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THE CHARTER AND PUBLIC EDUCATION:
THE TRANSFORMATION OF CANADIAN LEGAL CULTURE

by

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B.A. (Honours), Simon Fraser University, 1981
LL.B., University of British Columbia, 1985

THESIS SUBMITTED
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The Charter and Public Education: The Transformation of Canadian Legal Culture

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ABSTRACT

This dissertation explores the process through which democratic rights, promulgated in a constitutional charter, can become a living and growing part of a legal culture, and through that culture, a vital part of social reality. More specifically, the dissertation examines the manner in which an expansion and diffusion of constitutional rights in selected areas of Canadian education have affected the broader pattern of Canadian legal development. For example, have Canadian legal traditions which evolved in the pre-Charter era, been reinforced or fundamentally altered by the Charter of Rights and Freedoms? Beyond the obvious changes in Canada's legal architecture and rhetoric after 1982, in what way has the country's legal culture been transformed? Have Canadians become more "rights conscious" since the entrenchment of a constitutional charter, and if so, with what impact on the Canadian public education system?

The conceptual framework elaborated in the first chapter of the dissertation utilizes the concept of legal culture as a comparative analytical tool for studying rights consciousness and constitutional development in Canada following the adoption of the Charter. The major analytical chapters of the dissertation are case studies focusing on constitutional developments in various spheres of public education. Each of the four case studies -- treating salient rights and legal issues currently relevant to the Canadian school community - -explores change and continuity in Canada's legal culture. The case studies focus upon: (1) equal educational opportunities for children with disabilities; (2) teachers and the AIDS crisis; (3) gender equality in the schools, and; (4) the role of religion in the public school
curriculum. The final chapter reviews the major findings presented in the tour case studies, and explores some implications of those findings for the evolution of Canadian education and legal culture.
To Lenny,

With All My Love
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PREFACE

Canada's entrenchment of the *Charter of Rights and Freedoms* in 1982 signalled a new and momentous stage in the country's constitutional development. In the Supreme Court of Canada's first *Charter* judgment, Mr. Justice Estey emphasized both the significance and paramountcy of the novel constitutional instrument:

*We are here engaged in a new task, the interpretation and application of the *Charter of Rights and Freedoms*. This is not a statute or even a statute of the extraordinary nature of the Canadian Bill of Rights... It is part of the Constitution of the nation adopted by the constitutional process... The Charter comes from neither level of the legislative branches of government but from the Constitution itself. It is part of the fabric of Canadian law. Indeed, it is the supreme law of Canada.*

In the same ruling, the Court asserted that the *Charter* would be accorded broad and generous judicial interpretation in order "to better serve" the Canadian community which "it is designed to guide... for a long time." Anything less, the Court cautioned, would "stunt the growth of the law and hence the community it serves."

Few areas of Canadian society appear to have been as deeply affected by the *Charter* as the field of public education. In the short span of the new constitution's existence, education has rapidly become the focus of several important legal challenges and judicial decisions. The manner in which the *Charter* has impacted on educational policies and

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practices has important consequences for both the school community and Canadian society more broadly. In the United States, for example, constitutional decisions concerning educational issues frequently have been the catalyst for broad-ranging public policy debates having important repercussions on the evolution of public education. As one American constitutional scholar has pointed out: "Schools, by the nature of the enterprise and the immediacy of the impact of educational policies on large numbers of persons of disparate backgrounds, have been the focus of a significant share of (U.S.) Supreme Court opinions on social issues."³

This dissertation seeks to explore the process by which democratic rights, promulgated in a constitutional charter may become a living and growing part of the legal culture, and through that culture, a vital part of social reality. The dissertation will also examine how the expansion and diffusion of rights in various selected areas of public education have affected broader patterns of constitutional growth and change.

Has the Charter of Rights and Freedoms reinforced or reformed Canadian legal traditions? Beyond obvious changes in Canada’s legal architecture and rhetoric, in what way has the country’s legal culture been transformed? Have Canadians become more "rights conscious" since the entrenchment of a constitutional charter? The research design elaborated in the first chapter of the dissertation will utilize the concept of "legal culture" as a comparative analytical tool for studying rights consciousness and constitutional development in Canada since the adoption of the Charter in 1982. The major research

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chapters of the dissertation will focus on constitutional developments in the field of education as a means to explore change and continuity in the Canadian legal culture.

In Part I of the dissertation, the first chapter introduces the theoretical basis and focus of the study, and also elaborates a conceptual framework for assessing the impact of constitutional change on Canadian legal culture. Chapter 2 discusses Canadian constitutional developments as they relate to civil rights protections, with particular attention to the 1982 Charter of Rights and Freedoms. This chapter will also set the dissertation in the broader context of comparative education law. The subsequent four chapters of the dissertation in Part II are structured thematically, focusing on case studies which illustrate the linkage between constitutional development, legal culture, and education. The case studies represent salient rights and legal issues currently relevant to the school community: (1) equal educational opportunities for disabled children, (2) teachers and the AIDS crisis, and; (3) gender equality in the schools, and; (4) the role of religion in the public school curriculum. The final chapter in Part III summarizes the findings of the dissertation and explores the dynamic relationship between constitutional evolution, educational changes, and the Canadian legal culture.
PART ONE
CHAPTER 1

STUDYING THE LAW-SOCIETY NEXUS:
MAJOR CONCEPTUAL ISSUES

Without the use of concepts and general principles we can have no science, or intelligible systematic accounts, of the law or of any other field. Without general ideas human experience is dumb as well as blind.

M.R. Cohen

I. INTRODUCTION

Social theorists and legal scholars have long been fascinated with the interaction between law and social change. Analyzing and evaluating the interactive relationship between legal and societal change, however, is a difficult and complex task. Thus, several scholars have observed that there is an "embarrassing paucity of knowledge" regarding the relationship of law to society, and that many basic questions concerning the interaction between legal change and social change are "completely neglected." Moreover, while some analysts emphasize that the evolution and dynamics of a society are largely dependent on the nature of the legal system and the administration of laws, others view the legal system

1 Reason and Law (Glencoe, Ill.: Freepress, 1950), p. 63.

as primarily a reflection of social forces and social change.

Despite the controversy about the nature of the nexus between law and social change, and despite the considerable methodological difficulties in studying that relationship, the problem of unravelling the connection between legal systems and society continues to be a highly significant realm of social inquiry. This dissertation will examine the impact of legal change, and in particular the impact of constitutional change, on the evolution of the Canadian educational system, and thereby on Canadian society more generally. Four issue areas which have been important in the recent development of Canadian educational policy and practice -- (1) equal educational opportunities for disabled children, (2) teachers and the AIDS crisis, and (3) gender equality in the schools, and (4) the role of religion in the public school curriculum -- will provide case studies to examine the relationship between legal and educational development.

The manner in which the Charter has impacted on educational policy-making and practice has important consequences for both the school community and Canadian society more generally. For example, in the United States, constitutional decisions concerning educational issues frequently have been the catalyst for broad-ranging public policy debates having important repercussions on the evolution of public education. As one American constitutional scholar has pointed out: "Schools, by the nature of the enterprise and the immediacy of the impact of educational policies on large numbers of persons of disparate backgrounds, have been the focus of a significant share of (U.S.) Supreme Court opinions
on social issues."

In order to better understand the factors which affect the relationship between law and society, both generally and in the Canadian context, this first chapter of the dissertation will focus on theoretical and conceptual issues pertaining to the dynamic connection between legal development and societal change. Three particular topics addressed in the theoretical-conceptual literature are especially crucial to consider before turning to the case study portion of the dissertation. The topics are: (1) the components of legal systems; (2) the definition and dimensions of legal cultures, and; (3) the phenomena of rights consciousness and legal character.

II. LEGAL SYSTEMS

It is a commonplace that the nature and operation of legal systems vary significantly with the historical and evolutionary context in which they are developed. Focusing on such variants, scholars have usually differentiated between a number of major legal traditions or "families of law" (such as the Anglo-American common law tradition, the Romano-Germanic civil law tradition, the socialist law tradition, Moslem law, Hindu law, Jewish law, and canon law, etc.). Each family of law is characterized by a number of common traits. Legal systems generally associated with Western societies, for example, are all notable for the putative paramountcy of the rule of law, due process of law, and the independence of the judiciary,

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and so on. However, individual legal systems (e.g., the British, French Canadian, and American legal systems), falling within a specific "family" and sharing various common features, also exhibit certain unique characteristics which are reflected in a society's laws, legal institutions, and mores.

Given the complexity and diversity of legal systems, many different concepts, analytical frameworks, and methodologies have been elaborated to examine the dynamics of a society's legal structure and traditions. This is particularly true with respect to analyses concerning the impact of changing social attitudes and behaviour on legal systems. Lawrence Friedman, who has developed a particularly important and useful model for examining the operation and dynamics of legal systems has observed, for example, that "there are many...ways of looking at legal systems and their relationship to the larger society, and many hybrid views. Most of them rest on observations that are undeniably true in part. The various theories simply assume different conceptions of the legal system."4

In his seminal work on law and social change, Friedman identifies three major constituent elements common to all legal systems: (1) structural components; (2) substantive components, and; (3) cultural components. The "structural" aspect of a legal system refers to its legal institutions, including the forms they take and the processes that they perform (e.g., the administration of justice, the constitution, federalism, division of powers, etc.). Friedman describes the second element of the legal system as the "substantive" component, or the "output side" of the legal system. This element includes the actual laws of a legal system, that is, the rules, principles, doctrines, case law, statutes, and

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4 Friedman, "Legal Culture and Social Development," p. 37.
The third element in the legal system is discussed by Friedman in terms of a "cultural" component. This aspect of the legal system, which can be termed the "legal culture," describes the values and attitudes which bind the system together, and which determine the place of the legal system in the culture of the society as a whole. According to Friedman's view of the legal system, how these three elements interact with each other, how they are influenced by external societal demands and pressures, and how they, in turn, influence legal behaviour, shape the actual "living law" of a society. Before turning in the next chapter to a discussion of the recent interaction of these three elements within the Canadian legal system and Canadian society, it is profitable to examine in more detail the concept of "legal culture" elaborated by Friedman and others.

III. LEGAL CULTURE

For most legal scholars, the operation and viability of legal systems are closely related to citizens' views about law, justice and the legal authorities, or what has been termed the "legal culture." Analysts, however, have defined and discussed the concept of legal culture from a number of differing perspectives. For some authors legal culture should be defined

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and understood in rather broad terms. Such perspectives suggest that legal culture, in contrast to the routine adoption and amendment of laws by legislative and judicial institutions, refers to a diffuse matrix of beliefs and attitudes which constitute the underpinning of law-related behavior in a society. For example, Lawrence Friedman -- whose definition will be adopted in this study -- views the term "legal culture" in reference to "the network of values and attitudes relating to law, which determines why and where people turn to law or government or turn away." According to Friedman, in order to understand the basic nature of a legal culture it is important to ask the following major questions:

What are the attitudes of different populations toward law and the legal system: Who goes to court and why? Who occupies legal roles-lawyers, judges, policemen -- and what do the role -- players do? What is the conversion process of the legal system; that is, how are demands handled, by whom and how are decisions made? Which officials have discretion; which do not? What questions are matters of rule, and what questions are matters of discretion? Are various parts of the system bureaucratic or flexible? What are the effects of the outputs on the population and how can we measure them? What is the source of the legitimacy of various parts of the system? Who is supposed to make law; who is supposed to carry it out? Is there much corruption and maladministration and why?

Although Friedman's view of "legal culture" suggests a quite complex and fluid concept, it also defines the legal culture in terms of more persistent features. Thus, for instance, even in democratic states where the surface action of the legal process provides a lively spectacle of changing actors and issues, the legal culture's basic perspectives

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6 Friedman, "Legal Culture and Social Development," p. 34.

regarding the proper role and ambit of the law are generally quite persistent and deeply rooted. John Merryman has also emphasized the importance of the historical underpinning of legal systems and has described legal culture as:

...a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society and the polity, about the proper organization and operation of a legal system and about the way law is or should be made, applied, studied, perfected and taught.\(^8\)

In contrast to Friedman and Merryman, other authors have utilized the concept of legal culture in a narrower sense. For example, in his classic analysis of the Canadian judicial system, Peter Russell equates the "legal culture" with the "legal tradition" as used in distinctions among the various families of law. It is Russell's thesis that the exercise of power by the judiciary is shaped and influenced in any given society by three "environmental" factors: (1) the level of social and economic development; (2) the prevailing ideology or political philosophy; and; (3) the society's legal culture.\(^9\) For Russell, legal culture in this sense refers to the civil law, in the case of the French legal tradition,


or the common law, in relation to the English legal tradition.10

1. Legal Culture and Political Culture

Another approach to the analysis of "legal culture" is offered by scholars who employ the closely-related concept of "political culture." Studies of political culture -- usually understood as attitudes and beliefs about the political system and how it works -- focus on the psychological orientation of individuals and groups with respect to the political system. Research focusing on political culture has identified several different aspects of attitudes towards the political system and its institutions that define the situations in which political action takes place. These dimensions have been categorized into cognitive, affective, and evaluative or normative dimensions.11 Studies of attitudes and beliefs concerning the political system, consider political culture to be the link between what happens in the mind of individuals, and how political institutions function. From this perspective, studies of

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10 Russell actually posits that the Canadian legal system is not bifurcated along French/English lines, but that the country's legal traditions are predominately based on the legal traditions established by the "common law," (i.e., the system of law indigenous to Great Britain, and through colonization, spread through what are today the commonwealth countries.) For a discussion of Quebec's legal culture as the concept is used by Russell see also John E.C. Brierley, "The Renewal of Quebec's Distinct Legal Culture: The New Civil Code of Quebec," University of Toronto Law Journal, Vol. 42, No. 4 (Fall 1992), pp. 484-503.

political culture attempt to bridge the gap between the study of the individual in various socio-political contexts and the operation of the political system as a whole.\textsuperscript{12} For the student of political culture, legal culture is one component of overall attitudes toward political and governmental institutions. Thus, the attitudes, beliefs, and emotions of the "operators" (the "internal" legal culture) as well as of the "users" (the "external" legal culture) of the legal system determine the way in which the legal system actually functions.

For example, according to Henry Ehrmann’s groundbreaking study of comparative legal culture, the support or disaffection for specific legal institutions will always be linked to traditions and to the culture in which the legal system is embedded. From this perspective, both the political and legal cultures may be viewed as subsystems of their cultural environment. In turn, both of these subsystems contain different cultural subdivisions. Thus, just as in some countries the army or the militants of a radical party live in a political subculture of their own, in another setting the judicial or another legal subsystem, e.g., the legal profession, might live apart and occasionally clash with values prevalent in the society.\textsuperscript{13}


\textsuperscript{13} Ehrmann, \textit{Comparative Legal Cultures}, p. 10.
2. **Internal and External Legal Culture**

The fact that legal cultures are composed of different subsystems or "subdivisions" is also an important consideration in most theoretical discussions. As mentioned above, a legal culture is not made up of uniform attitudes and beliefs, but rather is composed of different subsystems or subdivisions within the broader legal culture framework. In his comparative analysis of legal culture, Ehrmann defines and explains the "internal" legal culture as the "legal elite," that is, the judges, lawyers, policemen, etc. who have an integral role in the operation of the legal system. Friedman discusses the internal legal culture in a similar fashion, suggesting that the internal legal culture is the domain of the "legal specialists" in the legal system. In Friedman's view, although every society has a legal culture, only societies with legal specialists will have an internal legal culture.

The internal legal culture can be further broken down into different sub-subcategories or groupings. For example, within the internal legal culture, one finds legal specialists or a legal elite composed of defense lawyers, prosecutors, judges, and law enforcement officers, etc. Each of these different groups will have a quite different "mindset" or perception about the legal system, depending on which segment of the legal system that they operate within. A law enforcement officer attempting to fulfil his quota of driving offenses, for example, will have a different view of the law and citizens' rights than, for example, a defense lawyer who defends clients charged with traffic offenses. The judge who adjudicates such cases will have yet a different perspective about the law.
Despite their differences, however, these different elite subgroups also have something in common that differentiates them from the external legal culture, that is, a perception of the law that is based on some type of legal training and law-related job experience.

The "external" legal culture, on the other hand, is composed of individuals who have relatively little or no expertise in the law. In Ehrmann's analysis, for example, the external legal culture is created by those individuals who use or who are affected by the law (including victims), but who usually do not play an assertive role in the operation of the legal system. Friedman has pointed out, that unlike the attitudes and beliefs of the legal elite, the external legal culture does not tend to be "deep, or rational, or systematic, or internally consistent," nor does it need to be. Thus, he suggests, the external legal culture is composed of "popular ideas" about the law that are held by the "popular masses of people." According to Friedman, whether members of the general population think about these ideas a great deal or only a little, indeed whether they think about them at all, such mass ideas form the "raw material of the popular culture and thus of both the political and legal culture." Like the internal legal culture, the external legal culture is also composed of different subgroups. Viewed in this manner, it would be misleading to think of the external legal culture as a monolithic phenomenon. As Friedman puts it: "There is no such thing as the public; to understand legal culture, one must carefully define a relevant public; for various issues, this will be a different group of people."15

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14 Friedman, Total Justice, p. 105.

15 Friedman, "Legal Culture and Social Development," p. 40. Friedman has also suggested in this vein that "legal culture is not "public opinion" in the crude sense of a public opinion poll."
While the internal and external legal cultures can be thought of as two quite distinct social forces, there is inevitably a connection between the two, which is essential if the legal system is to function properly. Thus, the internal legal culture often mirrors the external culture, and part of the general community usually shares those attitudes that shape the substantive law and legal institutions.

3. Legal Culture, Rights Consciousness, and Legal Character

Friedman, Ehrmann, and other scholars have suggested that monitoring and evaluating changes within the legal system is to examine trends and developments within the legal culture. In this respect, the legal system can be thought of as dynamic process, characterized and regulated by cycles of demand and response. According to Friedman, the legal process is set in motion when demands are made on it. These demands originate as general feelings within the external legal culture about a certain area of the law or legal system. In order for these public emotions and opinions to have an impact on the legal system, they must be converted from opinions and feelings into demands, attitudes, and behaviours that can be processed to fit the requirements of the internal legal culture. Without this transformation, the external legal culture will not be adequately processed by the internal legal culture and incorporated into the legal system. As Friedman points out: "Social pressure' in the air" is not in and of itself a demand on the legal system, except to the extent that such pressure is communicated to legal actors within the legal system, i.e.,
lawyers, judges, legislators.  

When Friedman talks about "social pressure in the air" he is actually referring to changes in the very definition of "legal" in people’s minds; for example, changes in the level and shape of public expectations, ideas about what is possible, what is natural and what is feasible through the law. The general feelings reflected in a legal culture regarding fundamental issues of liberty and freedom, or "rights," have also been generally described as the level of "rights consciousness" in a society. Put another way, rights consciousness refers to public attitudes, beliefs, expectations, etc. about justice and compensation. Legal scholars have suggested that dealing as it does with intangible concepts, such as Friedman's "social pressure in the air," rights consciousness "lacks a certain clarity of focus" and is therefore "difficult to define and operationalize." The root of this difficulty can be traced to the complex nature of "rights" as a concept. Ronald Dworkin, in his classic treatise, Taking Rights Seriously, suggests that the idea of "rights" has many different senses, and indeed "has different force in different contexts." Dworkin describes citizen consciousness about rights as a kind of "claims consciousness." From this perspective, Dworkin discusses "rights" in the following sense:

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16 The Legal System, p. 223.

17 Of course, as Ehrmann points out, in certain situations a legal elite or another power group might introduce changes in the law that are ahead of public opinion." Ehrmann, Comparative Legal Cultures, p. 4.

18 Friedman, Total Justice, p. 100.

A successful claim of right...has this consequence. If someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so. This sense of a right...seems to me very close to the sense of right principally used in political and legal writing and argument of recent years. It marks the distinctive concept of an individual right against the State. 20

Following Dworkin, this study will refer to "rights" as denoting various privileges and liberties which are generally considered antecedent to government and institutionalized legal declarations and to which political decision-makers and participants in the legal process must accommodate themselves.

Notwithstanding the obvious difficulties associated with defining and measuring rights consciousness, it is still possible to make some general observations about the concept. For example, Austin Sarat, in his study of American rights consciousness, has suggested that the concept can be thought of as an aspect of "legal competence" and that rights consciousness refers to "the extent to which individuals see themselves as possessing...mandatory claims, claims which may be as general as the right to speak freely or which may arise in specific situations, such as the right to recover from breach of contract." 21 How individuals collectively perceive of such "mandatory claims" finds expression in the society's "legal character." 22 In this sense, the general level and shape of rights consciousness exhibited by a legal culture can be described in terms of a "modal character." Thus, rights


22 Friedman, Total Justice, p. 99.
consciousness implies that there is a large or typical group of citizens who are, for example, deferential to authority and who do not tend to make "rights" demands or claims on their rulers and institutions; or, individuals who are not deferential to authority, and who "have a keen sense of what is coming to them and are willing to take action to get it."23

Although the idea of "legal character" is a rather amorphous and unscientifc concept, it is, nevertheless, a useful and interesting tool for describing the level and shape of rights consciousness within a society, as well as the general traits of a legal culture. For example, we are describing an aspect of a society's legal character when we say that the society is "litigious," or "deferential to authority." Implicit in this description is a comparison with other countries and other times. Generally, this comparison relates to some sort of modal legal character, or at the very least, to an increase in the numbers of those who do or do not possess some specific trait, such as a consciousness about rights. In the United States, for instance, there is an assumption that rights consciousness has grown and become stronger over time. The level of rights consciousness in Canadian society, on the other hand, has traditionally been described as being significantly lower than that exhibited by Canada's neighbours to the south. Such conventional wisdom has been expressed by one popular chronicler of the Canadian national and legal character who has suggested that: "Canadians, as everyone outside of a Canadian hockey rink knows, are a quiet, polite people, genetically tidy, forever reticent and always respectful of authority."24

23 Ibid.

24 Andrew H. Malcolm, "In Canada, 'No, Eh?' As Protest," New York Times, November 19, 1988, p. B3. This concept as it applies to the Canadian legal character is discussed more fully in Chapter 2.
Friedman suggests that when there is a fundamental change in the modal character of a society, it often signals the emergence of a new trait in the legal culture. Take, for example, the case of a legal culture that has traditionally not thought a great deal about rights, or made many rights claims on its government. If a large number of people typically begin to have greater expectations about their rights, and are willing to take concrete steps to see that such expectations are realized, the overall thinking about mandatory claims and the way the legal system should process such claims may be transformed. According to Friedman, when feelings and expectations about rights multiply within the legal culture, they tend to encourage demands on the law and legal institutions. These demands are in turn processed by the lawmakers and legal institutions. If these components of the legal system respond positively to the demands made by the legal culture, the legal system will spiral in the direction of more rights, which in turn creates greater expectations and a fresh round of demands by the legal culture, and so on. The end result, according to Friedman, may be a radically altered legal culture.

In the following chapter, trends in the legal character and rights consciousness of the Canadian legal culture will be examined in light of recent Canadian constitutional developments, and particularly in view of the 1982 entrenchment of the Canadian Charter of Rights and Freedoms. Before embarking on this analysis, however, it is useful to examine some additional conceptual areas necessary to any systematic evaluation of a changing legal culture.
IV. LEGAL CULTURE AND SOCIAL CHANGE: ADDITIONAL CONCEPTUAL CONSIDERATIONS

Research studies focusing on the concepts of legal culture and rights consciousness invariably point out that these phenomena do not lend themselves to easy measurement or evaluation. Indeed, Lawrence Friedman has lamented that there is a marked absence of any systematic literature concerning legal culture. In 1969, Friedman, who pioneered much of the legal culture scholarship suggested: "What is most notably missing, even for the Western countries, is information on what we have called the legal culture."\(^{25}\) Over 15 years later, Friedman once again pointed out that: "Legal culture is not well explored as an object of research, but there does seem to be a growing interest in the subject."\(^{26}\)

Those studies that have attempted to measure and evaluate changes in a legal culture have suggested that the first hurdle which must be overcome is to identify the indicators or evidence of a legal culture that can be isolated for study over time. In this regard, Friedman has pointed out that in the absence of any tangible evidence of changes within a legal culture, evidence can be drawn from court opinions. While Friedman and others concede that judicial decisions -- which are based on arguments made by lawyers, and interpreted by judges (i.e., agents of the internal legal culture) -- are hardly a random sample of attitudes -- they can offer significant insights into the thinking of the broader (i.e., external) legal culture. Thus, because the internal legal culture is in many ways a mirror of the external

\(^{25}\) Friedman, "Legal Culture and Social Development," p. 40.

\(^{26}\) Friedman, Total Justice, p. 32.
culture, at least part of the general community often shares those attitudes that shape case law. As such, court decisions -- in the absence of other indicators -- provide the best available evidence of trends and developments within the legal culture.

"Law, being a practical thing," the great American jurist Oliver Wendell Holmes, once stated, "must found itself on actual forces." This suggestion implies that legal development is inseparable from changes in the underlying societal institutions, as well as from the changing feelings and demands of the community. In a similar vein, a European scholar, Eugen Ehrlich, who was a pathbreaker in the field of comparative legal sociology, summarized his work by explaining that: "the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself."

"Society itself" has indeed been the key and the catalyst to changes in legal systems. Fundamental changes in a legal culture, for example, have generally accompanied the "great revolutions" of Western history. Such societal upheavals are relatively rare, however, and even these landmark events (e.g., the American Revolution of 1776, the French Revolution of 1789, the British Revolution of 1640, the Russian Revolution of 1917, etc.) have essentially transformed a country's legal tradition while still remaining within it. Harold Berman, in his important study, Law and Revolution, has described this trend in historical terms:

To speak of a "tradition" of law in the West is to call attention to two major historical facts: first, that from the late eleventh and twelfth centuries on, except in

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certain periods of revolutionary change, legal institutions in the West developed continuously over generations and centuries, with each generation consciously building on the work of previous generations; and second, that this conscious process of continuous development is (or once was) conceived as a process not merely of change but of organic growth.  

As a rule the legal culture, as part of the legal tradition, is shaped gradually over an extended period of time, is explicitly and implicitly transmitted by various processes of socialization, and is highly resistant to the transitory events and commonplace dynamics of a society. Thus, attempting to replace fundamental aspects of historically conditioned legal systems may invite the possibility of one of two situations, either: (1) uprooting fundamental legal traditions, at considerable cost and disruption, or; (2) facing the risk that the new laws and legal institutions would be ineffective.  

Indeed, according to Berman: "even the great national revolutions of the past...eventually made peace with the legal traditions that they or some of their leaders set out to destroy."  

Given the historical continuity and persistence of legal traditions and legal culture, it is interesting to examine when and why legal changes do occur, and the significance of such changes. According to Friedman, studying legal culture may help determine the conditions under which legal change occurs -- either spontaneous change, or imposed change -- and, in the case of imposed change, the conditions which make such changes either succeed or fail. In Friedman's view, legal change


30 Friedman has suggested that revolutionary legal change requires three prerequisites: an activist judiciary; an activist legal profession; a genuine social movement, whose values are shared by the judiciary. *Total Justice*, pp. 31-32.

and changes in social attitudes and beliefs are inextricably connected. Thus, he explains: "legal institutions are responsive to social change; moreover, they have a definite role, rather poorly understood, as instruments that set off, monitor, or otherwise regulate the fact or pace of social change."^32 Although it is difficult to measure the relationship between law and social change, it is inevitable that changes in a legal system reflect shifts in social attitudes and values, which in turn may have a significant influence on societal development. Thus, as one study of legal culture and social change has put it: "in times of real and perceived emergencies, of major technological breakthroughs, of social catastrophes and widespread indignation, law will make the jump that enables it to confirm or even accelerate social change."^33

Another way of viewing the relationship between legal and social change is to examine how the legal culture, i.e., the network of societal attitudes and values about the law, influence legal behaviour in terms of the nature and quantity of demands the legal culture places upon the legal system, and how it processes such demands. Depending on the research issue at hand, legal culture can be conceptualized as: a) an independent variable influencing the administration of justice and the legal dimensions of different subsystems (e.g., including the education system); b) a dependent variable affected by different institutions and actors (e.g., the judiciary, lawmakers, interest groups, etc.) or; c) an intervening variable conditioning the legal interface between the citizen and the state.

According to Friedman "pure legal behaviour obviously depends on feelings and

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^32 Friedman, "Legal Culture and Social Development," p. 29.

^33 Ehrmann, Comparative Legal Cultures, p. 4.
attitudes; these are also important in determining whether subjects of the law will form groups, exert pressure on the law for change, act as enemy deviants and the like." Thus, Friedman suggests that legal changes are likely to occur when social force, i.e., power, influence, presses upon the legal system and evokes legal acts, when legal culture converts interests into demands or permits conversion. As such, Friedman contends that the legal culture component of a legal system is the immediate source of any legal change, no matter what the original source may have been. Hence, the dynamics of the legal culture must always be taken into account in studying legal and social change.

V. ANALYZING LEGAL CULTURE

1. The Merits and Demerits of Impact Analysis

As discussed earlier, one way of understanding the nature and dynamics of legal culture is to analyze judicial decisions. More specifically, an evaluation of changes in a legal culture can be carried out by studying the "impact" of constitutional adjudication on popular thinking about law, and in particular, on thinking about rights.

"Impact analysis," the study of how laws\textsuperscript{34} affect social attitudes and behaviour, attempts to evaluate under what conditions people utilize, react, or ignore particular legal rules. During the 1970s and 1980s scholars attempted to employ impact analysis to assist

\textsuperscript{34} The term "law" is used broadly to include constitutions, legislation, judicial decisions, and judicial-like decisions (e.g., arbitration and tribunal decisions).
in determining the ultimate consequences of laws. Most of such impact literature tended to be rather exploratory in nature, and a satisfactory conceptual framework did not emerge from that body of research. Indeed, a 1973 review of some of the early impact studies still held true in many respects in the early 1990s:

None of these studies tests a theory of policy impact (or even a partial one), or elaborates a conceptual framework to guide their own or other research. Nor do any of the studies rely on even modestly rigorous analysis of their data. Still, in this newly tilled soil, I will argue that these studies taken cumulatively lay the foundation for a theory of impact.

What factors enable particular laws, legal instruments, or legal acts to either modify or change social values and attitudes? This is the central question arising from the impact analysis literature. Using a commonsense definition of "impact," laws and legal acts can


37 Legal acts may, of course, take many forms. For example, any decision by a legal authority, such as a court or legislature, may constitute a legal act.

38 Much of the thinking about impact analysis had it origins in studies focusing on education law decisions. For early examples of such studies see Frank Way, "Survey Research on Judicial Decisions: The Prayer and Bible Reading Case," Western Political Quarterly, Vol. 21 (June 1968), pp. 187-205; Gordon M. Patric, "The Impact of a Court
be said to have an "impact" on society when they are causally related to somebody's conduct. Following Lawrence Friedman once again, the term "impact" as used in this study means "behaviour causally linked to a rule or command." Attempting to measure or evaluate "impact" is a difficult and ambitious undertaking. First, as Friedman points out, there is the question of cause and effect. For example, how is it possible to prove that a legal act actually affects a particular form of behaviour? Is it possible to disentangle legal causation from other causal agents? Friedman has suggested that there are two important elements that can be isolated in order to help measure the impact of a particular legal act: 1) the law in question must call for behaviour which is easily seen or observed and; 2) it must be possible to separate this behaviour from behaviour that would have occurred in the absence of such a law. For example, Friedman argues that if the speed limit is lowered, it must be possible to evaluate not only how many people obey the reduced speed limit, but also how many people have changed their behaviour as a result of the new law. This kind of evaluation would require "before and after data," or some kind of measurable substitute.


40 Harrell actually suggests a model of regression analysis to aid the empirical measurement of "impact." See "Law as an Instrument of Public Policy."
such as interviews with drivers, comparisons of similar towns with different speed limits, etc.\textsuperscript{41}

Even utilizing this commonsense measurement, however, it is still difficult to evaluate the cause and effect relationship between legal acts and social change, and also to determine whether there is any appreciable change in the broader legal culture.\textsuperscript{42} In any event, many scholars agree that there is enough evidence relating law and social change to attempt a more scientific conceptualization or systemization of "impact analysis" studies. One method that analysts have employed to study legal culture, focuses on how court-made decisions impact on legal change and social behaviour. Impact analysis focusing on judicial decisions, thus concentrates on the "substantive" element of the legal system, and in particular on the output of the courts as reflected in their judicial adjudication (aspects of the internal legal culture) as a vehicle for analyzing the more broad-based attitudes and beliefs of the general (i.e., external) legal culture. In methodological terms, judicial decisions or "case law" provide a voluminous and quite accessible data base for studying changes in the legal culture. Evaluating the impact of judicial decisions on social change, however, proves to be a rather more complex task. In this regard, one scholar has pointed out that the method of ascertaining the causal connection between judicial decisions and social change is "by no

\textsuperscript{41} Friedman, \textit{The Legal System: A Social Science Perspective}, p. 54.

