

COURT OF APPEAL FOR ONTARIO

CITATION: Ontario (Education) v. Grassroots for Affordable Jewish Education
Inc., 2026 ONCA 70
DATE: 20260204
DOCKET: COA-25-CV-0298

Gillese, Pepall and Roberts J.J.A.

BETWEEN

His Majesty the King in Right of Ontario as represented by the
Minister of Education and the Minister of Health

Respondent/Moving Party/Appellant
(Respondent)

and

Grassroots for Affordable Jewish Education Inc., Stephen
Mitchell, Mordechai Ben-Dat, Zac Kaye, Ron Gersh, Ashleigh
Segal-Eskin, Ronnen Lederman, Miri Schneiderman, Karen
Goldenberg, Howard Price, and Sara Dobner

Applicants/Responding Parties/Respondents
(Appellants)

Jillian Siskind, Lawrence Greenspon and Victoria Pileggi, for the appellants

Josh Hunter and Maia Stevenson, for the respondent

Heard: November 21, 2025

On appeal from the order of the Divisional Court (Justices Nancy L. Backhouse, Richard A. Lococo and Shaun O'Brien) dated September 10, 2024, with reasons reported at 2024 ONSC 4905, setting aside the order of Justice Eugenia Papageorgiou of the Superior Court of Justice, dated August 21, 2023, with reasons reported at 2023 ONSC 3722.

Gillese J.A.:

I. OVERVIEW

[1] The appellants brought an application seeking public funding for Jewish day schools from the Ontario government.¹ Ontario moved to strike the application on the basis it was an attempt to relitigate the Supreme Court of Canada decision in *Adler v. Ontario*, [1996] 3 S.C.R. 609 (the “Motion”).

[2] The appellants responded to the Motion by arguing there was a reasonable prospect the court would revisit *Adler*, based on the test set out in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, and *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 (the “*Bedford/Carter* test”). Under the *Bedford/Carter* test, a trial judge can revisit binding precedent if: (i) a new legal issue is raised or new legal issues arise as a consequence of significant developments in the law; or (ii) there is a change in the circumstances or evidence that “fundamentally shifts the parameters of the debate”: *Bedford*, at para. 42.

[3] The motion judge found the appellants had a reasonable prospect of satisfying the *Bedford/Carter* test and dismissed the Motion.

¹ They also commenced their application against the Attorney General of Canada. The motion judge struck the application and the appellants did not appeal that decision.

[4] Ontario successfully appealed to the Divisional Court, which dismissed the application.

[5] In the appeal now before this court, the appellants challenge the Divisional Court decision and ask that their application be permitted to proceed.

[6] I would dismiss the appeal. *Adler* directly determines the issues raised on the application and, for the reasons of the Divisional Court, I see no reasonable prospect that, pursuant to the *Bedford/Carter* test, *Adler* can be revisited by the lower court.

II. BACKGROUND

[7] The individual appellants are parents and grandparents of children who attend or attended Jewish day schools in Ontario; the appellant Grassroots for Affordable Jewish Education Inc. is a not-for-profit organization that advocates on their behalf (together, the “Appellants”).

[8] The Appellants brought an application (the “Application”) in which they sought full funding for Jewish day schools by His Majesty the King in Right of Ontario as represented by the Minister of Education and the Minister of Health (“Ontario”). They contend that Ontario’s failure to fully fund Jewish day schools in Ontario, as it does for Roman Catholic separate schools, breaches their right to freedom of religion under s. 2(a) of the *Canadian Charter of Rights and Freedoms*

and their right to equality under s. 15(1) of the *Charter*. Sections 2(a) and 15(1) of the *Charter* are set out in Schedule A to these reasons.

