are contained in them.

It should be noted that the right of Ontario Roman Catholics to religious education in separate schools is guaranteed by s. 93 of the Constitution Act, 1867 and is not an issue in this appeal.

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2. THE FACTUAL BACKGROUND

This application was originally made by five parents of children attending elementary public schools within the jurisdiction of the respondent school board in Sudbury (the Board). Two of the applicants have since moved out of the Board's district and seek to discontinue their appeal. The three remaining appellants were supported in argument by the three intervenors.

The Board's evidence was that the daily opening exercises in all its schools are brief and include the singing of O Canada and the saying of the Lord's Prayer. The prayer is either led by the classroom teacher or recited over the school's public address system. In some schools, Scripture passages are also read.

At the request of a parent, a child is excused from the classroom during the exercises or, if he or she remains in the room, is not required to participate. Arrangements are made in every school for the care of children while they are excused from the classroom. If they remain in the classroom, the Board's evidence is that they normally stand with other students during the exercises but are not required to do so nor are they required to bow their heads. The decision as to how best to accommodate a child excused from

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participation in the religious exercises is made in consultation with the parents. The Board also permits students from different religious faiths to be absent from school at their parents' request in order to observe religious holidays.

Of the three remaining appellants one is of the Jewish religion and another is a Moslem. The third practises no religion but his wife is Roman Catholic and their children attend that church a few times a year. They decided to send their children to a public rather than a separate

school in order to give them a secular education. One appellant made his objections to compulsory religious exercises known by letter to the Board but did not request an exemption from the exercises for his children although invited to do so. The other two appellants did not object before commencing these proceedings and did not request an exemption. The three appellants stated that they had not requested an exemption for their children because they did not want them singled out from their peers because of their religious beliefs.

There was a difference of expert opinion about the effect of religious exercises on non-Christian or non-participating children. An affidavit of a psychologist, filed by the appellants, expressed the view that such children would be placed under pressure to conform which, if

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resisted, would result in their being alienated from their peers. The affidavits of two psychologists, filed by the Board, asserted that children from minority religions were not harmed by the policy. They stated that pupils were routinely excused from other subjects and activities. They also claimed that religious exercises resulted in minority children "confronting the fact of their difference from the majority". This was said to be a normal and healthy part of growing up which would contribute to the development of religious tolerance and understanding which is important in view of the multicultural heritage of Canadians.

In the Divisional Court, O'Leary J. held that the religious exercises prescribed by s. 28(1) did not infringe the guarantee of freedom of conscience and religion provided by s. 2(a) of the Charter. Alternatively, he held that, if the Charter freedom was infringed, the infringement was justifiable under s. 1 of the Charter which provides:

> 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.

He was of the view that the inculcation of morality was a proper educational object and that morality and religion were intertwined. If this resulted in any infringement on minority religious beliefs, it was not substantial. He

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pointed out that the religious exercises did not have to be Christian and, except in the case of non-believers, could be consistent with the Charter which, in its preamble, recognizes "the supremacy of God and the rule of law".

Anderson J. concurred with O'Leary J. for reasons which he described as "somewhat narrower". In his view, the Charter freedom under s. 2(a) would be infringed only if there were "coercion" on children to participate in the religious exercises. He held that coercion was negatived by the provision for exemption and stated at p. 780:

> The applicants and supporting intervenors argue, as indeed they must, having no alternative, that the right to abstain from the exercises or be absent from them, far from saving the regulation in fact condemns it; that the mere provision of this right implies that the exercises may be offensive to sane, and that the need to have recourse to the right of abstention or absence is in itself constraint, compulsion or coercion, or at least a major inducement. Thus baldly stated, the argument, in my view, offends logic and common sense. It is tantamount to saying that a right to refuse is a compulsion to accept. Choice is of the essence of freedom and the decision as to what choice is appropriate is often difficult. The difficulty is part of the price of freedom.

Reid J., in dissent, held that the position of religious minorities had to be appreciated and that it was no answer to their concerns to say that they should not be upset

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and that the religious exercises might be good for them. The effect of s. 28 was, in his view, to make one group, the religious majority, more equal than others, the religious minorities. He stated at p. 771:

> I have no doubt about the pressing need to encourage morality, but that religious exercises are necessary for its teaching is, in my opinion, a questionable proposition. I accept that they may be helpful, but necessity I cannot accept.

He found that the effect of the Act and the Regulations was to interfere with the Charter freedoms of conscience and religion of members of religious minorities and that it could not be justified under s. 1 of the Charter. He said at p. 772 that he did "not think" that s. 1

> ... was intended to be applied so as to justify an interference with the religious freedom of some but not of others. That would make the Charter contradict itself. If any interference may be justified by reason of s. 1, it seems to me it must be an interference not with the right of some to religious freedom, but with the right *of all.* In the result, I do not think the regulation can be defended upon s. 1."

3. HISTORICAL BACKGROUND

The place of religion in the public schools of Ontario has been a matter of concern and, sometimes, dispute throughout their history. It has two aspects: religious education and opening or closing religious exercises.

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Although almost all supporters of the public school system were Christian during the nineteenth century and most of this century, sectarian differences between Protestant denominations made it impossible to provide for religious instruction until 1944 when the present system was adopted. It was approved by the Royal Commission on Education in Ontario, 1950 (the Hope Commission) but its discontinuance was recommended by the Report of the Committee on Religious Education in the Public Schools of the Province of Ontario, 1969 (the Mackay Report). This recommendation was not adopted by the Government of Ontario.

This case is concerned with the other aspect of religion in public schools: opening or closing religious exercises. Such exercises were suggested as early as 1816 when it was recommended that "the labours of the day commence with prayer" and that "they conclude with reading publicly and solemnly a few verses of the New Testament". It appears that the recommendation was not universally followed. In 1855, a minute of the Council of Public Instruction recommended such opening and closing exercises with the significant addition that "no pupil should be compelled to be present at these exercises against the wish of his parents or guardian, expressed in writing to the Master of the School". In 1884, the opening of the school day with prayer and authorized scripture selections, read without comment or

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explanation, was made mandatory but children could be exempted if their parents wished. The Regulations of 1944 provided that the singing of God Save the King or O Canada, or both, should be part of the daily opening or closing exercises.

The continuance of such exercises was recommended both by the Hope Commission and the Mackay Committee. The latter Committee found that the opening exercises were more widely acceptable and less controversial than religious education. The Mackay Committee's Report states that it "sought to evaluate 'opening exercises' ... particularly in relation to our conclusion that there should be no religious indoctrination in the public school system." (p. 35). The Report then states:

> We were impressed by the fact, which we have noted was mentioned in several briefs, that many public functions in the province of Ontario, such as convocations, opening of the Legislature, and public meetings, are begun with the singing of the National Anthem and the reciting of a prayer. At gatherings such as these, people who object to the prayer usually stand in respectful silence without taking part. In the Committee's opinion,

> such opening ceremonies are indeed intrinsic in the culture *of* the province of Ontario. At school the child is being prepared for life in this society and accordingly participation in opening exercises at the beginning of each school day in the elementary grades is helpful in rounding out his education.

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> It was also brought forcibly to the Committee's attention, as previously noted, that to eliminate opening exercises would suggest that religion is not an integral part of the life of the people of this province. It is the Committee's view that religion does indeed play a vital part in our life and that the holding of opening exercises therefore exposes the child to a valuable learning experience in relation to the whole community in which he lives.

The opening exercises recommended by the Committee consisted of the "singing of the National Anthem and a prayer, either of universal character appealing to God for help in the day's activities, or the Lord's Prayer". The Committee felt that opening exercises in the hands of a sensitive and intelligent teacher could be expanded to "recognize national days such as Remembrance Day and significant religious days of all faiths such as Easter, Hanukkah, Christmas, or the Passover". The Committee recommended the cessation of Bible readings as part of the opening exercises, noting that the reading of the Bible had been criticized in numerous briefs for a variety of reasons. The Report emphasized that:

> The intention of the recommended opening exercises should be inspirational and dedicational rather than confessional. The above distinction is essential in order to permit participation by all students.

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Throughout its Report, the Mackay Committee demonstrated sensitivity to the change in the composition of the population of the province in post-war years and the present pluralistic nature of Ontario's society. It commented at pp. 36-37:

> The pluralistic nature of Ontario's society has been recognized by the Committee. The recommended opening exercises have religious significance for many and cultural significance for all. We are aware of the rights of minorities as well as the rights of the majority, and we have attempted to recognize the rights of both. What we have recommended is intended to fulfil a useful learning purpose, and should not be objectionable to most reasonable persons. Certainly, the opening exercises need provide no opportunity for indoctrination on the one hand or for watering down of individual belief on the other. We hope that all students will feel free to attend them in good heart.

Recognizing that the recommendation might not be universally approved, the Committee concluded:

> ... [T]he Committee is of the opinion that the opening exercises which we now recommend should be found acceptable to almost all reasonable persons. Isolated requests for exemption, on the basis of individual religious implications, may have to be dealt with on their merits as they arise. We would regret such necessity, but for democratic reasons must admit the possibility.

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It was not until 1978, nine years after the Mackay Committee Report, that the regulations governing opening religious exercises were changed by O.Reg. 704/78. The previous regulation, O.Reg. 30/44 said:

> 13.-(1)(a) Every public school shall be opened each school day with religious exercises consisting of the reading of the Scriptures and the repeating of the Lord's Prayer or other prayers approved for use in schools.

The revised regulation, which is now s. 28(1) of Regulation 262, R.R.O. 1980, is repeated for convenience:

> 28.-(1) A public school shall be opened or closed each school day with religious exercises consisting of the reading of the Scriptures or other suitable readings and the repeating of the Lord's Prayer or other suitable prayers. [Emphasis added.]

The revised regulations confer greater discretion on local school boards; While Bible readings are not terminated as recommended by the Mackay Report, they may now be replaced by 'other suitable readings'. As to prayers, the alternative to the Lord's Prayer becomes "other suitable prayers' and is not limited to 'approved" prayers as before.

Since World War II, Ontario has changed from a population composed almost entirely of Christians to an ethnically diverse, multi-religious and multicultural society. The Attorney General submitted that, whereas nineteenth century requirements for religious exercises

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recognized differences among Christian denominations, today's requirements must recognize both interdenominational differences and those between Christians and non-Christians.