\textsuperscript{42} For example, in a 1985 Canadian study on public opinion and the law, the editors point out: "The intriguing question of whether and how the legal system contributes to the formation of public attitudes about other matters – moral issues, business ethics, family relationships, or the way baseball and hockey should be played – does not appear to have yet received significant scholarly attention." Dale Gibson and Janet K. Baldwin (eds.), \textit{Law in a Cynical Society: Opinion and the Law in the 1980's} (Calgary: Carswell Legal Publications, Western Division, 1985).
means a self-evident proposition." Moreover, the Canadian legal scholar, Alan C. Hutchinson has suggested that: "the task of measuring the effect of judicial decisions on social behaviour is positively Herculean. Not only is there no convenient judicial Richter Scale available, but there is no reliable seismographic equipment to identify and isolate the impact of adjudication." Despite such methodological problems, Hutchinson and others still believe it is possible to make some general observations about the impact, or causal relationship between judicial adjudication and social change. As Krislov put it:

...the critical problem is to show that a change in a substantive law or a judicial decision in favour of a particular litigant and a subsequent change in social behaviour or arrangements "is not coincidental, but consequentially related."{45}

Arthur S. Miller, in his classic study of impact analysis and decision-making by the U.S. Supreme Court, suggests that analysis of judicial adjudication allows for the most comprehensive and systematic evaluation of the direction of social behaviour and change in the legal culture. According to Miller, for example, impact analysis "looks to the consequences of judicial decisions and evaluates them in accordance with the extent to which they further the attainment of social goals." In an argument similar to Friedman's, Miller suggests that Supreme Court decisions are not simply based on the interpretation and application of legal principles and doctrines, but rather are predicated on the justices' perception of how their judgments will impact on both individual litigants and society as a

{43} Miller, "On the Need for 'Impact Analysis' of the Supreme Court Decisions," p. 15.

{44} Hutchinson, "Charter Litigation and Social Change," p. 367.

whole. Thus, Miller characterizes the judiciary as forward-looking and "result-oriented" as much as it is "concept-oriented":

Choices are made by Justices from among conflicting principles (or inconsistent interests) not because of compelling law, but because of an evaluation of what the impact of a given decision is thought to be.46

2. **Impact Analysis: Instrumental and Non-Instrumental Perspectives**

A number of competing views have been advanced with respect to the question of whether or not judicial decisions influence social change. One school of thought, for example, suggests that judicial decisions have little impact on societal behaviour and by inference, the legal culture. In this view, laws and legal acts are seen as only being able to "codify" existing customs, values, attitudes, etc., but incapable of shaping people's mores and values. According to this perspective, laws can only gradually emerge into a formal or codified state after they have become part of routine social behaviour. As such, legal rules are considered to have an essentially "passive" or "non-instrumental" function.

For example, in his 1965 study, William M. Evans explained that the view of law as a "passive" social force is rooted in the 19th century philosophies of "social darwinism" and historical jurisprudence. The American sociologist, W.G. Sumner, was one of the 20th century pioneers of this approach.47 It was Sumner's thesis that law is a passive rather than


an active social force, which gradually emerges into a formal or codified state (i.e., judicial decisions, legislation) only after it has taken root in the behaviour of the members of society. According to Sumner, whenever an effort is made to change or enact a law in contradiction to existing mores, values, or "folkways" of a society, conflicts arise which result in the eventual undoing of the law. Since Sumner claims that there is a "strain toward a consistency of the mores," he concludes, in his classic treatise, that "stateways cannot change folkways."48

A more recent Canadian variant of this view is advanced by Alan Hutchinson. Hutchinson's work, which focuses on the impact of judicial adjudication on societal change, has suggested that while adjudication clearly is a significant feature of modern life, judicial decisions do not function as independent instruments of social change. Asserting that constitutional adjudication "is not important because it can cause anything to happen," Hutchinson suggests that social change does not necessarily flow from judicial decisions, i.e., that constitutional adjudication does not have an instrumental impact. Instead, he argues that it is possible for a judicial decision to be undermined by unsupportive and "unsympathetic social forces," while other decisions may be enhanced by a supportive public view.49 According to Hutchinson, the effect of judicial decisions (e.g., new legislation, modified behaviour), "not only demonstrates that litigation is often only an interlude or phase in a larger social struggle and that the end of the litigation marks the beginning of

48 The judicial decision is a law-creating institution. For a judicial decision to have real impact, there has to be a reasonable congruence between the policies adjudicated and perceptions of the population.

the next stage in a continuing social process.\textsuperscript{50}

Hutchinson takes issue with the instrumentalist view of law, i.e., that law is not merely a reflection of existing customs, morals, or codes, but is also a potentially "independent" or "active" social force which can directly influence behaviour and beliefs. According to Hutchinson, for example: "...in their more hyperbolic moments, even otherwise sophisticated lawyers make the most ludicrous claims for the efficacy and influence of constitutional litigation and courts."\textsuperscript{51}

Another school of thought has adopted quite a different perspective concerning this subject, namely, that legal rules and legal decisions do have the potential to act as a significant social force. This "activist" or "instrumental" view of the law posits that the impact of legal rules and decisions may actually modify or change the behaviour and values existing in a particular society. In other words, law is not merely a reflection of existing customs, morals, or codes, but is also a potentially independent social force which can influence behaviour and beliefs.\textsuperscript{52} The American constitutional scholar, Laurence Tribe, is cited by Hutchinson as "a particularly egregious example" of this school of thought. Tribe, who has quite a different view of the importance of court decisions, can be said in some respects to fall at the opposite end of the social impact continuum. While Tribe is certainly

\textsuperscript{50} Ibid., p. 371.

\textsuperscript{51} Ibid., p. 358.

not oblivious to the short-comings and limitations of constitutional adjudication, he argues that judicial decision-making in general, and constitutional adjudication in particular, have played a significant roles in shaping the U.S. society's values, attitudes, and activities, namely, the legal culture:

"The most basic ingredients of our day-to-day lives are sifted and measured out by the Supreme Court. When parents send their children to parochial schools, when men and women buy contraceptives, when workers organize a union, when friends share their intimate secrets in a telephone conversation without fear that other are listening, they enjoy rights and opportunities that would not exist if the Supreme Court had not secured them for us... In every aspect of our lives... not even the most passive, restrained, low-profile Supreme Court imaginable can any longer avoid playing a decisive role."

Falling somewhere between the two extremes of the non-instrumental and instrumental views, we find those studies suggesting that laws, legal instruments, and other legal acts can significantly impact on social behaviour, but only after certain conditions are met. For example, William M. Evans in a study representative of this intermediate perspective, argues that law can potentially act as a social or educational force in changing

53 For a more representative sampling of Tribe's constitutional thinking, see his collection of essays in Constitutional Choices (Cambridge, Mass.: Harvard University Press, 1985).

people's behaviour if:

1. The source of the law is perceived to be authoritative and prestigious;
2. The rationale for the new law is articulated in terms of legal, as well as historical and cultural continuity and compatibility;
3. Pragmatic models for compliance are identified;
4. A relevant use of time is made to overcome potential resistance;
5. The enforcement agents are themselves committed to the behaviour required by the law, at least to the extent of according it legitimacy if not to the extent of internalizing the values implicit in it;
6. Positive, as well as negative, sanctions are employed to buttress the law, and;
7. Effective protection is provided for the rights of those persons who would suffer from evasion or violation of the law.

In Evans' view, if law is to have an instrumental impact on social attitudes and behaviour, it must entail two interrelated processes: the institutionalization, and the internalization of patterns of behavior. In this context, institutionalization of a pattern of behavior means the establishment of a norm with provisions for its enforcement, and internalization of a pattern of behavior means the incorporation of the value or values implicit in a law. Law, as has been noted by others, can only affect behavior directly through the process of institutionalization; if, however, the institutionalization process is successful, it may, in turn, facilitate the internalization of attitudes or beliefs.  

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VI. FROM THEORY TO CONTEXT: LEGAL CULTURE IN CANADA

Canadian society in recent decades, and indeed throughout the history of Confederation, offers an excellent laboratory to utilize and analyze the rich fabric of themes and issues raised in the theoretical-conceptual literature relating to legal culture. For example, has the Canadian Charter of Rights and Freedoms led to an institutionalization and internationalization of a pattern of behaviour, attitudes and beliefs about mandatory citizen rights? If so, have these processes caused an alteration in the legal culture with respect to traditional views about rights? Put another way, is the Charter having a notable and instrumental impact on the Canadian legal culture? In turn, to what extent has the legal culture affected the reception of the new constitutional framework? In the following background chapter, the possibilities of a transformation in the Canadian legal culture will be discussed in light of the "legal revolution" accompanying the 1982 repatriation of the Canadian constitution, and the entrenchment of a Charter of Rights and Freedoms.
CHAPTER 2

CANADA'S LEGAL CULTURE IN FLUX:
CONSTITUTIONAL CHANGE AND EDUCATION AS A CASE STUDY

The new Constitution makes it abundantly clear that Canadian courts must now deny effect to a federal or provincial statute that offends against the Rights and Freedoms guaranteed in the Charter. That responsibility and power now exist as an integral part of the process of Canadian government.

Supreme Court of Canada Chief Justice, Brian Dickson (1985)1

I. CANADA'S "LEGAL CHARACTER": AN HISTORICAL OVERVIEW

Developments in the Canadian legal system during the 1980s and early 1990s provide an excellent setting in which to study the complex and subtle transformation of a legal culture. In 1982, following decades of discussion on the subject, Canadian politicians forged a new constitutional framework, including a novel Charter of Rights and Freedoms.2 The adoption of entrenched constitutional rights was both heralded and decried by its architects for its potential impact on the way Canadians would endeavour to advance and protect their basic civil liberties.3 By 1994, although the Canadian Charter of Rights and Freedoms had

1 Comments made in his address to the Canadian Bar Association, Globe and Mail, February 5, 1985, p. 1.


3 For example, according to Michael Kirby, one of Prime Minister Trudeau's key constitutional advisors, "to have achieved the Charter of Rights...was an enormous achievement." On the other hand, Manitoba Premier Sterling Lyon, who finally signed on to the Charter on behalf of Manitoba has remarked: "We didn't need a charter in our system, and we've seen the disastrous effects of the courts becoming final arbiters of social, and to some extent even economic, and certainly political matters in the United States, and
only been in effect for twelve years, and only eight years with respect to its important equality provisions, it had -- not surprisingly to most participants in the constitutional debates of the late 1970s and early 1980s -- generated profound changes in the Canadian legal system and legal behaviour. While the Canadian constitutional developments of the 1980s did not occur as a result of violence and social upheaval which often preceded major legal revolutions elsewhere in the Western world, there were clear signs during the first decade under the new constitution that the *Charter of Rights and Freedoms* was having a significant impact on Canada's legal development. "The impact [of the Charter] has come faster than I expected," said one member of the Supreme Court of Canada in 1987. "In hindsight I must have been insane not to expect it....I call it an implosion. Suddenly anything can come to you." Indeed, as many detractors of the constitution had predicted, there were indications that, by the late 1980s and early 1990s, Canadians had become more "rights conscious," and that Canada's legal culture was undergoing a fundamental transformation.

Pronouncements of fundamental or radical change in any aspect of Canadian society traditionally invite scepticism among observers in Canada. Canadians, according to the conventional wisdom, have a non-revolutionary or counter-revolutionary history and

I didn't think, nor did too many others, that we needed to import that kind of trouble into our system....I tend to view the *Charter* as being something that was mischievous and continues to be mischievous, and will cause us a lot of unneeded trouble...there's an awful lot of hail stones and stormy and rocky weather in it." Lenard J. Cohen and Paul V. Warwick, *et al.*, *The Vision and the Game: Making the Canadian Constitution* (Calgary: Detselig Press, 1987), pp. 9, 18, 93. Premier Lyon was subsequently appointed to the Manitoba Court of Appeal.

"national character." Lacking the traumatic experience of a violent political revolution or a civil war, and cherishing their British legacy of conservative change and traditional values, English-speaking Canadians in particular are often characterized as individually and collectively cautious, adverse to risk-taking, and hardly able to tolerate much more than a "quiet revolution" by the culturally less conformist francophonic population in the province of Quebec. In similar fashion, studies of Canadian political culture emphasize the deferential attitudes of the country's citizens toward established authority, and also their restrained tones of political expression. Such deference and moderation are particularly apparent when contrasts are made with the more iconoclastic habits and flamboyant style of political activity in the United States. Conventional generalizations about Canada's legal culture correspond closely to those about the country's national character and political culture. Thus, Canadians are seen as less litigious, less "rights conscious," and generally more respectful toward laws and legal authorities than citizens in liberal democracies with a revolutionary tradition. Indeed, one historian concluded in the early 1960s that Canada's "final governing force...is tradition and convention."

When compared to the United States, for example, Canada's relatively low ratio of police officers and lawyers to the general population has allegedly indicated that respect for public authority is grounded in "informal social controls" rather than the "restrictive emphasis of legal sanctions." Canada's lower crime rates also seem to reinforce the contrast

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5 See, for example, Edgar Z. Friedenberg, *Deference to Authority: The Case of Canada* (White Plains, N.Y.: M.E. Sharpe, 1980).

with the American propensity to utilize extra-legal measures to correct what is perceived to
be a wrong.  

Although the image of Canadians as being law-abiding and trustful toward legal and political authorities has seemed generally credible when making cross-border comparisons, observers have also drawn some attention to a striking erosion of respect for legal authority and the legal system in Canada during the second half of the twentieth century. Thus, one view maintains that by the 1980s Canada had become more of a "cynical society" than a deferential one with regard to legal matters. For example, a survey conducted in the 1980s concerning popular attitudes toward the Canadian legal system revealed that although most respondents supported the legal system, 82.7% also indicated that they respected the law less in 1980 than five years earlier. Slightly more than half of the people surveyed felt that most people were law-abiding.  

Such findings supported the views of a leading Canadian jurist that respect for the law had deteriorated among Canadians:

As social conflicts grow more and more virulent, and as workers, both intellectual and manual, forge a unity and discover a new solidarity, three parallel phenomena manifest themselves in contemporary [Canadian] society, and particularly in Quebec: the rejection of authority, whether religious, political or judicial; the gradual emergence of a general amorality; and finally, the politicization of the masses.


To what extent deference was actually supplanted by cynicism in the Canadian "legal character" is rather unclear, however, from the analyses suggesting such a trend. It is also important to note that the two mindsets, i.e., deference and cynicism, are by no means mutually exclusive. Rather more certain to observers in Canada at the outset of the 1980s, was that the formal legal rules had changed significantly, and also that many groups and social conflicts had indeed become more politicized. Thus, one of the major questions following the 1982 entrenchment of the Canadian constitution was whether the Charter of Rights and Freedoms would reinforce or alter the country's recent legal trends and fundamental legal traditions. Before endeavours to shed some light on those important questions it is useful to place Canadian constitutional developments during the 1980s and 1990s into a more comprehensive historical and legal context. An historical survey of constitutional arrangements and attitudes, and also Canadian thinking about "rights," are especially pertinent for any discussion of Canada's evolving legal character. The next section of the chapter will examine the historical roles of Canada's legislatures and courts in protecting and advancing Canadian civil rights. The survey will begin at confederation and cover the period up to the constitutional debates of the late 1970s and early 1980s.

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II. PARLIAMENTARY SUPREMACY: THE POLITICAL-LEGAL TREATMENT OF CANADIAN CIVIL RIGHTS

The role of the Canadian judiciary from Canada's confederation in 1867 until the patrition of the Canadian constitution from the United Kingdom in 1982, was defined and characterized by the British doctrine of "parliamentary supremacy." First articulated during the 19th century by the British constitutional scholar, A.V. Dicey in his classic treatise, *Introduction to the Study of the Law of the Constitution*, parliamentary supremacy was based on two principles: (1) parliament has the constitutional right to make or unmake any law whatever; and (2) no person or body may constitutionally override or set aside the legislation of Parliament. These constitutional principles were adopted by the Canadian founding fathers, in a form modified to fit Canada's federal political system. Thus, the

11 Prior to the entrenchment of the *Charter* in 1982, the Canadian legal system was almost entirely based on and influenced by the British common law. Indeed, prior to 1949 the highest court designated to hear Canadian civil and criminal appeals was the British Judicial Committee of the Privy Council (House of Lords). Appeals to the House of Lords were abolished in 1949, and the Supreme Court of Canada was made the court of last resort.


13 Canada's federal system of government divided power between two levels of government. This model departed from the British unitary form of government where power was concentrated in one central government. Some constitutional scholars have argued that the federal sharing of powers is incompatible with the notion of parliamentary supremacy. The nature of "Canadian" parliamentary supremacy as distinct from the traditional British model has been the subject of a voluminous literature. For an interesting pre-Charter discussion of this issue as it relates to the Bill of Rights, see Walter S. Tarnopolsky, *The Canadian Bill of Rights* (2nd ed.) (Toronto: Macmillan of Canada, 1978) (particularly Chapter 3). For a post-Charter examination of this issue at it pertains to civil rights see, Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox*
Canadian federal parliament and each of the ten provincial legislatures were constitutionally empowered with the exclusive right to make laws within the scope of their respective "exhaustive" powers enumerated in Sections 91 and 92 of the British North America Act (the BNA Act). As in the British tradition, the role of the Canadian judiciary was constitutionally subordinate to that of the legislative branch. Thus, while the courts were empowered to exercise judicial review of constitutional questions, their jurisdiction was limited to resolving conflicts between the federal government and the provinces concerning the exercise of legislative power under Section 91 and 92 of the BNA Act, and did not extend to decisions concerning the substantive merits of such legislation.

1. **Canadian Civil Rights Prior to World War II**

The principle of parliamentary supremacy as a major construct in Canadian political development has been central to the evolution of Canadian civil rights and liberties. For example, until the Charter was adopted in 1982, no explicit Canadian constitutional protections existed which guaranteed citizen rights and freedoms. Unlimited by any

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14 *The British North America Act, 1867, 30 & 31 Vic., c.3* is now known as the *Constitution Act 1867, Constitution Act 1982, Schedule B, Canada Act 1982, c. 11, (U.K.). Section 91 sets out the scope of powers which can be solely exercised by the federal parliament and section 92 sets out the powers which can be exercised exclusively by the provincial legislatures. Section 93 provides that education is within provincial jurisdiction.

human rights restrictions, both the provinces and the federal government were constitutionally at liberty to enact laws that discriminated against certain sectors of Canadian society, and routinely did enact such legislation (see below). For its part, the judiciary was constitutionally restricted from reviewing legislation on the basis of its substantive correctness. Thus the judiciary routinely acknowledged that "courts of law have no right whatsoever to inquire whether [legislative] jurisdiction has been exercised wisely or not."\(^\text{16}\)

In any case, during this period of time the central concern of Canadian society, governments, and the courts was the free exercise of commercial enterprise, even if it was at the expense of individual civil rights and freedoms.\(^\text{17}\) In the absence of civil rights constitutional protections or legislation, the few plaintiffs who did challenge discriminatory behaviour by the government or other citizens were forced to fall back on the common law. Such attempts were largely unsuccessful, however, with the courts refusing to acknowledge that the common law provided a cause of action or remedy for intentional acts of "discrimination."\(^\text{18}\)

The general mindset of the legislators and judges, (i.e., the internal legal culture) with

\(^{285}\) For a discussion of these cases as they relate to the doctrine of parliamentary supremacy and the distribution of powers see, Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977), pp. 421-430.

\(^{16}\) *Union Colliery Co. v. Bryden* [1899], A.C. 580.

\(^{17}\) See, for example, the Supreme Court of Canada decision in *Christie v. York Corp.*, [1940] S.C.R. 139.

\(^{18}\) The absence of such guarantees stems in part from broader common law principles which deny remedies in tort and contract for individual public acts of discrimination. For a fuller discussion of this point, see *Cameron v. Nel-Gor Nursing Home et al.* (1984), 5 C.H.R.R.R. D/2170.
regard to the issue of civil rights was reflected in the attitudes of Canadian society more generally (i.e., the external legal culture) during the first eighty years of Canadian confederation. The reaction of Canadian citizens, governments and courts to ethnic minorities in Canada provides a useful vehicle for examining these attitudes. For example, the growing Chinese population in British Columbia, and particularly in the City of Vancouver -- which coincided with the building of the Canadian Pacific Railway -- was met by popular protests and petitions urging the government to limit the immigration of "aliens." In 1887, these "anti-Oriental" protests turned into mob riots, and mass-attended public meetings were routinely held at the Vancouver City Hall. Newspapers, businessmen, and prominent politicians all warned that the influx of Chinese would force property prices to decline, and an anonymous "Vigilance Committee" regularly posted notices which urged Chinese citizens to leave Vancouver:

All Chinamen must leave the city limits on or before the 16th January instant, and all Chinamen found within the city on or after that date will be forcibly ejected and their goods and chattels moved to False Creek or such other places as convenience may dictate. And we warn the authorities not to interfere with us if they value their lives, as we mean business and are determined in our action.

In a legal, as well as popular sense, Oriental citizens and other ethnic minorities were treated as second-class citizens, i.e., inferior to the two Canadian charter groups (the white

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anglo-saxon majority in Canada and the francophones of Quebec). As noted above, the absence of any constitutional, legislative or common law doctrines prohibiting discrimination and protecting ethnic minorities, enabled provincial legislatures and the federal parliament to enact laws that were clearly discriminatory in both intent and effect. For example, the preamble to 1884 British Columbia legislation, entitled *An Act to Regulate the Chinese Population of British Columbia*\(^ {21} \) -- one of many such statutes passed during this period of time -- provided:

> Whereas the incoming of Chinese to British Columbia largely exceeds that of any other class of immigrant, and the population so introduced are fast becoming superior in number to our own race; are not disposed to be governed by our laws; are dissimilar in habits and occupation from our people; evade the payment of taxes justly due to the Government; are governed by pestilential habits; are useless in instances of emergency; habitually desecrate grave yards by the removal of bodies therefrom; and generally the laws governing the whites are found to be inapplicable to Chinese, and such Chinese are inclined to habits subversive of the comfort and well-being of the community...it is expedient to pass special laws for the Government of Chinese.\(^ {22} \)

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\(^ {21} \) 47 Vict. Chapter 4 (A.D.1884).

\(^ {22} \) Other legislation prohibited minorities from working in mines, owning property in designated areas, engaging in commercial activities, being employed in certain occupations, etc. In the most egregious example of officially sponsored discrimination, Chinese Canadians -- at the persistent request of the B.C. government -- were forced to pay a federal "Chinese Head Tax." This tax was in effect from 1885 to 1923 and applied to approximately 81,000 Chinese Canadians. The tax was progressively increased during this period and ranged from $50 to $500 dollars. It was estimated in 1988 that if the $23 million dollars collected during this time period had been invested in 1923, it would be worth approximately $896 million dollars today. *Globe and Mail*, October 31, 1988, p. A13. This legislative trend culminated in the federal *Chinese Exclusion Act*, which virtually prohibited all Chinese immigration between 1923 and 1947. Chinese Canadians were not the only minority group targeted by discriminatory legislation. Japanese, East Indians, Jews, and other visible minorities were also singled out for special legislative treatment.
The courts -- whose constitutional role under the doctrine of parliamentary supremacy was limited to reviewing questions relating to the division of powers, not the wisdom of the laws being enacted -- did not provide an alternative avenue for individuals attempting to challenge this kind of discriminatory legislation. For example, when a Canadian citizen challenged British Columbia legislation which prohibited "Orientals" from voting in local government elections, the constitutional question put to the courts was whether the legislation was a proper exercise of provincial power as it related to "elections" under Section 92 of the BNA Act, or whether it was an improper exercise of federal power relating to "immigration and aliens" under Section 91 of the constitution. The case finally made its way to Canada's final appellate court, the Judicial Committee of the Privy Council (the JCPC) which ruled that the legislation purported to regulate "aliens" and was therefore outside the scope (ultra vires) of the provincial legislature. On that basis, the provincial law was struck down. On the question of whether the legislation discriminated against Chinese Canadians, the JCPC in a representative judicial statement of that time ruled that "the policy or impolicy of such an enactment as that which excludes a particular race from the franchise is not a topic which their Lordships are entitled to consider."

The mindset of the judiciary was not only shaped by the restrictions imposed on it by parliamentary supremacy, but also reflected and in turn legitimated intolerant popular attitudes toward ethnic minorities. For example, in Ontario, the 1850 Common Schools Act established that coloured people had the "right" to establish their own schools. One

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24 12 Vic. Chapter 83, ss. 69-71.
Canadian school law study has pointed out that this entitlement was not granted as a positive gesture to a racial minority, but rather was authorized out of "deference to the prejudices of the white population." This conclusion is supported by a representative judicial observation made in a decision upholding the separate school law. Thus, the court observed that "Negro children," many of whom had recently escaped from slavery: "may be, in respect to morals and habits, unfortunately worse trained than white children are in general, and their [white parents] children might suffer from the effects of bad example."

2. **Post-World War II Developments: The Canadian Bill of Rights**

The extensive loss of human life, both civilian and military, during the Second World War triggered a dramatic watershed in public and elite thinking about the issue human rights. In Canada, as in other Western democracies, the postwar debate about civil rights was not whether civil liberties should be legally protected, but rather, how best to do so. Thus, John G. Diefenbaker (later Prime Minister Diefenbaker), first suggested in 1945 that a bill of rights would be the best method to protect and advance civil liberties. After 15 years of public controversy, parliamentary debate, and Senate hearings, the Canadian Bill

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26 *Re Dennis Hill v. The School Trustees of Camden and Zone* (1854), 11 UCQB 573, p. 578.

of Rights was passed into law as a federal statute in 1960. Although the Canadian Bill of Rights was greeted by many Canadians with enthusiasm and anticipation, in retrospect it is viewed as having provided only very limited civil rights protection. Several factors contributed to this situation. First, because the Bill of Rights was a federal statute it only applied to federal legislation, and did not extend to cover provincial laws. Second, as the Bill of Rights was not an enduring constitutional instrument, but only a statute (sometimes referred to as a quasi-constitutional statute) which could be repealed at any time by the prevailing government of the day, it lacked the moral and political authority necessary to create a different mindset concerning the importance and centrality of rights and freedoms. Third, the Bill of Rights included a provision which allowed the government to exempt certain legislation from its protections. Finally, in view of the above factors, when challenges were launched which claimed that federal legislation was discriminatory, the courts were extremely reluctant to exercise the judicial authority required to strike down legislation that conflicted with the Bill of Rights. The Supreme Court of Canada in particular was not convinced that the Canadian Bill of Rights had altered the scope of judicial review traditionally exercised by the court under the doctrine of parliamentary supremacy, and with the exception of the 1970 case of *R. v. Drybones*, did not uphold any

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28 S.C. 1960, c. 44.

29 For a comprehensive discussion of the cases decided under the Bill of Rights, see Tarnopolsky, *The Canadian Bill of Rights*. For an interesting article in which the then Chief Justice of the Supreme Court of Canada, Bora Laskin, discussed the Bill of Rights see, "An Inquiry into the Diefenbaker Bill of Rights," *Canadian Bar Review*, Vol. 37, No. 1 (March 1959), p. 77-134.

claims advanced on the basis of the federal rights legislation.\textsuperscript{31} As a result of these and other reasons, the 1960 \textit{Bill of Rights} is today regarded as a rather ineffectual experiment, more important for its educative value than for its actual expansion or protection of civil liberties.\textsuperscript{32} Even before its enactment in 1960, the \textit{Bill}’s fatal flaws were pointed out by some critical and perceptive observers. Among the harshest critics of the anti-discrimination legislation was the preeminent constitutional jurist (and poet), F.R. Scott, who argued:

\begin{quote}
It is only a very partial Bill, applicable only in peacetime, no stronger than the self-restraint of our federal members of Parliament at any given moment, and inapplicable to provincial legislatures. Moreover, it is confined to political and personal freedoms; it makes no attempt to protect other human rights, like the right to nondiscrimination in employment. Cultural and economic rights are also omitted. It is moreover drafted in technical legal jargon. If this is the best we can do, we are admitting that we are not really deeply concerned about civil liberties.\textsuperscript{33}
\end{quote}

At the same time the federal government had turned its attention to civil rights in the post-World War II period, the provinces also introduced a number of legislative initiatives designed to protect civil liberties.\textsuperscript{34} For example, in 1944, the Ontario legislature


\textsuperscript{32} The Canadian \textit{Bill of Rights} is still in force, although the \textit{Charter} has superseded the protections offered in the federal statute.

\textsuperscript{33} \textit{Civil Liberties in Canada} (Toronto: University of Toronto Press, 1959), p. 56.

enacted its first anti-discrimination statute, *The Racial Discrimination Act*, which prohibited the expression of racial or religious discrimination in publications or displays. It was not until 1947, however, that the first wide-ranging provincial human rights legislation was introduced in Canada. Thus, in 1947 the Saskatchewan *Bill of Rights* was enacted in order to guarantee freedom of speech, association, assembly, and religion. The Saskatchewan legislation also prohibited discrimination with respect to accommodation, occupation, and education on the basis of race, creed, religion, colour, or ethnic or national origin. According to the statute, complaints of discrimination were to be adjudicated by the judiciary, and discrimination contrary to the legislation would attract a maximum penalty of $200 or a three-month prison term in default of payment. Despite its good intentions, the quasi-criminal sanctions in the novel Saskatchewan *Bill of Rights* did not prove to be a very successful means of promoting or protecting civil liberties in the province. Thus, relatively few discrimination claims were brought under the statute, and when claims were initiated, courts were often reluctant to enter convictions. Moreover, in the few cases where convictions were entered, the prescribed sanction did not appear to be a deterrent to further discriminatory actions.

By the 1950s the majority of Canadian provinces, prompted in large measure by the 1948 *Universal Declaration of Human Rights*,35 had enacted statutes guaranteeing fair employment and accommodation practices. Prohibited grounds of discrimination were expanded from race, creed, religion, colour, ethnic or national origin to include age and gender. Notwithstanding these improvements, however, the human rights legislation of this

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period also proved to be largely ineffectual in eradicating systemic discrimination for many of the same reasons that the 1947 Saskatchewan *Bill of Rights* had not been overwhelmingly successful. Thus, this legislation continued to place the whole emphasis of protecting and promoting civil rights upon the individual who had been discriminated against. The result was that very few complaints were made, and very little enforcement achieved.

During the 1960s, the earlier anti-discrimination statutes were consolidated, expanded, and placed in new legislative frameworks designed to overcome many of the problems associated with the rights legislation of the 1940s and 1950s. By the 1970s, all the provinces and territories had enacted comprehensive human rights codes, and had established human rights commissions to administer the new statutes. These anti-discrimination initiatives proved more successful than their predecessors, for a number of reasons including: (1) they covered a broader range of activities (e.g., employment, accommodation, advertising, commercial and residential tenancy); (2) Human Rights Commissions were authorized to receive and investigate complaints, thus removing this burden from the individual complainant; (3) the Commissions were empowered to adjudicate complaints, thereby removing the time and cost element involved in ordinary litigation; and (4) most Commissions were also designed to play an educative role in the area of human rights, thus taking a preventive approach to discrimination.

Notwithstanding the expanded ambit of Canadian rights in the post World War II period, politicians, the public, and members of the judiciary were still not satisfied that these measures were adequate. While the postwar provincial and federal anti-discrimination statutes were an improvement on the prewar situation, it was widely believed that the
legislation still did not address the civil rights of Canadian citizens in a meaningful fashion. A central concern in this regard was that the postwar human rights legislation only applied to individual (as opposed to governmental) acts of discrimination. The limited scope of provincial anti-discrimination legislation, together with the impotence of the Canadian Bill of Rights to check governmental legislation and actions that infringed citizen rights, fuelled debate in the late 1970s about the need for further and more fundamental civil rights protections. Until civil rights and freedoms were constitutionally entrenched, critics maintained, Canadian rights would not be adequately recognized or protected, nor would Canadians feel the sense of nationhood that characterized countries such as the United States.

The next section of this chapter will discuss the constitutional events of the late 1970s and early 1980s, including the debates leading up to the constitutional entrenchment of the Charter of Rights and Freedoms in 1982.