[9] Ontario brought the Motion to strike the Application pursuant to r. 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. It maintained that the issues raised in the Application had been definitively decided in *Adler*. *Adler* was brought by parents who sent their children to private religious schools, including Jewish day schools. The parents sought a declaration that non-funding of Jewish day schools in Ontario violated ss. 2(a) and 15(1) of the *Charter*. The Supreme Court held the s. 2(a) claim failed because s. 93(1) of the *Constitution Act, 1867*, is a comprehensive code of denominational school rights. It held the s. 15(1) claim failed because the funding of Roman Catholic separate schools and public schools is within the contemplation of the terms of s. 93 and, therefore, is immune from *Charter* scrutiny. Section 93 of the *Constitution Act, 1867*, is set out in Schedule A to these reasons.

[10] In their Application, the Appellants put forward evidence of two types of facts and circumstances they contended were new. First, they submitted evidence of the threat to the long-term survival of the Jewish community. This evidence emphasized the importance of Jewish day school education to Jewish religious practice and cultural identity. Second, the Appellants relied on what the motion judge described as “a growing recognition of the benefits of supporting diversity”.

[11] The motion judge acknowledged that this evidence, on its own, did not satisfy the *Bedford/Carter* test. However, she stated, when considered together with the Appellants' other arguments, the evidence had "some relevance" to whether that test had been met. The Appellants' other arguments were based on: developments in the law related to the *Charter*; the addition of s. 93A to the *Constitution Act, 1867*; and, developments in international law. The motion judge concluded that when the evidence of social, political, and legislative changes was considered together, the Appellants had a reasonable prospect of satisfying the *Bedford/Carter* test. Accordingly, she dismissed the Motion and allowed the Application to proceed.

[12] In allowing Ontario's appeal, the Divisional Court noted there was "no doubt" *Adler* directly determined the issues raised in the Application; rather, the dispute between the parties was whether *Adler* could be revisited pursuant to the *Bedford/Carter* test. The Divisional Court concluded the motion judge erred in finding the Application had a reasonable prospect of satisfying that test for the following reasons.

[13] First, given that the motion judge acknowledged that the facts and circumstances in the Application were not new and found they did not on their own satisfy the *Bedford/Carter* test, she erred in treating that evidence as relevant when deciding whether the Application met the *Bedford/Carter* test. The Divisional Court found the evidence presented on the Application "not only failed to fundamentally

shift the parameters of the debate but replicated the circumstances in *Adler*". In so finding, it noted that in *Adler*, the lower courts had accepted the Appellants' evidence that education of their children in accordance with their religious practices and beliefs was essential to their membership in the religious community and the survival of that community. The importance of diversity was also "squarely at play" in *Adler*. Consequently, the small shifts in various facts and circumstances on the Application were insufficient to "profoundly alter" the framework in *Adler*. Accordingly, it was an error on the part of the motion judge to find that evidence was relevant to a determination of whether there was a reasonable prospect the Application would satisfy the *Bedford/Carter* test.

[14] Second, the Divisional Court found that none of the evidence of alleged developments in the law on which the Application rested had any reasonable prospect of meeting the *Bedford/Carter* test because they were irrelevant to the *Adler* analysis.

[15] The alleged developments in law were found to be irrelevant for a number of reasons, a key one of which is that the motion judge wrongly relied on dissenting opinions in *Adler* to question the force of the majority analysis. Developments in the law related to ss. 2(a) and 15(1) of the *Charter* were irrelevant because *Adler* holds that *Charter* analysis is inapplicable in light of the unique constitutional protection afforded to Roman Catholic separate schools in Ontario under s. 93(1) of the *Constitution Act, 1867*. In terms of developments in international law, the

Divisional Court made two observations of note. First, *Adler's* interpretation was rooted in Canadian history – in particular, the historical compromise made at Confederation – and did not leave room for the international instruments and other sources cited by the motion judge. Second, even if the presumption of conformity did constitute a development in the law, international principles cannot be used to invalidate Canadian constitutional provisions. If one part of Canada's own Constitution cannot be used to invalidate another provision within the Constitution, there is no reasonable prospect that international sources could do so.

