

These kids are not alright

When schools exclude children on the basis of religion

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Abstract

Schools should be places where all children are welcome to receive education. Yet sometimes they are a battleground for political conflicts amongst adults, as schools are often used to inculcate common values. It is therefore particularly demeaning for children to be excluded from schools. In Canada, children have been excluded from school on the basis of religious practices, thereby violating their religious freedom. Little legal scholarship exists on children's rights to religious freedom. This article reviews international law regarding the religious freedom of children in relation to education and then examines three legal cases involving successful challenges to the exclusion of students based on religion.

Keywords

Religious freedom, children, schools, expelled, Canada.

1. Introduction

Schools are places where children not only receive education but become acculturated to the dominant culture through secondary socialization. Most children in Canada attend state schools, which are funded by and operated by governments. Private schools not run by the government are often required to comply with various requirements, on such matters as teacher qualifications and curriculum. The state has an interest in seeing children equipped to be skilled workers in the future. Furthermore, many governments wish to instill a common set of values through education. Secondary socialization includes behavioural conformity, moral conformity and cultural conformity (Caribou et al. 2021:178).

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For at least the first hundred years (1867-1967) of Canada's history as an independent nation, Christianity was the dominant religion. It was socially reinforced in schools through reciting the Lord's Prayer and religious instruction in schools. Non-Christian students were marginalized if they sought to opt out of these religious practices. As journalist Lois Sweet comments, "To us, those children were aliens. They were the 'other' personified. So we tormented them with the particular cruelty of children" (Sweet 1997:3).

Canada has a high percentage of immigrants or descendants of immigrants. It has become religiously pluralistic, and its wide variety of religions are also represented by children in schools across the country. While acculturation into Christianity has diminished, students continue to face pressure to conform to certain behaviours, morality and cultural practices that may be in opposition to their family faith socialization.

Schools enforce conformity on students in numerous ways. Many of these are embedded practices, such as queuing or waiting one's turn (Caribou et al. 2021:179). However, many schools also have dress codes and codes of conduct, violations of which result in discipline (Caribou et al. 2021:184). There is a range of disciplinary practices in schools. The most severe punishment, expulsion, is usually reserved for crimes such as drug dealing or threatening other students or teachers. But it has also been applied when children follow their religious practices. Such instances expose the targeted children to profound experiences of exclusion.

I will analyze three cases of student expulsions on the grounds of religious practices in Canada. They include: (1) Jehovah's Witness students expelled for refusing to participate in patriotic exercises during the Second World War; (2) Jehovah's Witness students expelled for refusing to participate in religious exercises at a Roman Catholic school when no secular school existed; and (3) a Sikh student expelled for violating a no-weapons policy by wearing a kirpan (explained below).

Jehovah's Witnesses, a minority religious group in Canada, are opposed to patriotic exercise, participation in war, and receiving blood transfusions. They are very evangelistic and are known for door-to-door evangelism and distribution of literature. The numerous legal cases involving Jehovah's Witnesses have established a foundation for religious freedom law in Canada (Botting 1993; Penton 1976; Kaplan 1989).

Sikhs have several dress requirements. A turban must be worn along with a kirpan, which is a small dagger. Men must not shave or trim their beards. Various legal cases have arisen regarding these dress requirements, but few of them have involved children. Sweet tells the story of another Sikh student who faced

constant ridicule for his religious dress. She surmises, “The religious identity that [t]his child is receiving at home is not only being rejected by his peers at school but he, as a developing person, is being harassed and rejected” (Sweet 1997:15).

Before turning to the cases themselves, I will examine the law, both international and Canadian, relating to religious freedom for children in the area of education. Most of this legal framework developed years after the first legal case examined in this paper. The cases illustrate how religious freedom for children is currently understood, along with the resulting impact on children, even though this impact is rarely mentioned in the cases.

2. Children’s religious freedom under international law

Under international law, children have certain rights. The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESC) together are known as the “International Bill of Rights” and establish strong protection for religious freedom. The Convention on the Rights of the Child (CRC) guarantees rights specifically to children.

2.1. *The Universal Declaration of Human Rights*

Article 18 of the UDHR establishes the foundation for religious freedom:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

The UDHR also guarantees the right to education in Article 26. This article specifies that education will promote tolerance.