III. CANADA'S NEW CONSTITUTIONAL FRAMEWORK

Advocates of a constitutionally entrenched charter of rights maintained that the poor track record of Canada's legislators in the realm of civil rights and liberties suggested that the authority and responsibility for protecting and promoting human rights should be assigned to the courts, with ultimate authority residing in the Supreme Court of Canada.36

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1. **The Constitutional Debates of the Early 1980s**

In 1980, Prime Minister Pierre Trudeau -- largely motivated by his vision of a bilingual and bicultural Canada and the necessity of protecting minority language education rights -- launched a federal initiative to develop a constitutional amending formula, to repatriate the Canadian constitution from Great Britain, and to adopt a constitutionally entrenched charter of rights and freedoms. These important initiatives, Prime Minister Trudeau maintained, would serve to both protect the fundamental rights of Canadian citizens, and would also enhance national unity. Indeed in 1981, Prime Minister Trudeau implored the members of the House of Commons to constitutionally entrench a rights charter in the national interest, maintaining: "Lest the forces of self interest tear us apart, we must now define the common thread that binds us together." Thus, approximately 40 years after the first provincial human rights legislation was enacted, and 20 years after the passage into law of the Diefenbaker Bill of Rights, a lively Canadian debate about civil rights and liberties re-emerged as part of Prime Minister Pierre Elliott Trudeau's 1981 constitutional "peoples' package." After a tumultuous and emotionally charged constitution-making process, the Canadian constitution was patriated in 1982 together with an

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37 See, for example, Trudeau's remarks in the *House of Commons Debates*, 32nd Parliament, 1981.

entrenched Charter of Rights and Freedoms.39

Although Canadian constitution-makers embarked on the constitutional patriation process with these explicit goals in mind, they exhibited less clarity about how a constitutionally entrenched charter would actually function. For example, like earlier constitutional architects in other environments, the Canadian constitution's modern founding father, Prime Minister Trudeau, was simultaneously driven by two motives: (1) his fundamental constitutional vision for the country, and; (2) the more mundane practical political imperatives necessary to implement that vision. An illustration of this phenomenon can be seen in Trudeau's last address to the House of Commons on March 23, 1981, in which he made reference to his general constitutional vision, but also candidly expressed his uncertainty about what its implementation would entail for the country's political future:

We are merely setting the stage with a contest about the kind of Canada we will have in the future....Will we be highly centralized? Will we be a loose confederation of shopping centres...? Will we be something in between? I don't know.40

It may be that this overriding concern with "setting the stage" prompted the Charter's political sponsors to maintain the purpose of an entrenched bill of rights was "to give the courts, in an open and direct manner, the authority they need to protect basic rights and


freedoms if legislative and government restraint should fail," while neglecting to outline the new judicial tasks which the exercise of such authority obviously imposed. With the exception of the Charter's controversial non obstante or opting out clause -- which was politically motivated as a means to ensure a provincial check on the constitution's centralizing (i.e., federal) provisions rather than a legislative brake on the court's authority -- the constitutional framers devoted relatively little attention to the role and responsibilities of the courts following the entrenchment of the Charter. Thus, while the framers surely anticipated that their constitution-making work would have far-reaching effects on the Canadian legal system, they did little to spell out explicitly the nature and implications of the legal changes that might ensue. Those debates that did take place concerning the adoption of a written rights document and the role of the judiciary in interpreting that document often focused on whether the entrenchment of the Charter would "Americanize" the Canadian legal and political system. In this vein, one member of parliament complained, for example:

There are some parts of the Charter of Rights and Freedoms I do not like. I do not like turning my life over to the courts and to interpretation by the courts. That is alien to our form of government and our social consciousness. That is something that is American.  

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42 Section 33, commonly referred to as the non obstante or override clause, was finally included in the Charter as a result of a major federal concession to the provinces. The controversial provision is generally understood as a "subtle way of preserving the present balance among Canadian political institutions, that is, the traditional imbalance in favour of the provincial legislatures." Peter Hogg, "Canada's New Charter of Rights," *American Journal of Comparative Law*, Vol. 32, No. 2 (Spring 1984), pp. 283-305.

While criticism concerning the vision of the constitutional framers may have been warranted in the political atmosphere of the constitutional debates, it is somewhat unfair to have expected them to clearly envision all of the Charter's possible consequences. For example, the constitution-makers took for granted, and had little reason to question, either the future viability of the well-established and widely accepted tradition of parliamentary supremacy, or a continuation of the Canadian Supreme Court's record of judicial self-restraint.44 Given those political and judicial traditions, it is not surprising that the framers rather easily sidestepped suggestions that judicial interpretations of the Charter might eventuate in a fundamental shift of power from the legislative to the judicial branch of government. Moreover, when the framers did consider the possibility of an enhanced role for the court prior to 1982, that eventuality was largely downplayed or dismissed as exceedingly remote and essentially antithetical to the Canadian legal and political culture. In other words, it might be argued that the framers intended and expected that the Charter would protect fundamental rights and freedoms and thus foster national unity, but they did not, and indeed could not, fully comprehend that judicial interpretation and review of the Charter might necessarily impel an expanded and more activist role for the judicial sector.45


45 For example, a 1983 analysis of the Charter suggested that the Supreme Court of Canada would likely continue to exercise the same kind of judicial restraint that characterized the court's interpretation of the Bill of Rights. See Berend Hovius and Robert
Indeed, according to one constitutional scholar, by sidestepping or overlooking the possible implications of establishing a constitutional footing for the court to exercise judicial review, the federal Liberals ignored the Charter's "strongest centripetal effect on the Canadian polity."46 Thus, following the adoption of a new constitutional framework, the Supreme Court of Canada possessed quite impressive authority and responsibilities, but lacked clear guidelines or a well-fashioned mindset regarding how such responsibilities might be fulfilled. If, as the Charter's political sponsors maintained, patriation of the constitution did not imply an institutional realignment among the various branches of the parliamentary system, the dilemma had become how to engender a judiciary that would actively and effectively protect rights and guarantee national unity, yet would not assume a fundamentally new and ascendant role in the pantheon of Canadian political institutions.47

The predicament facing the court and Canadian society more generally was not

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47 One political analyst has remarked, however, that it is impossible to divorce the political and legal components implicit in the protection of rights. Thus he suggests that: "the practice of transforming political rights into legal ones is...a matter of the use of language to link politics and law. The law is not self-executing and its function and meaning depend upon political claims which describe and justify its use. That, of course, means that legal rights are judge-made, and that they are part of the process of defending a political position. The idea of transformations brings to light the political side of legal claims by directing attention to the background arguments embedded in a legal text....In constitutional law this means that legal rights are formulated to sustain political rights as practices which the Court deems to be deserving of its protection." See Ira Strauber, "Transforming Political Rights into Legal Ones," Polity, (1983), p. 26. This analysis implies that an activist interpretation of the Charter, that is, the court's creation of legal rights, will have important political consequences, including a greater policy-making role for the court.
particularly unusual in the history of comparative judicial development -- as the illustrated by American constitutional development -- but it subsequently produced a certain ambiguity and creative tension about the court's potential impact within the Canadian political system.

In view of this situation, during the years following the adoption of the Charter, the difficulties of untangling the closely related dimensions of judicial independence, judicial supremacy, judicial review, and judicial activism would become major features of the Canadian constitutional dynamic. Comparative studies of judicial development have suggested that the evolution of a high court's role in a political system may be influenced by the interaction of three major considerations: judicial independence, judicial review, and judicial sovereignty (supremacy). While the first of these considerations, the independence of the judiciary, was rather well rooted in the Canadian scene by the post-1982 period, the latter two dimensions would soon be in a state of flux. While a comprehensive discussion of these important and evolving dimensions of the Canadian constitutional landscape is beyond the scope of this study, it is necessary to the analysis in subsequent sections of this dissertation to briefly consider the dimensions of one of these concepts, namely, the phenomenon of judicial activism.

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2. Judicial Activism and the Supreme Court of Canada

The potential for judicial activism in Canada was clearly rooted in Section 52 -- the constitutional supremacy clause -- of the Charter of Rights and Freedoms. Stipulating that "the Constitution of Canada is the supreme law of the land," this clause expressly authorized, in striking contrast to the Canadian Bill of Rights, a more expansive exercise of judicial review. Thus, for the first time in Canadian constitutional history, the judicial sector was explicitly authorized to review federal and provincial legislation and, if appropriate, to declare them unconstitutional. Whether the Charter's declaration of "constitutional supremacy" would persuade the Supreme Court of Canada to assert constitutional authority and override the exercise of parliamentary supremacy -- and in the process foster greater judicial activism -- has been a subject of much speculation. Despite considerable negative opinion concerning the court's ability to overcome its "judicial temerity," judicial statements and decisions during the 1980s and early 1990s offered increasing evidence that the Supreme Court of Canada intended, while taking a gradual and evolving approach to constitutional


interpretation, to adopt a more activist stance regarding judicial decision-making. For example, less than one year after the Charter’s adoption, Mr. Justice Brian Dickson of the Supreme Court of Canada expressly recognized that judicial deference to parliament had dictated the court’s previously timid interpretation of the 1960 Canadian Bill of Rights (the Court had only used the Bill of Rights to invalidate one out of the approximately 30 federal acts challenged) and admitted that: “A spirit of uneasiness, even of guilt, colours some of the cases under the Bill of Rights.”\(^5\) He hastened to add, however, that “the Charter has replaced parliamentary supremacy with constitutional supremacy” and that such “thinking and those misgivings are now behind us.”\(^6\) Moreover, the Chief Justice signalled that the new constitutional basis for judicial review contained in Section 52 also placed the judicial branch in a more egalitarian and thus more active position vis-a-vis “the executive and legislative powers.” The next section of this chapter will provide a brief overview of the main features of the Charter in the context of the new Canadian constitutional framework.

IV. THE CHARTER OF RIGHTS AND FREEDOMS: DIMENSIONS AND SCOPE

The Charter of Rights and Freedoms governs the relationship between citizens and the state. As a constitutional document, the Charter sets out the minimum standards to which provincial and federal legislation, and the actions of governmental officials, must conform.


\(^6\) Ibid.
The judicial sector is authorized to review state laws and actions, and to the extent that they may conflict with the Charter, the courts are empowered to declare that such laws or actions are unconstitutional, and therefore of no force and effect. The courts are also empowered to fashion any remedy which they think justly addresses the infringement of a citizen's constitutional rights or freedoms.

1. **Specific Rights and Freedoms**

(a) **Fundamental Freedoms**

Section 2 of the Charter contains "fundamental" rights and freedoms and includes freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and media; freedom of assembly; and freedom of association.53 These rights and freedoms are similar to those contained in the 1960 Bill of Rights. This section was examined in one of the Supreme Court of Canada's first major Charter cases, R. v. Big M Drug Mart.54 In this case the court was asked to review the constitutionality of a (provincial) Lord's Day Act which provided that real estate transactions concluded on a Sunday were invalid. This legislation -- which was based on Christian


religious principles -- was ruled unconstitutional and struck down by the Supreme Court because, the court concluded, the legislation did not apply to all Canadians (that is, both Christian and non-Christian), and therefore infringed Section 2’s constitutional guarantee of "freedom of conscience and religion." Thus, in an early example of judicial activism, the Supreme Court of Canada concluded that "to the extent that it binds all persons to a sectarian Christian ideal, the Lord's Day Act works a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians." 55

(b) *Equality Rights*

Section 15 sets out the Charter's guarantee of equality rights. In order that the federal and provincial governments could review and revise legislation that might conflict with the equality rights provisions, Section 15 was proclaimed in force on April 17, 1985, three years after the Charter was formally adopted in 1982. Section 15(1) contains the constitution's substantive equality guarantees and provides that "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." The constitutional framers intended that Section 15(1) should be read together with the constitution's other "orienting principles," namely, the aboriginal rights section (Section 25); the multicultural clause (Section 27); and the gender equality clause (Section 28) (see

55 Ibid., p. 385.
below). Section 15(2) -- the affirmative action clause -- permits the establishment of affirmative action or "employment equity" programs, even though such initiatives may technically contravene Section 15(1). The equality rights provisions were widely viewed as being a central feature of the Charter, which could potentially have application to a wide variety of social policy issues.\footnote{For wide-ranging discussions of early assessments regarding the potential impact of the Charter's equality guarantees see the various articles in: Anne F. Bayesfsky and Mary Eberts (eds.), \textit{Equality Rights and the Canadian Charter of Rights and Freedoms} (Toronto: Carswell, 1985); Christine Boyle, \textit{et al.}, \textit{Charterwatch: Reflections on Equality} (Toronto: Carswell, 1986); Lynn Smith, \textit{et al.}, \textit{Righting the Balance: Canada's New Equality Rights} (Saskatoon: The Canadian Human Rights Reporter, 1986), and; Kenneth H. Fogarty, \textit{Equality Rights and their Limitations in the Charter} (Toronto: Carswell, 1987).

(c) \textit{Legal Rights}

Sections 7 to 14 contain rights relating to law enforcement and the administration of justice. Many of these clauses either restate or expand on common law or statutory rights, and have been widely used as defenses to allegations of criminal conduct.\footnote{For an excellent article comparing the Charter's "criminal law rights" to similar rights in the American constitution see A. Kenneth Pye, "The Rights of Persons Accused of Crime Under the Canadian Constitution: A Comparative Perspective," in Paul Davenport and Richard H. Leach (eds.), \textit{Reshaping Confederation: The 1982 Reform of the Canadian Constitution} (Durham, North Carolina: Duke University Press, 1984), pp. 221-248.} These provisions -- which have been characterized as having "revolutionized" the administration of criminal law in Canada -- were successfully utilized by criminal defense lawyers almost immediately after the Charter's enactment, and thus had an almost immediate impact on the Canadian criminal justice system.
Section 7, or the "due process" clause, guarantees the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice. Section 8 prohibits unreasonable search and seizure, and section 9 forbids arbitrary detention and imprisonment. Section 10 outlines citizen rights upon arrest or detention, including the right to be promptly informed of the reason for the arrest or detention, the right to retain and instruct counsel without delay, and the right to be informed of that right. Section 11 provides the legal rights of a person who is charged with an offence and includes, among other things, the right to be informed without unreasonable delay of the specific offence charged, the right to be tried within a reasonable time, and the right to be presumed innocent until proven guilty according to law in a fair and public hearing. Section 12 guarantees that everyone has the right not to be subjected to cruel and unusual punishment. Section 13 provides that a witness who testifies in a trial has the right not to have any incriminating evidence used against him in a subsequent trial. Section 14 provides that any person involved in a court proceeding has the right to an interpreter if that person does not speak the language used in the proceeding, or if the individual is deaf.58

(d) Democratic Rights

These rights are listed in Sections 3 to 5 of the Charter. Section 3 guarantees the right of all citizens to vote in federal and provincial elections. Section 4(1) sets out the maximum term for elected bodies, except in cases of special circumstances, as provided in section 4(2). Section 5 requires that the Legislatures and Parliament sit at least once every 12 months.59

(e) Mobility Rights

Section 6(1), one of the most novel constitutional provisions, stipulates that every citizen has the right to enter, remain in, and leave Canada. Moreover, Section 6(2) guarantees that citizens who are permanent residents of Canada have the right to move to, reside, and earn a living in any province. Sections 6(3) and 6(4) provide exceptions to these general rules.60


(f) **Language Rights**

As mentioned earlier in this chapter, Prime Minister Trudeau and the federal government considered minority language education rights to be the centrepiece of the Charter. Thus, Section 16(1) recognizes English and French as the two official languages of Canada and guarantees equality of status and rights for both languages in areas of federal jurisdiction. Sections 17-22 provide additional provincial language guarantees, and provide specific instances of such rights. Section 23 guarantees minority language education rights where numbers warrant such rights. One of the first major Charter cases launched after its adoption in 1982 concerned Section 23.\(^6\)

2. **General Provisions**

In addition to the substantive guarantees of rights and freedoms discussed above, the

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Charter also contains several general orienting principles designed to assist the courts in their interpretation of the constitution's specific guarantees. Most important of these orienting principles is Section 1 which provides that: "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."

How to interpret this section in light of the Charter's substantive rights was one of the key issues before the courts very early on in the life of the new constitution. In the 1986 decision of R. v. Oakes, the Supreme Court of Canada elaborated a two-part test that set the standard for judicial interpretation of the Charter. The first part of the test comprised the question of whether a substantive constitutional right was infringed. If the answer to this question was in the affirmative, the court then was required to ask a second question, namely, is the constitutional infringement "reasonable" under Section 1? Using this two-part test, a court could first conclude, for example, that education legislation prohibiting children under the age of 5 from attending public school was contrary to the equality guarantees of the Charter. The court would then be required to apply the second branch of the test, enquiring whether such discrimination was "reasonable" under Section 1. If, after hearing evidence on the issue, the courts concluded that such legislation was unreasonable, the legislative provision would be declared void and of no force and effect. If, on the other hand, the legislative enactment was found to reasonable, then the claim of discrimination would be dismissed.

In addition to Section 1, other general provisions are found in Section 27 of the

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Charter which requires that the constitution be interpreted in a manner consistent with Canada's multicultural heritage, and Section 28 which requires gender equality to be observed in all constitutional decision-making. Denominational schooling rights are protected by Section 29, and Section 26 stands for the general principle that constitutional rights "shall not be construed as denying the existence of any other rights or freedoms that exist in Canada."63

3. The Notwithstanding Clause

Section 33 – the opting out or notwithstanding clause – provides that the provincial legislatures or the federal Parliament may "opt out" of specific Charter rights for a five-year period. Thus, Section 33(1) provides:

Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

As discussed in Part III of this chapter, this very controversial provision was included at the insistence of the provinces during the constitutional patriation process. Most constitutional experts predicted that the Section 33 override would rarely, if ever, be invoked, since opting out of constitutionally guaranteed Charter rights would arguably expose a government to

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charges of anti-democratic behaviour. Despite such predictions, the section was almost immediately invoked by Quebec -- the only province which was not signatory to the constitution -- in regard to all provincial legislation following the entrenchment of the new constitution.

4. Application of the Charter

To whom does the Charter apply? Section 32 of the constitution states that the constitution applies to matters within the authority of the federal Parliament or provincial Legislatures, but does not apply to acts between private citizens. Where a government has been found to have infringed the Charter, section 24(1) states that a citizen may apply to the courts to obtain a remedy which the court considers appropriate and just under the circumstances.

V. THE CHARTER COMES TO LIFE: INITIAL EXPECTATIONS AND TRENDS

Once the Charter was adopted, questions naturally arose concerning how Canadian courts and Canadian citizens would interpret and utilize their new constitutional framework.

If judicial activism is understood as the court's inclination or propensity to intervene in the governing process -- a trait which, in comparative terms, is commonly marked by decisions calling for "social engineering" and which may intrude on matters traditionally reserved for legislative or executive action -- then clearly the potential for its exercise existed in the Canadian context after 1982. Although members of the Supreme Court, including Chief Justice Dickson, suggested in their first Charter judgements that the court would take a cautious and incremental approach to "judicial law-making," the court also indicated that the Supreme Court of Canada's law-making function had taken on an important new dimension since the entrenchment of the *Charter of Rights and Freedoms*. Thus, while the complex and ambiguous notion of judicial activism was perceived as being somewhat foreign to the Canadian legal context, it was just such complexity and ambiguity which offered an opportunity for the lively interplay of various political forces and judicial interpretations in Canadian society during the 1980s and the beginning of the 1990s.65

1. **The Supreme Court of Canada and the Charter: Cases and Decisions**

The absence of critical discussions in Canada about constitutional supremacy and its

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65 As with most broadly descriptive terms, this concept involves some ambiguities, however, it is useful for identifying a general judicial approach or point of view. An interesting example of how this tendency can be operationalized to illustrate certain constitutional trends and developments is found in John R. Schmidhauser, *Constitutional Law in American Politics* (California: Cole/Brooks Publisher, 1984), pp. 6-7. For another interesting analysis of the American experience with judicial activism see also, John Agresto, *The Supreme Court and Constitutional Democracy* (Ithaca: Cornell University Press, 1984).
implications for a more activist high court at the onset of the 1980s provided a striking contrast to the U.S. constitutional experience. Thus, for example, it was exactly the notion of the court "as the ultimate and effective partisan of constitutional and individual rights" which U.S. Chief Justice John Marshall had seized upon to defend the U.S. Supreme Court's assertion of judicial supremacy in the landmark 1803 case of *Marbury v. Madison* that would subsequently serve as the basis for the American Supreme Court's activist tendencies. While the Canadian constitutional framers may have largely downplayed or neglected the pivotal role of the judiciary in balancing out and adapting the new constitutional system to its broader environment, Canadian Supreme Court justices were far more attuned to comparative constitutional history and to their own potentialities to become an important political force. For example, in its first major consideration of the *Charter* in the 1984 case of *The Law Society of Upper Canada v. Skapinker,* the Supreme Court of Canada -- in what would emerge as a significant step forward in Canadian constitutional development -- explicitly drew attention to the significance of judicial review under Canada's new constitutional framework.

Indeed, the court did not hesitate to cite the famous American precedent of *Marbury v. Madison* as a basis for authorizing Canadian courts to review the constitutionality of legislation. On a double-edged note, the court also relied upon U.S. Justice John Marshall's 1819 decision in *McCulloch v. Maryland* to caution that both legislative and judicial power

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66 1 Cranch (5 U.S.) 137 (1803).
68 17 U.S. 316 (1819).
are limited under the Canadian constitution, and that the Supreme Court must allow the legislative branch to exercise the discretion assigned to it (and *vice versa*). Newly appointed Chief Justice Dickson minced no words, however, in signalling his model for Canada or the Supreme Court’s future direction within the Canadian polity when he indicated his hope that future *Charter* decisions would "resound like those of John Marshall."

Thus in the court’s unanimous first *Charter* judgement, written by Mr. Justice Willard Estey, the Supreme Court of Canada went well beyond considering the substantive issues raised in the *Skapinker* case, and indicated how the justices envisioned their new constitutional role and responsibilities. In effect offering guidelines for the judiciary’s new approach to constitutional interpretation, Mr. Justice Estey distinguished the nature and force of the 1982 *Charter of Rights and Freedoms* from that of its "shabbily treated" predecessor, the 1960 *Bill of Rights*. Thus, he remarked:

> We are here engaged in a new task, the interpretation and application of the *Charter of Rights and Freedoms*.... This is not a statute or even a statute of the extraordinary nature of the Canadian *Bill of Rights*....It is part of the Constitution of the nation adopted by the constitutional process....The *Charter* comes from neither level of the legislative branches of government but from the Constitution itself. It is part of the fabric of Canadian law. Indeed, it is the supreme law of Canada.

In judicially distinguishing the new constitutional guarantees of fundamental rights, the court further asserted that the *Charter of Rights and Freedoms* would be accorded broad

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70 *Skapinker*, p. 167.
and generous judicial interpretation in order "to better serve" the Canadian community that "it is designed to guide...for a long time." A less fulsome interpretation of the Charter, the court cautioned, would "stunt the growth of the law and hence the community it serves." Moreover, adopting judicial reasoning which put to rest any doubts about whether or not the Canadian Supreme Court had embarked on a new and dynamic course of constitutional development, the Canadian Supreme Court justices drew on U.S. precedent to outline their future approach to constitutional interpretation. Thus, Mr. Justice Estey commented: "The courts in the United States have almost 200 years of experience at this task and it is of more than passing interest to those concerned with these new developments in Canada to study the experience of the United States court."

VI. THE CHARTER AND CANADIAN PUBLIC EDUCATION: CASE STUDIES IN COMPARATIVE PERSPECTIVE

In the Skapinker case, the Supreme Court of Canada clearly signalled that courts would be looking to the American constitutional experience for guidance in resolving Canadian constitutional issues. Following this landmark decision, the Supreme Court of Canada and other Canadian courts would routinely refer to U.S. constitutional precedents and make extensive use of U.S. authorities in writing their Charter opinions. Indeed,

71 Ibid., p. 168.

72 See, for example, Christopher P. Manfredi, "The Use of United States Decisions by the Supreme Court of Canada Under the Charter of Rights and Freedoms, Canadian
some Canadian commentators concluded that the Charter, in making explicit reference to limits on rights and freedoms that can be "justified in a free and democratic society" (Section 1), invited the courts to look beyond Canadian borders to other democratic societies for assistance in deciding Charter issues. In the decade after the Skapinker case, the Supreme Court of Canada would accept this invitation in a large number of constitutional cases covering almost all facets of Canadian law and society. In referring to and adopting U.S. cases, Canadian courts were cautious, however, to avoid the wholesale importation of U.S. constitutional reasoning into Canadian constitutional issues. For example, according to Mr. Justice La Forest in the 1987 Supreme Court of Canada decision of Rahey v. The Queen:

While it is natural and even desirable for Canadian courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of Charter guarantees that have counterparts in the United States Constitution, they should be wary of drawing too ready a parallel between constitutions born to different countries in different ages and in very different circumstances...Canadian legal thought has at many points in the past deferred to that of the British; the Charter will be no sign of our national maturity if it simply becomes an excuse for adopting another intellectual mentor. American jurisprudence, like the British, must be viewed as a tool, not as a master.

The use of American case law in Canadian judicial reasoning since 1982 suggests the

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73 For an interesting normative argument as to why Canadian courts should not refer to U.S. constitutional precedents in deciding Charter cases, see Monohan, Chapter 5.


utility of studying and evaluating changes to Canada's legal system and legal culture from a comparative perspective. In order to assess the impact of the Charter of Rights and Freedoms on Canadian public education in this dissertation, the following chapters will examine four selected issues concerning Canadian public education. The four case studies are: (1) equal educational opportunities for disabled children; (2) teachers and the AIDS crisis; and (3) gender equality in the schools; and (4) the role of religion in the public school curriculum. The case studies will take an explicitly comparative approach, looking at the way in which the Charter has influenced Canadian law, and also how the evolution of American law has affected that impact.

A number of broad orienting questions will guide the analysis undertaken in the comparative case studies: What impact has the new constitution had on educational policies and practices in Canada? Has the Charter encouraged parents, students, and others in the Canadian public education setting to overcome their traditional deference to legislative and local school board authority and to assert their perceived constitutional "rights" through legal challenges? How have Canadian courts utilized the Charter to address the education-related rights of Canadian citizens? How has the American experience and legal evolution in these areas of public education influenced constitutional development in Canada? What do the answers to the preceding questions reveal about Canada's legal culture since the

76 Indeed, in the ground-breaking and excellent Canadian school law casebook on rights and freedoms in the Canadian public education system, the authors make extensive use of U.S. school law precedents to suggest possible trends and developments in Canadian education law. Gregory M. Dickinson and A. Wayne MacKay, Rights, Freedoms and the Education System in Canada: Cases and Materials (Toronto: Emond Montgomery Publications Limited, 1989).
entrenchment of the *Charter of Rights and Freedoms*? These and other questions will guide the analysis in the following case studies. Together the case studies are intended to elucidate the impact of the *Charter* on Canadian public education, and more broadly on the Canadian legal culture.
PART II
CHAPTER 3

EDUCATIONAL OPPORTUNITIES FOR SPECIAL NEEDS CHILDREN: PARENTAL PRESSURE AND THE CONSTITUTIONAL CONSEQUENCES

The problem of providing full educational opportunities to handicapped children is a task that has, with few honourable exceptions, been grievously neglected in Canada.

OECD Report (1976)¹

We believe the new Charter of Rights guarantees our daughter inclusion in society... You can’t discriminate against her because of her disability and that is what [the school board] is clearly doing.

Parents of Handicapped Child in Winnipeg (1986)²

In 1985 -- after a three year waiting period designed for federal and provincial governments to harmonize legislation and policies with the constitution's equality guarantees -- the Charter's equality provisions in Section 15 were enacted. Among other protections, Section 15 guaranteed that "every individual...has the right to...equal benefit of the law without discrimination and, in particular, without discrimination based on...mental or physical handicap."³ This chapter will examine the impact of the Charter of Rights and

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³ The term "handicapped," "disabled," and "special needs" are used interchangeably throughout the report while recognizing that the language of disability is itself a contentious issue. For the purposes of this chapter, handicap, disability and special needs denote both the loss or reduction of functional ability and activity, and the disadvantage consequent
**Freedoms** on the right of special needs children, that is children with mental and/or physical disabilities, to an appropriate educational program in the Canadian public school system.

In order to place the subject in context, the first section of the chapter provides an overview of legislative and judicial attitudes toward special needs children prior to the adoption of the *Charter* in 1982. Because post-*Charter* developments in the area of student rights for special needs children have drawn heavily on the American experience, the second section of the chapter focuses on U.S. constitutional and legislative developments regarding education for handicapped children. The third section of the chapter surveys post-*Charter* cases that have expanded the educational rights of disabled children in Canada. In the fourth portion of the chapter, the statutory rights of disabled children to access the public school system are examined in order to illustrate the way in which post-*Charter* changes in both Canada’s external legal culture (parents) and the internal legal culture (legislators) have influenced the evolution of provincial education legislation. Finally, the last section of the chapter summarizes recent changes in the area of special education as such developments have impacted on Canada’s evolving legal culture.

### I. SPECIAL EDUCATION IN THE PRE-CHARTER PERIOD

Historically, the group often referred to as Canada’s “most ignored minority” was denied both common law and statutory guarantees of equality. The common law, for

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example, disentitled persons with disabilities from both the benefit of substantive equality as well as due process of the law. While minority groups other than handicapped Canadians -- particularly racial and ethnic groups -- were also historically denied common law equality rights, public pressure to address the problem of disabled persons has been a relatively recent phenomenon in Canada. For example, all the provinces had enacted anti-discrimination statutes respecting racial and ethnic minority groups by the end of the 1950s as part of the postwar emphasis on human rights generally. It was not until the early 1970s, however, that anti-discrimination statutes began to address the anachronistic legal treatment of the handicapped, and only in subsequent years that legislative amendments by all the provinces and the federal government afforded protection against discrimination based on handicap.

1. Pre-Charter Provincial Legislation

During the nearly four decades between the end of World War II and the full adoption of the Charter's equality provisions in 1985, Canada became a signatory to several

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4 The absence of such guarantees stems in part from broader common law principles which deny remedies in tort and contract for individual public acts of discrimination. For a fuller discussion of this point see, Cameron v. Nel-Gor Nursing Home et al. (1984), 5 C.H.R.R. D/2170. For a discussion of the common law situation as it relates to persons with disabilities see, for example, R. v. Saxell, (1980) 59 C.C.C. (2d) 176. For an interesting post-Charter case which illustrates how the constitution has modified the common law see R. v. Johnny, Unreported, September 11, 1984 (B.C. Supreme Court).

5 For a comprehensive overview of the historical development of anti-discrimination laws in Canada see W.S. Tarnopolsky and William F. Pentney, Discrimination and the Law in Canada (Toronto: Richard de Boo, 1982).
international rights documents including the *Universal Declaration of Human Rights*,\(^6\) the *Declaration of the Rights of the Child*,\(^7\) and the *International Covenant on Economic, Social, and Cultural Rights*.\(^8\) As executors of these agreements Canada and the provinces expressed at least a moral commitment to every child's right to an appropriate education. For example, Article 13 of the *International Covenant on Economic, Social and Cultural Rights* stipulated:

1. 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 request for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different...shall be made generally available and accessible to all by every appropriate means.\(^9\)

Canada had also expressed a commitment to special education as elaborated by a number of United Nations Declarations and in many statements issued during the 1981 Year of the


Disabled.10

Norwithstanding Canada’s moral commitment to an appropriate education for all children regardless of ability, a notable gap existed between the principles expressed in universal declarations and actual provincial education legislation.11 Prior to the adoption of the Charter, most education laws tended to provide that a child would be "accommodated" in the public school system, but did not stipulate that such accommodation would be appropriate to the individual needs and abilities of the child. An example of this minimal entitlement was illustrated by the British Columbia School Act12 which provided:

The Board of each school district shall...provide sufficient school accommodation and tuition, free of charge...to all children of school age resident in that school district.13

Although more expansive entitlements were available in other provinces14 which recognized that appropriate education would vary according to individual children, even these statutes


11 Section 93 of the Constitution Act, 1867 (formerly the British North America Act), stipulates that education is a provincial responsibility.

12 R.S.B.C. 1979, c. 375.

13 Section 155(1)(a)(i). The legislation has since been amended as discussed later in this chapter.

14 For example, the Saskatchewan Education Act, R.S.S. 1978, c. 17 provided that: "Every person between the age of six and twenty-one years of age shall have the right to attend school in the division in which he and his parents or guardian are residents, and to receive instruction appropriate to his age and level of educational achievement and in courses of instruction approved by the board of education in school or schools of the division.
contemplated segregation of handicapped children from their non-disabled peers, and did not typically include provisions for parental involvement in placement and program decisions affecting their children.\textsuperscript{15} Moreover, while most provinces adopted some policies and programs designed to accommodate physically and mentally handicapped children, implementation of such policies and programs was both discretionary and conditional, so that the claim of special needs children to an appropriate education was more appropriately described as a privilege, rather than a right. This situation was typical of Canada’s legal culture prior to 1982. For example, the attitudes and views expressed by both legislators and judges during this period of time were characteristically restrained and non-expansive with regard to radical changes in the field of rights -- a feature which mitigated against innovation in the area of special education, as well as many other emerging societal problems (see Chapters 4-6).

In addition to providing minimal entitlements to education for children with disabilities, many provincial education statutes prior to 1982 also contained "exclusion" clauses which contemplated that not all children, particularly those with severe disabilities, would be provided access to "regular" classes in their neighbourhood public school. For example, while Section 47(1) of the Prince Edward Island School Act stated that "The Minister shall provide free school privileges... for every child... ," it also exempted from the right to "free school privileges... students for whom the Minister has provided special services

\textsuperscript{15} For a comprehensive overview of legislative provisions governing special education in the various Canadian provinces, see D. Poirier, L. Goguen and P. Leslie, \textit{Education Rights of Exceptional Children in Canada} (Toronto: Carswell, 1988).
such as the deaf, blind and cerebral palsy (sic)."16 Prior to the adoption of the *Charter*, Ontario was the only province that seriously attempted to bridge the gap between moral prescriptions and legislative provision of appropriate education for all children. Thus in 1980, the Ontario Government proclaimed novel amendments to its *Education Act* designed to update and overhaul the province’s approach to special education. While maintaining segregated schools for blind, deaf and "trainable retarded" pupils, the new legislation offered that "exceptional pupils" — that is, those pupils with "behavioural, communicational, intellectual, physical or multiple exceptionalities" -- would be placed in a special education program.17 In contrast to other educational objectives across the country, Ontario’s education legislation was intended to ensure that special needs children received instruction appropriate to their individual needs and capacities. The Minister of Education at the time, explained to the Ontario legislature:

>This Bill does two things: First, the basis for universal access contained within this Bill guarantees the right of all children, condition notwithstanding, to be enrolled after an assessment procedure established in law which has in fact denied universality of access. All children will now have a basic right to be enrolled. Second, school boards must assume responsibility for providing suitable programming for all children. This will include the provision of special education programs and special education services for its exceptional pupils.18

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16 R.S.P.E.I., 1974, C.S-2. Although different wording was adopted in the B.C. *School Act*, the effect was similar. Section 155(2)(b) of the B.C. legislation excused school boards from admitting to primary school a child who has not "attained a standard of education equivalent to that of pupils attending Grade One."