This, it was said, was exemplified by the experience of the City of Toronto public schools. As early as 1975, before the new regulations took effect in 1978, the Toronto Board of Education undertook a re-examination of religious exercises. This led, in 1979, to the formation of an interdenominational committee to recommend suitable prayers and religious readings. In 1980, the committee published a book of prayers and readings which was revised in 1981 and again in 1984. The readings and prayers in the book are drawn from a number of sources

including Bahaism, Buddhism, Christianity, Confucianism, Hinduism, Islam, Jainism, Judaism, People of Native Ancestry, Secular Humanism, Sikhism, and Zoroastrianism. The book has been used in Toronto public schools for opening exercises since 1980.

The exercises now consist of the singing of O Canada, the reading of one or more selections from the book, followed by a moment of silent meditation and sometimes by comments by the teacher or principal, on the origins of the selections used. The Toronto program appears to have met with general acceptance but we share the doubt, expressed by Reid J. at

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p. 773, whether it complies with s. 28(1) which requires both prayers and readings.

It is against this background of legislation, fact and opinion that we now must consider whether s. 28(1) of the Regulations infringes the Charter freedom of conscience and religion. The approach to be taken in such an inquiry is now well established by judicial decisions. The first step is to determine whether the legislation in question prima facie interferes with a Charter right or freedom. If such interference is established, the second step is to determine whether it is justified under s. 1 of the Charter: see R. v. Oakes, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.

4. DOES S. 28(1) OF THE REGULATIONS INFRINGE CHARTER FREEDOMS UNDER S. 2(a)?

(a) The nature of freedom of conscience and religion

The nature of the Charter freedom of conscience and religion was examined by the Supreme Court of Canada in R. v. Big M Drug Mart, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321.

In that case, the Supreme Court held that the Lord's Day Act, R.S.C. 1970, c. L-13, which required uniform observance of the Christian Sabbath, was inconsistent with s. 2(a) of the Charter and for that reason was of no force or effect under s. 52(1) of the Constitution Act, 1982, which provides:

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> 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Chief Justice Dickson, speaking for the court, eloquently described the meaning of the words "freedom of conscience and religion". In its most traditional sense, freedom of religion means the unimpeded freedom to hold, profess and manifest religious beliefs, as he said at p. 336 S.C.R., p. 353 D.L.R..

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.

He continued by saying that "the concept means more than that" and stated that the freedom can "be characterized by the absence of coercion or restraint". He went on to say at p. 336 S.C.R., p. 354 D.L.R.:

> Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices.

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Another aspect of the Charter freedom of conscience and religion, which is of particular significance in this case, is freedom from conformity. The practices of a majoritarian religion cannot be imposed on religious minorities. The minorities should not be subject to the "tyranny of the majority", as Chief Justice Dickson said at p. 337 S.C.R., p. 354 D.L.R.:

> What may appear good and true to a majoritarian religious group, or the State acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of "the tyranny of the majority".

Chief Justice Dickson also emphasized, in a passage of importance in this case, that s. 2(a), by its very wording, protects the freedom of non-believers to abstain from participation in any religious practices. He said at p. 347 S.C.R., p. 362 D.L.R.:

> Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion.

The only limitation upon an individual's freedom of conscience or religion recognized by the Supreme Court of

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Canada is that its manifestation must not injure others or interfere with their right to manifest their own beliefs and opinions. Dickson C.J. said at p. 346 S.C.R., p. 361 D.L.R.:

> The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided, inter alia, only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.

In Big M, Dickson C.J. declared at p. 343 S.C.R., p. 359 D.L.R., that s. 2(a) of the Charter proclaimed freedom of conscience and religion in "ringing terms" and applied the purposive approach enunciated in Hunter et al. v. Southam Inc., [1984] 2 S.C.R. 145, in interpreting the Charter at p. 344 S.C.R., p. 360 D.L.R.:

> The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection.

This approach compels the re-evaluation of opening religious exercises in public schools. It can no longer be assumed that Christian practices are acceptable to the whole community. The extent of this change was emphasized by the Supreme Court of Canada in Big M, where Dickson C.J. said at p. 351 S.C.R., p. 365 D.L.R.:

> In an earlier time, when people believed in the collective

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> responsibility of the community toward some deity, the enforcement of religious conformity may have been a legitimate object of government, but since the Charter, it is no longer legitimate. With the Charter, it has become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be and it is not for the State to dictate otherwise. The State shall not use the criminal sanctions at its disposal to achieve a religious purpose, namely, the uniform observance of the day chosen by the Christian religion as its day of rest.

(b) Does s. 28(1) infringe the Charter freedom of conscience and religion?

In Sudbury, the Board's application of s. 28(1) of the Regulations imposes Christian religious exercises in the schools. The Board has not exercised the option open to it under s. 28(1) of providing non-Christian prayers and non-Biblical readings. The possibility that the Board might exercise this option does not, however, affect the outcome in this case. The substantive issue here is whether s. 28(1), which makes it possible for the Board to prescribe Christian religious exercises, violates s. 2(a) of the Charter.

On its face, s. 28(1) infringes the freedom of conscience and religion guaranteed by s. 2(a) of the Charter. This was conceded by the respondents. Section 28(1) is antithetical to the Charter objective of promoting freedom of

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conscience and religion. The recitation of the Lord's Prayer, which is a Christian prayer, and the reading of Scriptures from the Christian Bible impose Christian observances upon non-Christian pupils and religious observances on non-believers.

The respondents, however, take the position that s. 28 viewed as a whole did not violate the freedoms of conscience and religion guaranteed by s. 2(a) of the Charter. They contend that the right to claim exemption from Christian religious exercises, conferred by *s-ss.* 28(10), (11) and (12), eliminates any suggestion of pressure or compulsion on non-Christian pupils to participate in those exercises. Anderson *J.,* as noted above, found it offensive to "logic and common sense" that the necessity of requesting an exemption was a form of 'constraint, compulsion or coercion". At most, the Attorney General submitted, the necessity of requesting an exemption might be an "embarrassment" but was not coercive in its effect.

From the majoritarian standpoint, the respondent's argument is understandable but, in our opinion, it does not reflect the reality of the situation faced by members of religious minorities. Whether or not there *is* pressure or compulsion must be assessed from their standpoint and, in particular, from the standpoint of pupils in the sensitive

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setting of a public school. In saying this, we approve the analysis of Reid *J.* in the Divisional Court at p. 769 where he said:

> It may be that a control or limitation indirectly imposed is not readily appreciable to those who are not affected by it. It may be difficult for members of a majoritarian religious group, as I am, to appreciate the feelings of members of what, in our society, are minority religions. It may be difficult for religious people to appreciate the feelings of agnostics and atheists. Yet nevertheless those feelings exist. No one has suggested that the feelings expressed by applicants are not real, or that they do not run deep.

Later on the same page, he refers to the pressure operating on members of religious minorities in deciding whether to participate in or seek exemption from religious exercises:

> ... [I]f most of the pupils willingly conform, might not a few whose family faith is Moslem, or Hebraic or Buddhist, feel awkward about seeking exemption? Peer pressures, and

> the desire to conform, are notoriously effective with children. Does common experience not tell us that these things are so, and that such feelings might easily, and reasonably, lead some not to seek exemption, and unwillingly conform, or others to seek it, and be forced to suffer the consequences to their feelings and convictions?

While the majoritarian view may be that s. 28 confers freedom of choice on the minority, the reality is that it imposes on religious minorities a compulsion to conform to

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the religious practices of the majority. The evidence in this case supports this view. The three appellants chose not to seek an exemption from religious exercises because of their concern about differentiating their children from other pupils. The peer pressure and the classroom norms to which children are acutely sensitive, in our opinion, are real and pervasive and operate to compel members of religious minorities to conform with majority religious practices. We adopt the view on this issue expressed by Brennan J. in Abington School District v. Schempp (1963), 374 U.S. 203 where he said at p. 288:

> ...[B]y requiring what is tantamount in the eyes of teachers and schoolmates to a profession of disbelief, or at least of nonconformity, the procedure may well deter those children who do not wish to participate for any reason based upon the dictates of conscience from exercising an indisputably constitutional right to be excused. Thus the excusal provision in its operation subjects them to a cruel dilemma. In consequence, even devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists simply on the basis of their request.
>
> Such reluctance to seek exemption seems all the more likely in view of the fact that children are disinclined at this age to step out of line or to flout "peer-group norms".

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We consider that s. 28(1) also infringes freedom of conscience and religion in a broader sense. The requirement that pupils attend religious exercises, unless exempt, compels students and parents to make a religious statement. We agree with the the Mackay Committee that the effect of the exemption provisions is to discriminate against religious minorities. It said at p. 24 of its Report:

> It has been suggested to the Committee by several briefs that although the present course of study may appear to leave children open to Protestant religious indoctrination, the provisions for exemption of those whose parents object to the teaching offset the exposure. It is our view ... that this special treatment is in itself discriminatory and should as far as possible be eliminated from the public school system. ... It is important to see clearly where the responsibility in this situation lies: contrary to popular belief, discrimination is not the problem of those who are discriminated against but of the

> "smug majority" who permit the practice, and who alone have the power to end it. The public schools must surely be kept free of prejudices if society as a whole is to advance towards their elimination. Every course or program in the public school should be designed to be acceptable to all reasonable persons and, consequently, leave no justification for requiring discriminatory exemptions.

Although this statement was made by the Committee with reference to religious education, we think it applies equally to religious exercises.

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This conclusion of the Mackay Committee supports the appellants' argument, with which we agree, that the right to be excused from class, or to be exempted from participating, does not overcome the infringement of the Charter freedom of conscience and religion by the mandated religious exercises. On the contrary, the exemption provision imposes a penalty on pupils from religious minorities who utilize it by stigmatizing them as non-conformists and setting them apart from their fellow students who are members of the dominant religion. In our opinion, the conclusion is inescapable that the exemption provision fails to mitigate the infringement of freedom of conscience and religion by s. 28(1).

Other arguments were made for denying the applicability of s. 2(a) of the Charter to religious exercises. It was contended that they did no harm to pupils of minority religions. This assertion is not proven because, as earlier indicated, there was a difference of expert opinion on whether or not minority pupils were harmed. In any event, in our opinion, harm to individual pupils need not be proved by those who object to s. 28(1). It is irrelevant to the real issue which is whether the Charter freedom of conscience and religion is infringed. There is no burden on those objecting to s. 28(1) on this ground to prove, in addition, that it causes actual harm to individual pupils.