2.2. *The International Covenant on Civil and Political Rights*

Article 18 of the ICCPR protects freedom of religion for “everyone.” Article 18(1) guarantees

the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

Subsection 2 guarantees freedom from coercion exercised by or on behalf of the state. Further, subsection 4 gives parents the right “to ensure the religious and moral education of their children in conformity with their own convictions.” This statement affirms parental rights rather than granting rights to children.

However, as a limitation, Article 18(3) allows states to limit freedom of religion under certain circumstances: “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”

Article 24(1) of the ICCPR provides specific guarantees for children:

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

The UN Human Rights Committee² (HRC) addressed the specific issue of state requirements to sing the national anthem and salute the flag as a condition of eligibility to attend state schools in a case in Zambia (Human Rights Committee 1996: para. 18). The HRC ruled that the requirement violated Articles 18 and 24 of the ICCPR.

The HRC has also addressed the right to wear clothing consistent with one’s religious beliefs, although it has not addressed the kirpan, which is the subject of one of the cases considered in this article. The HRC ruled, “The Committee considers that the freedom to manifest one’s religion encompasses the right to wear clothes or attire in public which is in conformity with the individual’s faith or religion.”

2.3. *The International Covenant on Economic, Social and Cultural Rights*

Article 13 of the ICESCR recognizes “the right of everyone to education.” It states:

The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effec-

² The Optional Protocol to the ICCPR establishes a procedure whereby individuals in a state may petition the Human Rights Committee to consider whether the state has violated their human rights.

tively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

This provision appears to affirm children's right to an education that respects their religious beliefs and practices.

Article 13(3) reiterates the requirement in article 18(4) of the ICCPR that States must respect the right of parents "to ensure the religious and moral education of their children in conformity with their own convictions." Again, this affirms parental rights over their children but is not a right specific to children themselves.

2.4. *The Convention on the Rights of the Child*

Article 28 of the CRC guarantees the right to education. Article 2 guarantees that children will not face discrimination on the basis of, *inter alia*, religion. Article 29 guarantees the right of education, with a focus on tolerance and respecting human rights. Article 30 specifically protects children who belong to, *inter alia*, religious minorities, and it guarantees such children the right to practice their religion.

These provisions make it clear that expelling a student based on religious practices violates the student's religious freedom and also his or her right to education under international law. Granted, some of the cases to which I refer occurred prior to this development of the international human rights regime. However, it is valuable to recognize that these rights now exist in international law.

3. Impact of expulsion on children

Many children are raised in a home with religious parents and are inculcated into their parents' faith from an early age. "The process of socialising children into a community involves children, parents and religious community" (Langlaude 2008:7). The child's religious commitment is a complex web of family and community relationships. It is a significant aspect of a child's identity. "Prior to attending school, children's main source of *socialization* comes from their families" (Caribou et al. 2021:175).

Former United Nations Special Rapporteur on Freedom of Religion or Belief Heiner Bielefeldt affirms the importance of the socialization of schools:

The possibility of having face-to-face interaction of students on a regular basis is not less important than the development of intellectual skills, because such regular interaction can promote a sense of communality that goes hand in hand with the appreciation of diversity, including diversity in questions of religion or belief. Experiencing the

combination of communality and diversity is also a main purpose of interreligious and intercultural dialogue projects. Thus the school provides unique possibilities for such a dialogue to take place on a daily basis, at a grass-roots level and during the formative years of a young person's development. (Bielefeldt 2017:34)

He goes on to note, however, that “members of religious minorities – students as well as parents – may fear discrimination, mobbing or pressure in the schools, perhaps even with the intention of urging them to assimilate into mainstream society by abandoning their faith” (Bielefeldt 2017:36).

As law professor Richard Moon notes:

When the state treats the individual's religious practices and beliefs as less important or less deserving of support than the beliefs and practices of others, or when her religious community is marginalized by the state in some way, the individual adherent may experience this not simply as a rejection of her views and values but also as a denial of her equal worth or desert, as unequal treatment that affects her dignity. (Moon 2008:234)

This is particularly true for children, who are deeply scarred and likely to feel rejected by the state and society when a school expels them because of their religious practices. Such experiences challenge the child's religious identity and can also negatively affect relationships with family members and with the child's religious community.

Identity formation is a significant aspect of a child's development. Charles Taylor has written about how identity is formed:

My identity is defined by the commitments and identifications which provide the frame or horizon within which I can try to determine from case to case what is good, or valuable, or what ought to be done, or what I endorse or oppose. In other words, it is the horizon within which I am capable of taking a stand.