18 Ontario *Hansard*, May 23, 1980. Section 8(2) of the legislation expressed these objectives.
Although this path-breaking legislation was a significant departure from more minimalist provincial entitlements across Canada, even these amendments did not prevent exclusionary treatment of the handicapped in certain cases. For example, s. 34 of the Ontario Education Act enabled a school principal or parent of a child who is "... because of a mental or a mental and one or more additional handicaps, unable to profit by instruction offered by the board" to refer the child to a committee of three appointed by the school board. This committee, consisting of a psychiatrist and a supervisory officer or principal, to neither of whom the matter had been previously referred, was charged to determine the extent of the child's disability, and where circumstances warrant, to assist the parents to locate a suitable program outside the public school system, at no cost to the parent."

2. Pre-Charter Special Education Litigation

The restrictive approach of pre-1982 provincial legislation toward children with disabilities was reinforced in the handful of court cases that attempted to challenge exclusionary provincial education legislation. For example, although Alberta's education laws did not explicitly exempt certain groups from the right to attend school, i.e., school boards were obliged to admit all children with no other distinction than residence, cases of

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exclusion of disabled children regularly occurred.\textsuperscript{20} In one of the few pre-Charter cases illustrative of this situation,\textsuperscript{21} parents of a child with cerebral palsy who was barred from inclusion in a regular class, successfully requested that an Alberta court order that school officials admit the child to a regular classroom on the basis of her residency. Although the court was able to compel the school board to admit the child on the basis of the education legislation's residency language, in its limited judicial review competence, the court had no jurisdiction to require school officials to provide the child with an education "appropriate" to her needs once admitted to school. This limited judicial remedy was typical of the pre-1982 special education cases,\textsuperscript{22} and illustrated the situation whereby Canadian courts were empowered to interpret legislation on procedural grounds, but were not empowered to strike down provincial or federal statutes on the basis of a substantive defect, such as discrimination on the basis of disability (see Chapter 2). Thus, even in cases where provincial legislation blatantly discriminated against handicapped children with respect to the provision of educational programs and services -- and prior to the entrenchment of the new constitution provincial education legislation across Canada almost universally failed to

\textsuperscript{20} For a discussion of this situation see, for example, D. Poirier, L. Gouguen, and P. Leslie, \textit{Education Rights of Exceptional Children in Canada}.

\textsuperscript{21} \textit{Carriere v. County of Lamont No. 30}, Unreported, August 15, 1978 (Alberta Queen's Bench).

recognize the right of children with disabilities to an appropriate education -- judicial
deferecne to parliamentary supremacy acted as a constitutional brake to the expansion of
rights in the area of special education. Thus, the actors who for many generations had been
the prime architects shaping Canada's internal legal culture, that is, members of the
legislature, legal community and the judiciary, did not view either the legislative arena or
Canada's courts as the prime levers for the expansion of rights, or for satisfying the rights
claims of special group constituencies. The orientation of the internal legal culture, as
expressed in part by the narrow scope of judicial review in Canada before 1982 (that is,
prior to the entrenchment of the Charter), the expense of instituting legal proceedings, and
also the remote chance of successfully challenging provincial legislation were all factors
discouraging parents of children with disabilities from seeking judicial redress in cases of
discriminatory treatment by the educational system. Such factors also motivated some
parents of special needs children to become actively involved in promoting the idea of
constitutionally entrenched equality rights for their children during the constitutional debates
of the early 1980s. One of the central arguments made by Canadian parents and interest
groups lobbying for the expansion of rights for the disabled during the parliamentary debates
on the constitution was the American experience with equal educational opportunities for
special needs children. In order to place post-Charter developments into context, the next
section of this chapter will briefly discuss the American experience as it relates to both
legislative and judicial developments in the area of special education.
II. EQUAL EDUCATIONAL OPPORTUNITY AND HANDICAPPED STUDENTS: THE AMERICAN EXPERIENCE

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.23

As in Canada, the issue of equal educational opportunities and services for handicapped children has been one of the most important and controversial civil rights issues facing American educators, public interest groups, legislators and the courts.24 The historical provision of educational services for handicapped children by U.S. state governments was glaringly inadequate, and legislation tended to lack both uniform standards and sufficient financial resources to support available programs. This situation in the United States changed dramatically in the early 1970s when public interest groups made an end-run around traditionally unresponsive state legislators and local school boards and mounted successful legal challenges to the systematic exclusion of handicapped children from educational programs.

Two significant legal decisions provided the initial impetus for increased judicial and governmental attention to the plight of handicapped children fighting for equal educational


benefits in the public school system. In the first case, *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania*\(^{25}\), the parents of seventeen mentally disabled children initiated a constitutional challenge to a Pennsylvania law which allowed for the exclusion of severely handicapped children certified by psychologists as "uneducable and untrainable" and "incapable of benefitting" from publicly subsidized instruction. The federal district court held that denial of equal educational opportunity to handicapped children was indeed unconstitutional. The consent decree issued in the decision accordingly stated in part that providing free education to non-handicapped students, while depriving mentally handicapped youngsters of an equivalent right, established a clear constitutional claim. Thus, the court remarked: "All children are capable of benefitting from instruction, if only in the sense that they can be rendered relatively less dependent on others."\(^{26}\)

Shortly following the PARC decision, a federal District of Columbia court ruled on a suit challenging exclusionary practices that resulted in approximately 18,000 handicapped children being denied public education during the 1972-1973 school year. In *Mills v. Board of Education of the District of Columbia*\(^{27}\) the plaintiff claimed that denying handicapped children the right to education -- in view of the District of Columbia law that mandated a free public education for all children between the ages of seven and sixteen -- violated the children's constitutional rights. The court upheld this claim and ruled that when a state provides free public education to normal and handicapped children, all handicapped


\(^{26}\) Ibid., p. 293.

children have the right to education under the equal protection clause of the Fourteenth Amendment. The judicial victories of PARC and Mills sparked considerable public attention and marked the first of many similar lawsuits launched in over thirty states. By the mid-1970s, the flurry of legal activity had extended the scope of the Fourteenth Amendment's equal protection clause to include the right of special needs children to receive all educational services regularly provided by the state to the non-handicapped.

Even as popular awareness and judicial support of children with disabilities increased in the United States, however, the practical dilemmas of defining equality with respect to handicapped children in the educational setting steadily emerged. For example, despite attempts by the states to enact special education laws in response to the PARC and Mills decisions, it soon became clear that such legislative initiatives were not substantially improving educational services to the handicapped. This situation prompted Congress to enter the arena and to advocate the creation of federal legislation and funding for the education of the handicapped.

U.S. Federal involvement and congressional initiatives came to a head in 1975 when Congress enacted the Education for All Handicapped Children Act (EAHCA). This legislation, popularly known as Public Law (P.L.) 94-142, shifted the focus from constitutional to statutory rights by mandating a "free appropriate public education and related services" for all handicapped children between the ages five and eighteen. State legislatures were given the option of participating in P.L. 94-142, and by the mid-1980s,

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almost every state had opted to take part in the program. A central feature of the federal legislation was, that to the fullest extent possible, handicapped youngsters were to be educated in the "least restrictive environment," that is, in classes with their non-handicapped peers; a process known as full integration or "mainstreaming." The Act also affirmed the principle that a regular classroom setting with appropriate supplemental services was preferable to special, segregated classes; special classes were preferable to separate special schools; and special schools were preferable to private institutions in a home setting. In addition, P.L. 94-142 provided that where no public facilities were available, private schools supplemented by public funds could be used as an alternative.

Extensive procedural protections (that went well beyond those stipulated in PARC and Mills) were also provided by the EAHCA to ensure that placement, evaluation, and program decisions were made in accordance with stringent due process requirements. The Act provided, for example, that a. "appropriate" educational program was to be tailored to meet the educational needs of each handicapped youngster. The "individualized education program" (the IEP) to be developed by school officials was to set out the educational objectives and goals designed for each child and to describe the specific services to be provided. Re-evaluation of the IEP was to be conducted annually. If objections were raised with respect to a particular IEP, parents were entitled to a hearing before a local school

board where could voice their complaints. If this hearing did not result in a satisfactory resolution of the complaint, parents could file a civil suit in state or federal court.

Although well-intentioned, the sparsely worded *Education for All Handicapped Children Act* opened the door to a variety of problems and unanswered questions. In particular, because P.L. 94-142 failed to consider what in fact and practice constituted an "appropriate education" parents and school officials often found themselves at loggerheads when it came to the practical implementation of the legislative provisions. Parents and school boards unable to arrive at a satisfactory resolution of such issues turned to the courts to flesh out the meaning of the EAHCA. Almost 300 federal and state cases involving P.L. 94-142 were heard before the U.S. Supreme Court finally entered the fray in 1982 when the Court rendered the first authoritative decision on the meaning of an "appropriate" education for handicapped children in the case of *Hendrick Hudson District Board of Education v. Rowley.* In that case, the Court concluded that an "appropriate" education, as provided by P.L. 94-142, only required instruction targeted at achieving a "beneficial" result, and does not require maximization of the students' potential "commensurate with their non-handicapped counterparts." Such a narrow interpretation of "appropriate" education was regarded by many as a limitation on the scope of P.L. 94-142, however, even critics of the


31 For a more recent court decision that considered some of the issues raised in Rowley, see *Timothy W. v. Rochester, New Hampshire School District,* 875 2d 294 (1st Cir. 1989).
decision pointed out that the basic entitlements the statute stood for represented a revolutionary expansion of rights for children with disabilities. One commentator thus remarked:

There have been some dramatic improvements in the plight of handicapped youngsters since the dark days before the adoption of the Education for All Handicapped Children Act, and the surge of state legislative reforms. The dialogue is now over how to educate the handicapped, not over whether to do it at all.\(^{32}\)

As a result of these changes, the already highly rights-oriented American legal culture had taken another qualitative step forward with regard to the rights of children with disabilities. Since the 1982 *Rowley* decision, the U.S. Supreme Court has had several further opportunities to interpret the controversial P.L. 94-142,\(^{33}\) and these decisions, together with lower court opinions, and legislative initiatives have significantly clarified the potential scope, application, and difficulties associated with P.L. 94-142. Despite its many shortcomings, P.L. 94-142 generated the type of productive interplay between the U.S. legislative and judicial branches which could serve as an interesting and instructive model for Canadian justices and legislators grappling with the future interpretation and application of Section 15 of the *Charter* as it relates to the provision of appropriate educational services for handicapped children. The next section of this chapter will discuss some of the legal cases generated by the *Charter* in order to demonstrate the *Charter*'s direct and indirect

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impact on the expansion of rights for disabled children.

III. CANADA'S SPECIAL EDUCATION CHALLENGES IN THE POST-CHARTER PERIOD

As discussed in Section II of this chapter, the poor track record of provincial legislatures and courts in acknowledging or expanding the educational rights of children with disabilities was a major impetus for parents and lobby groups representing special needs children to become involved in the constitutional debates of the early 1980s. Canada's modern constitutional framers would later acknowledge that it was these groups and individuals who literally "shamed" provinces and federal governments into including in the constitution's equality rights provisions, guarantees for mentally and physically disabled Canadians.\(^{34}\) Notwithstanding this successful lobbying effort, Canada's legislative and judicial history regarding educational opportunities for children with disabilities made special education activists only cautiously optimistic about the positive impact of the Charter on the expansion of special education rights. For example, in a representative statement made by a spokesperson for one special needs lobby it was suggested that:

The implementation of Section 15 provisions in the educational system of British Columbia is effectively resisted by agencies with whose resources we cannot begin to compete. I believe the resolution of this conflict will await specific decisions of the Supreme Court of Canada -- a very expensive, slow and laborious process....I fully anticipate that we shall achieve equality of educational opportunities in time -- but

\(^{34}\) As stated by Svend Robinson with respect to the Parliamentary Committee which heard representations from different interest groups concerning the proposed Charter of Rights and Freedoms. For a more detailed discussion of the lobby groups supporting the rights of disabled Canadians see Cohen and Warwick, The Vision and the Game, pp. 34-35.
not likely within this generation.35

In the mid-1980s it appeared that attitudes toward the rights of the disabled, and the broader development of rights consciousness throughout Canadian society, were changing more rapidly in the external legal culture than in the internal legal culture. Such a discrepancy, or lack of synchronization, between the two sub-areas of Canada’s legal culture, however, was not surprising. Generally speaking, members of the legal profession, political practitioners, and the judiciary are more cautious about embracing new approaches to complex societal problems than the activists who speak for rights-seeking constituencies. But the gap was closing in Canada, as legislative spokespersons responded to entreaties on the part of rights groups, and as the legal community and judiciary began to give substance to the new constitutional guarantees which explicitly recognized the rights of minority groups.

Thus, after the adoption of the Charter in 1982 the complex issue of accommodating the educational needs of disabled children within the public education system was the focus of numerous legal challenges and judicial comment. Notwithstanding that the courts had not definitively ruled that the constitution or human rights legislation was applicable to school boards (see Chapter 7), these challenges were generally brought by parents of special needs children against local boards of education.36 The new constitution’s guarantee of


36 "Parents of Disabled Fight to Desegregate Mainstream Schools," Globe and Mail, September 6, 1989, p. 3.
minority rights, and particularly equality rights for persons with mental and physical
disabilities, had a significant impact on how some parents began to think about rights. For
example, in stark contrast to the pre-Charter years, on the first day of the 1989 school year
the emotionally charged integration issue attracted national attention when two families
resident in two different Ontario school districts brought their handicapped children to
school, and according to one media report "dared school officials to turn them away." In
both cases school officials had told the parents that their children would be denied access
to their neighbourhood schools. Both sets of parents challenged these decisions in two
separate legal actions.

Since 1982 many of the court cases initiated by parents of handicapped children have
involved the contention that disabled children have a constitutional right to be fully
integrated into regular classrooms, and to receive an education with their non-handicapped
peers. Thus, in several of the post-1982 special education challenges, parents of special
needs children have maintained that the least restrictive environment for educating children
is provided by full integration of special needs youngsters into regular classrooms, as
opposed to placement in a segregated school, a segregated class within a regular school, or
other settings. This proposition allegedly was supported by Section 7 of the Charter, which
guarantees "the right to life, liberty and security of the person" (and which, it was argued,
includes a quality education), and also Section 15, which provides that every individual must
receive equal benefit of the law regardless of any mental or physical disabilities.

For their part, local school boards across Canada -- who by the early 1990s had
almost all moved to a more inclusive model of education -- contended that integration
of all special needs children was not always practicable, nor in the best interests of the handicapped child. For example, in one post-Charter case where parents of a severely handicapped child opposed the school board's decision to partially integrate the youngster in a regular classroom setting, the tribunal hearing the case observed:

It is the firm opinion of this Tribunal that the wholesale integration of exceptional pupils into regular classes solely on the basis of philosophical principle, untempered by due and informed consideration of each individual situation, is directly counter to the best interests of all pupils. Further, it is the conviction of the Tribunal that the assumption of rigid doctrinaire positions on the issue, not only threatens the very future of integration as a desirable practice but specifically, in cases such as [this], serves only to erode the good will and reason that must obtain if all parties are to act in her best interests.\(^{37}\)

Parents and support groups rejected this kind of reasoning, arguing that the Charter implies that all handicapped children are entitled to a fully integrated education, and that school boards do not have discretion in making placement and educational plan decisions. Notwithstanding the current positive attitudes expressed by parents toward integration, it can be anticipated that as full integration of handicapped children becomes the norm in the Canadian public school system, legal challenges will be initiated which may argue, for example, that children with disabilities who are required by local school boards to be fully integrated are being denied an appropriate education, because they are not being placed in a segregated setting with a low pupil-teacher ratio serviced by a special education teacher.

\(^{37}\) Rowett and the Board of Education for the Region of York, Unreported, Ontario Special Education Tribunal, 1986.
Whatever the attitudes or orientation the parents or school officials, since 1982 Canada's courts have been increasingly called upon to strike a balance between the competing rights and educational philosophies of school officials and parents in determining what the most reasonable and appropriate educational program and placement should be provided to students with special needs.

1. The Bales Case

One of the first special education cases to be litigated following the entrenchment of the constitution was the 1984 case of Bales v. Board of School Trustees of School District No. 23 (Central Okanagan). The Bales case concerned an eight-year-old student named Aaron Bales, whose mental age was less than half his years because of a brain dysfunction that occurred in his infancy. In the fall of 1983 school officials removed Aaron from the regular school he had been attending, and, against his parents' wishes, assigned him to a special segregated school for the handicapped. When school officials refused to allow Aaron to return to an integrated placement, his parents brought a Charter challenge in the B.C. Supreme Court requesting that the court compel the school board to return Aaron to the special class in the regular school he had been attending for three years prior to his reassignment. Lawyers for the Bales contended that the school board had no authority to operate a segregated school for handicapped children such as Aaron, and maintained that his assignment to such a school denied him the right to an education with his non-

handicapped peers in the ordinary school environment, contrary to Section 7 of the Charter. Moreover, Aaron's parents asserted that his attendance at the special school for the handicapped would not merely be less beneficial to him than continued attendance at the ordinary school where he was previously registered, but would actually be harmful to him. Because Aaron's reassignment took place prior to the coming into force of the constitution's equality guarantees in 1985, the Bales were at a serious disadvantage in making out their claim of discrimination without the assistance of Section 15 of the Charter. Consequently the Bales were limited to making procedural arguments pursuant to Section 7 (which guarantees "life, liberty and freedom of the person").

In the first Canadian superior court decision to comprehensively examine the concept of educational "mainstreaming" and American special education laws, Mr. Justice Taylor reluctantly concluded that while educational, sociological, and other expert evidence supported the argument that Aaron would benefit from continued enrollment in a regular school and integration in a regular classroom setting, he could not intervene because the decision of the school board was procedurally correct. Moreover, he ruled, because the court had no authority at that time to determine whether provincial legislation and board policy were substantively flawed, the student's reassignment to a segregated setting constituted a lawful exercise of the placement authority given to the school board by the B.C. School Act. Thus, in dismissing the Bales' claim, Mr. Justice Taylor held that the operation of a segregated school for the handicapped was within the general authority of the school board as provided by Section 160(h) of the School Act. As such, the court remarked that the school board had followed correct procedural requirements as it had:
...provided "sufficient accommodation and tuition" for moderately-handicapped pupils within the meaning of Section 155(1)(a)(i) because the board has not been shown to have acted unreasonably in the establishment of the facility in 1977—when most moderately-handicapped children in the province were educated in similar schools—or in failing thereafter to close it in response to subsequent developments in educational philosophy.  

Although the Bales family lost their case on technical legal grounds, they won a moral victory when in his concluding remarks, Mr. Justice Taylor acknowledged that it was the delay in the implementation of the Charter's equality guarantees, and not the validity of the Bales' claim that had determined his decision. In a rare case of judicial frankness -- and in language which foreshadowed the type of judicial activism which would be sparked by the Charter -- Mr. Justice Taylor went on to endorse the substantive merits of the Bales' allegation that Aaron's segregated placement was discriminatory:

In the circumstances as I have found them, the question of whether Aaron ought to receive the benefits which integration is thought to provide in the education of the handicapped is not a question which a Court may decide.... It seems to me, however, that the plaintiffs were justified in seeking a declaration of their rights...it is to be hoped that understanding of Aaron's educational needs and those of the handicapped generally have been advanced by the efforts which Mr. and Mrs. Bales and their counsel have devoted to this case, and for which they are to be commended.  

2. The Elwood Case  

Following the Bales case, an increasing number of special education cases were

39 Ibid., p. 33.  
40 Ibid., pp. 33-34.
initiated by parents who challenged the segregation of their children.\textsuperscript{41} The first important equality rights challenge in this regard was the 1987 case of \textit{Elwood v. Halifax County-Bedford District School Board}.\textsuperscript{42} The \textit{Elwood} case was triggered at the beginning of the 1986 school year after the Halifax school board decided that Luke should be removed from his regular Grade 3 class at Atlantic View Elementary School. Luke -- who suffered from a developmental disability which made it difficult for him to speak and understand language -- was instead placed in a special segregated class for disabled children at another school nearly 20 kilometres away.

Luke's parents challenged the board's decision, with their lawyers arguing that the new placement violated Section 15 of the \textit{Charter}, and that a regular class was "the most appropriate setting" and "least restrictive environment" for Luke's education. The Elwoods also maintained that Luke's constitutional rights under Section 7 and Section 15 of the \textit{Charter} would be violated if he was segregated and educated with disabled children. In October 1986, Luke's parents won a court injunction against the board's decision to relocate their son. This ruling allowed the nine-year-old to complete the school year in his regular


\footnotesize{\textsuperscript{42} Consent Order, Unreported, June 1, 1987.}
neighbourhood school. The Nova Scotia Supreme Court was scheduled to hear the case in June 1987, but shortly before that date the Elwoods and the Halifax County-Bedford District school board reached an out-of-court settlement endorsed by the provincial Supreme Court. The consent order issued by the court provided that Luke could continue attending regular classes until he began high school, and also established an "educational support team" and special individualized program in order to meet Luke's educational needs. It was the consensus of both parties that if the matter had proceeded to trial, Section 15 of the Charter could have been successfully employed by the Elwoods to challenge Luke's segregated placement. Thus, although the case "settled" it has consequently been treated as a landmark case, and used by other parents and interest groups as precedent to support other Charter cases challenging board decisions to segregate children with disabilities.43

3. The Rowett Case

Another high profile special education case followed close on the heels of the Elwood settlement. In the 1987 Ontario case of Rowett v. Board of Education for the Region of York

43 For a discussion of this case see A. Wayne McKay, "The Charter of Rights and Special Education: Blessing or Curse?" Canadian Journal for Exceptional Children, Vol. 3, No. 2 (1987), pp. 118-127. Other special education cases that have resulted in a court ordered settlement include Robichaud c. Nouveau-Brunswick Commission Scolaire No. 39 (1989), 99 N.B.R. (2d) 341 (CA), reversing (1989), 95 N.B.R. (2d) 375 (Q.B.) and Hysert v. Carleton Board of Education (1990); settlement approved by the Ontario Court (General Division).
et al., the parents of a child with Down's Syndrome sought judicial review of a school board's decision to place their child in a special class with a low adult-pupil ratio for at least 50% of the school day. Planned integration opportunities as appropriate were to be developed in order to allow the youngster to interact with her non-handicapped age-appropriate peers during the remainder of the school day. The Rowetts, however, believed that their daughter should be entitled to full integration in a regular classroom and requested the Ontario High Court to grant a declaration stating that the placement decision of both the school board and the provincial government violated the child's constitutional rights to equality pursuant to Section 15, and freedom of association under Section 2(d).

In the fall of 1988, an Ontario District court ruled in favour of the school board and province, and dismissed the Rowett's case. In its judgement, the court made a number of important observations. First, the court ruled that the local placement committee which had reviewed the student's records and made the placement decision was not a court of "competent jurisdiction," and therefore the Charter was not applicable to the school board's placement decision. Secondly, the court concluded that the decision of the provincial special education tribunals -- which was statutorily empowered to adjudicate appeals from local placement decisions -- were final and binding, unless the tribunal acted arbitrarily or capriciously, or outside its statutory jurisdiction. In this particular case, the

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44 Leave to appeal to the Ontario Court of Appeal granted on June 1, 1989.

45 The special education tribunal made its decision in 1986. The Ontario District court case is reported in (1988), 63 O.R. (2d) 767.

46 Section 24(1) of the Charter only contemplates remedies from courts of "competent jurisdiction. This matter has not yet been resolved by the Supreme Court of Canada.
court concluded that the Charter was not relevant because the special education tribunal had acted properly. Finally, the court determined that the committee had reached the relocation decision in full and proper exercise of its jurisdiction and statutory duties under the Ontario School Act and regulations, and that the Rowett placement decision was consequently not reviewable.

In the Rowett's appeal to the Ontario Court of Appeal, the central argument advanced was that the lower court had erred in finding that school board appeal policies and decisions are not subject to the Charter of Rights and Freedoms. The Court of Appeal ruled in 1989 that the Tribunal's decision-making powers were subject to the Charter and remanded the Rowett's case back to the Ontario District Court.47

4. The Deptford Case

The decision in the 1992 special education case of Deptford and Board of School Trustees of School District No. 63 (Saanich)48 is illustrative of the kinds of cases that have been brought to human rights tribunals since the enactment of the 1982 constitution. The case also illustrates the difficult balancing of interests that courts and tribunals have increasingly been required to engage in during the past decade.

In the Deptford case a complaint was initiated to the Human Rights Council by the parents of a 13-year-old girl — who suffered from severe multiple mental and physical

47 (1989), 69 O.R. (2d) 543. The case was later settled in an out-of-court settlement.

handicaps -- that the Saanich School Board had discriminated against their daughter with respect to a service or facility customarily available to the public, because of mental or physical disability, contrary to Section 3 of the B.C. Human Rights Act. Specifically, the parents claimed that their daughter should be integrated with students who were her neighbourhood playmates, which the parents considered to be children enrolled in Grade 4 and who were 8 and 9 years of age. For its part, the School Board believed that the youngster should be placed in a fully integrated age appropriate setting (Grade 6) with appropriate in-class support and extra-class resources such as speech therapy and specialized educational assistance. After extensive consultation with the parents and professionals about the student's educational program and placement options, the School Board failed to reach a satisfactory agreement with the parents. The Board then directed that the student be placed in an integrated educational program with appropriate in-class and extra-class support, in an age-appropriate setting. With respect to the issue of appropriateness the Board argued that:

It is...the School Board's educational opinion that [the student] should be placed in a reasonably age-appropriate setting in order to continue her schooling in the public education system. To place [her] with children who are four or five years younger, would in terms of the Ministry of Education and [the] School Board's policy and practice, be discriminatory and would deny her the opportunity and the right to become involved with and be treated in ways consistent with her same-age peers.49

The parents rejected the Board's placement options, arguing that the 13-year-old should be placed with children who were more closely proximate to her mental, and not chronological

49 Submissions by the Board of School Trustees of School District No. 63 (Saanich) to the B.C. Human Rights Council (1992).
age. The Human Rights Council ruled in favour of the School Board, concluding that school officials had not discriminated against the handicapped child. In particular, the Council determined that an age appropriate placement in an integrated program in the student's neighbourhood school with appropriate special education resources would properly accommodate the student, and was not a discriminatory placement.50

As demonstrated in the cases discussed earlier, the manner in which Canada's judiciary and legal community were responding to the demands of children with disabilities was occurring rather incrementally, largely owing to the prolonged and complex nature of court and tribunal cases involving the area of special education. But momentum was clearly moving in the direction of expanded rights for minority groups, and the emergence of a new rights-oriented jurisprudence as a core trait of the Canadian legal culture.

IV. SPECIAL EDUCATION AND THE B.C. SCHOOL ACT: RIGHTS CONSCIOUSNESS AND PARENTAL PRESSURE

The mounting tide of parental pressure on school boards to expand the education rights of children with disabilities through Charter and human rights challenges also influenced Canada's provincial legislatures to review and revise statutory provisions governing the delivery of educational services to all children. In this section of the chapter

50 The B.C. Human Rights Council is currently considering another case of alleged discrimination on the basis of disability against a school board in the matter of Adamer and Board of School Trustees of School District No. 62 (Sooke). That case involves several allegations, including the parent's claim that her son, who she says has a severe hearing loss, was not provided with a French-speaking interpreter for the deaf in his advanced French classes. The outcome of this case was still pending in early 1994.
developments in British Columbia will be used to illustrate the direct and indirect impact of the Charter on legislative developments in the area of special needs education.

1. **A Transformation of the External Legal Culture: Parental Pressure for Expanded Educational Rights**

Despite commitments expressed by the federal government and provincial governments that the period from 1982 to 1985 would be used to review and revise legislation in anticipation of the constitution's Section 15 equality provisions coming into force, there was no immediate reaction by provincial ministries of education to revise public school statutes during this three year waiting period. In British Columbia, for example, just one month prior to the adoption of constitutional equality rights on April 17, 1985, the Attorney General, Brian Smith expressed a cautionary approach to the Charter's equality provisions remarking: "We've gone too far down the road in Canada in the last five years of emphasizing people's rights and not their responsibilities."

Although the courts had not yet clarified whether policies or decisions made by local school boards were subject to review under the Charter of Rights and Freedoms, by the mid-1980s the courts clearly required legislative provisions to meet the standards prescribed by the constitution. It was this consideration, and also extremely strong parental pressure, that prompted the education law reforms in British Columbia. Thus, just four years after the provincial Attorney-General made his cautionary remarks, British Columbia -- which had

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one of the most restrictive legislative frameworks regarding the accommodation and inclusion of special needs children in the public school system -- completely revised its education legislation to provide a far more rights-oriented model of educational services to all children.

In the immediate post-Charter period parents of children with disabilities in British Columbia became very active in promoting the idea that all children had the right to be accommodated equally in the public school system. Thus, lobby groups in B.C. pointed to the Bales and Elwood cases as examples of constitutional challenges that they would bring against local school boards and the province if legislative policies and practices were not revised to harmonize with the Charter. In view of the new rights climate emerging in the late 1980s, in 1988 the British Columbia Royal Commission on Education recommended that educational programs for all children should focus on and be tailored to the unique abilities of the individual learner. Such individualized child-centred programs would, it was suggested, provide the most enabling educational environment for students enrolled in the public school system, and would take into account the rights of all children. The Education Ministry’s 1989 Mission Statement in the Mandate for the School System, reinforced the Royal Commission’s philosophy with its declaration that students now "have the opportunity

52 Some of these interest groups included, Parents for Integration, the B.C. Association for Community Living, the Family Support Institute, the B.C. Coalition of Human Rights, and the Vancouver Association for Adults and Children with Learning Disabilities. The provincial Educational Advisory committee struck to advise the Education Ministry on changes to the proposed education legislation included a representative from an interest group associated with the expansion of rights for disabled children.

53 In both these cases the parents were provided with moral and other support from public interest organizations which promoted the rights of disabled children.
to avail themselves of a quality education consistent with their abilities." The revamped 1989 School Act that grew out of the Royal Commission was also based on the premise that the most enabling environment can be achieved by focusing on the educational plan best suited to individual learners.

In the area of special education, the School Act and related programs and policies all emphasized that school board decision-making regarding the delivery of special education programs and resources would occur on an individualized basis in order to place disabled children in the most enabling educational setting according to each child's specific capabilities and needs. In a significant departure from earlier restrictive legislation, policies and programs regarding special needs children, and in direct response to an aggressive lobbying effort by parents of special needs children, the new B.C. School Act suggested that whenever possible and appropriate, special needs students would be entitled to full integration in regular classrooms in their neighbourhood schools in order to facilitate "the achievement of learning goals and an enhanced self-concept."

While the revamped School Act did not totally satisfy handicap lobby groups and parents, the new legislative provisions for full integration of special needs children in a regular classroom setting, the requirement for input from parents concerning the design and implementation of educational programs for children with disabilities, the right of parents to appeal school-based and other decisions regarding the provision of educational services, including placement decisions, and the deletion of exclusionary provisions for "mentally retarded" students, all contributed to a much more rights-oriented service model in

54 S.B.C. 1989, c. 61.
comparison with the previous legislation.

2. **A Transformation of the Internal Legal Culture: Legislative Changes in the B.C. School Act**

The 1989 *School Act* provides that all children in British Columbia who meet age and residency requirements are entitled to an educational program in the public school system. An "educational program" is defined as "an organized set of learning activities that, in the opinion of the board is designed to enable learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy society and a prosperous and sustainable economy." In addition to these basic educational access rights the legislation also stipulates that school boards shall make available an educational program to all persons of school age resident in their districts who enroll in schools in the district. In contrast to the old *School Act* -- which only required that school boards provide "sufficient accommodation and instruction to students" -- the 1989 legislation places a new responsibility on school boards to accommodate the rights of all children by providing individualized, "appropriate" and not merely "sufficient" educational

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55 Section 2.

56 Section 1.

57 Section 94.

58 In the case of *Antonson v. Vancouver School Board*, Unreported, July 14, 1989 (B.C. Supreme Court) parents of a dyslexic child challenged the design of a school board's educational program for their child under the old *School Act*. Although the parents claim was denied, the court suggested that since students who meet residency requirements have a legal right to an education, it follows they must be entitled to an educational program which meets some basic educational standard which is appropriate to their individual
programs to all children, including children with special needs.\textsuperscript{59}

In a last-minute response to strong interest group lobbying efforts based upon the moral and constitutional provisions of the \textit{Charter}, the provincial legislature limited school board discretion regarding the delivery of educational programs by the introduction of a novel ministerial order.\textsuperscript{60} Thus, Minister's Order 13/89 requires that school boards ensure that school principals encourage parental consultation regarding placement decisions affecting special needs children. The Order also requires school boards to presume, as a matter of policy, that special needs students will be integrated into regular classrooms, unless the "educational needs" of the student suggest otherwise.\textsuperscript{61} Order 13/89 provides:

\textit{\underline{requirements.} "If it were not so," the court has observed, "the right would seem, for practical purposes, meaningless."}

\textsuperscript{59} While there is a presumption that school boards will provide all learners with access to public education, school officials are still able to exercise considerable discretion with respect to the specific educational program design, placement and delivery decisions. For example, section 1 stipulates educational programs will be provided to students that, "in the opinion of the board," are designed to enable learners to achieve their individual potential. Moreover, the right of school boards to assign students to specific educational programs, and make specific placements is addressed in section 94(4) of the \textit{School Act} so as to allow boards to "assign and reassign students to specific schools and educational programs." Regulation 5(7)(b) further provides that the principal of the school is responsible for "administering and supervising the school including the "placing and programming of students in the school".