[16] Finally, the Divisional Court held the addition of s. 93A had no reasonable prospect of meeting the *Bedford/Carter* test because it does not apply to Ontario and does not affect how s. 93 is to be interpreted in this province. The amendment was authorized under the amending formula in s. 43 of the *Constitution Act, 1982*, by Quebec and Canada and, therefore, affects only residents of Quebec. Thus, the motion judge erred in finding that s. 93A gave rise to a reasonable prospect that the Application could meet the *Bedford/Carter* test.

III. THE ISSUES

[17] The Appellants ask that the following three questions be decided on this appeal. Did the Divisional Court err:

1. in applying the wrong test for determining a motion to strike under r. 21;

2. in law, in concluding that the *Bedford/Carter* test could not be met by considering the cumulative effect of a number of changes in facts and law; and
3. in finding that s. 93 of the *Constitution Act, 1867*, was a complete bar to the Application's success, despite the changes brought by s. 93A, changes in international law, and the evolution of *Charter* rights since 1996?

IV. THE FRESH EVIDENCE MOTION

[18] The Appellants moved to introduce fresh evidence on this appeal. The proposed evidence consists of a report published in July 2025 (the "Report") and a corresponding affidavit of its author (the "Affidavit"). The Report and Affidavit address the nature and extent of antisemitism in Ontario's schools from kindergarten to grade 12. Among other things, the Report shows widespread antisemitism in that population in both public and Catholic schools. Further, the Affidavit states that the situation facing Jewish schoolchildren attending Ontario publicly-funded schools has "worsened substantially since 2000, with the most dramatic change being the period post-October 7, 2023".

[19] The Appellants submit the proposed evidence should be admitted because the Divisional Court decision "was predicated on its conclusion that the circumstances raised in the Application 'replicated' those circumstances that

existed in *Adler*". They maintain the proposed evidence establishes that finding is "demonstrably wrong".

A. The Principles Governing the Admission of Additional Evidence on Appeal

[20] The requirements governing the admission of additional evidence on appeal were revisited in *Barendregt v. Grebliunas*, 2022 SCC 22, [2022] 1 S.C.R. 517. As stated at para. 29 of *Barendregt*, appellate courts have the discretion to admit additional evidence to supplement the record on appeal when the proposed evidence:

- (i) could not, by the exercise of due diligence, have been obtained for the lower court;
- (ii) is relevant, in that it bears upon a decisive or potentially decisive issue;
- (iii) is credible, in the sense it is reasonably capable of belief; and
- (iv) is such that, if believed, could have affected the result in the lower court.

[21] The admission of additional evidence on appeal "will be rare" because, as the case proceeds up the appellate ladder, the matters in issue between the parties should narrow, rather than expand: *Barendregt*, at para. 31. To treat additional evidence otherwise would blur the distinction between the roles of trial and

appellate courts, with trial courts being responsible for making factual findings and appellate courts being responsible for reviewing trial decisions for errors: *Barendregt*, at para. 40.

[22] *Barendregt* also addresses the differences between “new” evidence on appeal, as opposed to “fresh” evidence. Evidence is “new” if it pertains to facts that occurred after trial; evidence is “fresh” when it occurred before trial but, for some reason, could not be put before the lower court: *Barendregt*, at para. 48. However, all four requirements set out above apply to additional evidence tendered on appeal, regardless of whether it is fresh or new: *Barendregt*, at paras. 34, 55.

B. Analysis

[23] I have concluded that the proposed evidence does not meet the fourth requirement and, accordingly, I would not admit it. Before giving my reasons for so concluding, I will briefly address the first three requirements.

i. The first requirement

[24] The first requirement is that the proposed evidence could not, with the exercise of due diligence, have been obtained for the lower court. In this appeal, neither the Report nor the Affidavit were in existence at the time of the proceedings below. Nonetheless, as *Barendregt* explains, the due diligence requirement is “sufficiently flexible” to adapt to concerns raised by evidence arising after trial: at para. 58. However, to find the first requirement satisfied simply because the

evidence was not in existence at the time of the lower court proceeding would do away with the due diligence requirement. Instead, the first requirement requires the court to consider the conduct of the litigant seeking to adduce the proposed evidence. The court must determine whether that party could – with due diligence – have acted in a way that would have rendered the evidence available for trial: *Barendregt*, at paras. 56-61.