He goes on to say that a spiritual view “provides the frame within which they can determine where they stand on questions of what is good, or worthwhile, or admirable, or of value.” Further, “were they to lose this commitment or identification, they would be at sea, as it were; they wouldn't know anymore, for an important range of questions, what the significance of things was for them” (Taylor 1989:27).

Taylor identifies, in a separate article, the impact of having one's identity rejected:

The thesis is that our identity is partly shaped by recognition or its absence, often by the *misrecognition* of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being. (Taylor 1992:25)

The impact on a child of being expelled from school for not conforming to societal norms can be highly damaging to that child's sense of identity and self-understanding. The fact that, in each case addressed below, the expulsions were eventually overturned does not reverse the harm these children experienced. As Benjamin Berger (2015) notes, law has its own culture and that it views religion through that culture, often to the detriment of religious self-understanding. One cannot and should not be complacent that the courts will right the wrongs that a child has suffered due to being expelled for following religious practices.

4. Children's religious freedom in Canadian law

There is surprisingly little specific law on the rights of children in Canadian law outside certain aspects of family law related to marriages breaking down. Children are often seen as subordinate to their parents. Canada ratified the CRC in 1990 but the provisions must be enacted by legislation in order to incorporate Canada's international commitments into domestic law. The CRC has not been specifically implemented in Canadian law although the Supreme Court of Canada has ruled that international human rights treaties, including the CRC, should be used to assist in the interpretation and application of legislation that impacts children's rights (*Baker v. Canada* 1999).

Canada adopted a constitutional bill of rights in 1982, the Canadian Charter of Rights and Freedoms. Section 2(a) of the Charter guarantees "everyone" the right to freedom of conscience and religion. In addition, section 15 guarantees "every individual" equality before the law and equal protection of the law without discrimination on the basis of, *inter alia*, religion. Moon (2014:21) notes, "The inclusion of religion as a ground of discrimination under section 15 of the Charter lends support to this idea of religion as identity." These constitutional protections apply to children as well as adults, and to minorities as well as majorities.

Canada is a federal country with a national government and 10 provincial governments. Under the Constitution, education is a provincial matter. Religious ed-

ucation has been described as “the most contentious issue in Canadian national life” (Walsh 1968:238). Since the various provinces have quite different religious populations, they also have had very different experiences in accommodating students from minority religious communities (Buckingham 2014: ch. 1). With regard to religious freedom and education, most laws and legal cases address the rights as they pertain to parents, not to the children themselves. Clearly, however, children are deeply impacted by marginalization in schools for their religious practices.

4.1. *Donald et al. v. The Board of Education for the City of Hamilton (1945)*

This first case dates back to the Second World War, a time of great national fervour during which school children were required to start the day with patriotic exercises. When Jehovah’s Witness children refused, in accordance with their religious beliefs, they were expelled. Even more problematic, the Jehovah’s Witnesses became a banned organization as of 4 July 1940. Prior to the ban, these children were usually accommodated by requiring them to remain outside the classroom until opening exercises were completed. After the ban, the situation changed.

The children expelled were Graham, age 12, and Robert, age 16. They were attending a public school, but on 18 September 1940, the boys were sent home with a letter from the school principal addressed to their father. It read as follows:

Your children Robert, Grade VIII and Graham, Grade IV, have refused to take part in the opening exercises of this school. They refuse on religious principles to sing ‘God Save the King’, to repeat the pledge of allegiance, and to salute the Flag. Your children are hereby suspended from this school and a copy of this letter sent to the Board of Education.

The children’s father secured private education for his sons. Robert passed his high school entrance exam and was admitted to high school in 1942. He was then expelled from high school for the same reasons. The Board of Education approved the expulsions.

Mr. Donald brought an action on behalf of himself and his two sons against the Board of Education for a declaration, mandamus and damages. The case was decided at first instance in favor of the Board of Education. While there was a statutory exemption for school children from compulsory religious exercises, the court did not consider patriotic exercises religious in nature and thus did not uphold the exemption (*Donald 1944*).

However, the Donalds were successful at the Ontario Court of Appeal (*Donald 1945*). The court first referred to the Public Schools Act, which grants the right to attend school to every person between 5 and 21 years of age. Section 7 of the Act

states, “No pupil in a public school shall be required to read or study in or from any religious book or to join in any exercise of devotion or religion, objected to by his parent or guardian.”