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The effect of religious exercises cannot be glossed over with the comment that the exercises may be "good" for minority pupils. This view was expressed, as we indicated above, by a psychologist in supporting the Board's case who said that it was salutary for minority pupils to confront "the fact of their difference from the majority". This insensitive approach, in our opinion, not only depreciates the position of religious minorities but also fails to take into account the feelings of young children. It is also inconsistent with the multicultural nature of our society as recognized by s. 27 of the Charter which declares:

> 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

It was also argued that any infringement by s. 28(1) of the Charter freedom of conscience and religion was so trivial and insubstantial that it was not worthy of Charter protection. We reject this argument and, with respect, cannot agree with O'Leary *J.* that it applies in this case. In our opinion, judged on a purely factual basis, the denigration of the minorities' freedom of conscience and religion by the operation of s. 28(1) constitutes an infringement of *s.* 2(a) of the Charter which is not "insubstantial or trivial": see Jones v. The Queen, [1986] 2 S.C.R. 284, 31 D.L.R. (4th) 569 per Wilson J. at p. 314

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S.C.R., p. 578 D.L.R. and Edwards Books and Art Limited v. The Queen, [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1 per Dickson C.J. at pp. 759-760 S.C.R., pp. 34-35 D.L.R.

Counsel for the Board submitted that s. 28(1) of the Regulations was consistent with the preamble of the Charter which declares:

> Canada is founded upon principles that recognize the supremacy of God and the rule of law.

It is a basic principle in the construction of statutes that a preamble is rarely referred to and, even then, is usually employed only to clarify operative provisions which are ambiguous. The same rule, in our view, extends to constitutional instruments. There is no ambiguity in the meaning of s. 2(a) of the Charter or doubt about its application in-this case. Whatever meaning may be ascribed to the reference in the preamble to the "supremacy of God", it cannot detract from the freedom of conscience and religion guaranteed by s. 2(a) which is, it should be noted, a "rule of law" also recognized by the preamble.

Both the appellants and the respondents referred to two leading decisions of the United States Supreme Court on state legislation which mandated opening prayers and devotional bible readings in public schools but permitted pupils to be excused if requested by their parents: Engel v. Vitale (1962), 370 U.S. 421

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and Abington School District v. Schempp, supra. The legislation in both cases was declared unconstitutional because it violated the First Amendment of the Constitution of the United States the relevant part of which reads:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

The first part of the First Amendment is referred to in United States constitutional law as the "establishment clause" and the second as the "free exercise clause". In both cases, the court held the legislation to be invalid because it violated the establishment clause.

The respondents argued that, because the Charter contained no establishment clause, s. 28(1) could not be invalidated. A similar argument was made in Big M, supra, but was rejected by Chief Justice Dickson who said at at p. 339 S.C.R., p. 356 D.L.R.:

> In my view this recourse to categories from the American jurisprudence is not particularly helpful in defining the meaning of freedom of conscience and religion under the Charter. The adoption in the United States of the categories "establishment" and "free exercise" is perhaps an inevitable consequence of the wording of the First Amendment. The cases illustrate, however, that these are not two totally separate and distinct categories, but rather, as the Supreme Court of the United States has frequently recognized, in specific instances "the two clauses may overlap".

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He concluded that American decisions on freedom of religion must be applied with care by Canadian courts and said at p. 341 S.C.R., p. 357 D.L.R.:

> In my view the applicability of the Charter guarantee of freedom of conscience and religion does not depend on the presence or absence of an "anti-establishment principle" in the Canadian Constitution, a principle which can only further obfuscate an already difficult area of the law.

The United States Supreme Court had no difficulty in striking down the legislation in the Engel and Abington cases under the establishment clause. The justices, however, in obiter differed on whether the legislation also offended the free exercise clause. In Engel, the justices were of the view that mandatory school prayer with an exemption provision did not appear to be coercive enough to constitute a free exercise clause violation. Their opinions echoed that of Justice Jackson in McCollum v. Board of Education (1948), 333 U.S. 203 at p. 232 that the risk of embarrassment of non-conforming students seeking exemption from religious instruction did not amount to coercion.

While the majority judgment in Abington struck down the legislation on the basis of the establishment clause, Justice Brennan, in a concurring opinion, held that it also violated the free exercise clause. He said at p. 288:

> The more difficult question, however, is whether the availability

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> of excusal for the dissenting child serves to refute challenges to these practices under the Free Exercise Clause. While it is enough to decide these cases to dispose of the establishment questions, questions of free exercise are so inextricably interwoven into the history and present status of these practices as to justify disposition of this second aspect of the excusal issue. The answer is that the excusal procedure itself necessarily operates in such a way as to infringe the rights of free exercise of those children who wish to be excused. We have held ... that a State may require neither public school students nor candidates for an office of public trust to profess beliefs offensive to religious principles. By the same token the State could not constitutionally require a student to profess publicly his disbelief as the prerequisite to the exercise of his constitutional right of abstention. [Emphasis added.]

As indicated above, we adopt his view that the excusal clause did not preclude a finding of coercion because pupils under peer pressure would be reluctant to call attention to their differences by taking advantage of it. Like Brennan J. we are also of the opinion that the exemption procedure has the chilling effect of discouraging the free exercise of the freedom of conscience and religion. He said at p. 288:

> ... Moreover, the excusal procedure seems to me to operate in such a way as to discourage the free exercise of religion on the part of those who might wish to utilize it, thereby rendering it unconstitutional in an additional and quite distinct respect.

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Two conclusions can be drawn from the American decisions. The first is that the absence *of an* establishment clause in s. 2(a) does not limit the protection it gives to freedom of conscience and religion. The second is that support can be found in Abington, the most recent major decision on school prayer, for our conclusion that the compulsion on students to conform and not exercise the right of exemption is a real restraint on the freedom of conscience and religion guaranteed by the Charter.

(c) Can s. 1 be invoked to justify the Charter infringement?

It follows from our analysis that s. 28(1) of the Regulations constitutes a *prima* facie infringement of the appellants' rights under s. 2(a) of the Charter. In a usual Charter case, the burden passes at this stage to the parties upholding the Charter infringement to show on a balance of probabilities that it is justifiable under s. 1 of the Charter: R. v. Oakes, supra. In this case, however, the appellants contended that, since the very purpose of s. 28 of the Regulations violated s. 2(a) of the Charter, it was incapable of justification under s. 1.

In making this argument, the appellants relied on Big M where the Supreme Court found that the true purpose of the Lord's Day Act was to "compel the observance of the

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Christian Sabbath". Dickson C.J. said at p. 353 S.C.R., p. 367 D.L.R.:

> The characterization of the purpose of the Act as one which compels religious observance renders it unnecessary to decide the question of whether s. 1 could validate such legislation whose purpose was otherwise or whether the evidence would be sufficient to discharge the onus upon the appellant to demonstrate the justification advanced.

He rejected the argument that the Act might be validated under s. 1 because it accomplished an important secular objective in providing for a weekly day of rest from work. On this point, he said at p. 353 S.C.R., p. 366 D.L.R.:

> It seems disingenuous to say that the legislation is valid criminal law and offends s. 2(a) because it compels the observance of a Christian religious duty, yet is still a reasonable limit demonstrably justifiable because it achieves the secular objective the legislators did not primarily intend. The appellant can no more assert under s. 1 a secular objective to validate legislation which in pith and substance involves a religious matter than it could assert a secular objective as the basis for the argument that the legislation does not offend s. 2(a).

He also emphasized that it was the initial purpose of the legislation which determined its true character and that this was not changed by any alteration in its effects *as a* result

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of changing times and circumstances. He said at p. 336 S.C.R., p. 353 D.L.R.:

> While the effect of such legislation as the Lord's Day Act may be more secular today than it was in 1677 or 1906, such a finding cannot justify a conclusion that its purpose has similarly changed. In result, therefore, the Lord's Day Act must be characterized as it has always been, a law the primary purpose of which is the compulsion of sabbatical observance.

In contrast, the Supreme Court's decision in Edwards Books, supra, held that the Retail Business Holidays Act, R.S.O. 1980, c. 453, which prescribed Sunday as a holiday for retail stores, was not religiously motivated but was enacted for the secular purpose of providing uniform holidays for retail workers. Although it infringed the religious freedoms of members of minority religions whose Sabbath was on a day other than Sunday, it was held to be justifiable under s. 1 and its validity under the Charter was upheld.

The appellants contended that there was no saving secular purpose in s. 28(1). Its wording and, in the appellant's submission, its legislative background going back to the earliest times indicated that its purpose was religious and that, like the Lord's Day Act in Big M, it was incapable of justification under s. 1. The Attorney General and the Board, on the other hand, asserted that s. 28(1) had

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paramount secular objectives, both educational and moral, and that the religious exercises served those purposes. In support of their arguments, counsel on both sides referred us to the reports of the Hope Commission, the Mackay Committee, and other historical materials.

After a careful consideration of the Act, the Regulations, and other materials placed before us, we have concluded that the purpose of Regulation 28(1) is religious and that the exercises mandated by the Regulation were intended to be religious exercises. This is the only conclusion which can be drawn from the wording of the Act and the Regulations. This view is confirmed by the specific provision for exemption contained in s. 50(2) of the Act which for illustrative purposes we repeat:

> (2) No pupil in a public school shall be required to read or study in or from a religious book, or to join in an exercise of devotion or religion, objected to by his parent or guardian, or by the pupil, where he is an adult.

It is clear that the exemption provision is included in the Act because the exercises were intended to serve religious and not secular purposes.

At their inception in 1816, there is no doubt that the opening and closing religious exercises were intended to serve the purpose of imbuing education with Christian

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principles. Later in the nineteenth century, when the exercises were made mandatory, there was again no doubt as to their religious purpose. Dr. Egerton Ryerson, the founder of Ontario's public school system, stated in his "Report on a System of Public Elementary Education of Upper Canada" that "as Christianity is the basis of our whole system of elementary education, that principle should pervade throughout". The objective of the religious exercises mandated in the nineteenth century was not changed in this century. When the Regulations were last amended in 1978, it can be taken that they reflected the conclusions of the Mackay Committee of 1969, quoted above, that the exercises were

intended to continue to serve a religious purpose. The Mackay Committee at p. 34 accepted the view that:

> [t]he absence of opening exercises would indicate that religion was not an integral part of life and make the school wholly secular. Opening exercises, reverently conducted, could set the tone for the day and give strength and peace of mind. Learning to worship at the beginning of each day may initiate in the child a habit which will govern his attitudes and conduct.

