

O Canada! As New Brunswick Mandates Schoolhouse Patriotism, Is Freedom of Conscience at Stake?

In late 2008, when a New Brunswick school cancelled its daily ritual of singing the national anthem, a furor erupted.^[2] The school's principal says he made the decision to accommodate certain anonymous students. These students, for reasons of religion or conscience, are uncomfortable with taking part in a patriotic exercise. The vocal majority of local and provincial citizens were upset, even outraged, at the school's decision. The heated disagreement led to threats of violence, a lawsuit, and the provincial government making a new school regulation. Using its authority under section 57(1) of the *Education Act*,^[3] the Executive Council of New Brunswick (the provincial cabinet) repealed the section of the school regulations which allowed that "a teacher *may* provide for the singing of the national anthem at the beginning of each school day" (emphasis added), and replaced it with a mandatory rule. The new regulation requires that every school ensure the daily broadcast of the national anthem. If that is impossible then another activity that "promotes the spirit of patriotism" must be substituted. Students may be excused from participating or being present during such activities if their parents apply to the principal for an exemption.^[4]

Equality, Conscience and the Anthem

The official lyrics of *O Canada*, Canada's national anthem, prescribed by the *National Anthem Act*^[5] of 1980, do not generate widespread disagreement or protest. However, there are several reasons why some citizens might feel that being compelled to sing this song, or possibly even having to listen to it being broadcast, would encroach of their rights and freedoms as protected by the *Charter*. Section 15 of the *Charter* guarantees the right to equality. Canada's national anthem begins with the line, "O Canada! Our home and native land!" It has been suggested by some that the reference to Canada as our "native land" might leave Canadians who were born abroad feeling alienated or unequal.^[6] The line that reads, "true patriot love in all thy sons command," has been opposed by some who object to the use of the gender-exclusive word "sons." The claim could be made that the spirit of the *Charter*, which protects equality, is not fostered by such a lyric. In 2002, a Senate private member's bill proposed changing the lyrics of *O Canada* to include all Canadians.^[7]

More contentious is the alleged invocation of religion in the anthem, which could be considered to conflict with freedom of religion and conscience as guaranteed by section 2(a) of the *Charter*. The line that reads, "God keep our land glorious and free," may be disagreeable to atheists, agnostics, or humanists. The French version of the anthem is more explicit in its religious connotations. An English rendering of one line is: "As is thy arm ready to wield the sword, So also is it ready to carry the cross."^[8] Irrespective of any

particular lyrics, some groups, such as the Jehovah's Witnesses, object generally to the singing of a national anthem: they believe that such displays of patriotism violate their religious beliefs by putting the nation before God.[9]

An Optional Exemption Cannot Save School Prayers from Constitutional Challenge. What about Patriotic Songs?

Prior to the introduction of the *Charter* in 1982, most provinces provided for school boards to require devotional instruction, including scripture reading and prayer, at the start of each school day. However, legislation commonly allowed parents to exempt their children on request. Section 50(2) of the current version of Alberta's *School Act* reads:

Where a teacher or other person providing religious or patriotic instruction receives a written request by a parent of a student that the student be excluded from religious or patriotic instruction or exercises, or both, the teacher or other person shall permit the student (a) To leave the classroom or place where the instruction or patriotic instruction or exercises are taking place for the duration of the instruction or exercises, or (b) To remain in the classroom or place without taking part in the instruction or exercises.[10]

In Ontario and British Columbia, courts have found that provisions to allow students to be exempted from religious activities cannot save school prayer from constitutional challenge. In the 1988 decision *Zylberberg v. Sudbury Board of Education*,[11] the Ontario Court of Appeal considered the case of three students (one Jewish, one Muslim, and one student who wanted a secular education) who had not requested an exemption because they did not want to be singled out from their peers. At trial, the students' claim of infringement to their freedom of religion was not recognized because there was no overt coercion on the students to participate; they had the option of seeking an exemption.[12] However, the appeal court reversed this decision, finding that there were subtle forms of coercion at play. The court cited Chief Justice Dickson's landmark Supreme Court decision on freedom of religion, *R. v. Big M Drug Mart*: 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.[13] The Court of Appeal reasoned that "peer pressure and the classroom norms to which children are acutely sensitive are real and pervasive and operate to compel members of religious minorities to conform with majority religious practices." [14] Thus, the court struck down as unconstitutional the legislation which provided for prayer in the classroom. In 1989, the B.C. Supreme Court followed *Zylberberg* and struck down another provincial law that allowed for school prayer.[15] While these courts have recognized that providing the option to exempt oneself from school prayer does not provide sufficient means of protecting freedom of religion, it is not clear whether a similar option - to exempt one's self from patriotic exercises, such as singing the national anthem - is sufficient to protect freedom of conscience.

Further Reading

Graham Darling, "[Municipalities Asked to Stop Praying](#)" *Centre for Constitutional Studies* (1 January 2007).

Nayha Acharyra, "[Just When You thought the Church and the State were Separated...](#)" *Centre for Constitutional Studies* (11 March 2008).

Jim Young, "[Senate Bill Would Preserve Citizenship Oath to the Monarchy, 'Notwithstanding' Charter Challenges](#)" *Centre for Constitutional Studies* (2 June 2009).

[West Virginia State Board of Education v. Barnette](#): The United States Supreme Court's 1943 decision which established that it is unconstitutional to compel students to salute the flag, recite the pledge of allegiance, take part in classroom prayer, or make other displays of religion or patriotism.

[1] Jim Young is a student in the Faculty of Law, University of Alberta. The author's views do not necessarily reflect those of the Management Board and staff of the Centre for Constitutional Studies. [2] "[N.B. school silences O Canada](#)" *CBC.ca* (28 January 2009). [3] *S.N.B. 1997, c. E-1.12*. [4] *New Brunswick Regulation 2009-65*, section 2. [5] *R.S.C. 1985, c. N-2*. [6] Jim Byers, "'O Canada' offensive, Metro says", *Toronto Star* (22 June 1990). [7] Bill S-39, *An Act to amend the National Anthem Act to include all Canadians*, 1st Sess., 37th. Parl., 2001-2002. [8] "[National Anthem: O Canada](#)" Canadian Heritage, Ceremonial and Canadian Symbols Promotion. [9] "[Civil Liberties and Patriotism](#)" *Encyclopedia.com* (2001). [10] *School Act, R.S.A. 2000, c. S-3*. [11] 65 O.R. (2d) 641 at 18. [12] 55 O.R. (2d) 749 (Ont. Div. Ct.) [13] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para. 95. [14] *Supra* note 11 at 24. [15] *Russow v. B.C. (A.G.)*, 62 D.L.R. (4th) 98.