[25] In this case, when considering the first requirement, it is useful to consider whether the proposed evidence is new or fresh. The Report is new, in my view, for two reasons. First, it was published in 2025, after the Motion and appeal to the Divisional Court were decided. Second, it was based on a study that was conducted from late January to early April 2025 and covered incidents taking place specifically between October 2023 and January 2025. Neither the Report nor the information it contains could have been available earlier in this proceeding with the exercise of due diligence. Therefore, in my view, the due diligence requirement is met with respect to the Report.

[26] Determining whether the due diligence requirement is met in respect of the Affidavit is not as straightforward. Consider, for example, the affiant's opinion that "antisemitism faced by children in public schools has worsened substantially since 2000, with the most dramatic change being the period post-October 7, 2023". Given the lengthy period between 2000 and the bringing of the Application, the affiant's reference to worsening circumstances since 2000 suggests that evidence

supporting that opinion could, with due diligence, have been obtained and put before the motion judge. This consideration weighs against the admission of at least some of the additional evidence. However, the affiant's reference – in the same sentence – to the “most dramatic change” having arisen in the period between October 2023 and January 2025, shifts the calculus in favour of admitting the proposed evidence, including the Affidavit, because again that information could not have, with due diligence, been put before the court in the earlier proceedings.

[27] Thus, the question becomes, how is the court to decide whether to admit proposed additional evidence that appears to consist of both fresh and new evidence? Even accepting that the due diligence requirement is met, such a determination is unnecessary because of my conclusion that the Appellants' motion to adduce fresh evidence is best decided on the fourth requirement. I leave a deeper exploration of how to treat evidence that consists of both fresh and new for a case in which that determination is critical.

ii. The second requirement

[28] To satisfy the second requirement, the proposed evidence must be relevant, in that it “bears upon” a decisive or potentially decisive issue. One of the decisive issues in this appeal is whether the evidence on the Application has a reasonable prospect of satisfying the second prong of the *Bedford/Carter* test. To do so, that evidence must establish a change in circumstances that fundamentally shifts the

parameters of the debate in *Adler*. The proposed evidence does bear on whether there has been a change in circumstances from those in *Adler*. However, as I explain in my analysis of the fourth requirement, the proposed evidence does not have a reasonable prospect of fundamentally shifting the parameters of the debate in *Adler*.

iii. The third requirement

[29] To satisfy the third requirement, the proposed evidence must be “credible”, in the sense it is reasonably capable of belief. In my view, it is unquestionable that the proposed evidence is credible. The author of the Report is a distinguished expert on antisemitism in Canada. Furthermore, the commissioned study was conducted under the purview of the Government of Canada (Department of Canadian Heritage, Ministry of Canadian Identity and Culture).

iv. The fourth requirement

[30] The fourth requirement for admission of additional evidence is that, if believed, the proposed evidence could have affected the result in the lower court. In my view, the proposed evidence does not satisfy this requirement.

[31] The primary factual circumstance in *Adler* was the threat to the long-term survival of the Jewish community. While the proposed evidence offers further insight into the challenges to the long-term survival of the Jewish community, that additional insight does not amount to a change in circumstance that has a

reasonable prospect of “fundamentally shift[ing] the parameters of the debate”. Therefore, if admitted, the proposed evidence could not be expected to have affected the result below. Accordingly, the proposed evidence does not satisfy the fourth requirement for the admission of additional evidence.