The case turned on the question of whether the flag salute and singing of the national anthem are religious exercises. For the Donalds, they were. The court accepted the fact that the Donalds viewed saluting the flag as a religious act and thus granted a religious objection. It was clear that the two boys had acted respectfully in class during the patriotic exercises. Therefore, the court found that the Board had acted illegally in expelling them. The court granted mandamus, requiring the Board to allow the students to return to school, plus damages for the expense of private tuition for the two boys.

This case had a positive ending, albeit many years after the children were expelled. Notably, the decision came after the war had ended. “After the War ... the courts slowly began to vindicate the Witnesses on many fronts” (Yahya 2016: para. 31). Not all affected children had parents who went to court, however. William Kaplan comments, “Children, for respectfully refusing to salute the flag and sing the national anthem, were not just expelled from public school classrooms, they were seized from their parents and ordered placed in juvenile delinquent centres and foster homes” (Kaplan 1990:70). James Penton identified at least five incidents where school officials threatened to expel Jehovah’s Witness children for refusing to participate in patriotic exercises even after the war, indicating that the issue continued to arise beyond 1945 (Penton 1976:225).

4.2. *Chabot v. School Commissioners of Lamorandière (1957)*

The second case concerned the children of Cajeton Chabot, who had been a Roman Catholic but converted to the Jehovah’s Witness faith. Chabot lived in the municipality of Lamorandière, Quebec, which is both quite remote and very Roman Catholic. The two Chabot children, Marcel, age 7, and Jean-Pierre, age 8, were enrolled in the local school, which was Roman Catholic. At that time in Quebec, schools were either Roman Catholic or Protestant, depending on the local population. There was no other school in the region.

When he converted to the Jehovah’s Witness faith in 1953, Mr. Chabot informed the school that he did not want his children to participate in Roman Catholic religious practices such as catechism and reciting prayers. The letter the Chabot parents sent to the school read:

This letter is to inform you that we do not belong to the Roman Catholic faith. Consequently, we are against our children practising Roman Catholic devotions.

Furthermore we pay school taxes and have the right to send our children to your school. We ask that their liberty of worship, as our own, be respected.

Consequently we ask you that our children be excluded from religious devotions by being allowed to remain in their seats while the other pupils do their devotions. And we assure you that at all times our children will show true respect and will not interfere in the activities of the other pupils.

The teacher was willing to accommodate this request, but the Commissioners of the school, the governing body, took the position that the children's non-participation could become a source of disorder and that the teacher's actions were illegal. Instead, they expelled the boys until they were willing to participate in the religious practices of the school.

Mr. Chabot appealed to the Commissioners and then brought a mandamus action to the courts when the Commissioners refused to reconsider. After four years, the case was resolved in the Chabots' favour at the Quebec Court of Appeal. The court noted that provisions in the legislation for Protestant schools gave exemptions to students of other faiths, such as Catholics and Jews, so that they would not be required to participate in activities of a religion they did not share. However, the legislation regulating Roman Catholic education did not have similar exemptions.

The court recognized, "On this subject, it appears useful to recall that the right to give one's children the religious education of one's choice, like freedom of conscience, is anterior to positive law." As precedent, court referenced cases as far back as 1878, which long predates the international law on this subject. So it is clear that such a right existed in Canada prior to the development of international human rights norms. Several justices on the panel noted that Mr. Chabot was legally required to send his children to school. Therefore, the school, the only one available to the family, was obliged to receive them.

Ultimately, the Quebec Court of Appeal recognized both the right of the children to education and the right of the parents to determine the education of their children in conformity with their religious beliefs.

4.3. *Multani v. Commission scolaire Marguerite-Bourgeoys (2006)*

The final case, also from Quebec, involved a Sikh boy, Gurbaj Singh Multani. Having been baptized into the Sikh faith, he therefore wore a kirpan, a small dagger made from metal. In 2001, it was discovered that Gurbaj had brought a kirpan to school when he accidentally dropped it on the playground. This violated the school's code of conduct, which prohibited carrying weapons and dangerous objects at school.

The school board's legal counsel sent the Gurbaj's parents a letter offering a reasonable accommodation. The letter authorized Gurbaj to wear the kirpan, provided that it was sealed inside his clothing. Gurbaj and his parents agreed. However, the school's governing board refused to ratify the agreement. The parents appealed to a review committee, which upheld the decision against Gurbaj. Instead, the council of commissioners suggested that he wear a symbolic kirpan in the form of a pendant, or a kirpan made of something other than metal.