In this case it cannot be argued, as it was in Big M, that over time the purpose of the impugned regulation had shifted from religious to secular objectives. Its religious character was reinforced by the Mackay Report. The opening exercises may have secular moral and educational effects but

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these are, in our opinion, merely derivative from their religious objective. It is the purpose and not the impact of legislation which is determinative for constitutional purposes. Dickson C.J.C. said in Big M, at p. 331 S.C.R., p. 350 D.L.R.:

> Moreover, consideration of the object of legislation is vital if rights are to be fully protected. The assessment by the courts of legislative purpose focuses scrutiny upon the aims and objectives of the Legislature and ensures they are consonant with the guarantees enshrined in the Charter. The declaration that certain objects lie outside the Legislature's power checks governmental action at the first stage of unconstitutional conduct. Further, it will provide more ready and more vigorous protection of constitutional rights by obviating the individual litigant's need to prove effects violative of Charter rights. It will also allow courts to dispose of cases where the object is clearly improper, without inquiring into the legislation's actual impact.

Chief Justice Dickson then referred with approval to A.-G. Que. v. Quebec Ass'n of Protestant School Boards et al., (1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321 at p. 332 S.C.R., p. 351 D.L.R.:

> I would note that this approach would seem to have been taken by this court, in its unanimous decision in A.-G. Que. v. Quebec Ass'n of Protestant School Boards et al. ... When the court looked for an obvious example of legislation that constituted a total negation of a right guaranteed by the Charter, and therefore one to which the limitation

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> in s. 1 of the Charter could not apply, it recited the following hypothetical at p. 88 S.C.R., p. 338 D.L.R.:
>
> > An Act of Parliament. or of a legislature which, for example, purported to impose the beliefs of a State religion would be in direct conflict with s. 2(a) of the Charter, which guarantees freedom of conscience and religion, and would have to be ruled of no force or effect without the necessity of even considering whether such legislation could be legitimized by s. 1.

5. COULD SECTION 28(1) HAVE BEEN JUSTIFIED UNDER SECTION 1 OF THE CHARTER?

Although we have concluded that this Charter . infringement is incapable of justification under s. 1, we think it proper to state that the result would be the same if s. 1 applied. For convenience, we repeat the section which reads as follows:

> 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.

In R. v. Oakes, supra, at pp. 138-140, the Supreme Court of Canada laid down the procedure which must be followed in deciding whether legislation *infringing* Charter

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rights can be justified under s. 1. First, it must be determined whether the legislative objective is sufficiently important to warrant overriding the Charter right or freedom. If it is, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This, in turn, requires the application of the three components of what the Supreme Court of Canada called the "proportionality test", which requires a balancing of the objective of the legislation with its effects. The first question to be asked is whether the legislation is rationally connected to the objective. The second is whether the means chosen impair the Charter right or freedom as little as possible. The third is whether there is proportionality between the objective and the effects of the measures in limiting Charter rights or freedoms.

It is not necessary, in this case, to conduct a ritualistic step-by-step inquiry under each of the four elements of the Oakes test. If the respondent fails under one element of the test, the Charter infringement cannot be justified. We propose, therefore, to consider the most vulnerable element of the test from the respondent's standpoint which is whether s. 28(1) impairs the appellants' freedoms under s. 2(a) "as little as possible". For the purposes of this inquiry we will assume, without deciding, that s. 28(1) could have been justified under the first two

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elements of the test as having an objective sufficiently important to warrant overriding the Charter freedom under s. 2(a) and as being rationally connected to the attainment of that objective.

The experience of the Toronto Board of Education convincingly demonstrates that there are less intrusive ways of imparting educational and moral values than those provided in s. 28. The Toronto experience, which was fully described above and need not be repeated here, shows that it is not necessary to give primacy to the Christian religion in school opening exercises and that they can be more appropriately founded upon the multicultural traditions of our society. In saying this we are not to be taken as passing a constitutional judgment on the opening exercises used in Toronto public schools. They were not in issue before us and we express no opinion as to whether they might give rise to Charter scrutiny.

6. CONCLUSION

Since s. 28(1) infringes the appellants' Charter freedoms and could not, in any event, have been justified under s. 1, the appellants are entitled to the declaration they seek under s. 52 of the Constitution Act, 1982 that s. 28(1) of the Regulations is of no force and effect.

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The appellants also appeal against the Divisional Court's dismissal of their application for a declaration that s. 50 of the Education Act and s. 28 of the Regulations violate s. 15(1) of the Charter, the Religious Freedom Act, R.S.O. 1980, c. 444 and the Ontario Human Rights Code, S.O. 1981, c. 53. In view of our decision on the application of the Charter in this case, it is unnecessary to address these issues.

In the result we allow the appeal, set aside the order of the Divisional Court and, in its place, direct that a declaratory judgment in the terms set out above be entered for the appellants. The appellants shall have their costs in this court as well as in the Divisional Court but there will be no costs for the intervenors.

[S]

[S]

[S]

[S]

LACOURCIERE J.A. (dissenting):

I have had the advantage of reading the reasons for judgment prepared by my colleagues. They canvass the factual and historical backgrounds and it is unnecessary for me to repeat what has been comprehensively reviewed by them. With respect, I am unable to agree that s.50 of the Education Act and s.28(1) of Regulation 262 infringe the freedom of conscience and religion guaranteed by s.2(a) of the Charter. I am further of the opinion that while s.28 does not infringe the equality rights guaranteed by s.15 of the Charter, the prevailing practice of the Sudbury Board of Education at the relevant time constituted a violation of that section. I agree with the conclusion of the Divisional Court on the main ground of appeal, basically for the reasons given by the majority, but I would like to state my own reasons for the disposition of the appeal which I propose. I will deal first with the argument based on s.2(a) of the Charter, considering separately the purpose and effect of the impugned regulation, before considering s.15.

I. WHETHER S.28 OF THE REGULATION IS AN INFRINGEMENT OF S.2(a) OF THE CHARTER

A. The Purpose of Section 28

The initial test of the constitutional validity of legislation requires an *examination* of its purpose. In R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, Chief Justice Dickson (then Dickson J.) said at p.331:

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> ..In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation....

And at p.334 he said:

> ...[T]he legislation's purpose is the initial test of constitutional validity and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test....

In my opinion, s.28(1) has a secular educational purpose with a religious component. For convenience, I have set out s.50 Df the Education Act and s-ss.1 and 10 of s.28 of Regulation 262, R.R.O. 1980:

> 50.--(1) Subject to the regulations, a pupil shall be allowed to receive such religious instruction as his parent or guardian desires or, where a pupil is an adult, as he desires.

(2) No pupil in a public school shall be required to read or study in or from a religious book, or to join in an exercise of devotion or religion, objected to by his parent or guardian, or by the pupil, where he is an adult.

***

28.--(1) A public school shall be opened or closed each school day with religious exercises consisting of the reading of the Scriptures or other suitable readings and the repeating of the Lord's Prayer or other suitable prayers.

…

(10) No pupil shall be required to take part in any religious exercises or be subject to any instruction in religious education where his parent or, where the pupil is an adult, the pupil applies to the principal of

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the school that the pupil attends for exemption of the pupil therefrom.

It should be noted at the outset that s.50 of the Education Act and the regulations thereunder have never been constitutionally challenged as being ultra vires the provincial legislature on the basis that they are legislation in relation to religion and violate religious freedom. It is clear that the regulation is intra vires the Education Act and that, on its face, the Act contemplates religious exercises as an aspect of the public school system. The absence of a constitutional challenge against this legislation or its predecessors during a period of 120 years can be interpreted as a tacit acknowledgment that it is, in pith and substance, legislation with an educational purpose within the competence of the provincial legislature and that it is not, in pith and substance, legislation in relation to religion or legislation with an underlying purpose to compel religious practice.

In seeking to determine the purpose of the impugned legislation, the inquiry should not be confined to the nineteenth century approach to religious exercises in schools at a time when Ontario society was almost entirely Christian. The only relevance of the earlier approach is to provide a historical background. The 1978 amendment to what is presently s.28 of Regulation 262, which allows other suitable readings and the repeating of other suitable prayers, reflects the continuing evolution of Ontario society by reason of the flow of immigrants with diverse cultural

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and religious backgrounds. The amendment allowed the development of the book of readings and prayers by the Toronto Board of Education, which draws on a wide range of religious traditions and on secular humanism, thereby properly reflecting and respecting multicultural

and multireligious differences and diversities. I disagree with the statement in the majority judgment that the Regulation retained a "religious objective" with a derivative secular, moral and educational effect. The crucial 1978 amendment reinforces my opinion that the Regulation always had an educational objective, while attempting to accommodate a society with increasingly diverse religions.

If the regulation itself had a religious purpose, such purpose would be defeated by provisions in s.28, one of which allows any suitable reading and prayer in the opening exercises and another which allows an exemption from these exercises. I agree with the argument of the respondent Board that exercises with a religious component which are aimed at fostering moral principles encouraging honesty, integrity and good citizenship constitute a worthy educational goal, a view which was emphasized by the Report of the Hope Commission in the following words:

> There are few educators who would not agree that the schools should be concerned, above everything else, with the kind of person they are helping to produce. We should never forget that the verb "to educate" as defined in the Concise Oxford Dictionary, means "to give intellectual and moral training". It is the duty of the school to aid its pupils to develop strength of character....

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It is important, in my opinion, for the educational system to instill personal values in its pupils so that they may be prepared for the challenges of life. I agree with what was said by Audrey S. Brent in an article "The Right to Religious Education and the Constitutional Status of Denominational Schools" (1975-76), 40 Sask. L. Rev. 239 where she said at p. 243:

> Thus, one thing is noticeable about the philosophies of state and religion: there is no consensus. Why must there be any consensus? The educational system can and should accommodate all groups -- not by driving any religious element out, but by allowing groups with similar goals and objectives, or similar views of society or with similar beliefs to transmit these values to their children through the educational system. After all, that is the purpose of the educational system and as long as no one group can prove their values to be superior to another group's values, there is no justification for seeking to eradicate them.

Therefore, while the purpose and the ultimate goal of the section are educational in the broad sense of the word, one must recognize that the prescribed exercises have a religious component which gives rise to the unqualified right of the pupil or the parent to require an exemption. The regulation is not "purely religious in purpose".

Given the religious component of the prescribed exercise and even if it is granted that the appellants were

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correct in asserting that these exercises evince a religious purpose, it does not necessarily follow that s.28 violates s.2(a) of the Charter. The Lord's Day Act was held to violate the Charter in R. v. Big M Drug Mart Ltd., supra, not because it was aimed at facilitating or encouraging sabbatical observance, but by reason of the criminal sanction which creates the elements of compulsion, coercion or constraint for sabbatical observance on a day preferred by the Christian religion: Chief Justice Dickson at pp.330, 333 and 336. At pp.336-37 he said:

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the State or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and *constraint,* and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.
>
> What may appear good and true to a majoritarian religious group, or to the State acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from th— e great of "the *tyranny* of the majority".