\textsuperscript{60} This ministerial order was one of the only provisions that was not vetted with the various stakeholder groups prior to the 1989 \textit{School Act}'s adoption, and was introduced to the legislation at the eleventh hour by the Minister of Education.

\textsuperscript{61} A limitation to a student's right to enroll in an educational program in a public school setting is mandated by section 109 of the Act. Section 109 provides that a school board may exclude a student from school if a school board medical officer declares that the child is suffering from a communicable disease or other physical, mental or emotional condition that would endanger the health or welfare of the other students. In the event that a student is removed from school for any of the above reasons, however, a board must continue to make available an educational program to that student (section 103 (2)(d)). A child may also be
Handicapped students

(1) A board shall ensure that an administrative officer offers to consult with a parent of a handicapped student regarding the placement of that student in an educational program.

(2) Unless the educational needs of a handicapped student indicate that the student's educational program should be provided otherwise, a board shall provide that student with an educational program in classrooms where the student is integrated with other students who do not have handicaps.

As a corollary to Order 13/89, Section 103 of the Act requires that "a board may...subject to the orders of the minister approve educational resource materials and other supplies and services for use by students." Section 106(1) further stipulates that a board "shall provide health services, social services and other support services for schools in accordance with any orders made by the minister". Order 12/89 provides boards to assume significant responsibility for providing students with support services, including: 1) referring students who are hearing-impaired to the Minister of Health (section 2); 2) providing speech and language therapy services for students of school age who attend a school in the district "whose education is adversely affected by oral communication difficulties" (section 3); 3) assessing and referring students for occupational or physiotherapy consultation (section 4); 5) providing trained staff to supervise and maintain "complex medical procedures" if such procedures are carried out in the school (section 5). These sections have fundamentally excluded from school if he/she proves to be so disruptive that he endangers the ability of his peers to benefit from education. Under section 103(2)(c) of the School Act, for example, a board has the authority to discipline a student for unsuitable behaviour, which may include excluding a student from class.
expanded the legislative entitlement of physically handicapped students to appropriate resources which, in the opinion of the board, will enable the student to develop his/her individual potential. Finally, an appeals section in the School Act\textsuperscript{62} provides parents and students with the new statutory right to appeal decisions and non-decisions which "significantly affect the education, health or safety of a student." Such appeals may apply to a variety of special education decisions including evaluation, assessment, identification and placement decisions, educational program design, provision of support services, physical facilities, and transportation.\textsuperscript{63}

Since the adoption of the 1989 legislation, parents of special needs children in B.C. have continued to bring pressure to bear on local school boards to provide what are viewed as children's constitutionally protected rights to free appropriate public educational opportunities. In 1992, for example, one of the major interest groups for disabled children, the B.C. Association for Community Living (BCACL), launched a province-wide project which had as its stated objective: "To enable and empower parents of children with mental handicaps, along with their children and community members, to ensure access to integrated and inclusive education under the British Columbia School Act.\textsuperscript{64} The BCACL stated that this objective was to be met, in part, by providing "written information to parents throughout

\textsuperscript{62} Section 11.

\textsuperscript{63} When the provincial Ombudsman was given jurisdiction over schools in the fall of 1992, one of her first actions was to release a list of controversial "Guidelines" to school boards setting out what she considered to be the required practice in order to ensure students' procedural rights.

\textsuperscript{64} Funding Application Summary to the British Columbia Law Foundation, September 5, 1991, p. 1.
the province on how changes made to the School Act affect children with...handicaps" and to document "the legal options available to families and a framework for developing successful legal strategies to ensure access to integrated education (eg. appeals, Human Rights Commission, Charter challenge, etc.)." According to the organization it was essential that parents of special needs children be provided with information which would enable them to effectively defend and expand the rights of their children to equal educational opportunities:

Parents theoretically have recourse to several mechanisms beyond an appeal (eg. Human Rights Commission, political appeal, private lawsuit, Charter challenge) but few individual families have the knowledge or financial resources needed to pursue these options. BCACL and the FSI [Family Support Institute] need to collectively develop and document an in-depth understanding of the advocacy and legal options available to families to ensure that their rights under the School Act are upheld.65

V. CHAPTER SUMMARY AND IMPLICATIONS FOR LEGAL CULTURE

It has frequently been observed that the extent of democracy in a society can be best assessed by the way that society treats its minorities. Viewed by this measure, Canadian society during the last decade has been rather successful in broadening the scope and quality of democratic life; a trend which is clearly illustrated in the constitutional and legislative provisions relating to Canadians with disabilities. Ironically, the progress made by the special needs constituency in Canada -- a minority group with handicaps that often place the members at a disadvantage compared to the mainstream citizens of society -- has provided an important impetus to positive changes in the overall legal culture of Canada. As pointed

65 Ibid., p. 4.
out in Chapter 1, fundamental changes in the legal culture of a society are often signalled by more superficial changes in the socio-political activities and attitudes of citizens. For example, Lawrence Friedman has suggested that when searching for new traits in a legal culture, it may be useful to examine a society that has not typically devoted a great deal of thought to rights, or made many rights claims on its government. If a large number of people within this legal culture begin to have greater expectations about their rights, and are willing to take concrete steps to see that such expectations are not disappointed, the overall thinking about mandatory claims and the way the legal system should process such claims may be transformed.46

The preceding examination of trends in the area of special education provides interesting evidence -- albeit of an inferential rather than "causal" nature -- that an important transformation is underway in Canada's legal culture. Thus after 1982, in contrast to the pre-Charter period, Canadian parents and interest groups (i.e., the external legal culture) acting on behalf of children with disabilities increasingly exhibited greater expectations about the rights of students with physical and mental handicaps. Such parental and interest group activists translated those expectations into legal action utilizing a variety of means, including challenges to governmental decisions that were deemed to limit children's rights. For example, following the adoption of the Charter, the special needs constituency asserted that there was a mandatory or constitutional "right" of disabled children to be integrated into regular classrooms with their non-handicapped peers, and to

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46 See, for example, the discussion in Chapter 10 of Lawrence Friedman's, The Legal System: A Social Science Perspective (New York: Russell Sage Foundation, 1975).
be provided with appropriate educational opportunities, including the right to appropriate educational and financial resources. Moreover, supporters of broader rights for children with special needs -- taking a cue from their counterparts in the United States -- took "concrete steps" to expand those rights by initiating Charter challenges and human rights cases, and also by successfully lobbying local school boards and provincial legislators to revamp legislative provisions regarding children with disabilities. As demonstrated in this chapter's case study, the Canadian legal system and various levels of government (the internal legal culture) responded to such claims by assuming a much more activist role in recognizing and expanding the education-related rights of children with special needs.

The combination of enhanced rights consciousness on the part of parents and interest group activists (the external legal culture) as it related to the rights of children with disabilities, and the positive response of the internal legal culture (lawyers, judges, legislators, etc.) to such demands revealed a fundamental change in the way citizens regard the rights of Canadians with disabilities, thereby reflecting early inferential evidence of a significant change in Canada's legal culture. Although definitive conclusions of a causal nature cannot be adduced from the qualitative trend analysis presented above, there is strong evidence from the case study that the legal system and legal culture is undergoing a significant transformation.
CHAPTER 4

BALANCING HARDSHIPS:
TEACHERS’ RIGHTS AND THE AIDS CRISIS

On the one hand, there is the important goal of protecting public health in the face of an as yet incurable and fatal disease. On the other hand, there is the important goal of protecting the rights of individuals, whether they be AIDS patients, persons who have tested antibody positive, or persons who are perceived to be infected or likely to so become.

Canadian Bar Association

I. INTRODUCTION

If epidemics wreck havoc with systematic policy-making processes, they are even more disruptive to civil liberties and human rights. In modern liberal democracies, the treatment of the victims of infectious diseases raises questions concerning citizens’ mobility rights (e.g., the right not to be placed in quarantine), medical testing, confidentiality of records, not to mention the rights of citizens to receive public services, pursue their occupations, and freely interact with other individuals in society. The innate conflict between the rights of the community and individual rights looms large when an epidemic occurs in modern democratic regimes, especially those having operative constitutional charters which address human rights and freedoms.

This chapter will focus on the responses of the Canadian and American public education systems to the AIDS (Acquired Immune Deficiency Syndrome) crisis, or what is

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1 Report of the Canadian Bar Association - Ontario Committee to Study the Legal Implications of Acquired Immunodeficiency Syndrome, April 1986.
now commonly referred to as the "plague of the century." More specifically, the chapter will explore legal and educational policy responses to the AIDS epidemic, with special attention devoted to the impact of the AIDS crisis on teachers' rights.

Coincidentally, the advent of the international AIDS epidemic occurred at precisely the same time that major constitutional change and rights consciousness were acquiring a higher profile in Canada. Although up to mid-1993 the *Charter of Rights and Freedoms* had not been explicitly used in Canada by AIDS victims claiming discriminatory treatment, the notion that all Canadians have constitutionally entrenched "rights" and particularly the constitutional right to be treated equally before and under the law regardless of physical handicap, indirectly impacted on the range and scope of human rights AIDS cases that were initiated by Canadians during the decade after 1982. Thus although the *Charter* was not the particular legal instrument used to advance AIDS discrimination cases -- most challenges were initiated pursuant to provincial human rights legislation or through the collective agreement grievance process -- this chapter will demonstrate that the enhanced rights consciousness among Canadians triggered in large part by the adoption of the *Charter* has had a direct impact on citizen activism in advancing what are perceived to be inalienable constitutional rights.

Owing to the enormous scope of the AIDS epidemic in the United States, as compared to Canada, AIDS-related rights claims tended to be initiated much earlier on in the American experience with the epidemic. Interestingly, many of the first landmark cases defining the rights of AIDS victims generally concerned civil rights cases relating to students and teachers barred from classrooms in the public education sector. When Canada's first
AIDS cases were first advanced in 1987, these important American public education cases had already resulted in a considerable body of judicial, legislative and policy precedents that were frequently utilized or referred to by Canadian decision-makers adjudicating AIDS-related rights claims. In view of such trends, this chapter will begin by discussing the evolution of AIDS cases in the American public education system, and will then detail how those cases and others impacted on the issue of AIDS and rights that arose in the Canadian public education system. The chapter concludes with a discussion of how citizen rights claims arising from the AIDS epidemic have influenced Canadian legal culture.

II. THE AIDS CRISIS IN PERSPECTIVE

1. Epidemics, Public Policy and Civil Rights

The rapid spread of infectious diseases through non-immunized populations has been a major force in historical development. From the Black Death of the Middle Ages to the mass smallpox and influenza outbreaks during the 19th and 20th centuries, epidemics have resulted in enormous social, economic and political disruption, often with protracted consequences for the societies affected. Although long underestimated by historians, serious epidemics are now recognized as more than simply "background noise" to conventional societal dynamics. As William H. McNeill demonstrated in his groundbreaking study *Plagues and Peoples*, patterns of disease circulation have been a crucial aspect of human affairs from ancient to modern times. Indeed as McNeill puts it, human lives and
communities are "caught in a precarious equilibrium between the microparasitism of disease organisms and the macroparasitism of large-bodied predators, chief among which have been other human beings."\(^2\)

As unpredictable and disruptive historical episodes, major epidemics are the bane of policy-makers and sequential policy-making. Faced with a major public health challenge and abnormal mortality patterns, public decision-makers must rapidly improvise policy responses. When confronted with a dearth of information on a strange and temporarily incurable virus, there is no time to engage in conventional stages of policy-making or careful forward-planning. While progress in science and bacteriology has removed much of the terror that accompanied epidemics in ancient and medieval times, the spread of deadly infectious diseases can still engender considerable angst and tension. Modern man, just as his less technically astute ancestors, remains susceptible to what one historian called the "feeling of complete helplessness in the face of mysterious perils."\(^3\) Fearing the unknown and the seemingly incurable, policy-makers and public institutions are placed under enormous pressure to find solutions and restore calm and routine to the community. Indeed, the pressure and expectations exerted on the policy-making process by a highly contagious disease spreading through a non-immunized population is essentially like any other major societal disaster such as an earthquake or tornado. What begins as a public health problem


assumes economic, social, political, legal and moral dimensions, mobilizing the diverse interests and prejudices of the entire society. The same crisis would also become a contributory factor, along with other pressing issues in society, accelerating major changes in the Canadian legal culture.

2. The Medico-Political Context

In early 1981, several Los Angeles men were diagnosed as having a very rare form of pneumonia. During the same time period, an outbreak of an equally rare form of skin cancer was also reported in the Los Angeles area. In both cases, the victims of these unusual opportunistic infections were male homosexuals. The medical community considered the appearance of these infections in otherwise healthy individuals as highly unusual, since both infections were usually associated with patients, such as organ transplant recipients, having severely depressed immune systems. In June 1981, the National Center for Disease Control (CDC) in Atlanta issued a report which discussed the unusual Los Angeles cases. Within one year, the incidence of these infections among male homosexuals and intravenous drug users became routine and widespread. It soon became apparent that, in each case, a previously healthy individual somehow acquired an unidentified virus (later identified as HIV) which attacked and devastated the immune system, leaving the victim

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4 Pneumocystis carinii pneumonia, or PCP, which has become the most common infection found among AIDS patients.

5 Kaposi's sarcoma (KS).
unprotected against any infections. By September 1982, the CDC recognized that the medical community was coping with an outbreak of a distinctive and new disease, which they labelled, Acquired Immune Deficiency or "AIDS." By 1983, the CDC identified high risk groups as male homosexuals, intravenous drug users, Haitians, haemophiliacs, infants born to infected mothers, and recipients of transfused blood. Throughout the following decade, AIDS continued to be a disease chiefly affecting men who have homosexual sex or who are intravenous drug users. For example, the CDC reported in 1993, that 51% of the AIDS cases in the United States during 1992 involved men who were homosexual and bisexual. However, in 1993, the CDC also reported that for the first time the incidence of the disease among other groups, particularly young children and women, was assuming much higher proportions. For example, of the 47,095 AIDS cases reported in the U.S. during 1992, the rate for women rose 9.7% over the previous year, or nearly four times the 2.5% rate increase for men. In 1993, just twelve years after the release of the first 1981 CDC report on the mysterious Los Angeles cases, the organization estimated that over one million Americans were infected with the HIV virus, and that 170,000 people in the U.S. had died

6 During the early stages of the AIDS epidemic, the disease was labelled as Gay Related Immunodeficiency or GRID, as if it were an inherently gay disease.


8 In a "frank and explicit" report on the state of the AIDS epidemic in the U.S., Dr. Antonia Novello, the outgoing U.S. Surgeon General, warned that the AIDS virus is spreading "silently and insidiously" into new communities, rural areas, and small cities, and among more and more women and young children, and among rising numbers of teenagers and young adults. For example, during the past two years, there has been a 77 percent rise in the U.S. of AIDS among youngsters between the ages of 13 and 21. San Francisco Chronicle, June 7, 1993, p. A2.

Global trends in the incidence of AIDS were equally striking. For example, in 1993, the World Health Organization estimated that 14 million people throughout the world were infected with HIV. The organization also estimated that by the end of the 1990s another 20 million people would become infected with the AIDS virus. As of mid-1993, no treatment existed which was capable of either suppressing the multiplication of HIV within an infected individual, or in reconstituting the immune system once it has been shattered, and no vaccine has been developed to protect individuals who had not yet been exposed to the AIDS virus. The relative incidence of AIDS was much lower in Canada than in the United States or other countries. At the end of 1992, for example, 7,282


11 Actuaries who have studied AIDS for the life insurance industry say that the rate of new HIV infections has dropped dramatically since the 1980s, and that the epidemic is close to peaking or may have already peaked. Canadian Press, March 11, 1993. UNICEF estimates that there are now 2 million children orphaned by AIDS worldwide, The number is expected to rise to 10 million by the end of the decade. Washington Post, June 10, 1993.


13 In the Americas, Canada has the fourth highest incidence of reported AIDS cases after the U.S., Brazil and Mexico. Canadian Press, June 15, 1993. Expressed on a per capita basis, Statistics Canada has reported that the incidence of AIDS is more than three
cases of AIDS had been diagnosed in Canada, and it was estimated that 4,700 Canadians had died from the disease.  

By mid-1993 a total of 11,573 AIDS cases had been reported in Canada.

National governments, including those in Canada and the United States, were criticized for failing to either to devote sufficient resources to AIDS research or to formulating policies to deal with the epidemic proportions of the virus. Although slow to respond to the AIDS crisis in its initial stages, it appeared that by mid-1993 governments were increasingly turned their attention to combatting the deadly disease. In the United States, for example, the Senate approved the *AIDS Federal Policy Act of 1987* which provided for a program of AIDS education, treatment and research at a cost of up to $1 billion. The program, which had bi-partisan support, was the first comprehensive program to be passed by the U.S. Congress. Calling for support of the bill, U.S. Senator Edward M. Kennedy, stated: "According the U.S. Public Health Service, by 1991 AIDS will claim more

14 The first AIDS case in Canada was reported in 1979. For an interesting article describing the impact of AIDS on Canadian youth see Charles Hobart, "How They Handle It: Young Canadians, Sex, and AIDS," *Youth & Society*, Vol. 23 (June 1992), pp. 411-433.

15 The first AIDS case in Canada was reported in 1979. For an interesting article describing the impact of the AIDS crisis on Canadian youth see Charles Hobart, "How They Handle It: Young Canadians, Sex, and AIDS," *Youth and Society*, Vol. 23 (June 1992), pp. 411-433.


lives each year than the entire Vietnam War. We must act immediately and decisively and halt this killer. More than 60,000 Americans have come down with AIDS. Nearly 3,500 are already dead."18 By 1993 Canada had not yet passed national AIDS legislation; however, Ottawa gradually increased its financial commitment to battling the disease during the 1980s and early 1990s. By March 1993, for example, Health Minister Benoit Bouchard pledged that Ottawa would spend $211 million on AIDS research and education over the next five years.19 This figure represented an increase of approximately 13% in annual spending on AIDS at time when most federal programs were being cut back.20

3. **Anatomy of a Virus**

Since AIDS was first identified in 1981, medical researchers and public policy-makers have attempted to unravel the mysteries of the deadly HIV virus. Some medical insights concerning the nature and transmissibility of the disease have been forthcoming, however, relative to the work that has gone into studying the disease, only little is known about AIDS. The HIV virus is believed to have originated with Central African monkeys who somehow infected the continent's human population. The virus next spread to the Caribbean. Vacationing homosexuals probably contracted the disease in Haiti and brought it back to

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North America in the late 1970s.

AIDS is defined by the CDC as "an acquired immune deficiency syndrome in association with evidence of exposure to the human T-cell lymphotropic retrovirus type III in a person who is not otherwise at risk for developing an immune deficiency syndrome."\textsuperscript{21} The virus, HTLV-III, was first identified by researchers at the U.S. National Institute of Health in 1984.\textsuperscript{22} The HTLV-III virus has been isolated in blood, semen, tears, saliva and sweat. There is no evidence, however, that AIDS is spread through airborne transmissions, such as a sneeze or cough, or through regular contact with infected tears, saliva or sweat (i.e., body fluids not routinely introduced into the bloodstream). Medical evidence has also suggested that AIDS is not transmitted through casual contact such as hugging, kissing, sharing telephones or restrooms. The CDC has therefore narrowed the methods of contagion to transfers of blood and semen. The virus may only be transmitted if the infected body fluids of one person are transmitted into the bloodstream of another individual. The medical consensus up to mid-1993 was that HIV could only be transmitted from person to person in one of four ways: (1) sexual transmissions; (2) transplants of tissues

\textsuperscript{21} Centres for Disease Control Guidelines, "Education and Foster Care of Children Infected with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus," August 30, 1985 (hereafter referred to as the CDC Guidelines).

\textsuperscript{22} The HTLV-III virus causes reduced cellular immunity. The virus affects one specific white blood cell type (T-lymphocyte) which normally attacks viruses, fungi, parasitic infections, and cancer. As a result of the breakdown in T-lymphocytes, the AIDS patient first becomes unusually vulnerable to opportunistic infection which present a variety of symptoms associated with ARC (AIDS Related Complex). Later, as the disease progresses, the patient becomes debilitated by viral and fungal illnesses common in the general public but deadly to the AIDS patient. During the first stages of the disease, patients usually died within 3 years of diagnosis. More recently, however, the discovery of new drugs has considerably prolonged the lives of patients infected with the virus.
or transfusion of blood products which are infected with the AIDS virus; (3) sharing of contaminated needles or syringes; (4) transmission from an infected mother to her child during pregnancy. According to experts, there is also a low risk that individuals who work in occupational settings where they are exposed to blood and body excretions, may also become infected. Individuals who test positive for HIV do not automatically contract a full-blown case of what is known as "clinical" AIDS. Many never develop any symptoms associated with the AIDS virus, and others develop symptoms associated with AIDS Related Complex (ARC).

4. A Canadian in Paris...New York and San Francisco

In October 1987, Randy Shilts, an investigative journalist for the San Francisco Chronicle, revealed that scientists suspected a Canadian airline steward of playing a major role in the spread of AIDS to North America. The Air Canada employee, Gaetan Dugas, was thought to have contracted the disease in Europe through sexual contacts with Africans. While there is no conclusive evidence that Dugas was actually the first person to introduce the virus to North America, the U.S. federal government apparently believed that during the late 1970s the Canadian steward was the principal actor in the initial spread of the deadly virus among homosexual men. Researchers at the CDC, who refer to Dugas as "Patient Zero," reconstructed the pattern of his sexual activity as he travelled throughout North

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23 ARC is the acronym for "AIDS Related Complex" which encompasses any disease associated with the HTLV-III infection that does not fall far enough into the spectrum to be classified as clinical AIDS.
America, flying from Canada to New York and San Francisco. Dugas reportedly told his
doctor that he averaged 250 sexual partners every year for a decade prior to his death in
1984. Medical reports indicate that of the first 19 cases of AIDS reported in the Los
Angeles area, four had sexual relations with the Montreal steward, and four others had
sexual relations with one of his sexual partners. The first two known cases of AIDS
reported in New York in 1979, were both sexual partners of Dugas. By mid-1982, at least
40 of the first 248 AIDS cases reported in the United States had either engaged in sexual
relations with Dugas or with one of his partners.\textsuperscript{24}

III. AIDS AND THE SCHOOL POPULATION: THE FIRST PHASE


Reports of children being infected with the AIDS virus came to light soon after the
disease was identified in late 1981. As the incidence of school-age children infected with
the AIDS virus escalated policy-makers in the North American school bureaucracy, as early
as the 1982-1983 school year, began to explore alternatives for dealing with such children.\textsuperscript{25}
It was not until the fall of 1985, however, that the Centers for Disease Control in Atlanta


\textsuperscript{25} In New York City, the Department of Health received its first inquiry from a school
regarding how to deal with children with AIDS in the spring of 1983. As reported in
Frederick A.O. Schwarz Jr. and Frederick P. Schaffer, "AIDS in the Classroom," \textit{Hostfra Law
considered the question of whether children infected with the AIDS virus should be allowed to function in a regular classroom setting. In order "to assist...local health and education departments in developing guidelines for their particular situations and locations," the CDC offered both information and recommendations relating to the education and care of children afflicted with the AIDS virus.\textsuperscript{26} The overall thrust of the CDC's report was that school-age children should be permitted to attend school "in an unrestricted setting" unless they are "neurologically handicapped," "lack control of their bodily secretions" or display behaviour such as biting."\textsuperscript{27} Determination of whether a child would be permitted to attend a public school was to be reviewed on a case by case basis by committees established by local school boards.\textsuperscript{28} One year later, the American Medical Association (AMA) also

\textsuperscript{26} \textit{CDC Guidelines}. This report has served as the basis for many of the AIDS policies developed by North American educational associations, including those developed by the National Education Association in the U.S. and the Canadian Teachers' Federation in Canada.

\textsuperscript{27} Even behaviour such as biting, however, will not automatically exclude a student with AIDS from a school setting. For example, in \textit{Thomas v. Atascadero Unified School District}, 662 F. Supp. 376 (C.D. Cal. 1987), a California district court granted a preliminary injunction prohibiting the Atascadero School District from excluding Ryan Thomas, a child with AIDS, from the classroom, despite the child's involvement with a biting incident. The court ruled (p. 380) that: "The overwhelming weight of medical evidence is that the AIDS virus is not transmitted by bites, even bites that break the skin....Any theoretical risk of transmission by Ryan in connection with his attendance in regular kindergarten class is so remote that it cannot form the basis for any exclusionary action by the school district." Three years later, however, an Atlanta school board sought to transfer a teaching assistant with AIDS from his duties working with behaviour-disordered children because, school officials maintained, they were "not concerned about the children getting AIDS from biting [the teaching assistant], but what would happen to him if [the children] bit him. They [medical advisors] said it would be extremely dangerous to [the teaching assistant] to get an infection from any kind of bite." \textit{Atlanta Journal and Constitution}, July 31, 1991, p. D3.

\textsuperscript{28} The New Jersey Court of Appeals supported this recommendation when it overturned a mandatory order by the state Education Minister intended to force two local school districts to admit two kindergarten pupils with AIDS. The Minister had issued a state-wide
issued a public statement recommending that children with AIDS should be allowed to attend public schools.  

Public health and school board policies patterned on the CDC, AMA and Surgeon General's recommendations proliferated following the release of the reports. New York, with its high incidence of the disease, was one of the first jurisdictions to formulate such a policy. Indeed, the New York Commissioner of Health held a press conference at the beginning of the 1985 school year to announce that based on the CDC recommendations, children with the AIDS virus would not automatically be excluded from public schools, and the identity of such children would remain confidential. In particular, the Health Commissioner announced that a seven year old child who had been reported as having AIDS, and had already been attending public school for three years, would be permitted to continue attending that school. This disclosure triggered widespread outrage and fear.

directive ordering children with AIDS to be admitted to class. The court over-ruled this mandatory directive concluding that local school boards should be given the opportunity to present evidence showing why students should be barred from contact with other pupils. The court said, for example, that "there has been significant showing of potential risk" to at least warrant hearings on such cases. *New York Times*, March 26, 1986, p. B24.

29 *New York Times*, June 20, 1986, p. A14. The 1986 U.S. Surgeon General's Report on AIDS also specifically addressed the risk of AIDS transmission in the classroom setting, stating (pp. 23-24) that: "None of the identified cases of AIDS in the United States are known or are suspected to have been transmitted from one child to another in school, day care or foster care settings. Transmission would necessitate exposure to of open cuts to the blood or other body fluids of the infected child, a highly unlikely occurrence....Casual social contact between children and persons infected with the AIDS virus is not dangerous."

30 In Canada, many school boards adopted variations of the CDC Guidelines not long after they were released in the U.S. For example, in British Columbia, both the Vancouver School Board and the B.C. Ministry of Education draw on the Guidelines. For a discussion of how AIDS policies in schools have evolved see, for example, Tiffani Mari Schmitt and Raymond L. Schmitt, "Constructing AIDS Policy in the Public Schools: A Multimethod Case Study," *Journal of Contemporary Ethnography*, Vol. 19 (October 1990), pp. 295-321.
among parents opposed to the New York policy. Reacting in a manner that has been characterized as an "epidemic of fear" and "plague mentality," parents of students attending New York schools organized boycotts and protests of the policy. In many respects this social reaction to the New York AIDS policy recalled, in the words of one politician, "an earlier time in history when fear of contagion clouded the thinking and withered the emotions of otherwise rational and feeling people."

2. AIDS and Student Rights: AIDS Litigation in the School Setting

Fearing the danger of a "witch hunt" mentality colouring decisions about how to deal with AIDS in the classroom," New York public health and school officials attempted to quell fears that the AIDS epidemic would spread to students attending public schools. For example, Dr. James O. Mason, Director of the CDC, made a public announcement that the risk of a child getting AIDS from another child in school was like the risk of "being struck by lightning when you walk out the front door in the morning" and "much less than the chance of the boiler that heats the building blowing up."


32 Dr. James Oleske, Director of the Division of Allergy, Immunology and Infectious Diseases at the University of Medicine and Dentistry. His comments referred to the Bedminster School Board, New Brunswick, New Jersey. New York Times, December 8, 1985, p. A47.

Despite such attempts at public education, parents of children attending the New York school identified as accommodating an AIDS-infected child launched a lawsuit seeking to enjoin the admission of the child or, in the alternative, to have the child's identity revealed to school board members and school officials. This petition represented the first legal challenge in North America arising from a school policy on AIDS and school-age children. At the heart of the case, District 27 Community School Board v. Board of Education,34 were the competing rights of the individuals' right to a public education in an unrestricted setting versus the public right to an education in a disease-free environment. After a one month trial which canvassed both legal and medical issues, the Supreme Court of Queens County upheld the New York policy of not automatically excluding children infected with the AIDS virus from public schools. In reaching this conclusion, the court ruled that this policy did not violate any law relating to communicable or contagious diseases.35 Moreover, the court concluded that in view of the medical information testified to during the trial, the policy was neither arbitrary nor capricious, nor an abuse of discretion.36 Indeed, as a result of the overwhelming evidence that AIDS is not transmissible in a classroom setting, the court ruled that a policy of excluding all children with AIDS from public school would violate, among other things, a child's constitutional right to equal protection of the laws. While recognizing legitimate parental fears and concerns about the transmissibility of the AIDS virus, the court clearly

34 130 Misc. 2d 325 (Sup. Ct. 1986).


36 Ibid., p. 412.
emphasized the paramountcy of individual civil liberties in cases such as this one:

Although this court certainly empathizes with the fears and concerns of parents for the health and welfare of their children within the school setting, at the same time it is duty bound to objectively evaluate the issue of automatic exclusion according the evidence gathered and not be influenced by unsubstantiated fears of catastrophe.37

The New York case represented only one of several controversial cases that polarized communities over the issue of whether students with AIDS should be permitted to attend public school.38 According to a Gallup Poll taken in the second half of the 1980s, two-thirds of American adults would permit their children to attend school with a student who had AIDS, while one-fourth would not. Seventeen percent of those who said they would not allow their children to attend classes with AIDS victims said they believed the disease could be transmitted by casual social contact, while 59% of this group said AIDS could not be transmitted in this fashion. Twenty-four percent of the group were undecided.39 Divergence in American public opinion toward the presence in public school classrooms of persons infected with the AIDS virus indicated their sensitivity of the issue, which after all was perceived correctly as a life and death matter, and also illustrated that even in a highly

37 Ibid., p. 413.

38 In an interesting 1991 post-secondary AIDS case, the Los Angeles City College decided not to discipline a professor for saying in front of a class of 60 students that he feared he might contract AIDS if he handled the paper handed in by an HIV positive student. After a two month investigation, the College determined that the remark was made out of ignorance, not malice. Los Angeles Times, December 26, 1991, p. 3.

39 The Poll was based on telephone interviews with 1,004 people from March 7-10, 1986. The margin of sampling error was 4% in either direction. New York Times, April 17, 1986, p. A26.
rights-oriented legal culture, inhibitions and resistances to health-related rights issues can be quite substantial. An additionally interesting facet of the AIDS crisis was the fact that members of the legal community -- that is the actors shaping the internal legal culture -- were often more protective and sensitive to victims' rights than the general community (those comprising the external legal culture) who tended to be more likely to come face-to-face with problems of AIDS infection. Unlike the field of special education where members of the general community could be generally sympathetic to the needs of the disabled without fearing that the requirements of that constituency would impact on their own health status, the issue of AIDS aroused much deeper anxieties within the general population.

(a) The Ray Case

One example of the public hysteria exhibited in parents opposed to public schooling for AIDS victims, centred around the Ray family of Arcadia, Florida. The three young Ray boys contracted the AIDS virus while being treated for haemophilia. After the disclosure that all three boys had tested positive for the AIDS virus, a wave of hysteria swept the small Southern community: the local barber refused to cut the boys' hair, the family minister suggested the family not attend local church services, and even the local mayor withdrew his child from the Arcadia elementary school. Local parents formed a group called "Citizens Against AIDS in the Schools" and boycotted the school the Ray boys were attending. Forced out of their elementary school by public pressure and death threats, the Ray family
turned to the courts for a remedy. In 1987, they successfully petitioned a Tampa, Florida district court for an order allowing the three boys to return to school. In granting the interim order pending a full trial in the case, U.S. District court judge, Elizabeth Kovachevich, specifically addressed the issue of balancing the concerns of the community with those of the Ray family:

The Court recognizes the concern and fear which is flowing from this small community, particularly from the parents of school age children in DeSoto County. However, the Court may not be guided by such community fear, parental pressure, and the possibility of lawsuits. "These obstacles, real as they may be, cannot be allowed to vitiate the rights..." of [the Ray children].

Just days after the court order was issued, a fire completely destroyed the Ray home.