[32] For essentially the same reason, I do not accept the Appellants’ assertion that the Divisional Court decision is predicated on it having concluded that the circumstances raised in the Application “replicated” those in *Adler*. In making that statement, I understand the Divisional Court to simply be saying that the evidence adduced on the Application was similar in nature to that which was before the Supreme Court in *Adler* and, therefore, did not have a reasonable prospect of fundamentally shifting the parameters of the debate.

Issue 1 No error in the application of the rule 21.01(1)(b) test

[33] The Appellants submit the Divisional Court failed to properly apply the test for a motion to strike under r. 21.01(1)(b). They contend that instead of asking whether there was a reasonable prospect the *Bedford/Carter* test would be met on a full evidentiary record, the Divisional Court engaged in a substantive analysis of the arguments and asked whether the Application would succeed.

[34] I do not accept this submission.

[35] The Divisional Court expressly recognized that Ontario brought the Motion to strike under r. 21.01(1)(b) on the basis the Application had no reasonable

prospect of success. It also expressly recognized that, on the Motion, the court had to determine whether there was a reasonable prospect the Appellants could satisfy the *Bedford/Carter* test for revisiting binding precedent. And, the Divisional Court correctly articulated the *Bedford/Carter* test.

[36] There is nothing in the Divisional Court reasons to indicate that, as the Appellants allege, the court then determined whether the Appellants would succeed, rather than whether the evidence raised a reasonable prospect it would satisfy that test. That the Divisional Court properly applied the test is evident from para. 15 of its reasons, where it instructs itself as follows:

On a motion to strike, it is not the court's task to finally conclude whether the record discloses such a fundamental shift or profound alteration, but the court must at a minimum identify where there is a reasonable prospect it will be found in the record.

[37] On a full and fair reading of its reasons, that is precisely what the Divisional Court did. Accordingly, in my view, this ground of appeal fails.

Issue 2 No reasonable prospect the *Bedford/Carter* test could be met

[38] The Appellants submit that the Divisional Court erred when it concluded there was no reasonable prospect that the Application could satisfy the *Bedford/Carter* test. They argue that the Application raises several new legal issues that were not raised in *Adler* and, thus, the court is not bound by *Adler* in relation to those issues. They also contend that the reasons of the Divisional Court

indicate that a single solitary issue must shift the parameters of the debate, rather than a consideration of the cumulative effect of numerous changes in facts and law.

[39] I do not accept this submission. The evidence adduced on the Application was similar in nature to that which was before the court in *Adler*. I echo the Divisional Court's reliance on *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 26, which highlights the strictness of the *Bedford/Carter* test. The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system and to guaranteeing certainty in the law. Thus, the new evidence exception to vertical *stare decisis* is limited. That exception has been found to be engaged "where the underlying social context that framed the original legal debate is profoundly altered": *Comeau*, at para. 31.

[40] For the reasons of the Divisional Court, I also reject the submission that the Application raised new legal issues that have a reasonable prospect of satisfying the first prong of the *Bedford/Carter* test.

[41] Finally, I see nothing in the argument that the Divisional Court found that a solitary issue was needed to shift the parameters of the debate. It dealt with the Appellants' submissions, both separately and cumulatively, before finding that none posed a reasonable prospect of satisfying the *Bedford/Carter* test.

Issue 3 No error in the treatment of s. 93 of the *Constitution Act, 1867*

[42] I see no error in the Divisional Court’s analysis of s. 93 of the *Constitution Act, 1867*, as summarized above.

V. DISPOSITION

[43] For these reasons, I would dismiss the appeal. In accordance with the parties’ agreement, I would make no order as to costs of the fresh evidence motion or the appeal.

Released: February 4, 2026 “E.E.G.”

“E.E. Gillese J.A.”
“I agree. S.E. Pepall J.A.”
“I agree. L.B. Roberts J.A.”

Schedule A

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B. to the Canada Act 1982 (U.K.), 1982, c.11

2 Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

...

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.

Constitution Act, 1867

93 In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union;

...

93A Paragraphs (1) to (4) of section 93 do not apply to Quebec.