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Similarly, in Edwards Books and Art Limited et al. v. The Queen, [1986] 2 S.C.R. 713, the Sunday closing legislation was found to have a secular purpose which was not offensive to the Charter guarantee because it did not compel religious observance. Dickson C.J.C., in referring to Big M, said at pp.758-59:

> The Court was concerned in that case with a direct command, on pain of sanction, to conform to a particular religious precept. The appeals with which we are now concerned are alleged to involve two forms of coercion. First, it is argued that the Retail Business Holidays Act makes it more expensive for retailers and consumers who observe a weekly day of rest other than Sunday to practise their religious tenets. In this manner, it is said, the Act indirectly coerces these persons to forego the practice of a religious belief. Second, it is submitted that the Act has the direct effect of compelling non-believers to conform to majoritarian religious dogma, by requiring retailers to close their stores on Sunday.

…

> This does not mean, however, that every burden on religious practices is offensive to the constitutional guarantee of freedom of religion. It means only that indirect or unintentional burdens will not be held to be outside the scope of Charter protection on that account alone. 'MT= 2(a) does not require the legislatures to eliminate every miniscule state-imposed cost associated with the practice of religion....

Section 28 of the Regulation is expressed in mandatory terms subject to the provision of individual exemptions. In contrast to the legislation impugned in Big M, it is clear that s.28 does not seek to compel participation in exercises with a religious component by all public school children. I agree that indirect forms of coercion may result in a Charter violation, but

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whatever may be the indirect effect of the Regulation, it cannot reasonably be suggested that its purpose is to compel participation in these exercises when the exemption is cast in such broad terms.

If the purpose of the impugned Regulation is therefore to encourage or support religion, without compelling religious observance, is it nevertheless violative of the Charter? An issue which was left open in Big M and Edwards Books, supra, is whether s.2(a) of the Charter prohibits all governmental aid to or advancement of religion as se. The heart of the s.2(a) challenge to s.28 of Regulation 262 comes from those who would demand the abolition of all religious exercises in schools. Even if s.28 showed no favouritism between religions and provided for all equally, all of the appellants would still want it struck down because, as it became clear during the course of their argument, they are opposed to religion generally in schools. The issue is essentially a matter of freedom of conscience: is the state-created opportunity to participate in or facilitation of any religious activity an unconstitutional purpose?

Traditional American constitutional law doctrine holds that any state aid to religion violates the Establishment Clause of the First Amendment, although there continues to be considerable debate on the issue. The relevant part of the First Amendment reads:

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> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;...

The two Religion Clauses of the First Amendment quoted above have been applied to the states by virtue of the Fourteenth Amendment: Cantwell et al. v. Connecticut (1940), 310 U.S.

296. A leading case on the Establishment Clause, Everson v. Board of Education of the Township of Ewing et al. (1947), 330 U.S. 1 contains the following passage (at pp.15-16):

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the— clause against establishment of religion by law was intended to erect "a wall of separation between church and State."... [Emphasis added.]

The modern American approach to Establishment Clause analysis has been governed by the three-part test developed in Lemon et al. v. Kurtzman, Superintendent of Public Instruction of Pennsylvania, et al. (1971), 403 U.S. 602 at 612-13. The case involved the validity of a Rhode Island statute which authorized

the payment of a salary supplement to teachers of secular subjects in non-public elementary schools, and of a Pennsylvania statute which authorized the purchase of certain secular educational services from non-public church-related schools. Both statutes were held unconstitutional. In order to pass Establishment Clause scrutiny, a challenged statute must (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not foster excessive government entanglement with religion. Generally, then, the Establishment Clause prohibits government action that aids or inhibits religion, either on purpose or in its primary effect.

In applying this principle to the issue of school prayer and Bible reading, the U.S. Supreme Court has consistently found that such practices are a violation of the First Amendment. In Engel et al. v. Vitale et al. (1962), 370 U.S. 421, the court, with Stewart J. dissenting, held that state officials may not require that a denominationally neutral prayer be recited in the public schools of the State of New York, even though the students could remain silent or be excused from the classroom during the prayer. In School District of Abington Township, Pennsylvania et al. v. Schempp et al. (1963) 374 U.S. 203, it was decided that no state law or school board could require Bible readings or the recitation of the Lord's Prayer for opening exercises, even

if individual students were allowed to be excused. Stone et al. v. Graham, Superintendent of Public Instruction of Kentucky (1980), 449 U.S. 39 is a per curiam judgment of the Supreme Court

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(Rehnquist J., as he then was, dissenting) holding that a State of Kentucky statute requiring a posting of a copy of the Ten 2ommandments on the wall of each public school classroom had a pre-eminent religious purpose which violated the Establishment clause of the First Amendment. In Engel, supra, Mr. Justice Black, delivering the opinion of the court, said at p.430:

> ...The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not....

Mr. Justice Black's statement that coercion is not an element of Establishment Clause analysis has been criticized (McConnell, "Coercion: The Lost Element of Establishment" (1986), 27 William and Mary Law Review 933). McConnell's view is that the courts should be more hospitable to liberty - enhancing accommodations of religion, and he argues for a model of "religious pluralism" rather than "strict neutrality" or "strict separation" (McConnell, "Accommodation of Religion", [1985] Sup. Ct. Rev. 1). Some support for this view may be found in Stewart J.'s dissent in Abington, supra, where he said (at p.316):

> ...In the absence of coercion upon those who do not wish to participate - because they hold less strong beliefs, other beliefs, or no beliefs at all - such provisions cannot, in my view, be held to represent the type of support of religion barred by the Establishment Clause....

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Nevertheless, the weight of U.S. authority favours the position that, as a general principle, state support for religion, even in the absence of any element of compulsion, violates the Establishment Clause of the First Amendment.

Accommodation of religion is an issue in U.S. cases because a rigid application of the Lemon test regarding the Establishment Clause can have the effect of infringing on the "free exercise" of religion, which is also protected by the First Amendment. In Walz v. Tax Commission of the City of New York (1970), 397 U.S. 664, property tax exemptions for religious organizations were challenged as violating the Establishment

Clause. In upholding the constitutionality of the statute, the court commented on the "sweeping utterances" in Engel and Everson, supra, and noted at pp.668-69:

> The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other....
>
> …
>
> ...The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. [Emphasis added.].

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The court concluded, with respect to the tax exemption, it pp.672-73:

> The legislative purpose of the property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility.
>
> …
>
> ...We cannot read New York's statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private property institutions.

Walz, supra, was decided before Lemon, supra, but it is relevant to the analysis of those cases that fall in the area between state concessions to religion required by the Free Exercise Clause and those prohibited by the Establishment Clause. Thus, for example, in Lynch, Mayor of Pawtucket, et al. v. Donnelly et al. (1984), 465 U.S. 668, the display of a crèche or Nativity scene in a private park in the city of Pawtucket, R.I., was challenged on the ground that it violated the First Amendment. The court found no violation. Chief Justice Burger, delivering the opinion of the court, noted that while the description of the Religion Clauses as erecting a "wall of separation" between church and state is a useful figure of speech, it is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state. He further states at p.673:

> No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government.... Nor does the Constitution require complete separation of church and state; it affirmatively

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> mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.

Later Burger C.J. said at p.674:

> There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789....

He then quoted a short passage from Zorach et al. v. Clauson et al., Constituting the Board of Education of the City of New York, et al. (1952), 343 U.S. 306, where the court stated at p.313:

> We are a religious people whose institutions presuppose a Supreme Being....

The court went on to state (at pp.313-14):

> ...We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe....

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The above passages should not be taken as indicating that aid to religion is necessarily permissible, but rather that a religious purpose alone will not always justify the constitutional invalidation of legislation even when an "anti-establishment" principle governs, as in the United States. The U.S. Supreme Court is divided on what constitutes permissible accommodation of religion, and at least some believe that the Establishment Clause does not require the banning of all religious activity from the public sphere.

A recent case that highlights the uncertain state of American law is Wallace, Governor of Alabama, et al. v. Jaffree et al. (1985), 472 U.S. 38. The court struck down a statute that authorized a period of silence "for meditation or voluntary prayer" because it manifested an impermissible endorsement of prayer during that moment of silence. Chief Justice Burger dissented on the ground that striking down the statute merely because of the inclusion of the word "prayer" manifests not neutrality but hostility towards religion (at pp.89-90):

> ...The statute does not remotely threaten religious liberty; it affirmatively furthers the values of religious freedom and tolerance that the Establishment Clause was designed to protect. Without pressuring those who do not wish to pray, the statute simply creates

> an opportunity to think, to plan, or to pray if one wishes -- as Congress does by providing chaplains and chapels. It accommodates the purely private, voluntary religious choices of the individual pupils who wish to pray while at the same time creating a time for nonreligious reflection for those who do not choose to pray. The statute also provides a meaningful opportunity for schoolchildren to appreciate the absolute constitutional right of each individual to worship and believe as

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> the individual wishes. The statute "endorses" only the view that the religious observances of others should be tolerated and, where possible, accommodated. If the government may not accommodate religious needs when it does so in a wholly neutral and noncoercive manner, the "benevolent neutrality" that we have long considered the correct constitutional standard will quickly translate into the "callous indifference" that the Court has consistently held the Establishment Clause does not require.

Perhaps most significantly, it appears that if the Supreme Court had been faced with a moment of silence statute that referred only to "meditation" and not to "prayer", it would have been upheld provided that it was not passed for entirely religious purposes and that it was not used as a means for governmental encouragement of religious beliefs on public school property (Rotunda, Nowak and Young, Treatise on Constitutional Law: Substance and Procedure (1986), vol.3, p.390).

The relevance of American cases to the issue of the constitutional permissibility in Canada of state aid for religion is limited by the fact that there is no express equivalent of the Establishment Clause in s.2(a) of the Charter. In Big M, Chief Justice Dickson expressed the view that recourse to the American categories of "establishment" and "free exercise" is not particularly helpful in defining the meaning of freedom of conscience and religion under the Charter (at p.339). More specifically, he said, in a passage to which the majority referred, at p.341:

> In my view the applicability of the Charter guarantee of freedom of conscience and

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> religion does not depend on the presence or absence of an "anti-establishment principle" in the Canadian Constitution, a principle which can only further obfuscate an already difficult area of law....

Chief Justice Dickson's point is that the absence of an establishment clause does not help settle s.2(a) cases one way or the other. Thus one cannot rely on the absence of an anti-establishment principle to justify non-coercive state aid to religion. However, the American cases are useful to the extent that they deal with the issue of accommodation of religion by the government.