Court documents setting out the arguments of both the Ray family and the school board disclosed that the school officials believed that too much was still unknown about AIDS, and that they would not risk exposing children to the disease by admitting the Ray boys. The Ray family accused school officials of "abusing their power, depriving the boys of their rights because they were disabled, and helping create an atmosphere of hatred towards the boys." On September 29, 1988 the Ray family reached a $1.1 million out-of-court settlement with the DeSoto County School District. Judge Kovachevich, in approving the settlement, characterized the award as "a lesson for educators nationwide. Let us hope

40 Ray v. School District of DeSoto County, 666 F.Supp. 1524 (M.D. Fla. 1987), p. 1535. The court ordered the DeSoto County school board to admit the Ray brothers, but prohibited the boys from taking part in contact sports.

there will not have to be too many more cases for other families or other school boards like the Ray case.\textsuperscript{42}

During the course of their ordeal, the Ray family and their supporters, voiced serious concerns about the inequitable state and local AIDS policies. Testifying before the U.S. Senate Hearings Before the Committee on Labour and Human Resources (the Committee charged with tabling the first comprehensive AIDS legislation in the United States), the Rays' lawyer, Mr. William Earl, shed some light on the very different policy approaches adopted by school boards in Florida state, and the consequences of not having any state or national leadership and guidelines:

One of the problems...is that each county in Florida has an independent elected school board. We have a school board like Arcadia which is, I would say, neanderthal in terms of what we have seen in this case. On the other hand, we have other school boards such as Dade County, Florida, and Sarasota County, which after this tragedy adopted a very forward-looking courageous policy of following the CDC guidelines, providing confidentiality. But one of the concerns of the members of that school board was: I am in favour of this policy, this school board member said, but are we going to become a dumping ground for the rest of the state because we have no state leadership and to date no national help on this. And I think that was a very valid concern, the communities' elected officials at the local level who are showing some courage and doing the right thing are rightfully worried that they are going to become magnets for children with this condition from all over the state. So I think we need some state and national help on this.\textsuperscript{43}

An Illinois Superintendent of Schools took this line of thought one step further, arguing that school boards around the U.S. appeared to be literally "forcing" courts to make policy

\textsuperscript{42}On December 13, 1992 Ricky Ray, the eldest Ray son, died of an AIDS related illness. He was 15 years old. \textit{St. Petersburg Times}, December 14, 1992, p. 1A.

decisions concerning AIDS-infected school age children in order "to deflect the anger of the community away from school officials."

In some communities where school officials feel, for whatever reason, that it's politically dangerous to allow the child to enter school, the strategy for dealing with the problem is to force the courts to tell the district that it has to take the child. This, in effect, takes the responsibility off the school officials. 44

As school boards ignored, deflected, or confronted AIDS-related policy issues, numerous cases involving school-age children with AIDS arose throughout North America. By the early 1990s such cases were awaiting resolution at either the local school board level or in the courts. It is instructive to briefly consider another student AIDS case in order to illustrate the complexities of the human rights issues that arose in such cases.

(b) The Girl in the "Glass Cage"

On the eve of the 1988 school year, Judge Elizabeth Kovachevich of the Tampa district court (coincidentally, the same judge who decided the controversial Ray case discussed above) was called upon to adjudicate yet another difficult student-related AIDS case. In Martinez v. Hillsborough County School Board, 45 a court challenge was brought on behalf of 7-year-old Eliana Martinez. Eliana, who was born in Puerto Rico, suffered from


45 Unreported, August 8, 1988 (Tampa District Court).
respiratory distress during the first four months of her life. As part of her treatment she received 39 blood transfusions. At some point during those months, Eliana was separated from her natural parents and was cared for by a hospital in Puerto Rico. After hearing a radio report about the girl's desperate situation in 1983 Rosa and Joe Martinez of Florida decided to adopt Eliana. Rosa Martinez, a licensed nurse, described Eliana's serious illness during the first years of her life: "When I found her [in 1983] she was a vegetable. She was almost a year old and she weighed only 10 pounds. She wouldn't blink. She wouldn't respond to anyone." 46 Despite Eliana's health problems, the Martinez family decided to go ahead with the adoption. In order that Eliana could receive better medical care the family moved to Tampa, Florida. Just two years later, in 1985 the Martinez family was told that 4-year-old Eliana had been infected with the AIDS virus, and was suffering from AIDS-Related Complex (ARC). Eliana apparently became infected with AIDS as a result of the numerous blood transfusions she received in Puerto Rico.

Prior to being diagnosed with AIDS, Eliana attended various private preschools in Tampa. Following her diagnosis, she received rehabilitative training from a Tampa agency for approximately six months. Eliana was considered "trainable mentally handicapped," a category designating children with I.Q.'s between 25 and 50. Typically, such children have intellectual abilities corresponding to people one-quarter to one-half their ages. Medical experts claimed that Eliana thought and acted like a 3-year-old, although her doctors said that her intelligence increased with medical treatments (azidothymidine, or AZT), 47 and


47 AZT is an experimental AIDS drug.
also that Eliana is in the top portion of the trainable I.Q. range. Eliana spoke ten words, but knew how to sign 54 more using American sign language for the deaf.

When Eliana reached school age in the summer of 1986, Mrs. Martinez tried to enroll her daughter in a Hillsborough County public school for trainable handicapped children. Having already adopted a policy to deal with AIDS-related cases, the school district referred the Martinez request to a special committee of educators and doctors. After considering Eliana’s case, the committee turned down her mother’s petition to enter the public school system. The Committee did, however, determine that Eliana could continue to be home-taught by a homebound teacher provided by the school board. At that point, in September 1987, Mrs. Martinez launched a lawsuit challenging the Committee’s decision, and requesting a declaration that Eliana be permitted to attend public school.

After hearing extensive medical evidence, Judge Kovachevich rendered a judgment in the case on August 8, 1988. As in the Ray case (where she ruled that the Ray boys could attend school, but could not take part in contact sports), Judge Kovachevich again attempted to balance the concerns of both the student victim of AIDS and the community. The judge ruled that Eliana could attend Manhattan Exceptional Center, (a public school for disabled children), but that during class the youngster must stay inside a specially built glass booth. In a highly unusual judgment, the judge also specified that the enclosure must measure at least 6x8 feet, be located toward the back of the classroom, have a large plexi-glass window and sound system, and also contain a toilet and desk. The ruling further provided that a special full-time aide would be assigned to Eliana during school hours. The judge’s "glass cage" arrangement was to remain in effect until Eliana was toilet-trained and stopped
sucking her fingers. In her written opinion, the judge expressed hope that once Eliana was able to see how her mentally handicapped peers cope, she would become toilet-trained and learn not to habitually suck her fingers. Once that happened, the judge ruled, "the remote possibility" that AIDS could be spread to her classmates would be so slight that Eliana should be allowed to sit in the classroom with her peers. Judge Kovachevich also ruled that other children could play with Eliana, but only if their parents first signed consent forms. Although Eliana's mother said she did not intend to send her daughter to school under such arrangements, school officials commissioned construction of a $10,000 glass enclosure complete with plumbing, and also having dimensions larger (10x19 feet) than those mandated by the court.

Not surprisingly, Kovachevich's judicial balancing act satisfied neither Eliana's mother nor the school board. Extremely unhappy with the "glass cage" compromise, Eliana's mother appealed the case, explaining that Eliana "was deprived of family and we became that. She was deprived of health and we gave her the best medical attention we could.

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48 Most handicapped trainable children must be toilet trained after they enter school.

49 Orlando Sentinel, August 25, 1988, p. D3. Sam Rampello, Vice-Chairman of the Hillsborough School Board explained the board's reasons for complying with the court order to construct the glass booth: "What the judge is asking us to do is unusual. But we're going to do it. I'm not criticizing; I'm not praising. We have to take all the good and all the problems that come with it, and all the consequences that come with it." Associated Press, August 9, 1988.

50 After she launched her court challenge, Rosa Martinez has was subject to the same kind of community hysteria as the Ray family. For example, Mrs. Martinez received hate messages, had her property vandalized, and graffiti painted on her home. Eliana's home teacher also had her home vandalized. The weekend after the trial, flower pots were overturned on her front porch and "AIDS-Lover" written in the spilled dirt. Orlando Sentinel, August 14, 1988, p. A1.
Now, I don't want her deprived of an education. She needs more than an hour a week to progress. And she needs friends." Mrs. Martinez believed that Eliana should either be allowed to attend school under normal conditions, or remain in the homebound program. Hillsborough County school officials, who feared Eliana might transmit the AIDS virus through bodily fluids, wanted to bar her from attending school, but were also opposed to the glass booth remedy. One school board member, for example, said the booth was "sadistic," and that "if we did that in any other school in Hillsborough County we would be before the court for child abuse." Hillsborough Superintendent Raymond Shelton said that "his heart goes out to the judge. I don't see an end solution of this problem of children with AIDS and handicaps. But I haven't heard anyone with an education background that thinks this will be a positive experience for her. I just don't think this is any kind of instructional solution....I think it could be harmful emotionally." Parents of Eliana's prospective classmates were also unhappy with the court ruling. Days before the first week of school, 150 parents toured the newly constructed glass booth. Following the inspection, one parent remarked: "If Eliana Martinez comes here, my daughter won't." Another parent commented: "I'm sorry she [Eliana] has the disease, but why put all the other children in jeopardy?"

Shortly following the court order, Eliana's lawyer filed for a stay of the district court order, and for an appeal before the 11th U.S. Circuit Court of Appeals in Atlanta. The

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lawyer alleged that Eliana would be "irreparably harmed" by isolation in a glass booth. On August 24, 1988, federal court Chief Justice William Terrell Hodges ruled that Eliana could remain in a homebound study program until the appeals court decided whether or not her public education must take place in a glass booth. On April 26, 1989 the Tampa District Court ruled that Eliana could attend her regular classroom without being restricted to the glass cage. The court concluded that no evidence had been produced with justified the physical separation of the youngster from her classmates.\(^5\) Eliana attended school for the first time on April 27, 1989.\(^5\) She was only able to attend school for a few weeks, however, before she was rehospitalized, and on November 16, 1989 the eight-year-old little girl died of heart failure.

The complex and controversial Martinez case illustrated the multi-faceted challenge which a serious epidemic posed for the educational system at the end of the 1980s. How would society properly protect the rights of the individual student or teacher suffering from a deadly disease while still protecting the rights of the other members of the school community? The Ray and Martinez cases demonstrated that there were no easy answers to such questions, especially when one handicap becomes entangled with another. Moreover, the context for resolving a conflict of rights never remains static or neutral. In the Martinez case, as in earlier cases surveyed, events unfolded in a vortex of community controversy with charges flying, emotions frazzled, and aspects of hysteria and violence present. In Eliana's


\(^5\) Eliana reportedly returned to school "amid cheers" from her classmates and other supporters. Her mother described the event as "the most important day" in Eliana's life. Associated Press, April 27, 1989.
particular circumstances. Judge Kovachevich tried to fashion a satisfactory balance or compromise between competing rights and needs. As in most compromises, both sides were dissatisfied.

IV. TEACHERS AND THE AIDS CRISIS: AMERICAN AND CANADIAN PERSPECTIVES

As school boards and courts grappled with the issue of students rights and the AIDS epidemic, they faced an even more complex area of decision-making, namely, how to deal properly with teachers and AIDS. Should school boards formulate AIDS policies regarding teachers and other school board employees? What are the implications of not having such policies in place? What elements and interests should a school board policy on AIDS take into account? For example, can school officials require teachers to submit to mandatory testing for AIDS? Should teachers with AIDS be permitted to continue working in a classroom setting? What are the privacy rights of teachers infected with the AIDS virus? Do co-workers and students of an AIDS-infected teacher have the right to be informed of the teacher's disease? If school officials terminate a teacher who has AIDS, are they entitled to medical or disability benefits? The following sections of this chapter will explore these and other related issues confronting educational policy-makers in both the Canada and the United States.
1. **The United States**

At the beginning of the 1985 school year, New York Schools Chancellor, Nathan Quinones, disclosed that at least eight New York Board of Education employees had been diagnosed as having AIDS. He also reported that doctors at the school board, in consultation with the Health Department, would be evaluating all the AIDS-infected employees who were seeking to return to work. In a move consistent with the CDC's medical findings, the Schools Chancellor announced that because the danger of contagion was "extremely remote," teachers with AIDS would be permitted to function in the classroom setting, stating that if the teacher could "perform that job, and there are no other medical reasons barring his or her return, then that person will be permitted to return to work." The identities of the teachers were considered confidential.56

(a) **The U.S. National Education Association Guidelines**

Just one month later, the U.S. National Education Association (NEA) released comprehensive guidelines similar to the New York policy, designed to provide schools with policy-making guidance relevant to teachers (and students) who had contracted the AIDS

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virus. The guidelines,\textsuperscript{57} which were modelled after the CDC's position regarding students and AIDS, attempted to strike a balance between the right of a school board employee who has AIDS to continued employment and the right of students and other school employees to be free from the risk of exposure to the disease. The National Education Association (NEA) policy provides guidelines in two different areas: (1) protection of the rights of teachers who have AIDS and; (2) protection of the rights of uninfected teachers vis-a-vis other teachers and students infected with the AIDS virus.

One of the most controversial aspects of the debate regarding teachers with AIDS concerns whether school boards have the right to require teachers to submit to an AIDS test; and, if boards do have such a right, what criteria should be utilized to determine when such testing should take place. The NEA guidelines stipulate that school boards should request medical evaluations only when the board has "reasonable cause" to believe an employee have contracted AIDS. "Reasonable cause" is deemed to exist in only a very narrow range of circumstances, i.e., if the spouse of a school employee has AIDS, or if a school employee has given birth to a child who has AIDS. The guidelines also specifically state that sexual orientation does not constitute reasonable cause for the purpose of testing, and that school employees cannot be compelled to disclose information concerning their sexual orientation.\textsuperscript{58}

The NEA guidelines suggest that the determination of whether or not an infected

\textsuperscript{57} National Education Association, "Recommended Guidelines for Dealing with AIDS in the Schools," October 9, 1985.

\textsuperscript{58} Ibid., sections 2 (a), (b).
school employee should be permitted to remain employed in a capacity that involves contact with students or other school employees, should be made on a case-by-case basis. Such decisions are to be made by a specially designated team composed of public health personnel, the school employee's physician, the school employee and/or his representative, and appropriate school personnel. In making their determination, the team must consider the physical condition of the school employee, the expected type of interaction with others in the school setting, and the impact on both the infected school employee and others in that setting.  

Perhaps the most controversial civil liberty issue to be raised by the AIDS epidemic is the question of confidentiality. What are a teacher's privacy rights? What are the rights of students and other school employees to be informed that they might be in contact with an infected individual? In keeping with its objective of balancing individual and collective rights, the NEA suggests that the identity of an infected individual, or an individual who there is reasonable cause to believe has been infected by the AIDS virus, shall not be publicly revealed. With regard to teachers permitted to remain in the school setting, however, the NEA guidelines provide that school employees who are likely to have regular personal contact with the AIDS-infected teacher should be informed of his/her identity by the school board, and provided with appropriate information as to that individual's medical condition.  

If the team assessing a teacher makes a determination that the infected teacher

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59 Ibid., section 1 (c).
60 Ibid., section 5.
should be terminated, or if the teacher arrives at this decision together with the school board, the NEA AIDS policy provides that such individuals are entitled to use any available medical leave and receive any available medical disability benefits. The guidelines also recommend that school boards review their state retirement systems and other disability income programs and, if necessary, seek to amend them to provide appropriate coverage for school employees with AIDS.\textsuperscript{61}

How to protect the civil rights of non-infected teachers is an issue which tended to be overlooked in the scramble to formulate policies for dealing with AIDS victims. Most jurisdictions in North America have occupational health and safety legislation which provide that employers must provide employees with safe working environment. The AIDS crisis has routinely confronted school boards with the complex issue of how to ensure non-infected teachers a safe working environment. In New York City, for example, where over 200 people a month die of AIDS and health officials estimate that there are thousands of infected children in the school system, the Board of Education attempted to deal with this difficult problem by announcing in late 1987 that 1.5 million disposable gloves at a cost of $50,000 would be distributed to teachers in the City's 100 public schools.\textsuperscript{62} The NEA guidelines suggest that non-infected teachers should not be required to teach or provide other personal contact services to an infected student, or to work with an infected school

\textsuperscript{61} Ibid., section 3 (b).

\textsuperscript{62} New York Department of Health, 1987. The policy was endorsed by the United Teachers Federation. In Canada, it was reported in 1988 that a Winnipeg school board ordered 2,000 pairs of latex gloves to protect teachers from children who might carry the AIDS virus. Andrew Mikiforuk, "AIDS: How Sex, Death and Fear Spell Profits and Losses, Canadian Business, May 1988, p. 108.
employee, unless an infected individual has been screened and permitted to remain in the school setting. Moreover, the guidelines offer that the NEA and its affiliates will provide appropriate legal assistance to any teacher who is disciplined by a school employer because he/she refuses to teach, provide personal contact services to, or work with an infected individual in the absence of a team assessment.63

(b) Teachers and AIDS: School Superintendents’ Perspectives

Despite the formulation of national guidelines concerning AIDS and teachers, a 1987 study examining the attitudes and perceptions of 100 local school board superintendents, revealed that views concerning AIDS policies varied significantly across the United States.64 For example, Superintendents were almost equally divided (56% to 44%) concerning whether teachers with AIDS should be afforded the protection of federal anti-discrimination laws which currently protect individuals against discrimination based on race and age, and whether school district policies should treat AIDS differently from other communicable diseases (58% to 42%). Differing views were also revealed in response to questions about teacher contracts and AIDS. For example, 78% of the respondents opposed and 22%
Table 4.1

Views on Teachers and AIDS in the United States: A National Survey of Superintendents

<table>
<thead>
<tr>
<th>Questions</th>
<th>Agree</th>
<th>Disagree</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Teachers with AIDS should not be protected by federal anti-discrimination laws (which currently provide protection against discrimination based on race and age).</td>
<td>56%</td>
<td>44%</td>
</tr>
<tr>
<td>2. School district policies should not treat AIDS differently from other communicable diseases.</td>
<td>58%</td>
<td>42%</td>
</tr>
<tr>
<td>3. Oppose mandatory testing of professional employees (i.e., teachers, supervisors, administrators).</td>
<td>93%</td>
<td>7%</td>
</tr>
<tr>
<td>4. Oppose mandatory testing of support staff (i.e., bus drivers, food handlers, custodians).</td>
<td>94%</td>
<td>6%</td>
</tr>
<tr>
<td>5. Oppose mandatory testing of volunteers in school.</td>
<td>95%</td>
<td>5%</td>
</tr>
<tr>
<td>6. Oppose contracts that make testing for AIDS as a condition of employment.</td>
<td>78%</td>
<td>22%</td>
</tr>
<tr>
<td>7. Oppose contracts that call for the dismissal of non-tenured employees who test positive for the AIDS virus.</td>
<td>87%</td>
<td>13%</td>
</tr>
</tbody>
</table>

favoured contracts that would make testing for AIDS a condition of employment, while 87% opposed and 13% favoured contracts that called for the dismissal of non-tenured employees who tested positive for the AIDS virus. There was more consensus, however, with regard to questions concerning mandatory testing, with 93% of the respondents opposing the mandatory testing of teachers; 94% opposing the mandatory testing of support staff, and 95% opposing the testing of school volunteers.

No matter how school boards and superintendents decide how to deal with the many controversial issues inherent in any AIDS policy, they are likely to be influenced by many factors including local citizen pressure, political exigencies, and other local dynamics.

(c) The Racine Case

The trend toward litigation of policies concerning teachers and AIDS had already begun in 1985 in Racine, Wisconsin, when the Superintendent of Schools observed that it was "easy to identify" individuals who were infected with the AIDS virus "because all AIDS victims look like Rock Hudson," and a school board member suggested that "homosexuals should not teach Racine Unified School District children." Shortly following these observations, the Racine school board put in place an AIDS policy for dealing with AIDS-infected teachers and students. The policy, adopted in 1985, provided that teachers and staff members exhibiting any "AIDS symptoms" -- identified by the policy as including mere paleness or weight loss -- would be required to submit to a compulsory medical examination.

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for the disease. The Racine policy deviated from the National Education Association's
guidelines on AIDS both with respect to the criteria for testing (i.e., the NEA guidelines
stipulate that there must be "reasonable cause" before testing occurs), and the right of
teachers suffering from the disease to either continue working in the school setting or resign
with full medical benefits. According to the Racine policy, school employees diagnosed as
having AIDS were to be expelled from the school setting, barred from their employment,
and placed on sick leave. When the sick leave period expired, the Racine policy provided
that employees would be immediately terminated without any further disability benefits.

The school board's AIDS policy was challenged by the Racine Educational
Association (REA) during 1986 in a legal action heard by an administrative law judge in the
Wisconsin Department of Industry, Labour and Human Relations Department (DILHR). 66
The REA's lawyer argued that teachers with AIDS are "handicapped" and are therefore
protected by federal anti-discrimination legislation. In making his argument, the REA's
lawyer relied on the 1987 landmark ruling of the United States Supreme Court in School
Board of Nassau v. Arline. 67 In that decision, the U.S. Supreme Court ruled that a Florida
elementary school teacher had been discriminated against when she had been suspended
with pay and later fired because she had active tuberculosis. The court held that
tuberculosis was a communicable disease which qualified the teacher as "handicapped" and
therefore guaranteed her protection under federal civil rights law. In reaching this

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conclusion, the Supreme Court discussed the rationale for treating communicable diseases as a fundamental civil rights issue:

Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness. Even those who suffer or have recovered from such noninfectious diseases such as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious. The [Rehabilitation Act of 1973] is carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments.68

Although the Supreme Court expressly sidestepped the issue of determining whether the 1973 Rehabilitation Act protects carriers of the AIDS virus, the REA argued that the reasoning of the Supreme Court opinion offered a measure of protection to people suffering impairment from any disease, including AIDS, from being dismissed by employers or excluded from schools because of irrational fears of contagion or infection.

After two years of litigation, the REA finally succeeded in securing a court order which both overturned the AIDS policy, and directed the school board to pay a major portion of the Association's legal fees. Judge Pamela Rasche reasoned that the school board policy was "intended to be an absolute ban on the attendance of persons with AIDS-ARC in the Racine Unified Schools," and therefore discriminated against teachers following the tests laid down by the US Supreme Court in Arline. She also wrote that the

68 Ibid., p. 1129. The case involved section 504 of the Rehabilitation Act of 1973, 29 USC §794, which bars recipients of Federal financial assistance (in this case a Nassau public school) from discriminating against "handicapped" people who are "otherwise qualified" to do the job or participate in the program at issue.
Superintendent's "intention was clear. He found no need to make a case-by-case evaluation because he did not want any persons with AIDS-ARC in the schools under any circumstances."  

(d) The Vincent Chalk Case

Another example of a school board policy that actually resulted in one of the first cases of litigation involving a teacher with AIDS, was the landmark California case of Chalk and the Orange County Department of Education. The case unfolded after Vincent Chalk, a 43-year old teacher of hearing impaired students, disclosed to the Orange County school board that he had contracted AIDS. In August 1987 the school board barred Chalk from his teaching duties despite the fact that a county public health officer had determined that the teacher posed no health threat to his students. In lieu of his teaching duties, the board proposed that Chalk sit out the school year and work in an office writing grant proposals. The teacher turned down the school board's proposal, as in the words of his lawyer: "Sending him home would be like being declared useless to the Eskimo band and being set adrift on an iceberg....He's a real human being and he wants to feel


70 On May 22, 1987, Dr. Thomas J. Prendergast, the Director of Epidemiology and Disease Control for the Orange County Health Care Agency, informed the Orange County Education Department that "nothing in [Chalk's] role as a teacher should place his students or others in the school at any risk of acquiring the HIV infection." Cited in Chalk v. U.S. Dist Ct., 832 F.2d 2365 (9th Cir. 1987), p. 2370.
Defending the board’s decision, the Orange County Superintendent of Schools suggested that the board’s priority was the public health of the school’s students: "Our concern is to be as compassionate as possible for AIDS victims, yet our first priority has got to be the welfare of the students and others who might come in contact with him [Chalk]."\(^7\)

When Chalk and the school board could not reach an agreement on his status for the 1987-88 school year, they turned to the courts to resolve the issue. In fact, school officials indicated that they preferred having the courts make the final determination regarding Chalks’ employment status. As the County Superintendent noted, if the school board were required by a court order to return Chalk to his classroom duties, the board would be protected from possible lawsuits from students and their parents. For example, he suggested that "if someone [in the school] came down with AIDS, from some unknown cause, they could immediately consider some kind of court action against us."\(^73\) In August 1987, the Orange County school board petitioned the Orange County Superior Court for a ruling on whether Mr. Chalk had the right to teach in the classroom, and Chalk countersued in a Los Angeles federal court, requesting a preliminary injunction blocking his transfer to a non-teaching position.

In September, U.S. District Judge William Gray turned down Chalk's injunction


\(^72\) *Ibid.*

\(^73\) *Ibid.*
application. Although attorneys filed over 100 articles from medical journals reporting studies that concluded that AIDS cannot be transmitted through casual contact, Judge Gray ruled that there was still too little known about the deadly disease to allow the teachers' return to the classroom. In denying Chalk's injunction, the District court concluded that Chalk's "injury" was outweighed by the fear that his presence in the classroom was likely to produce:

I think I have a right -- in fact, an obligation to compare on the one hand the trauma on the plaintiff [Chalk] if he is held out from the school for a period of months....The trauma on him, on the one hand, with the trauma on the children and parents in being required to submit to what they are likely to conclude is an unacceptable risk.

Chalk appealed the ruling to a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit. In a unanimous judgment, the court overturned Judge Gray's decision and instructed the lower court to issue an order reinstating Chalk in his classroom duties.

74 John Doe v. Orange County Department of Education et al., Case No. 87 05169 WPG, US District Court for the Central District of California, September 8, 1987 (Unreported). Chalk originally filed the suit under the name "John Doe." On October 28, 1987, Chalk's true name was substituted.

75 Interview with Marjorie Rushford, attorney for Vincent Chalk, May 2, 1988.

76 John Doe, pp. 35-36. Interestingly, the Court of Appeals noted in reversing Judge Gray's judgment that: "The district court apparently miscalculated the reaction of at least some of Chalk's students and their parents. The mothers of five of Chalk's students joined amicus Disability Rights Education and Defense Fund in support of Chalk's appeal, and Chalk was greeted with hugs and homemade gifts upon his return to work following our order of November 18. See "AIDS Teacher Returns Amid Hugs, Smiles," Los Angeles Times, November 24, 1987, p. 3.

In making its ruling the court stated that there was no medical evidence to suggest that the
teacher would pose a health risk to his students. Significantly, the court cited the U.S.
Supreme Court decision in Arline as authority in reaching its conclusions about AIDS,
employment and civil rights. In particular, the California Appeals Court pointed to the
reasoning and test formulated by the Supreme Court concerning legitimate and illegitimate
grounds for excluding a person with a communicable disease from employment:

The Supreme Court recognized in Arline that a significant risk of transmission was
a legitimate concern which could justify exclusion if the risk could not be eliminated
through reasonable accommodation; however, it soundly rejected the argument that
exclusion could be justified on the basis of "pernicious mythologies" or "irrational
fear." 78

Employing this reasoning, the California appeals court thus concluded that "even under the
balance of hardships standard [Chalk's] injury outweighs any harm to the [Orange County
school board]." 79

Commenting on the court's decision, one of Chalk's lawyers, remarked (prophetically,
as it would later turn out) that the decision would have "a tremendous impact throughout
the country, because the court has said very clearly, given what we know about AIDS, it is
improper to exclude or discriminate against any person with AIDS." 80  The school board

79 Ibid., p. 2386. In a separate concurring judgement, Mr. Justice Sneed wrote: "Chalk, on
the basis of current, and perhaps permanent, truth, demonstrated high probability of
success, and on the basis of the same truth showed that the balance of hardships tipped
sharply in his favour" (p. 2389).
decided not to appeal the decision. As the Orange County Superintendent explained it: "We have tried to be as compassionate as we could be.... We wanted direction from the courts that could absolve us of any liability that could ensue any time over the next five years." On October 2, 1990, less than three years after the appeal court decision, Vincent Chalk died of an AIDS-related illness. He was 45 years old. Reflecting on Chalk's death and his groundbreaking court case, the Superintendent of Schools in Orange County commented: "We ended up being the unlikely pioneers. We brought about some good guidance from the court and ended up getting good information about how the disease is spread."²

2. Canada

(a) Canadian Workplace Developments

The number of AIDS cases in Canada in 1979, 1980 and 1981 were 1, 3 and 6 respectively. By 1993, over 11,573 cases had been reported. A 1987 national poll indicated that 99% of Canadians had heard of a disease called AIDS, and that 80% believed that the disease was a serious problem.³ Although by 1993 the incidence of AIDS in Canada was significantly lower than in the United States, many of the same public policy considerations

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² Ibid.
and civil rights issues have confronted Canadians attempting to cope with the epidemic.

As the number of adult AIDS victims soared in Canada, the question of how to deal with employment-related AIDS issues received heightened legal and policy attention. In April 1987, the first employment-related case concerning AIDS and the workplace in Canada was arbitrated. In the case of Re Pacific Western Airlines Ltd. v. C.A.L.F.A.A.\(^4\), Hans Prins, a 17 year veteran of the airline, who PWA suspected was suffering from an AIDS-related illness, was indefinitely suspended with pay by the airline for "safety reasons." The employee successfully grieved his suspension. The arbitrator ruled that PWA had acted wrongfully when it suspended Prins from his duty, concluding that the safety risk from AIDS was not a possible risk, but only a "theoretical one."\(^5\)

What the employer sought to achieve in this dispute was not the elimination of risk, but the elimination of any theoretical possibility of risk. Theories that there is a possibility of risk of the transmission of AIDS through casual contact, on the evidence we heard, are subjective and embrace the most conservative medical theories at one end of the spectrum and the hysterical obsession of uninformed persons at the other end. Those theories do not justify the extreme response of removing employees from flight duties.\(^6\)

One year following the Prins case, the Canadian Human Rights Commission released


\(^5\) Ibid., p. 308. Despite Arbitrator Hope's decision, the 41-year-old Prins was not reinstated to his duties, as he died from AIDS-related complications one week after the arbitration ruling.

policy guidelines for federal departments, Crown corporations, and regulated industries (i.e., transportation, communications and banking), relating to AIDS and employee rights. The policy prohibited mandatory AIDS testing for federal employees, discrimination against people considered especially vulnerable to AIDS infection, or against those who associate with victims of the disease. The new policy also prohibited employers from refusing to hire an AIDS victim simply because fellow workers refused to work with the individual. Max Yalden, the Chief Commissioner of the Federal Human Rights Commission, indicated that the policy guidelines had been introduced "to cut down the element of panic and make people realize this is not something you catch by walking down the street with someone or working with someone in the office."87

On June 28, 1988, the first AIDS case to be determined under human rights legislation was settled by a nurse with AIDS and his Toronto hospital employer. The nurse, Ron Lentz, had filed a complaint with the Ontario Human Rights Commission alleging that he had been dismissed by the hospital after they learned he had AIDS. The settlement, which was approved by the Ontario Human Rights Commission, included Mr. Lentz's reinstatement, approximately $14,000 in benefits, $5,000 for legal fees, restoration of seniority, and a clean employment record. Commenting on the Commission's consent order, Raj Anand, Chief Commissioner of the Ontario Human Rights Commission, observed that: "our central principle is that persons with AIDS or AIDS-related conditions must be clearly

87 Vancouver Sun, May 26, 1988, p. A10. The policy also listed exceptions (e.g. health care employment, foreign postings, etc.) for which a job could be denied to someone infected with HIV.
and definitively guaranteed their civil rights just as persons with other disabilities are. Following the reasoning in the American Supreme Court decision in Arline, the basis of the Commission's decision was that Lentz's AIDS condition was a "handicap" and as such constituted a prohibited ground of discrimination under the Ontario Human Rights Code. Moreover, Anand observed that: "This case should send a strong signal to the public and to persons with AIDS that they have the right not to be discriminated against in the workplace."

(b) The Biggs/Cole Case

On October 14, 1988, the B.C. Human Rights Council rendered its first decision in an AIDS-related discrimination case. Ruling on a complaint by Peter Biggs -- a Vancouver apartment dweller who claimed that he and his roommate had been evicted from their West End apartment because Biggs had AIDS Related Complex (ARC) -- the Council stated that individuals infected with AIDS have a "physical disability" and are therefore entitled to protection under the B.C. Human Rights Act. That statute prohibits discrimination on the basis of disability. In reaching this conclusion, the Human Rights Council employed reasoning very similar to that of U.S. courts and tribunals who had adjudicated AIDS discrimination cases, and in particular, adopted the conclusions reached by the U.S. Supreme Court in the Arline decision. The Human Rights Council also considered and adopted the

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reasoning in the *education-related Racine* and *Chalk* cases.

In effect the Biggs/Cole decision -- like the PWA and Lentz cases -- meant that AIDS victims were legally entitled to equal treatment with respect to public facilities, employment, etc. Ironically, however, the Council dismissed the claim brought by Peter Biggs and his roommate, Joseph Cole, concluding that because Biggs had persisted in keeping a pet dog in an apartment building with a "no pet policy," the apartment landlord had a bona fide reason for evicting the two men from their apartment.