Balvir Singh Multani brought an action to the court on his behalf and that of his son, seeking a declaratory judgment permitting Gurbaj to wear a metal kirpan to school so long as it was secured. He also arranged for alternative schooling for his son. At first instance, the Multani petition was granted. However, it was overturned at the Quebec Court of Appeal. The Multanis appealed to the Supreme Court of Canada.

Between the time of the previous cases and the Multani case, Canada had adopted the Charter of Rights and Freedoms, a constitutional bill of rights. The Multanis therefore alleged a violation of their religious freedom under the Charter.

Gurbaj gave testimony that as an orthodox Sikh, he was required to comply with a strict dress code requiring the wearing of uncut hair, a wooden comb, a steel bracelet, a special undergarment and the kirpan. A Sikh chaplain testified that the Sikh religion teaches pacifism and that the kirpan must not be used as a weapon to hurt anyone. By contrast, the school saw the kirpan as a weapon.

The respondent school board and the Quebec Attorney General clearly viewed the kirpan as "a dagger, a weapon designed to kill, intimidate or threaten others." As Mark Witten surmises, "Stripped of its religious context, the kirpan was an incomprehensible and dangerous artifact that was best confined to the private sphere" (Witten 2016: para. 60).

The court ruled that the school had violated Gurbaj's religious freedom under section 2(a) of the Charter. Once a violation has been found, the school has an opportunity to justify its actions under section 1 of the Charter, the limitation clause. The school had to show that a pressing and substantial objective warranted violating a constitutionally protected right. Here, the objective of ensuring safety in schools met that requirement.

But the school then had to show that the means it used to achieve its objective was rationally connected to the objective and that it minimally impaired the right in question. The court ruled that the rational connection requirement was met. However, the school could not prove that it only minimally impaired Gurbaj's religious freedom. The court observed that there had been no reported cases of a kirpan being used for a violent purpose in any Canadian school.

The court concluded:

A total prohibition against wearing a kirpan to school undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others. On the other hand, accommodating Gurbaj Singh and allowing him to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities. (para 79)

5. Conclusions

This article has analyzed three historic legal cases resulting from children being excluded from state-funded schools for practising their religious beliefs. In each case, the child identified with a minority religion, the values and practices of which were at odds with prevailing Canadian values and practices. The experiences of these students, all of whom were excluded for following their family's religious practices, were tremendously alienating. In each case, parents had to arrange for some form of alternative schooling for their children. The children felt rejected by the schools, by school officials and their commissions, and by society. They were singled out as different and their religious beliefs were deemed unacceptable, even deviant. By proxy, their parents were also deemed unacceptable, as were the religious practices of the entire religious community.

In each case, the courts ultimately upheld freedom of religion and the right to education for religious minorities. Carissima Mathen notes, "The Supreme Court has generally been sensitive to protecting children even where doing so might infringe upon others' fundamental freedoms" (Mathen 2009: para. 38). Eventually, in these cases at least, the children were admitted back into the school from which they had been excluded. But what did that feel like for the students? What harm to their identity, psyches and mental health had already been inflicted by the school's actions? In a small community like Lamorandière, Quebec, or even in a larger one like Hamilton, Ontario, the other students would likely have known the full story. Other children may have been warned by their parents not to associate with these children who had different beliefs. As Lois Sweet (1997:3) commented, "They were the 'other' personified."

It is tempting to dismiss these cases as anomalies in an otherwise tolerant society. However, in 2022, Josh Alexander, a male high school student in a small community, was expelled from a state-funded Roman Catholic school for taking a public stance in opposition to transgender students using female washrooms (Canadian Catholic News 2024). This expulsion occurred even though his position was consistent with

Roman Catholic teaching on human sexuality. This expulsion has not yet been litigated, but it shows that students continue to be expelled on the basis of religious beliefs.

If indeed, as discussed in the introduction, schools have a significant role to play in socializing students to be productive, participating members of society, one of the values instilled must be respect for others' deeply held religious beliefs. Canada is a multi-cultural, multi-ethnic and multi-religious society with a commitment to practising pluralism. Schools can and should be a place where such pluralism is modelled. The Canadian legal system must continue to support the rule of law even where it applies to minority rights regarding children and the right to religious freedom. The kids deserve this!

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