One cannot ignore the positive features of the Canadian Constitution which suggest a different relationship between church and state than that which exists in the United States. The Attorney General, in its factum, claims that the Constitution Act, 1867, and the Charter have "built a bridge between church and state rather than a wall of separation". Reference is made to the preamble of the Charter, which states:

> Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:...
>
> ***
>
> Attendu que le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu et la primauté du droit:...

The preamble of the Canadian Bill of Rights contains a similar acknowledgment:

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> The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;
>
> Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;...
>
> ***
>
> Le Parlement du Canada proclame que la nation canadienne repose sur des principes qui reconnaissent la suprématie de Dieu, la dignité et la valeur de la personne humaine ainsi que le role de la famille dans une société d'hommes libres et d'institutions libres;
>
> Il proclame en outre que les hommes et les institutions ne demeurent libres que dans la mesure où la liberté s'inspire du respect des valeurs morales et spirituelles et du règne du droit;...

In Reference re Language Rights under Section 23 of the Manitoba Act, 1870, and Section 133 of the Constitution Act, 1867, [1985] 1 S.C.R. 721, the Supreme Court of Canada sanctioned reliance on the preambles to the Constitution Acts, and the general object and purpose of the Constitution, in inferring constitutional principles (at p.751).

The preamble to the Charter is probably no more than an interpretive tool and it is clear that it cannot be relied on to derogate from the substantive rights guaranteed in the Charter. But it does lend credence to the view that a strict separation of church and state is not contemplated by the Charter, and that the

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advancement of religion is permissible as long as it does not infringe anyone's religious freedom. In McBurney v. The Queen (1984), 84 D.T.C. 6494, Muldoon J. of the Federal Court Trial Division characterized the situation as follows (at p.6496):

> ...[I]t is not stretching matters to say that even in the modern, secular age the advancement of religion is rooted in our law
>
> and in our Constitution. That policy is readily discernable in the declaratory preambles to the Canadian Bill of Rights, R.S.C. 1970, Appendix III and the Canadian Charter of Rights and Freedoms which both affirm that Canada "is founded upon principles that" acknowledge and recognize "the supremacy of God", and the "rule of law"....
>
> ...So it is that while Canada may aptly be characterized as a secular State, yet, being declared by both Parliament and the Constitution to be founded upon principles which recognize "the supremacy of God", it cannot be said that our public policy is entirely neutral in terms of "the advancement of religion"....

Support for the proposition that the Canadian Constitution has built a bridge between church and state in the realm of public education can be gleaned from a reading of s.93(1) of the Constitution Act, 1867, which provides:

> 93.(1) Nothing in any such law shall prejudically affect any Right or Privilege with respect to Denominational Schools which any class of Persons have by law in a Province at the Union:...
>
> ***
>
> 93.(1) Rien dans ces lois ne devra préjudicier à aucun droit ou privilège conféré, lors de l'union, par la loi à aucune classe particulière de personnes dans la province,

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> relativement aux écoles séparées (denominational);...

The protection afforded denominational schools has been included in s.29 of the Charter which reads:

> 29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.
>
> ***
>
> 29. Les dispositions de la présente charte ne portent pas atteinte aux droits ou privilèges garantis en vertu de la Constitution du Canada concernant les écoles séparées et autres écoles confessionnelles.

The significance of the entrenchment of educational rights was explained in the majority decision of the Ontario Court of Appeal in Reference re an Act to Amend the Education Act (1986), 53 O.R. (2d) 513 at 575-76:

> These educational rights... make it impossible to treat all Canadians equally. The country was founded upon the recognition of special or unequal educational rights for specific religious groups in Ontario and Quebec. The incorporation of the Charter into the Constitution Act, 1982 does not change the original Confederation bargain [Quoted approvingly by Wilson J. in the appeal to the Supreme Court of Canada in Reference re an Act to Amend the Education Act (Ontario), [1987] 1 S.C.R. 1148 at 1198-99.].

This entrenchment of educational rights shows that there is no firm wall between church and state in Canada, at least in the realm of public education. Irwin Cotler in "Freedom of

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Assembly, Association, Conscience and Religion", Tarnopolsky and Beaudoin eds., The Canadian Charter of Rights and Freedoms: Commentary (1982), has suggested that the incorporation of s.93 into the Charter amounts to a breach of the establishment principle and states at p.201:

> ...In Canada...separation of church and state has never been an avowed policy of Canadian legislators, and indeed, the incorporation of s.93 into the Charter, together with the reference in the Preamble to the Supreme Deity, would seem to evince a contrary legislative intention, let alone a distinguishable legal culture....

A. Wayne MacKay draws a similar conclusion, stating that, because of s.93 of the Constitution Act, 1867, and s.29 of the Charter, "the Canadian situation is exactly opposite to that in the United States, as religion in the schools is guaranteed rather than forbidden" ("The Canadian Charter of Rights and Freedoms: a Springboard to Students' Rights" (1984), 4 The Windsor Yearbook of Access to Justice 174 at 213). See also Anderson, "Effect of Charter of Rights and Freedoms on Provincial School Legislation", Manley - Casimir and Sussel eds., Courts in the Classroom: Education and the Charter of Rights and Freedoms (1986), where the following passage appears at p.190:

> ...The European Convention does not prohibit religion in schools but it does provide that education must be in conformity with parental "religious" convictions.
>
> For public schools in Canada, there is no constitutional prohibition against "religion" in schools. Insofar as provincial legislation permits religious matters in schools, it is not subject to challenge through the liberty provision of the Charter. What is reviewable in Canada is any compulsory participation in

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> any such religious activities based on freedom of religion as guaranteed by s.2 of the Charter. [Emphasis added].

Finally, s.27 of the Charter may be of some assistance Ln this regard. Section 27 reads:

> 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.
>
> ***
>
> 27. Toute interprétation de la présente charte doit concorder avec l'objectif de promouvoir le maintien et la valorisation du patrimoine multiculturel des Canadiens.

Culture is defined, in anthropological terms, as "the sum total of ways of living built up by a group of human beings and transmitted from one generation to another" (The Random House Dictionary of the English Language, 2nd ed. (1987)).

Religion is one of the dominant aspects of a culture which the Charter is intended to preserve and enhance. In R. v. Videoflicks Ltd. et al. (1984), 48 O.R. (2d) 395 at 427-28, Tarnopolsky J.A., delivering the judgment of the court, stated that "[r]eligion is one of the dominant aspects of a culture which it [referring to s.27 of the Charter] is intended to preserve and enhance....Section 27 determines that ours will be an open and pluralistic society which must accommodate the small inconveniences that might occur where religious practices are

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recognized as permissible exceptions to otherwise justifiable homogeneous requirements."

In this light, the removal of all religion from the school environment seems more consistent with the encouragement of a homogeneous society than with the preservation or enhancement of a "multicultural" one. The American concept of a "melting pot" of cultures does not form part of the Canadian tradition. As was stated by O'Leary J. in the judgment appealed from, in (1986), 55 O.R. (2d) 749 at 759:

> ...Difference is the very essence of a multicultural society. Difference is to be worn with pride not hidden....

While it is clear that s.27 of the Charter cannot be invoked by a majority that wants to impose its cultural norms or standards on the rest of society, it is also clear that s.27 does not mandate the homogenization of all public life. Religious exercises drawn from a variety of religious traditions can serve to preserve and enhance our multicultural heritage, and as long as their object is not to coerce anyone into participating, they do not reflect any purpose inconsistent with the Charter.

Some judicial support for the proposition that indirect state aid to religion 22E se is not unconstitutional may be gleaned from Edwards Books. In assessing the impact of the Retail

Business Holidays Act on persons with religious beliefs, Chief Justice Dickson notes that it has a "favourable impact" on Sunday

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observers, in that it decreases the cost of religious observance for them (at p.763). Thus the legislation has the effect of benefitting Christianity and other Sunday - observing religions. Chief Justice Dickson never suggests that this in itself could constitute a violation of s.2(a).

It is worth noting that whether such an effect would violate the U.S. Establishment Clause is at least a debatable issue. In the U.S. Sunday closing cases decided in 1961 (eg. McGowan et al. v. Maryland (1961), 366 U.S. 420), the legislation which prohibited the sale on Sunday of all merchandise, subject to certain exceptions, was upheld. If these cases were decided today, applying the second part of the Lemon test, i.e. that the statute cannot have a primary effect of inhibiting or aiding religion, the result would probably be the same.

However, as Tribe notes, this branch of the Lemon test has been transformed: "the Court has transformed [the requirement of 'primary secular effect') into a requirement that any non-secular effect be remote, indirect and incidental" (American Constitutional Law, 2nd ed. (1988), at p.1215; see also Note: "The Unconstitutionality of State Statutes Authorizing Moments of Silence in Public Schools" (1983), 96 Marv. L. Rev. 1874 at 1877; Meek et al. v. Pittenger, Secretary of Education et al. (1975), 421 U.S. 349; Committee for Public Education and Religious Liberty et al. v. Nyquist, Commissioner of Education of New York, et al. (1973), 413 U.S. 756). The above-mentioned cases considered the

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effect of direct state aid to predominantly church-related, non-public elementary and secondary schools, by way of direct funding or the provision of instructional material and equipment. Although the purposes of the state aid were ostensibly secular or neutral, it had the effect of advancing sectarian schools, and therefore constituted an impermissible establishment of religion.

The fact that a governmental action which has the effect of advancing religious activities may be prohibited in the U.S. under the Establishment Clause does not mean it is not permissible in Canada, nor does it mean that it is permissible in Canada simply because we have no establishment clause (see Big M at p.341). Nevertheless, the fact that the benefit accruing to

Sunday observers as a result of the Retail Business Holidays Act was noted without comment on its constitutionality, provides some support for the position that noncoercive state aid to religion is constitutionally permissible.

In summary, the decided cases in Canada establish that legislation whose purpose is to compel religious conformity infringes s.2(a) of the Charter. However, there is no reasonable basis for asserting that the impugned Regulation in the present case has such a purpose. Whatever its effects may be, its clear and comprehensive exemption provision indicates that it was not intended that all children be compelled to participate in the exercises.

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The issue as yet undecided is whether Ely religiously - motivated state action is unconstitutional, absent any element of compulsion or coercion. The relevance of the American cases is limited by the fact that thre [sic] is no express equivalent of the Establishment Clause in our Charter. However it is clear that it has never been the policy of Canadian legislators to completely segregate church and state. On the contrary, there are provisions in the Constitution Act, 1867 and in the Charter which contemplate a "bridge" between church and state, at least in the realm of public education. Thus, even if, contrary to my opinion, the impugned Regulation has a religious as opposed to an educational purpose in that it facilitates religious activities in the school, it does not violate s.2(a) of the Charter for that reason alone. Section 2(a) of the Charter does not prohibit all governmental aid to or advancement of religion der se.