(c) *The Canadian Teachers' Federation AIDS Policy*

During the 1980s and early 1990s, school board employees and students in Canada were not widely infected with the AIDS virus when compared with the situation in the United States. Canadian school administrators were consequently not under the same policy or legal pressure to deal with situations that might arise in the school setting. Concerned that the American experience foreshadowed similar difficulties in the Canadian public education system, Canadian school boards, teachers' associations, and parents, nevertheless, expressed strong concern about students, school board employees and the AIDS crisis. Mandatory testing, confidentiality, removal from employment responsibilities, and the provision of services to students, were among the issues discussed at both the local and national levels in Canada. In order to provide some guidance to these various groups, the Canadian Teachers' Federation (CTF) adopted the first education-related national policy
The CTF policy preamble began by stating that medical evidence had demonstrated that the AIDS virus was transmissible only through sexual activity, sharing contaminated needles, as the result of contamination of transfusion of blood or blood product, or by a mother infecting her child at the time of birth. With respect to teachers infected with the AIDS virus, the CTF policy statement was similar to the U.S. National Education Association guidelines, providing that: (1) the identity of a teacher with AIDS should be protected; (2) teachers infected with AIDS should have the right to continue their employment, and; (3) where a teacher with an AIDS-related illness becomes too sick to work, full access to sick leave, long-term disability and medical benefits should be ensured.

\textit{(d) The Eric Smith Case}

During the summer of 1987 Eric Smith, at approximately the same time that the CTF was drafting its national AIDS policy, a 29-year old teacher in the Cape Sable Island community of Clark's Harbour, Nova Scotia, checked into a local hospital for routine surgery. Unknown to Smith, his doctor ordered among other tests, a blood test for the presence of HIV. Several days later, Smith's doctor phoned him with news that would
fundamentally change the life of the Nova Scotia teacher: his test results revealed that he had AIDS. What might have remained a private matter between Smith, his doctor, and the school board, erupted overnight into a heated public controversy when a medical secretary with access to Mr. Smith's medical files disclosed to her sister that an "unnamed teacher" at the school her sister's daughter was attending had contracted AIDS. Prior to this disclosure, Eric Smith had led a quiet and seemingly model life in the small Sable Island community. He was reportedly a dedicated and committed teacher, admired and respected by students, parents and colleagues at Cape Sable Island elementary school. The teacher had kept his private life, and in particular his homosexuality, completely confidential, not even disclosing his sexual orientation to his family. Within days of learning that he had AIDS, Smith's private life became a matter of public record and debate.

Amidst the rumours, speculation, and fear that gripped the small Baptist community, Smith reported his newly diagnosed medical condition to the Shelburne County school board. As many other school boards in Canada, the Shelburne County school board had not drafted an employee or student AIDS policy, nor had even discussed alternative policy responses to a potential AIDS case. Under intense public pressure and threats from parents that they would pull their children from all fourteen schools in Shelburne County if Smith were allowed to continue teaching, the school board decided to relieve the teacher from his teaching responsibilities and to reassign him to a non-teaching position. This policy decision appeared to appease the community faction urging Smith's removal from the classroom setting. At the same time, however, the school board decision came under fire from health officials and AIDS specialists. For example, Dr. Walter Schlech, an AIDS
specialist in Halifax, said that Smith was not likely to pose a danger to his students and suggested that Smith might never develop a full-blown case of the disease. Another Nova Scotia doctor noted that it was ironic that a school board, rather than educating the public, was fuelling public hysteria: "To me it is outrageous that a board of education is supporting ignorance." A spokesman for the provincial Health Department suggested that even a person who displays symptoms of AIDS presents no risk in the casual contact of the classroom if he or she is at the first stages of the disease.

The parent group clamouring for the teacher's removal was as much concerned with the "infectiousness" of Smith's homosexuality, as with the possibility of the transmission of the AIDS virus. For example, in an effort to educate themselves about the disease, the staunchly religious Protestant community turned to audio tapes prepared by Christian fundamentalist groups in the U.S. which cautioned parents that homosexual teachers were attempting to indoctrinate students into "unnatural practices." The spectre of immoral practices being propagated by homosexual teachers led one community Baptist minister to suggest in public hearings that a return to "biblical morality" not AIDS education was what was needed to "conquer the disease." He added that homosexuals are not "innocent bystanders." Although Eric Smith decided not to legally challenge the school board


decision, he was extremely unhappy with the board's decision to remove him from his teaching duties. Not long after the school board decision, the Nova Scotia government hastily convened an AIDS task force in October 1987 with a mandate to study and make recommendations concerning how to deal with the AIDS epidemic. Smith was one of the members appointed to the provincial task force.

Just days following the creation of the Nova Scotia task force, Premier John Buchanan, commenting on the Smith case, observed that parents have a right to be told if their children's teacher has AIDS. Taking a position contrary to the provincial health regulations -- which require medical confidentiality unless a person with an infectious disease is a threat to public health -- Premier Buchanan stated: "My own personal view is that a parent has a right to know if a teacher has the AIDS disease." Although the Premier acknowledged the distinction between an individual who actually had AIDS, and one who is simply a carrier of the AIDS virus, he suggested that parents in Cape Sable Island were not interested in such distinctions when it came to the public safety of their children. Citing the recent AIDS-related death of a PEI teacher in support his position that the names of teachers with AIDS should have their names revealed, the Premier commented: "We had an unfortunate situation in PEI where a teacher wasn't a carrier but actually had the disease and died. It created a real furore over there and it was decided that the parents had a right to know, as did other teachers have the right to know." Buchanan's remarks were

broader discussion of the religious right and North American public education see Chapter 6 of the dissertation.

94 Betty Jean Brown, Minister of Education for PEI denied that any such decision had been made. New Brunswick's Ministry of Education revealed its policy in September 1987,
attacked by members of the medical community and others. One AIDS specialist, for example, characterized the premier's comments as "typical of the low level of knowledgeability existing in the province." As of March, 1988 Nova Scotia had 29 recorded AIDS cases and 12 AIDS related deaths. Premier Buchanan reversed his position within days of his initial comments, and later stated that the identities of teachers with AIDS should be made public only with an individual's permission: "If the teacher doesn't want to divulge the information, that's entirely up to the individual, not up to the Government."

Interestingly, in a Gallup poll which asked Canadians to respond to the question: "Do you agree or disagree that people with special responsibility for Canada, like politicians or teachers should be medically tested to find out whether or not they have exposed to AIDS?" 63% of the people polled in Atlantic Canada agreed with a this statement. This result was 9% above the national average of 54%, and the highest positive response rate to this question in the country. In response to the question: "Do you agree or disagree that employers test everyone they employ?" Canadians in Atlantic Canada again had the highest level of agreement with the question at 57% compared with a national average of 46%. Nova Scotia has reported the highest incidence of AIDS cases in Atlantic Canada, which included a strong section on the need for maintaining confidentiality of teachers' medical records. *Globe and Mail*, October 21, 1987.


Table 4.2

Canadian Attitudes Toward Teachers and AIDS
(in percent)

Q: Do you agree or disagree that: (1) people with special responsibility for Canada, like politicians or teachers...should be medically tested to find out whether or not they have been exposed to AIDS; and (2) employers should have the right to test employees for AIDS?

<table>
<thead>
<tr>
<th></th>
<th>Agree</th>
<th>Disagree</th>
<th>Don’t Know</th>
</tr>
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<tbody>
<tr>
<td>Those with special responsibility</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>National</td>
<td>54</td>
<td>41</td>
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<tr>
<td>Region</td>
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<tr>
<td>Atlantic</td>
<td>63</td>
<td>33</td>
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<td>Quebec</td>
<td>51</td>
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<td>Ontario</td>
<td>55</td>
<td>39</td>
<td>6</td>
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<tr>
<td>Prairies</td>
<td>49</td>
<td>48</td>
<td>3</td>
</tr>
<tr>
<td>British Columbia</td>
<td>54</td>
<td>35</td>
<td>11</td>
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<tr>
<td>Employers’ right to test employees</td>
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<td>National</td>
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<td>Atlantic</td>
<td>57</td>
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<tr>
<td>British Columbia</td>
<td>44</td>
<td>49</td>
<td>7</td>
</tr>
</tbody>
</table>

although that number is substantially less than the number of cases in B.C., Quebec, and Ontario, which had respectively 10.9, 7.8 and 6.9 cases for every 100,000 residents (Table 4.2). Once again, as in the earlier discussion of American responses to the AIDS crisis, members of the broader Canadian community indicated that they were very sensitive to the health risks of the epidemic, and willing to curtail individual rights in order to minimize that risk.

The Nova Scotia AIDS task force conducted public hearings during 1987 and 1988. In an attempt to influence the task force report, Shelburne County town councils passed resolutions advocating that people exposed to the AIDS virus be barred from Nova Scotia classrooms. One town council went so far as to resolve that all homosexuals be barred from entry into public school classrooms. These resolutions are not binding on school board policy.

As the heated public debate over teachers and AIDS continued, the Shelburne County school board decided to allow Eric Smith to return to teaching in the fall of 1988 despite threats from parents that they would keep their children home from school. One parent cautioned, for example: "If the board tells us...he's been assigned to our school, fine our kids won't be there the first day of September. They won't be there the 20th day of September for the school board to get their funding neither." Barrington Municipal Council, a Shelburne County township, indicated to the Shelburne County school board that it is "not in favour of known carriers of the AIDS virus, whether they be teachers, students or others, being place in the school system." In the wake of harsh criticism and ultimatums,

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the Shelburne County school board has expressed its "exasperation" in attempting to formulate and implement a policy to accommodate both parents and Smith. For example, in a written brief to the Nova Scotia task force the school board plaintively queried: "Can we, as a board, compel students to attend a class where parents perceive the teacher to be a danger and immoral?"

Eric Smith did not return to his teaching position with the Shelburne County school board. When the task force he had been appointed to released its report in October 1988 the teacher condemned the report, characterizing the project "as a waste of a whole year," and suggesting that the report's recommendations did not adequately address the issue of human rights protections for individuals infected with the AIDS virus.100

(e) **The Centre d'Accueil Case**

In 1989, one of the few AIDS-related cases in the Canadian public education system was arbitrated in the province of Quebec. In *Centre d'Accueil Sainte-Domitille v. Union des Employees de Service, Local 298,*101 Louise Lamothe, a special education teacher who had contracted AIDS, was terminated from her teaching duties with the Centre d'Accueil Sainte Domitille for refusing to submit to her employer's request that she be tested for the HIV virus. The teacher grieved her termination, arguing that the Centre d'Accueil had infringed her rights by demanding that she submit to a medical examination as a condition for

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101 *Unreported*, April 21, 1989 (Lussier).
returning to her employment.

The Centre d'Acceuil was a boarding school for behaviourally difficult teenage girls, where the teaching staff live with the students. Lamothe had been on sick leave from the Centre from October 1987 as a result of contracting malaria, and was scheduled to return to her teaching duties on March 1, 1988. On February 26, 1988, the teacher participated in a television program in disguise, during which she revealed that she was infected with the HIV virus. As it turned out, one of the Centre's directors was watching the program, and despite her disguise, recognized Lamothe. The director subsequently contacted the teacher and indicated that she would have to submit to a medical examination before she would be able to return to work.

Despite her objection to the demand, Lamothe did attend a medical examination, and was found to be in good health and capable of returning to work. However, she did not disclose to the doctor that she was infected with the AIDS virus, and the doctor's final report did not indicate that she was HIV positive. Despite the results of the medical examination, the Centre d'Acceuil made a request that Lamothe undergo a second examination. The teacher refused to submit to this second examination, and consequently she was terminated from her employment.\textsuperscript{102}

In the teacher's grievance, her union pointed to the collective agreement governing Lamothe's employment at the Centre which provided that employees who were excused from their duties as a result of carrying infections were to be transferred to another position

\textsuperscript{102} Up to this point in time, Lamothe had not returned to work, and was placed on paid leave pending the medical examinations.

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without loss of salary. For its part, the Centre argued that the teaching staff at the Centre often participated in sports activities with the students, and that if Lamothe was infected with AIDS that she posed an unsuitable risk to the students. Further, the employer maintained there were occasions when there were altercations between students or between a student and a member of the staff, and that these events might occasionally lead to injuries which would also place students and staff at risk. Expert evidence adduced at the arbitration on the nature of the virus suggested that the HIV virus was very fragile and did not live long outside the human body. The evidence further demonstrated that at least 97% of the known cases of HIV transmission resulted from pregnancy, exchange of contaminated needles, or unprotected sexual relations. Any other modes of transmission, according to the expert testimony, were only theoretical, and there was accordingly no reason to exclude a carrier of the AIDS virus from the workplace, even in a milieu where there was a possibility of physical altercations. With regard to the issue of the medical examination, the arbitrator concluded that any such right on the part of an employer must be exercised with circumspection as it necessarily involves an intrusion of privacy rights. He concluded, on the basis of arbitral precedent, that the right of the employer to demand a medical examination as a condition of employment was dependent on whether there were reasonable grounds for believing that an employee was incapable of working. He also concluded that the risk of affecting other employees or students could be a factor in assessing whether an employee was capable of returning to work. As in the Prins case discussed earlier, the arbitrator cautioned that such risks must be real and significant, and not hypothetical.

After hearing the evidence of the teacher, the Centre, and the expert evidence, the
arbitrator concluded that the employer had no basis for demanding the medical examination, nor for terminating the teacher’s employment, and that there was no medical basis for the employer’s fears in this regard. The arbitrator also remarked that the directors of the Centre had sufficient information or sufficient access to such information that they should not have based their decision to terminate the teacher based on their own preconceptions of the disease. Of particular significance in this regard, according to the arbitrator, was the fact that the employer had sought legal advice during the case which had indicated that the employer did not have legal grounds to take terminate the teacher. Interestingly, the arbitrator did not conclude that Lamothe had acted improperly in refusing the doctor access to her complete medical files. According to the arbitrator, even taking the point of view most favourable to the employer, he did not believe the grievor was under an obligation to disclose all of her confidential medical records to the examining physician. The employer’s entitlement to have a doctor review the grievor’s medical files was limited by the scope of the employer’s right to verify the grievor’s reasons for illness and ability to return to work. In addition to awarding the teacher damages for lost earnings, the arbitrator also awarded her an unspecified amount of compensation for non-pecuniary injury based on evidence that the events surrounding the teacher’s termination had caused her stress which had accelerated her AIDS symptoms.
Since the controversial Smith and Lamothe cases confronted Canadian school officials in the late 1980s, a number of public school boards, associations and provincial education ministries across Canada have developed and implemented AIDS policies and resolutions regarding both teachers and students.103 Without exception, these policy statements have followed the lead of the CTF policy on AIDS, endorsing confidentiality of AIDS victims, the right of teachers (and students) to remain in a regular classroom setting as long as they are physically able, and full medical disability assistance for teachers who are unable, or do not wish to continue with their teaching responsibilities. Commenting on the general orientation of these AIDS policies at the July 1988 CTF convention, the President of the Ontario Teachers' Federation (OTF) observed that: "The basic intent of the rights of both students and teachers as a basic philosophical belief has been accepted across the country."104 The OTF President was quick to point out that the public hysteria surrounding the Eric Smith case was an exception to this rule, suggesting that: "Even there [in Nova Scotia] philosophically they've accepted it [civil rights] but practically they've run into some small problems."105

Different policy-making approaches to AIDS-related issues have been adopted by the


105 Ibid.
different provinces. For example, in Manitoba, the Manitoba Education Council released guidelines in September 1988 which, according to Manitoba Education Minister Len Derkatch, were sent to school superintendents around the province in order "to help divisions create their own policies to deal with AIDS."\textsuperscript{106} The Ministries of Education in British Columbia and New Brunswick also issued policy statements concerning AIDS-related school issues. In other provinces, AIDS policies have originated at the local level. For example, the Vancouver and Langley school boards in British Columbia and the Ottawa Board of Education, Carleton Separate School Board, and Waterloo Region Separate School Board in Ontario have all developed their own local AIDS policies, which drew upon a combination of provincial health laws, the Canadian Teachers' Federation guidelines, and the Center for Disease Control recommendations. All these policies contained stringent provisions to ensure that the identity of an AIDS-infected individual remains confidential. According to the Waterloo Region Separate School superintendent, Tony Truscello, in the light of the Smith case, the confidentiality element was of the utmost importance. Truscello explained that his Board "wants to avoid subjecting anyone to the treatment accorded Smith,"\textsuperscript{107} who was initially removed from his teaching duties when news that he was infected with the AIDS virus leaked into the small Nova Scotia community. Teachers' organizations, including the B.C. Teachers' Federation, the Alberta Teachers' Association, the Ontario Secondary School Teachers' Federation and the Nova Scotia Teachers' Union all passed resolutions supportive of the CTF position on AIDS in the schools.


\textsuperscript{107} \textit{Ibid.}
As illustrated by the above judicial and policy trends, members of the legal and education community appeared highly advanced in their sensitivity to the rights-related facets of the AIDS crisis, and the need for balancing protections accorded to individuals with the AIDS virus, and the broader Canadian community. This heightened sensitivity on the part of the legal and education communities may be due to the fact that the growth of the AIDS epidemic coincided with the emergence of Canada's new Charter of Rights and Freedoms. This situation likely enhanced the legal community's awareness of the special rights-related issues surrounding this particular health crisis.

V. BALANCE-MAINTENANCE IN A POLICY CRISIS

Epidemics traditionally breed fear and confusion in human communities. This is especially true when an epidemic has fatal consequences for those afflicted with an infectious disease, and when -- as in the case of AIDS -- the disease relates directly to the intimate and sensitive sphere of human sexuality. Efforts to formulate "rational" policies and adhere to established policy-making paradigms are rarely successful in the crisis atmosphere engendered by a medical epidemic. More often than not, public pressures aroused by fear of the unknown lead policy-makers to jettison established decision-making paradigms. For reasons of political expediency and ignorance, policies are often quickly cobbled together to stem a public outcry and find a "quick fix" to a complex and seemingly insoluble problem. All too frequently, such crisis-management and policy improvisation will sacrifice individual rights to the momentary and emotional needs of the affected, and potentially infected,
Unlike "classic" policy paradigms which prevail during periods of "normal" or routine decision-making, crises engender a telescoped or compressed policy-making pattern in which the "articulation," "aggregation," and "allocation" of policies occur almost simultaneously. It is only after a calmer atmosphere prevails, and more expertise and information are brought to bear on the crisis at hand, that greater attention is devoted to balancing the interests of the community with those of the victims and carriers of a rapidly spreading disease. Thus, epidemics such as the AIDS crisis appear to go through several waves of decision-making, and it is not until the initial anxieties generated by the health risks have been dampened that deliberate consideration can be given to formulating appropriate policies and carefully working out a balanced and legally sound response which recognizes the rights of both the broader community and those directly suffering from the epidemic.

The impact of the AIDS crisis on North American public education detailed in this chapter illustrates many of the difficulties of policy-making during a medical crisis. As Sandra Panem pointed out in a recent study of policy-making and the AIDS epidemic "a novel health emergency demands simultaneous - not sequential problem solving:"

The timely resolution of a novel health emergency requires closely coordinated efforts by diverse institutions. Yet given the way the system functions, normal everyday operations make an efficient and integrated response to a new disease extremely difficult. Business as usual - which includes adversarial relationships

between executive and congressional branches of the federal government, makes rivalries among different agencies... lack of clear cut lines of authority and accountability among officials in different levels of government, and informal relations between the public and private sector - is part of the problem. Although on a day-to-day basis such practices may foster creative tension and provide checks and balances, they come into conflict with the successful handling of a novel health emergency.109

Another study critical of policy management during the AIDS epidemic has charged that by the time America "paid attention to the disease, it was too late to do anything about it." The epidemic "was allowed to happen by an array of institutions, all of which failed to perform their appropriate tasks to safeguard the public health."110

Beyond the disruption of "normal" policy-making paradigms, the management and mismanagement of the AIDS epidemic also illustrate how questions of justice and equity soon intrude on the consciousness of victims and spectators during the plague-like crises of modern democracies. These legal repercussions were recognized by a 1986 Canadian Bar Association report identifying the risk to individual civil liberties posed by the modern AIDS crisis:

At stake are the legitimate interests of individuals in controlling the generation and dissemination of information about them (privacy), the individuals interest in carrying

109 Sandra Panem, *The AIDS Bureaucracy* (Cambridge, Mass.: Harvard University Press, 1988), pp. 141, 136. Elsewhere Panem suggests that: "Although the initial period of the AIDS experience provided a working model for policy development in managing a novel health emergency, the demands of the immediate crisis continued to divert attention from the set of problems that lay just around the corner, as well as from the problems that would surely accompany the next epidemic" (p. 100).

on with the normal activities of one's life unlimited by unwarranted restraints based upon one's medical condition (liberty), and the right not to be discriminated against with regard to employment, accommodation and such matters, because of an unjustified perception that the individuals poses a significant risk to others (non-discrimination).

The same report also stressed that:

It is impossible to insist on the a priori primacy of one set of interests over the other: both are legitimate and important, and must be accommodated to the extent possible in every decision to be made. For example, even if one thought that the protection of public health ought to predominate in the balance, one would still have to take account of the constraints, both legislative and constitutional, that operate in this context.

Although the AIDS crisis did not abate, by the mid-1990s policy-makers and the public seemed relatively better informed, and also better able to deal with the consequences of the epidemic. Certainly fear and ignorance about AIDS did not disappear, nor did a clear consensus emerge about the causes, treatment, or proper policy response to the disease. Guidelines for a more rational policy paradigm were, however, more readily available to those seeking such advice, and the public appeared far more aware of what behaviour is appropriate in dealing with the demands of a serious, but still controllable health emergency.


112 Ibid.
VI. CHAPTER SUMMARY AND IMPLICATIONS FOR LEGAL CULTURE

Canada's constitutional development in the decade after 1982 closely paralleled global and national awareness about the AIDS epidemic. During the crucial years prior to 1982, when debate ensued regarding a "made-in-Canada" constitution and the adoption of a charter of rights, an organized constituency mobilized to educate and seek assistance for the victims of AIDS still had not fully appeared on the Canadian political stage. However, in the decade after 1982, the response to the AIDS crisis on the part of Canadian citizens and government officials was significantly affected by Canada's new constitutional dynamics and burgeoning rights consciousness — a pattern with broad similarities to the emergence of Canada's special needs constituencies discussed in Chapter 3.

As pointed out in the dissertation's earlier theoretical discussion (Chapter 1), significant changes in citizen feelings and expectations about "rights," that is, those privileges and liberties which are generally considered antecedent to government and institutionalized legal declarations, and to which political decision-makers and participants in the legal process must accommodate themselves, may signal an important alteration in the legal culture.\(^\text{113}\)

The analysis in this chapter revealed changed expectations about the "right" of Canadian teachers infected with the AIDS virus to continue teaching in the Canadian public

\(^{113}\) For a broader discussion of this concept see, for example, Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977).
school system, and also new responses by the legal system, in particular human rights councils and arbitrators, in processing and upholding such claims. The assertion and recognition of such claims or rights both contributed to and reflected a significant change in Canadian rights consciousness and legal culture. The evidence for this change is largely inferential and cannot be considered definitive proof of a cause and effect relationship, but it is arguable, based on the evidence presented, that an important trend is underway. Thus, Canadian teachers with AIDS -- following cases successfully advanced by teachers and students in the United States -- maintained that their illness was a "disability" or "handicap," and therefore should not disentitle them from the right to continue teaching in the public school system.

However, unlike the special needs constituency discussed in Chapter 3 -- which advanced its agenda of rights and claims largely through Charter-based litigation and governmental lobbying -- AIDS litigants tended to assert their rights through provincial human rights legislation and collective agreement grievance provisions. Several factors account for this trend. In the first place, the constitution's equality provisions did not come into effect until April 17, 1985. Thus, human rights legislation and resort to the arbitration process were initially the only available instruments for advancing employment-related rights in the pre-1985 AIDS cases. Because AIDS litigants were often successful in advancing these claims, human rights legislation and rights arbitration became identified in the early 1980s as the standard legal tool for initiating such rights claims. Secondly, AIDS litigants -- owing to their usually terminal HIV-related illnesses -- generally did not have the financial resources or time to launch protracted, complex, and expensive Charter cases. Thus,
litigation launched pursuant to human rights legislation and the arbitration process presented a far more realistic and efficient avenue for AIDS litigants.

While employing somewhat different legal vehicles to advance perceived mandatory rights, the special education and AIDS constituencies (emergent components of a changed external legal culture) contributed to a significant change in the type of demands placed on an adapting legal system (the internal legal culture). Thus, as revealed in the analysis in both Chapters 3 and 4, in the decade after 1982 students with physical and mental handicaps and also teachers infected with the AIDS virus perceived that they had mandatory rights that should be legally recognized and accommodated. These two minority groups successfully initiated legal and other challenges that prompted the legal system and, indeed the broader Canadian society, to recognize the legitimacy of such claims. As in the discussion of special education in the preceding chapter, the changes in the legal system relating to the AIDS crisis provide a strong inference that the Canadian legal culture is in the throes of an important transformation.
CHAPTER 5

GENDER EQUITY AND THE CANADIAN PUBLIC EDUCATION SYSTEM:
THE IMPACT OF THE CHARTER ON WOMEN’S EQUALITY RIGHTS

You know you cannot have a charter of rights in Canada and not give... the women’s rights.... I remember telling some of them: “Wait until the women... go after you guys, you will come back quick.” And that’s exactly what happened.

Jean Chretien, Minister of Justice

1. INTRODUCTION

1. The Charter’s Equality Guarantees

Should women as a group be accorded constitutionally entrenched equality rights? And if so, how should such Charter guarantees be crafted? These questions were among the most controversial issues addressed during the constitutional debates of the early 1980s. After much political wrangling, the following equality guarantees for women were provided

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2 For an interesting historical overview of how the equality provisions of the Charter were shaped in reference to the women’s sexual equality guarantees see Mary Eberts, “Sex-Based Discrimination and the Charter,” in Anne Bayefsky and Mary Eberts (eds.), Equality Rights and the Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1985), pp. 199-204. For a more general legislative history concerning the drafting of the constitutional equality rights see Kenneth H. Fogarty, Equality Rights and their Limitations in the Charter (Carswell: Toronto, 1987), pp. 89-134.
under the Charter that was finally adopted in 1982:³

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 (author's emphasis).

In addition to urging the adoption of the guarantees contained in to Section 15(1), women's lobby groups argued that it was also necessary to explicitly provide constitutional protections for programs aimed at ameliorating historically disadvantaged groups, such as women. Provision of such protections were justified, it was maintained, in view of the American constitutional experience where courts frequently characterized group-oriented programs as "reverse discrimination," and therefore ruled that such programs were unconstitutional. Thus, Section 15(2), popularly known as the Charter's "affirmative action" provision, was also entrenched in the Canadian constitution.⁴ That section provides:

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origins, colour, religion, sex, age or mental or physical disability.

Buttressing the substantive equality rights contained in Section 15 of the Charter are the

³ The implementation of Section 15 was postponed three years in order that provincial legislature and the federal Parliament could review their respective laws in light of the Charter's equality guarantees. Section 15 came into force on April 17, 1985.

gender equality provisions found in Section 28:

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Although the dimensions of Section 28 were not elaborated by the courts during the first decade after the Charter's adoption, the intent of the constitutional framers was for Section 28 to set out general orienting or interpretive principles of gender equality in order to guide judicial interpretation of the Charter, as opposed to providing another substantive equality right. The entrenchment of this section was in large measure due to an intense lobbying effort by women's groups across Canada who believed that discrimination on the basis of sex had not been effectively prohibited under Section 15. These groups maintained that Section 28 would in effect impose an absolute guarantee of gender equality which would override any other interest.

The promise and potential of the Charter of Rights and Freedoms appear to have prompted Canadian citizens, and women's groups in particular, to more actively challenge

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5 For a more general explanation of Section 28 see Katherine de Jong, "Sexual Equality: Interpreting Section 28," in Equality Rights and the Canadian Charter of Rights and Freedoms, pp. 493-528. For the difficulties inherent in the judicial application of Section 28 see Fogarty, Equality Rights and Their Limitations in the Charter, pp. 304-307.

in the courts cases of alleged sex discrimination. The result of such legal activity has in turn resulted in enhanced judicial activism on behalf of women's sex discrimination claims, and also enhanced judicial responsiveness to those claims. One of the earliest and striking cases in that regard was the landmark case of R. v. Morgentaler in which the Supreme Court of Canada affirmed a constitutional right to abortion in Canada. The Morgentaler case was one of the earliest examples of the Supreme Court's selective willingness to enter into the realm of social policy. For example, in the Morgentaler decision Madame Justice Bertha Wilson's majority opinion enlarged the concept of liberty of the person by introducing a new dimension, namely, the "right to dignity;" that is, the right of an individual to "a degree of autonomy in making decisions of fundamental personal importance," and the right to a degree of personal autonomy over important decisions intimately affecting their (sic) private lives." Referring to American case law, Madame Justice Wilson ruled that this liberty includes the right to marry and to procreate, the right to attend private schools, etc.

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8 The term "judicial activism" is used in the dissertation to characterize a court's inclination or propensity to intervene in the governing process -- a trait which in comparative terms is commonly marked by decisions calling for "social engineering" and which may intrude on matters traditionally reserved for legislative or executive action.


10 Not all the Supreme Court justices were willing to take the same activist view of the Charter. For a discussion of these different approaches to Charter interpretation see Chapter 7. For an interesting discussion of the Morgentaler case see M. L. McConell, "Abortion and Human Rights: An Important Canadian Decision," International and Comparative Law Quarterly, Vol. 38 (1989), pp. 905-913.
2. **Rights Consciousness, Gender Equity, and the Impact of the Charter**

As discussed above, the new consciousness about rights triggered by the constitutional debates and eventual entrenchment of the *Charter* in 1982, stimulated concern among citizens and groups about women's equality rights. At the onset of 1982, and particularly after the Supreme Court of Canada's first *Charter* decision in the 1984 *Skapinker* case -- in which the court expressed its willingness to take a "broad and generous" approach to interpreting *constitutional* rights -- there was considerable enthusiasm on the part of Canadians about the potential of the new constitution for promoting and securing equality rights for women. The high expectations apparent in segments of the external legal culture concerning the impact of the *Charter* on Canadian rights and freedoms naturally encouraged increasingly rights conscious citizens to turn with renewed attention to other instruments for promoting and securing rights. One of the most important instruments available were provincial and federal human rights codes, which, among other things, explicitly prohibit discrimination on the basis of sex.

In the area of women's equality rights, the entrenchment of the *Charter* and the Supreme Court of Canada's early endorsement of the instrument as a means for securing rights, appeared to have both a direct and indirect impact on the expansion of women's equality rights. Thus, in terms of a direct impact, *Charter* cases alleging sexual discrimination were rapidly advanced and successfully argued before Canadian courts. Meanwhile, in a more indirect manner, it appeared that enhanced expectations about
women's equality rights encouraged women to: (1) advance sexual discrimination cases utilizing other rights instruments available to them, in particular, provincial and federal human rights codes, and; (2) step-up pressure on law-makers and employers (both in the public and private sectors) to recognize and rectify instances of sexual discrimination. The following section of this chapter will provide a general overview of the Charter's direct and indirect impact in the area of women's rights and gender equity as such trends relate to both employees and students in Canada's public education system. The chapter concludes with a discussion of how such changes have impacted on Canada's legal culture.

II. GENDER EQUITY AND THE PUBLIC EDUCATION SYSTEM

In contrast to pre-Charter decisions concerning sexual discrimination, decisions from the Supreme Court of Canada after 1982 established and reinforced important aspects of equal rights for women. Many of these rights will be discussed below relative to the realm of public education. For example, decisions upholding a woman's constitutional right to abortion, the right to employment benefits during pregnancy, and the right to be free from sexual harassment, indicated that the Supreme Court of Canada was adopting a fairly activist approach to issues relating to sex-based discrimination.

In terms of broad judicial trends in the area of women's equality rights, it was perhaps especially noteworthy that the Canadian judiciary after 1982 characterized the

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unequal treatment of women as "sexual discrimination." Thus, whether a legislative provision discriminates against women, or whether women are subjected to inappropriate actions such as sexual harassment, the Supreme Court has treated such matters as a broader indication of discrimination on the basis of sex, thus entitling women to remedies available under the equality guarantees contained in both the Charter and human rights statutes.\(^\text{12}\)

For example, on the heels of the 1988 Morgentaler abortion rights case, the Supreme Court of Canada issued a second landmark sexual discrimination ruling relating to the issue of benefits available to pregnant employees. The case of Brooks v. Canada Safeway\(^\text{13}\) overturned a previous decision by the Supreme Court of Canada in the Bliss case that had upheld legislation restricting the access of pregnant women to unemployment insurance benefits. In Brooks, the Supreme Court impugned a Safeway Group Insurance Plan which provided that disability benefits would be available for pregnancy-related illness during pregnancy, but excluded pregnant women entirely from coverage -- whether their disability


\(^{13\text{}}} (1989). 10 \text{C.H.R.R. D/6183.}
related to a pregnancy-related condition or non-pregnancy-related condition -- during the period commencing ten weeks prior to birth, the week of birth, and six weeks following the birth. Characterizing the Safeway Plan as discriminating on the basis of sex, the Court remarked: "It is difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex."14

The Brooks decision has been the subject of considerable debate among employers attempting to interpret and apply the decision to employee benefit plans. Narrow interpretations of the decision have relied upon the following statement of the court: "In sum, if an employer such as Safeway enters into the field of compensation for health conditions and then excludes pregnancy as a valid reason for compensation, the employer has acted in a discriminatory fashion."15 Proponents of a narrow reading of the case suggest that it can be argued that while Brooks prohibits the discriminatory refusal of an employer to grant pregnant women an otherwise generally available benefit plan, it does not impose a positive obligation on employers to provide maternity benefits.