B. The Effects of Section 28

It is clear that the effects of legislation are relevant in determining the legislation's constitutional validity: Big M, at p.331; Edwards Books, at p.725.

I agree with the appellants that, regardless of its purpose, s.28 of the Regulation would be invalid if it had an unconstitutional effect. The appellants argue that the effect of s.28 is to pressure children to participate in exclusively Christian religious exercises, in contravention of s.2(a) of the Charter. The appellants strengthen this argument by pointing to

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the prevailing practice of the Sudbury Board of Education in offering exclusively Christian religious exercises. In my view, this requires separate consideration.

The submission is based on the allegedly objectionable effect on minority students of requiring them to opt out of the majoritarian, Christian religious exercises. It is argued that this requirement is objectionable both on its face because it compels students to make a choice and in its effect, as it compels minority students to conform to the religious practices of the majority, thereby having a chilling effect on the free exercise of religion and conscience, alienating religious minorities and setting non-believers apart from the majority. According to the submission, being forced to declare one's difference from or one's conformity with the majority religious view, in effect, to make a religious statement, constitutes an infringement of s.2(a). The argument taken from the factum of one intervenor, the Canadian Jewish Congress, is expressed as follows:

> The act of exempting oneself or one's child from participating in religious activities is itself an outward manifestation of one's religious conviction. Therefore, the Regulation which compels students either to participate or to exempt themselves from participation offers no real choice. In either case, students and parents are compelled to make a religious statement.

There is nothing in the definition of freedom of religion in Big M or Edwards Books which supports the view that being compelled to make a religious statement alone constitutes a

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violation of s.2(a). In Big M, Dickson C.J.C. said (at p. 347), in a passage partially quoted in the majority decision:

> ...Equally protected, and for the same reasons are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion. For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose... [Emphasis added.).

The Chief Justice left open the possibility that the concept of freedom of religion may mean more than freedom from coercion to affirm or manifest specific beliefs or practices, but the concept cannot be so broad as to prohibit government acts which compel the making of a religious choice. If "freedom" were so broadly conceived, it would demand a stance of state neutrality that is not justified and probably not possible to achieve.

It was argued by counsel for the Attorney General that, far from infringing freedom of religion, s.28 promotes such freedom by offering the students a choice. Furthermore, it was argued that the provision of religious exercises in a manner consistent with ss.2(a) and 15(1) of the Charter, will preserve and enhance the multicultural heritage of Canadians. Even rejecting these submissions to suggest that the requirement that a student make a choice is itself constitutionally invalid is, in my

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opinion, an untenable position. In my view, the government may not compel students to participate, but it is not prevented from creating a situation where a choice as to whether or not to participate must be made.

Stewart *J.,* in his dissenting opinion in Abington, said at pp.316-17:

> ...Even as to children, however, the duty laid upon government in connection with religious exercises in the public schools is that of refraining from so structuring the school environment as to put any kind of pressure on a child to participate in those exercises; it is not that of providing an atmosphere in which children are kept scrupulously insulated from any awareness that some of their fellows may want to open the school day with prayer, or of the fact that there exist in our pluralistic society differences of religious belief.

I agree entirely with this view, which I would apply to the social context existing in Canada. As mentioned above, we have no "wall of separation" between church and state. Not only are we a pluralistic society like the United States, but further, our pluralism, or "multicultural heritage", has been entrenched in the Charter as an aid to its interpretation. The state is under no duty to insulate children from cultural and religious differences. Thus, being compelled to choose whether or not to participate in religious exercises is not, in itself, constitutionally impermissible.

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I also reject the proposition that the effect of the obligation to seek an exemption compels religious minorities to conform to the practices of the majority. The real question is whether it has been shown by the appellants that the pressure to conform has placed such a burden on the minority pupils or parents that the exemption is, in effect, not a viable alternative. Some American cases make it clear that not all burdens on religion violate the Free Exercise clause: Johnson, Administrator of Veterans' Affairs, et al. v. Robison (1974), 415 U.S. 361 (withholding educational benefits from a conscientious objector who performed alternative

civilian service does not violate right of free exercise of religion); Thomas v. Review Board of the Indiana Employment Security Division et al. (1981), 450 U.S. 707 (denying unemployment compensation benefits to a Jehovah's Witness who terminated his employment to avoid participating directly in the production of weapons an infringement upon his free exercise right pursuant to the First Amendment); Hobbie v. Unemployment Appeals Commission of Florida and Lawton & Company (1987), 107 S.Ct. 1046 (denial of unemployment compensation benefits to claimant who was discharged when she refused to work on her Sabbath violated her free exercise right pursuant to the First Amendment). Each case must therefore be examined to determine the impact of the challenged legislation.

My colleagues in this court adopt the view expressed by Brennan J. in Abington at p.288, where he stated that the exemption provision stigmatizes as non-conformists those who

utilize it, thereby imposing a penalty on pupils who wish to be exempt for any reason based on the dictates of conscience. The majority also rely on Engel. These cases are said to support the conclusion that pupils will refrain from seeking the permissible exemption as they feel a compulsion to conform, and they are therefore restrained in their guaranteed freedom of conscience and religion.

The U.S. cases on religion in school referred to by the majority appear to turn on the Establishment Clause of the First Amendment of the *Constitution* of the United States and not on the Free Exercise Clause.

In Engel, the first case on school prayer, Mr. Justice Black, delivering the opinion of the court said (at p.430):

> ...Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, o t e First Amendment ... [Emphasis added.].

This may be taken as some indication that school prayer would be constitutionally permissible in the U.S. if there were no Establishment Clause. However, Black *J.* went on to say (at pp.430-31):

> ...This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and

> financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious

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> minorities to conform to the prevailing officially approved religion is plain....

In the second school prayer case, *Abington,* Mr. Justice Clark, writing the opinion of the court, noted that one of the parties to the action, a father, had decided not to have his children excused from the religious opening exercises for fear of having them labelled as "odd balls" and "un-American" (at p.208, fn.3). Mr. Justice Douglas, in his *concurring opinion,* also referred to that evidence, but he held that coercion of that sort must be proved affirmatively. Mr. Justice *Brennan,* also *concurring,* wrote the *only opinion in* which the Free Exercise Clause was discussed. He stated that, while it was not necessary to decide the case on the basis of the Free Exercise Clause, the excusai procedure itself operated in such a way as to infringe the free exercise rights of those children who wished to be excused (at p.288). He pointed to both the susceptibility of school-age children to "peer-group norms" and their "understandable reluctance to be stigmatized as atheists or nonconformists" (at p.290). He relied on expert evidence concerning the susceptibility of children to peer-group pressure, although he pointed out that there were no reported experiments bearing directly on the question under consideration. He also made note of the fact that this situation was distinguishable from similar cases involving adults, because of the impressionability of children (at pp.298-99).

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It is worth noting that the distinction made by Mr. Justice Brennan was repeated in Marsh, Nebraska State Treasurer, et al. v. Chambers (1983), 463 U.S. 783, where the Supreme Court upheld the constitutionality of the practice of beginning each session of the Nebraska Legislature with a prayer by a chaplain paid by the State. The case turned on an interpretation of the Establishment Clause, but the majority distinguished Abington on the ground that "the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination' ... or peer pressure" (at p.792).

In Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign County, Illinois, et al. (1948), 333 U.S. 203, religious instruction given by private religious groups to pupils in public school buildings during school hours was challenged. Pupils whose parents so requested were excused from their secular classes to attend religious instruction,

but other pupils were not released from their public school duties. In ruling that the practice violated the First Amendment, made applicable to the states by the Fourteenth Amendment, Frankfurter *J.,* concurring with the majority, said at p.227:

> ...That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend....

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In Wallace, supra, a "moment of silence" case, the Supreme Court based its decision on the finding that the words of the statute impermissibly endorsed prayer as the preferred activity. It did not deal with the effects of the statute, although reference was made to the comments of Mr. Justice Frankfurter in Illinois ex rel. McCollum, supra, quoted above, and of Mr. Justice Brennan in Abington (per Stevens J., at pp.60-61, fn.51). Madam Justice O'Connor, in her concurring opinion, made note of the fact that the decisions on state-sponsored vocal school prayers acknowledged the coercion implicit in a statutory scheme where a nonadhering pupil must choose to actively withdraw from the exercises, thereby drawing attention to his or her `non-conformity (at p.72). She did not endorse those earlier decisions but merely pointed out that such implicit coercion does not exist in a moment of silence context.

The U.S. cases on religion in school appear to have been decided on Establishment Clause principles, or through the combined operation of the Free Exercise and Establishment Clauses, which often overlap. The two clauses also determine the standard to be applied in determinations of what constitutes an impermissible burden on freedom of religion. In saying this, I do not overlook what Chief Justice Dickson said in Big M about the anti-establishment principle in the context of the Charter guarantee of freedom of conscience and religion. The American jurisprudence is not determinative, obviously because of the difference in the constitutional provisions, and also because

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members of the U.S. Supreme Court are clearly divided on the implications of their interpretations of the constitutional provisions for the special situation of public school children. I tend to agree with the conclusion of Anderson J. in the Divisional Court decision of the present case, that the question of compulsion, coercion and constraint is a question of

fact from which "judgments made elsewhere upon different evidence are of little help" (at p.782).

Neither common experience nor the evidence in this case lend support to the conclusion that the obligation to seek an exemption imposes on religious minorities a compulsion to conform to the practices of the majority. The appellants' expert, Dr. Bassis, could go no further than to assert that the requirement of seeking an exemption "may be harmful" to the children. However, the evidence is clear that students of the respondent Board are regularly excused from classroom or educational activities for many different reasons. They are permitted to be absent from school to observe religious holidays at their parents' requests. It has not been suggested that a request of this nature raises in the minority students or their parents any concern in differentiating them from the majority. We as a contemporary multicultural Canadian society are trying to encourage minority children to be proud of their ethnic heritage and to assert their respective religious or ethnic identities.

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In my respectful opinion there is no support in the material for the argument that compulsion arises by reason of the chilling effect of seeking an excusai. In this case, the preponderance of expert opinion given by eminent psychologists is to the contrary. According to Dr. Kennedy, in his affidavit:

> ...Moderate levels of "pressure to conform" and "conflict" are part of the normal developmental process in children, as well as in adults. In normal children, the most likely result of any such pressures or conflicts would be to increase the arousal level and thereby to strengthen the learning process. Under such conditions, decision- making should be reinforced and self-definition encouraged. In the normal child, with respect to morning exercises as practiced in Ontario public schools, the expected result would be a strengthening of genuinely held convictions....

He later states:

> It has been my experience that the public school system in Ontario is neither an advocate of a specific religious belief-system nor the advocate of secularism or of humanism. It has evolved into a school system that attempts to inculcate sensitivity and respect for all socio-cultural value-systems. It tends to be philosophically inclusive, rather than exclusive. It tends to expose students to a wide variety of ideas, while encouraging reasoned dissent. It does not reduce exposure to the minimum, but rather maximizes exposure and encourages understanding and respect for variety. It is multi-cultural, rather than espousing either the viewpoint of one group over and above others, or alternatively advocating a "melting pot" philosophy, in which differences are

> discouraged, merged and submerged. It requires exposure to differences in order to teach sensitivity, understanding, respect for others, and cooperative behaviour.

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In his affidavit Dr. Philipp expressed the following opinion:

> In my opinion, it is expected and indeed common for children of whatever faith to have to reconcile differences between the value and belief systems of their parents and those with which they come into contact in school and in society at large. This process is in fact important in the child's development of his own value and belief system.

Some of these passages and others were relied upon by D'Leary J. in the Divisional Court decision at pp.758-59. They appear to me to reflect the reality of contemporary Canadian society as I have endeavoured to express it.

In fact, the respondent Board itself, operating in an area where many cultures make up its demographic mosaic, acknowledges the value of the multicultural heritage. However, the Board has never been requested by the appellants nor by anyone else to incorporate other readings and prayers into its religious exercises. The Board has expressed a willingness, upon the request of parents, to vary its practice to attain a multi-denominational programme such as that developed by the Board of Education for the City of Toronto. In fact, there exists not only tolerance but active encouragement of the minority view. The appellants, who are not forced to participate in the exercises, should not succeed in prohibiting suitable prayers and readings which have traditionally been deemed to be in the best interests of public school children.

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If the circumstances disclosed in the record, or an objective analysis of the situation, could reasonably support an inference that the impugned Regulation creates indirectly a coercive effect, I would not hesitate to concur with my colleagues' conclusion with respect to its constitutional invalidity. I agree that, where the inference of coercion can reasonably be drawn, there is no need for the applicants to produce concrete evidence of harm in order to demonstrate a prima facie infringement of the constitutional freedom.

Canadian cases make it clear that not all burdens on religion will violate the Charter. Normally, an exemption provision should suffice to nullify an inference of coercion, thereby defeating a Charter challenge. In Jones v. The Queen, [1986] 25 S.C.R. 284, the Supreme Court of Canada was concerned with the requirement that every child of school age attend

public school unless lawfully excused. The court held that compulsory attendance provisions did not offend the freedom of conscience and religion of the pastor of a fundamentalist church who educated his children and others in a church basement. It was also held that the legislation, if it had any impact at all on the pastor's freedom of conscience and religion, did not contravene the constitutional guarantee under s.2(a) of the Charter, in that the impact was merely "formalistic and technical". The burden on conscience or religion in the present case is considerably less than that which existed in Big and Edward Books. It is instead, similar to the formalistic and technical burden in Jones, supra.

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I agree with the majority in the Divisional Court that there is no reason why a child should feel coerced into participating in religious exercises.

Similarly, in R. v. Videoflicks, supra, Tarnopolsky J.A. suggested at p.428 that a broad, unqualified exemption clause would have removed the element of coercion: in that case, the inducement of persons who observe a Sabbath other than Sunday to conform with the Sunday closing requirement of the Retail Business Holidays Act.

C. Conclusion On S.2A Argument

In my opinion the challenged legislation has a broad secular purpose, which is both educational and pedagogical. While it has a religious component, its purpose is not coercive. The legislation does not attempt, directly or indirectly, to pressure public school children to participate in any religious exercise. Further, the Regulation cannot properly be said to have a coercive effect. In any event, the Canadian Constitution contemplates a bridge rather than a wall of separation between church and state, so that even a religious purpose or an incidental religious effect would not render the challenged legislation unconstitutional.

I have therefore concluded that s.50 of the Education Act and s.28 of Regulation 262 do not violate s.2(a) of the Charter. I find it thus unnecessary to consider any justifications of the legislation under s.I of the Charter.

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II - SECTION 15 CHALLENGE

The appellants have argued that the impugned Regulation violates the equality rights guaranteed by s.15 of the Charter because it (i) can be applied in a discriminatory manner; reveals a preference for Christian prayers and readings; and discriminates against non-believers on the basis of religion. Section 15 provides as follows:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> ***
>
> 15.(1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Section 52(1) of the Charter provides:

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> ***
>
> 52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

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As stated by Chief Justice Dickson in Big M at p.351, in a society with a diversity of belief and non-belief, such diversity makes it "constitutionally incompetent for the federal Parliament to provide legislative preference for any one religion at the expense of those of another religious persuasion". This statement also applies to provincial legislation and may be read together with the statement at p.347:

> ...The equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment.

In light of the above passages from Big M, I agree with the conclusion of the majority of the Divisional Court that the legislation itself does not violate s.15. The fact that a statute or regulation may be improperly interpreted or applied in a discriminatory manner does not mean that the legislation itself infringes s.15. In my view, the reference in s.28 to the Scriptures and the Lord's Prayer are given by way of illustration of the sort of exercise contemplated, without preference for Christian texts over other suitable readings and prayers. Non-religious persons

may be accommodated by readings on secular humanism such as are included in the Toronto Board's book of readings. The selection by the Legislature of Scriptures and the Lord's Prayer as an illustration of suitable readings and prayers is in conformity with the Christian heritage of the majority. As Chief Justice Dickson has said in Edwards Books, supra, at p.743,

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"our society is collectively powerless to repudiate its history, including the Christian heritage of the majority."

The Lord's Prayer, admittedly of Christian origin, perhaps because it does not mention Christ, has gained such wide acceptance that it is regarded by many as ecumenical and so acceptable to other religious groups as to make it universal. It reads as follows:

> Our Father, Who art in Heaven, hallowed be Thy name, Thy kingdom come, Thy will be done in earth as it is in Heaven; give us this day our daily bread; and forgive us our trespasses as we forgive them that trespass against us; and lead us not into temptation, but deliver us from evil: For thine is the kingdom, and the power, and the glory, for ever. Amen.
>
> Holy Bible: St. Matthew 6: 9-13.

I find it difficult to see how its words could offend any religious group. However, if, contrary to my opinion, the reference to it and to the Scriptures in the Regulation appear to favour the Christian faith, or if the Regulation is interpreted as having that effect, thereby limiting the use of other suitable readings and prayers, the appropriate remedy would not, in my opinion, require that the entire Regulation be struck down. In accordance with s.52(1) of the Charter, the court would be entitled to hold that the Regulation, to the extent of the inconsistency with the Charter, is of no force and effect. Section 28(1) would then read:

> A public school shall be opened or closed each school day with religious exercises consisting of suitable readings and suitable prayers.

The deletion would render the section clearly non-discriminatory.

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However, my interpretation of the impugned words of s.28 is examples of a suitable prayer and readings, does not lead to :he conclusion that there is a legislative preference for :hristian tradition. I therefore find it unnecessary to delete :he references to the Lord's Prayer and the Scriptures in order to ,reserve the constitutional validity of the section.

The s.15 challenge against the actual practice of the Sudbury Board of Education with respect to its opening exercises is more persuasive than the attack against the wording of s.28 of the Regulation. It is clear that the practice of the Sudbury Board has been to formally open each school day by the singing of "O Canada" and the recitation of the "Lord's Prayer", often followed by Scripture readings or Biblical stories, in order to encourage respect for the moral principles emphasized within the Judeo-Christian tradition. This practice may be explained by the fact that the Board has never been requested to incorporate other prayers or readings in the opening exercises, although it has now expressed its willingness to vary its present practice.

In determining whether the practice of the Sudbury Board is discriminatory and therefore violates s.15(1) of the Charter, it is not necessary to enter into a step-by-step analysis, as recommended in R. v. Ertel (1987), 58 C.R. (3d) 253 at 271 et ma. It is sufficient to state that the practice of the Board, in conducting opening exercises based exclusively in the Christian religious tradition, may be deemed discriminatory in the sense

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that it gives preference to that tradition at the expense of all non-Christians. This has an adverse impact on the equality rights of non-Christians, thereby infringing s.15(1) of the Charter (Re McKinney and Board of Governors of the University of Guelph et al. and eight other applications (1987), 63 O.R. (2d) 1 at 40.). This infringement cannot be justified under s.l of the Charter, as there are other ways, which are less intrusive on the equality rights of religious minorities, to implement religious exercises which encourage respect for moral principles. An example of one such practice is that of the Toronto Board, which has implemented opening exercises consisting of suitable readings and prayers from a variety of traditions.

The appellants do not now seek a variation of the Sudbury Board's practice but, as previously mentioned, seek the abolition of all religious exercises in school as a matter of freedom of conscience. The majority of the Divisional Court, having found the impugned legislation to be valid, purported to exercise its discretion by refusing to prohibit the respondent Board or its director from implementing daily opening exercises of a more ecumenical nature. If the application before the court had been made under s.24(1) of the Charter, claiming that the applicants' freedom of conscience had been infringed or denied, the court could have

considered granting as a remedy the order of prohibition sought. The applicants' defective procedure should not prevent the court from granting the appropriate Charter remedy.

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In my opinion, it would have been appropriate and just to grant the order of prohibition. The practice of the Sudbury Board constitutes a prima facie violation of the equality provisions of the Charter by favouring the Christian religion in the school opening exercises. This violation cannot be justified under s.l of the Charter. The fact that the applicants had not requested any change in the Board's practice should not deprive them of a remedy where a clear violation of a constitutionally entrenched freedom is continuing. However, the appellants' failure to request a voluntary change of practice before launching this application after s.15 came into effect on April 17, 1985 may be taken into account in assessing the costs of the application.

I would affirm that portion of the Divisional Court judgment which supports the constitutional validity of s.50 of the Education Act and of s.28 of Regulation 262, but I would allow the appeal, in part, to vary the judgment by adding a declaration that the prevailing practice of the Sudbury Board of Education and its Director of Education, in conducting its daily opening exercises, violates s.15 of the Charter, and by adding an order in the nature of prohibition to compel those responsible to comply with s.15 of the Charter, as indicated.

I would not allow any costs in favour of or against any party or intervener in this court or in the Divisional Court.

[S]