A more expansive interpretation of Brooks maintains that the case stands for the general proposition that women should be entitled to an enhanced measure of benefits during pregnancy. Proponents of this interpretation rely upon the following comments by the court:

14 Ibid., p. D/6199.
15 Ibid., p. D/6196.
It is to state the obvious that pregnancy is of fundamental importance in our society. It cannot be dispute that everyone in society benefits from procreation. The Safeway Plan, however, places one of the major costs of procreation entirely upon one group in society: pregnant women.  

1. **Sex Discrimination, Human Rights Legislation and Labour Arbitrations: The Charter’s First Wave**

In light of the enhanced profile accorded to women’s equality rights in the Canadian constitution, Canadian society and Canadian courts -- as illustrated by the Morgentaler and Brooks decisions -- gender equity issues relating to school board employees and students have also received more attention within the Canadian public education system during the last decade. This section of this chapter will examine the direct and indirect impact of the Charter on gender equity issues in Canadian schools. As with gender equality generally, the Charter has had both a direct and indirect impact on sexual discrimination claims relating to the public education system. Thus, the following discussion will examine three different impact areas of gender equality: (1) challenges under human rights codes and labour arbitrations; (2) Charter cases, and; (3) legislative developments.

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17 For an assessment of this trend see, for example, Mary Eberts, *et al.*, *The Case for Women’s Equality: The Federation of Women Teachers’ Associations of Ontario and the Canadian Charter of Rights and Freedoms* (Toronto: Federation of Women Teachers’ Associations of Ontario, 1991).
(a) **Teaching and Non-Teaching Employees**

Since the equality provisions of the *Charter* were not operationalized until 1985, many of the early gender equity cases in the public education system were initiated by rights-seeking citizens who utilized provincial human rights legislation and the grievance procedure available under collective agreements. Interestingly, one of the earliest sex discrimination employment cases concerning the public school system was initiated by a male teacher who argued that he had been discriminated against on the basis of his sex. In the 1985 case of *Rossi v. School District No. 57 (Prince George)*\(^{18}\) a teacher alleged that the school board's decision not to hire him to teach a girls' physical education class was in contravention of the sex discrimination prohibition in the B.C. *Human Rights Act*. The B.C. *Human Rights Act* prohibits employers from discriminating on the basis of sex, and in particular Section 8 of the Act provides:

8.(1) No person or anyone acting on his behalf shall

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person with respect to employment or because of the...sex...of that person....

The school board admitted that it had discriminated on the basis of sex in selecting a female teacher for the P.E. position, but maintained that there was reasonable grounds for the discrimination, namely, the maintenance of public decency. The Human Rights

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Council rejected the school board’s position, and ruled in favour of Rossi concluding that the school board had failed to prove on the balance of probabilities that:

...direct supervision, in the sense of the physical education teacher having to be present in the change rooms, either regularly or sporadically, is necessary or required or that supervision of girls’ physical education class change rooms by male physical education teachers at the schools in question does not provide either 'effective supervision' or the 'assistance necessary for the supervision of pupils.'

In light of this reasoning, the Council ordered the school board to cease similar breaches of the Human Rights Act, namely, "expressing a limitation, specification or preference as to sex in regard to applicants for positions as girls physical education teachers or discriminating against a person in respect of employment as a girls physical education teacher because that teacher is male."20

Another public education case relating to allegations of sex-based discrimination was the 1985 B.C. human rights case of Spelchan and School District No. 22.21 In this case, the B.C. Human Rights Council considered an allegation of sex discrimination made by a female school bus driver against a school board. Specifically, the bus driver alleged that work was improperly allocated to a junior male employee which resulted in his seniority rights being increased, and thus negatively affecting her layoff and bumping rights. After reviewing the employment practices of the school board relating to bus driver assignments, the Human Rights Council dismissed the female bus driver’s complaint concluding that driving


20 Ibid., p. D/3241.

assignments were made using criteria other than gender, and that no sex-based
discrimination had taken place.

In a sex discrimination case which also involved the public education system, non-
teaching employees filed a complaint against an Ontario school board. In the 1988 case of
Peel Board of Education and CUPE Local 2703 and 2544 and the Ontario Human Rights
Commission\(^\text{22}\) it was alleged that the school board's physical plant department maintained
a system which classified employees on the basis of sex. For example, it was alleged that
positions such as casual and part-time cleaners, cafeteria workers and school attendants were
considered to be female occupations, while positions such as custodians, building supervisor
and maintenance employees were viewed as male occupations. This discriminatory
employment practice, it was alleged, perpetuated an employment system that streamed men
and women into certain employment classifications based strictly on their gender. The case
was settled, without any admission of liability or any admission that the Ontario Human
Rights Code had been breached by the board.

(b) Sexual Harassment

In addition to the equality rights cases discussed above, another area of
discrimination that has recently attracted considerable attention is the issue of sexual
harassment. In a 1992 interview conducted with 321 business leaders by Southam Business
Monitor, 47% of the executives surveyed said that the issue of sexual harassment had been

\(^{22}\) November 3, 1988 (settlement agreement).
blown out of proportion, while 31% believed it was "a real problem," and 17% were reportedly "somewhere in between". Those figures compare to an October 1991 poll conducted by the Angus Reid Group, where 49% of Canadians surveyed said they feel that sexual harassment is a real problem affecting the quality of life for working women. In the Angus Reid survey 37% of the women polled said that they had experienced some form of sexual harassment at work.\textsuperscript{23} Notwithstanding different views of Canadians on the topic of sexual harassment, the Canadian judiciary has clearly treated the issue of sexual harassment as a serious sex discrimination matter, and recently has released some very significant rulings on the issue. Thus far, these cases have concerned challenges initiated under human rights legislation. In contrast to the situation discussed in Chapter 4 regarding the very sensitive AIDS crisis, the similarity between changing views on the issue of sexual harassment on the part of the legal community and the general population was quite striking. Indeed, in contrast to their pre-1982 restraint in the area of expanding minority rights, the Canadian judiciary has exhibited an unusual degree of judicial activism in the area of sexual harassment and sexual discrimination. Thus, before turning to a consideration of sexual harassment cases in the public education system it is first useful to review the Supreme Court of Canada's thinking on this issue.

\textit{(i) The Robichaud Case}

In the 1987 case of \textit{Robichaud v. The Queen}\textsuperscript{24} the issue considered by the Supreme

\textsuperscript{23} As reported in the \textit{Vancouver Sun}, March 7, 1992, p. 1

\textsuperscript{24} (1987), 40 D.L.R. (4th) 577.
Court of Canada was whether an employer was liable under the Canadian Human Rights Act for acts of sexual harassment committed by its employees within the course of their employment. The landmark women's rights case arose when Bonnie Robichaud filed a complaint with the Canadian Human Rights Commission alleging that she had been sexually harassed, discriminated against, and intimidated by her employer, the Department of National Defence. She further alleged that the person who actually committed the harassment was her supervisor. The Supreme Court of Canada upheld Robichaud's complaint against her employer, ruling that in order for the employer to be liable the situation in which the alleged sexual harassment takes place must in some way relate to or be associated with the employment. Commenting on the issue of employer liability, Mr. Justice La Forest stated on behalf of the court that the "remedial effect of the Act would be stultified if... remedies were not available as against the employer."

Citing the leading U.S. Supreme Court decision in Meritor Savings Bank, FSB v. Vinson with approval, the Supreme Court of Canada commented on the general duties of a supervisor towards employees as it relates to their working environment:

A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace. There is no reason why abuse of the latter authority should have different consequences than abuse of the former. In both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong; it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on

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25 Ibid., p. 583.

subordinates.\textsuperscript{27}

The court also implied that the conduct of the employer in dealing with the issue of sexual harassment in the workplace may have a bearing on the issue of employer liability:

For example, an employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps.\textsuperscript{28}

(ii) The Janzen Case

The Supreme Court of Canada considered a second sexual harassment case in 1989. In \textit{Janzen v. Platy Enterprises Ltd.},\textsuperscript{29} the Supreme Court of Canada issued a landmark ruling which clearly stated that sexual harassment constitutes sexual discrimination. The \textit{Janzen} case concerned two complainants who were employed as waitresses. The two waitresses alleged that they had been subjected to unwelcome conduct of a sexual nature by the restaurant's cook, contrary to the Manitoba \textit{Human Rights Act}, and that this harassment had made the work environment difficult to operate in.

A review tribunal concluded that both complainants had been victims of sex harassment and by inference sexual discrimination. On appeal, this decision was upheld in the Manitoba Court of Queen's Bench. The case was further appealed to the Manitoba

\textsuperscript{27} Robichaud, p. 585.

\textsuperscript{28} Ibid., p. 585.

\textsuperscript{29} (1989), 59 D.L.R. (4th) 352.
Court of Appeal, who, in a surprising decision, reversed the finding that sexual harassment is sexual discrimination.\textsuperscript{30} The case was then appealed to the Supreme Court of Canada which restored the earlier decisions equating sexual harassment with sexual discrimination.

In its decision in \textit{Janzen} the Supreme Court of Canada defined sexual harassment as follows:

...sexual harassment may take a variety of forms. Sexual harassment is not limited to the demand for sexual favours made under threat of adverse job consequences should the employee refuse to comply with the demands. Victims of harassment need not demonstrate that they were not hired, were denied a promotion or dismissed from their employment as a result of their refusal to participate in sexual activity. This form of harassment, in which the victim suffers concrete economic loss from failing to submit to sexual demands, is simply one manifestation of sexual harassment. Albeit a particularly blatant and ugly one. Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which the employees must endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour.\textsuperscript{31}

The court also suggested:

Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the work place may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the working environment or leads to adverse job related consequences for the victims of harassment. It is...as has been widely accepted by other adjudicators and academic commentators, an abuse of power. When sexual harassment occurs in the work place, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the work place attacks the dignity and self-respect of


the victim both as an employee and as a human being.\textsuperscript{33}

Discussing sexual harassment in terms of discrimination on the basis of sex, Chief Justice Dickson further comened that "keeping with this general definition of employment discrimination, discrimination on the basis of sex may be defined as practices of attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender."\textsuperscript{34}

The combined effect of the decisions in \textit{Robichaud} and \textit{Janzen} is that sexual harassment is sexual discrimination within the meaning of the term in human rights legislation, even where the appropriate legislation does not specifically make reference to sexual harassment. Further, it is now clear that it is the employer’s responsibility to ensure that the work environment is free of harassment. Employers are liable for acts of sexual harassment committed by their employees so long as there is some connection with the employment setting. Since the Supreme Court of Canada decisions, education cases that have considered sexual harassment by school board employees include: \textit{Avalon North Integrated School Board v. The Newfoundland Teachers’ Association}\textsuperscript{35}, and \textit{University of Manitoba v. The University of Manitoba Faculty Association}\textsuperscript{36}. In the Newfoundland case an arbitration board imposed an eight month suspension without pay on a principal for

\textsuperscript{33} \textit{Ibid.}, p. 372.

\textsuperscript{34} \textit{Ibid.}

\textsuperscript{35} April 25, 1990, Unreported (arbitration award).

\textsuperscript{36} December 1, 1989, Unreported (arbitration award).
sexually harassing two female members of his staff. In the Manitoba case, a faculty member was suspended four months without pay for sexually harassing an office assistant.37

In addition to ensuring that employees are able to work in a "friendly" environment, school boards are also required to ensure that the right of students to be educated in an environment which is safe and free from sexual harassment and sexual discrimination is maintained. To date there have only been a handful of cases where allegations of sexual harassment have been brought by students against teachers. In view of the general trend of sexual harassment litigation and arbitration, however, such cases can be expected to increase during the 1990s. Among some recent cases that have been initiated by students against teachers are:  

Harris and Reicker v. Her Majesty the Queen in Right of the Province of New Brunswick;38 Re Memorial University of Newfoundland39; and Garai v. British Columbia Institute of Technology and B.C. Council of Human Rights40. In all of these cases, the approach of the Supreme Court of Canada was adopted in that sexual harassment was treated as sexual discrimination.41


40 April 4, 1990, Unreported (B.C. Supreme Court).

41 Two other recent British Columbia cases concerning sexual harassment of students by teachers are: Board of School Trustees of of School District No. 46 (Sunshine Coast) and Sunshine Coast Teachers’ Association (May 19, 1992); revs’d, April 15, 1993, BCLRB No. B100/93, Case No. 11528 (B.C. Court of Appeal decision pending); and Dupuis v. Ministry of Forests, Forest Sciences Division, December 23, 1993 (B.C. Human Rights Council).
In *Harris and Reicker* an arbitrator ruled that an appropriate penalty for a teacher who had written poems, letters, notes and an essay of a romantic nature involving a student, was a suspension without pay of approximately 11 months. The principal of the school who had not brought the matter to the board's attention, but had attempted to deal with the situation himself, was demoted from principal to teacher, and suspended for six months without pay.

Following the Supreme Court of Canada ruling in *Robichaud*, the Newfoundland Court of Appeal held in the case of *Re Memorial University of Newfoundland* that a University may be added as a party to human rights proceedings involving an allegation of sexual harassment made by a student against a professor. In this case, a female student alleged that she had been sexually harassed during an incident that occurred off campus when a professor allegedly invited her into a bar for a drink in order to discuss her studies. She complained that he took this occasion to sexually harass her.

As for the *Garai* case, the B.C. Supreme Court upheld a decision of the British Columbia Human Rights Council dismissing a complaint of 21 separate sexual harassment incidents alleged by a student against the B.C. Institute of Technology. The student reportedly made the allegations following her expulsion from a sausage-making program at the Institute.

(iii)  
*The Franklin Case: The American Experience*

Although a number of Canadian arbitration and lower court decisions have considered disciplinary cases involving student allegations of sexual harassment against
board employees, the Supreme Court of Canada has yet to consider whether a school board is vicariously liable for the misconduct of its employees in relation to the sexual harassment of students. It is interesting to note, however, that the U.S. Supreme Court in the recent case of *Franklin v. Gwinnett County Public School*, has ruled that students who have been sexually harassed by teachers or other board employees may sue the school board for such harassment.\(^{42}\) In the United States, as in Canada, sexual harassment is treated as sexual discrimination.

The United States Supreme Court decision in *Franklin* overturned a ruling by a federal appeal court in Atlanta. That Court had dismissed a suit brought against a Georgia school district by a high school student who charged that school officials had failed to stop a teacher forcing unwanted sexual attention on her for more than a year. The *Franklin* case was initiated with a lawsuit filed by Christine Franklin against the Gwinnett County Georgia School System. Franklin, then a high school student, contended that for over a one year period a teacher had pursued her and forced sexual relations on her. She said that school officials were aware of the situation but that they took no action to stop it and discouraged her from pressing criminal charges. The teacher eventually resigned and the school closed its investigation. The Federal District Court in Georgia dismissed Franklin's lawsuit in a decision that the United States Court of Appeal for the 11th Circuit affirmed in 1990. The U.S. Supreme Court ruling overturning the lower court judgements entitled the student to sue the school district for failing to take action against an employee who knew or should

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\(^{42}\) Unreported, No. 90-918, February 26, 1992.
have known was sexually harassing a student.  

2. **Charter Challenges**

Two years after the entrenchment of the Charter's equality rights section, an Ontario teacher launched a constitutional challenge alleging sexual discrimination on the part of her professional federation. In *Tomen v. The Federation of Women Teachers' Association of Ontario (FWTAO)*, a female teacher alleged that being forced to belong to a women's affiliate of the Ontario Teachers' Federation contravened the constitution's guarantee of equality. In Ontario, the provincial teachers' federation is the Ontario Teachers' Federation (OTF), a body created by statute. One of the bylaws governing the OTF provides for compulsory membership for all female teachers who are assigned to an elementary public school in an affiliate of the OTF, namely, the FWTAO. The teacher initiating the

43 Following the reasoning of courts in both the United States and Canada, it could also be possible for a school board to be held vicariously liable for permitting one student to sexually harass another student. For a Canadian case where one student was found guilty of harassing another student see *A. v. E.*, Unreported, March 12, 1992 (Ontario arbitration).

44 (1987), 61 O.R. (2d) 489 (H.C., aff'd (1989) 70 O.R. (2d) 48 (Ont. C.A.). On March 31, 1994 a single-member Board of Inquiry constituted under the Ontario *Human Rights Code* released a 355-page decision in a human rights challenge advanced by Tomen against the FWTAO and the OTF. In brief, the Board of Inquiry determined that the requirement that female elementary teachers be members of the FWTAO constitutes sexual discrimination under the *Human Rights Code*. As of April 1994 it was not clear whether the FWTAO or the OTF would appeal this decision.


46 Three other teachers challenged the bylaws on the basis of religion. In Ontario teachers who teach in separate schools are required on the basis of religion to belong to another affiliate of the OTF.
challenge asserted that this bylaw discriminated against her on the basis of her sex, contrary to Section 15(1) of the Charter. In an interesting twist, the Ontario Public School Teachers’ Federation (OPSTF), a predominantly male organization, assisted Tomen in her challenge.

Tomen and the OPSTF maintained that the gender-based regulation contravened Section 15 of the Charter because it subjected teachers to unequal treatment on the basis of sex. The FWTAO -- which had a long history of advancing the cause of women teachers -- maintained that far from denying sexual equality, the regulation sought to advance equality rights for women teachers; that is, the membership requirement ensured that the FWTAO would remain an effective instrument for promoting equal conditions for women teachers. Thus, both parties invoked the equality provisions of the constitution, with one side using the Charter to attack the gender-based regulation, and the other to defend it.

For its part, the court considered the application of the equality provisions at length, finally side-stepping the Charter issue entirely by concluding that the bylaw was a corporate regulation governing internal private (as opposed to governmental) matters, and therefore outside the scope of the Charter. Accordingly, the court dismissed the teacher's complaint against the OTF. In the course of this much-criticized judgement,47 Mr. Justice Ewaschuyk observed that, in his view, the Charter was not intended to be "the universal panacea that legal scholars expected it to be." Moreover, he explained, he did not advocate that the Charter be used as a vehicle allowing individuals to "tyrannize a group." The preceding

statement illustrates the strong residual attitudes which are derived from an established internal legal culture which may linger on after radical changes in a country's constitutional architecture and public attitudes.

To date there have been very few cases of alleged sex-based discrimination brought by students against school boards in Canada. This trend may be reversed in the 1990s as students being educated in a more rights conscious legal culture begin to more actively challenge school boards to maintain and foster "gender-friendly" learning environments. In the United States, one area in which students have asserted gender equality claims has related to sports teams. Thus, for example, in one case a court ruled that it was unconstitutional for a school board to deny girls the right to join a boys' tennis team and a cross-country skiing team where no such teams had been established for female students. In another case, a court ruled that female students were entitled to participate in any sport for which there was a boys' team, but not a girls' team. In yet another case, a court ruled

An interesting example of how children are attempting to utilize the Charter to advance their rights was recently illustrated in an Ontario case involving five children ranging in age from 3 to 13. The children argued that the Immigration Act's provisions prohibiting them from challenging the deportation of their guardian infringed their rights under Section 7 and 15 of the Charter. Through their lawyer the children sought legal standing to intervene in their guardian's constitutional challenge of the Immigration Act. On July 15, 1993, Mr. Justice Michael Moldaver of the Ontario Court's General Division ruled that the children undoubtedly have an interest in their guardian's court case and could be adversely affected by the outcome. The judge also ruled, however, that the legal issues are so diverse and complex that a court case involving the children and the guardian would be too unwieldily for a judge to sort out. As a result, he ruled that it would be inappropriate for the children to be granted legal status in the woman's case. Globe and Mail, July 15, 1993, p. 1 and July 16, 1993, p. A4.


that two girls who tried out and were placed on a boys' basketball team were entitled to remain on the team, even after the school board had created a separate girls' basketball team.51

This kind of American gender equality case was considered by the Canadian courts in a 1986 Charter case. In a sex discrimination challenge -- which had important implications for the public education system -- a young Ontario girl initiated a constitutional challenge against a provincial sports organization in the case of Justine Blainey and the Ontario Hockey Association et al.52 The Blainey case involved a 12-year-old girl who was prevented from playing on a boys' hockey team. Blainey's lawyers alleged that the gender-specific membership endorsed by the Association violated Section 15 of the Charter. Secondly, it was argued, the Ontario Human Rights Code, which provided that the prohibitions against sex discrimination in the Code were inapplicable "where membership in an athletic organization or participation in an athletic activity is restricted to persons of the same sex."

The Ontario Court of Appeal ruled that, like the Tomen case, the Association's regulations were "private" and therefore not subject to the protections against governmental discrimination contained in the Charter. However, the Court went on to rule that the provisions in the Ontario Human Rights Code exempting athletic activity from the Code's general equality rights guarantees, were unconstitutional and therefore of no force and


52 (1986), 54 O.R. (2d) 513 (Ontario C.A.); leave to appeal denied by the Supreme Court of Canada (1986), 58 O.R. (2d) 274.
effect. Ruling in Justine Blainey's favour, the Ontario Court of Appeal stated that participation in athletics is an important development of "health, character and discipline." While the court noted that in the field of athletic activity, distinctions that have a different impact on participants by reason of their sex may be reasonable, if there is a valid purpose for such a distinction, in this case no such purpose was established.

Justine's battle for equal athletic opportunities did not end with the Ontario Court of Appeal decision. Subsequent to the appellate court ruling, she was offered a position playing on a hockey team which purported to offer separate but equal athletic opportunities for female hockey players. Justine challenged this alternative arguing that the woman's hockey team did not provide an equal and acceptable sports opportunity. She alleged that the women's league offered approximately 50% less ice time; only had two, as opposed to five levels of play available for the men's team; had a shorter playing season; prohibited body checking; and had other inferior qualities, including less media coverage. The Human Rights Board of Inquiry reviewing her complaint found in favour of Justine, and ruled that the refusal to allow the girl to play on a men's hockey team was contrary to the Ontario Human Rights Code.53

3. **Employment Equity: The Impact of the Charter on Legislation**

During the three year period (1982-1985) that the provincial and federal governments reviewed legislation with a view to harmonizing statutory enactments with the Charter's

equality guarantees, interest groups and women's organizations began to place considerable pressure on government officials (and private enterprises) to enact "employment equity" legislation and practices. Without such legislation, it was argued, the Charter's equality guarantees were meaningless. In particular, governments and private businesses were urged to implement "pay equity" legislation in order that the salaries and working conditions of women employees, which traditionally had lagged behind that of their male counterparts, could "catch-up" to that of male employees.\(^{54}\)

During the 1982-1985 period, Judge Rosalie Silberman Abella, who had been appointed as the Royal Commissioner charged with enquiring into employment equity issues for the federal government, released a two-volume study recommending various measures the federal government should take in order to give substance to the equality guarantees contained in Section 15 of the Charter.\(^{55}\) Her recommendations were supported by trends reported by Statistics Canada which revealed, for example, that in 1990 women in fulltime jobs earned 67.6% of what men did.\(^{56}\) Notwithstanding these trends, Judge Abella's recommendations, and other initiatives spearheaded by the public sector unions\(^{57}\) and women's groups, by the early 1990s a good deal of controversy still existed regarding the

\(^{54}\) One of the major forces behind this pressure was the Abella Commission's report on gender equality that was commissioned in anticipation of the Charter's equality guarantees coming into force in 1985. Abella, *Equality in Employment*, 1984.

\(^{55}\) *Equality in Employment* (Canada: Minister of Supply and Services, April 1985).

\(^{56}\) This figure was up from 65.8% in 1989. As reported in the *Vancouver Sun*, March 7, 1992, p. 1.

\(^{57}\) In British Columbia, for example, most collective agreements between school boards and non-teaching employees have recently been negotiated to include pay equity provisions.
concept of employment equity. For example, in a 1992 survey conducted by Southam Business Monitor, 321 business leaders were interviewed about the issue of gender equity and pay equity programs. While 6 out of 10 of the CEO's interviewed suggested they were in favour of pay equity for female government employees, 66% disapproved of a similar program for the private sector. Of those interviewed, 79% said that they already had a formal pay equity program in place. Only 21% said they did not have a pay equity program.\(^{58}\)

As the issue of gender equity assumed an increasingly high profile in the latter half of the 1980s and early 1990s some Canadian governments did take legislative initiatives aimed at ameliorating the historically disadvantaged position of women in the work force, including public sector education employees. In general terms, the legislation designed to protect women from employment and pay discrimination evolved through four distinct phases. The first phase included statutory initiatives designed to promote the idea of "equal pay for equal work." This concept suggested that male and female employees should be paid the same salary for doing identical work. For example, a male and female school custodian under this legislation would be required to be paid the same wages. The second phase of employment equity initiatives included the notion of "equal pay for similar or substantially similar work." In this paradigm, even though male and female employees might have different job titles, if they performed substantially the same work (e.g., male custodians and female cleaners), employers were required both male and female employees to be paid equal wages. The third development related to the idea of "equal pay for work of equal

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\(^{58}\) Vancouver Sun, March 7, 1992, p. 1.
value." This concept differed significantly from the two preceding principles because it did not compare "work", but rather the "value" of work. Value was to be determined according to this concept by job evaluation techniques. Thus comparisons could be made between dissimilar jobs, i.e., a school board typist and a bus driver, and if job evaluation criteria indicated that the work was of similar value, pay scales would have to be adjusted accordingly. The theory behind this concept was that women traditionally received less pay for work of similar value that was performed by male employees. Finally, and the least evolved of the four employment equity concepts, was the notion of "pay equity." The concept of pay equity was based on an assumption that pay discrimination against women is endemic in the Canadian socio-economic system, and thus necessitates a comprehensive and systemic remedy. Pay equity legislation does not only prohibit wage discrimination, but also places positive obligations on employers to review their wage practices and policies, and to ensure that such practices and policies complied with any pay equity legislation.59

Employment equity legislation in each of the four areas discussed above varied considerably from one province to another by the early 1990s. In some provinces, for example, pay equity -- the most far-reaching employment equity concept -- was contained in new legislative provisions, while in other provinces the this issue was not addressed by statute, but was rather left to unions to negotiate in collective agreements governing working conditions. Potentially significant cost increases to employers instituting pay equity schemes

59 For a more detailed discussion of these various employment equity initiatives see, for example, D. Rhys Phillips, "Equity in the Labour Market: The Potential of Affirmative Action," pp. 49-112; and Margrit Eichler, "Applying Equality in Employment," pp. 205-214, both in Abella, Equality in Employment, Volume II.
-- particularly onerous in the recessionary economic climate of the early 1990s -- often contributed to employers' reluctance (both in the private and public sectors) to introduce pay equity schemes.

(a) Ontario's Public Education Pay Equity Program

Ontario -- which has both well-organized and institutionalized teacher unions -- was one of the first provinces to implement pay equity legislation that impacted on the public education system.\(^6\) Thus, the stated purpose of Ontario's 1987 Pay Equity Act\(^6\) was to: "...redress systemic gender discrimination in the compensation of employees in female job classes." In the Ontario legislation's pay equity scheme, systemic gender discrimination was to be identified through comparisons of male and female job classes in terms of compensation and work performed. Pay equity was deemed to have been achieved under the statutory scheme when "the job rate for the female job class that is the subject of the comparison is at least equal to the job rate for a male job class in the same establishment where the work performed in the two job classes is of comparable value." Judging from the experience in the United States with affirmative action programs, it was anticipated that the implementation of Ontario's pay equity legislation in the public school system would be a

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\(^6\) Other provinces with pay equity legislation include Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, and the Yukon. Federal employees are also governed by pay equity legislation.

\(^6\) Pay Equity Act 1987, S.O. 1987, c. 34, as amended.
complex and longterm undertaking.62

As part of Ontario's employment equity program, a provincial Pay Equity Tribunal was established which was designed to hear appeals of pay equity designations made by public sector employers, including school boards. By the early 1990s, this Charter-inspired legislation had spawned another avenue of asserting rights claims, with boards and employee unions' appealing decisions to both the Pay Equity Tribunal, and also to the Ontario courts.63 Ontario's pay equity legislation, and the legal challenges arising from the new statute provided early examples of how the post-Charter evolution of rights consciousness and rights assertion by women employees in particular had an indirect impact on the administration of public education. As in other areas of gender equality, the issue of employment and pay equity in the public education sector will likely receive more attention from litigants and Canadian courts in the years ahead.

III. CHAPTER SUMMARY AND IMPLICATIONS FOR LEGAL CULTURE

There has been a very close relationship between gender equality issues and Canadian constitutional development in the decade after 1982. The basis for that


63 For example, in the area of public education two Ontario school boards petitioned the Ontario Divisional Court to review an order made by the Pay Equity Hearings Tribunal which had ordered the school boards to increase the salary of certain employees: Wentworth County Board of Education et al. v. Wentworth Women Teachers' Association (1991), 80 D.L.R. (4th) 558.
connection is undoubtedly related to two trends: (1) the fact that women have been the numerically largest minority traditionally disadvantaged in Canadian society, and; (2) the enhanced role of women in Canada's legal community during the last decade. As a result of these trends, gender equality issues have had a major impact on the broader transformation of Canadian legal culture. As pointed out in Chapter 1, changes in legal culture may be thought about as "social pressure in the air," when such pressures are communicated to members of the legal community (i.e., lawyers, judges, legislators) who, in turn, process these demands. Changes in the level and shape of public expectations, changes in the very definition of what is "legal" in people's minds, ideas about what is possible, what is natural and what is feasible through the law are all descriptive of different aspects of legal culture. Moreover, general feelings reflected in a legal culture regarding fundamental issues of liberty and freedom, or "rights," reflects the broader level of "rights consciousness" in a society.

The analysis in this chapter revealed that gender equality issues arising in Canadian

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64 Madame Justice Bertha Wilson recently pointed out that at the time of her appointment to the Supreme Court of Canada in 1982, gender bias still represented a strong force in the higher ranks of the country's judicial establishment: "I couldn't have [spoken out] because I think there was a fair measure of apprehension on the part of the members of that court about having women join that group. I realized that there was going to have to be a period of probation, of having to prove myself." It was only in 1990 that Wilson delivered a speech at Osgoode Hall Law School acquainting the public with her own views on gender bias, and her commitment to broadening awareness about that bias throughout the Canadian legal system. Susan Lightstone, "Bertha Wilson: A Personal View on Women and the Law," The National, Vol. 2, No. 7 (August/September 1993), pp. 13-14.

society over the last decade, and particularly the expression of those issues in the Canadian public school system, constituted an important area of expanding rights consciousness, and also inferential evidence of an important transformation underway in Canada's internal and external legal culture. Thus, litigants making gender equity claims attempted to make inroads into discriminatory policies and practices in the field of education by utilizing several techniques such as Charter litigation, the advancement of human rights claims and rights arbitration, and also lobbying for legislative changes. Using these different avenues of legal recourse women in the public education system challenged a variety of discriminatory practices including: the segregation of women teachers within a professional association; the denial of employment opportunities within the educational setting on the basis of gender; inequitable salary structures; and the sexual harassment of women teachers and students.

All these efforts reflected changes with respect to societal perceptions concerning mandatory rights for women. At the beginning of 1994 many agenda items relating to the advancement of non-discriminatory policies and practices in the Canadian education setting still had not been addressed. However, as the American experience examined in this chapter's case study illustrated, it would likely only be a matter of time before both the attitudes expressed by Canadian women in the external legal culture, and those embraced by members of the legal community, will result in further recognition of expanded rights for Canadian women within the educational setting specifically and Canadian society more generally. Thus, in the realm of gender issues Canadians had clearly begun to alter their views about what was possible and feasible, as such views related to women's equality issues. Such new perceptions significantly advanced and modified Canada's legal culture in the
decade after 1982. It is very difficult to make a definitive claim of a cause and effect relationship between the *Charter* and the expansion of women’s rights -- and indeed counter-arguments to that view have been vocally advanced -- but there seems little doubt that in Canada’s new constitutional context gender equality issues have assumed a higher profile and that some degree of progress has been made.
CHAPTER 6
THE CHARTER AND RELIGION:
MORAL VALUES IN CANADIAN PUBLIC EDUCATION

What unites freedoms in the American First Amendment [and] s. 2(a) of the [Canadian] Charter...is the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or constrain its manifestation....It is this same centrality that in my view underlies their designation in the Canadian Charter of Rights and Freedoms as "fundamental."

Supreme Court of Canada (1985)

Debate regarding the best way to teach moral values in the Canadian public education system, and what impact post-Charter constitutional changes should have on such educational policies, have become controversial school law issues during the last decade. Indeed, shortly after the Charter's adoption, the Supreme Court of Canada signalled a change in its attitude toward the place of religion in Canadian society. Addressing a constitutional challenge to Sunday shopping legislation, the Supreme Court of Canada thus endorsed "the centrality of the rights associated with the freedom of individual conscience." Encouraged by such Charter rulings, parents who either oppose religious content in the schools as a means of teaching moral values, or who decry the lack of Christian values in the public school curricula proceeded to initiate several interesting and influential Charter-


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inspired challenges. This chapter will examine Canada's changing legal culture through an exploration of the impact of the constitution on the role of religion in the public school curricula. Particular attention will be devoted to the controversies surrounding school prayer, religious exercises and instruction, as well as the contentious use of curriculum materials which allegedly promote the "New Age" religion of secular humanism.

I. CHURCH AND STATE IN CANADA: THE HISTORICAL BACKGROUND

In contrast to the United States, where all public schools are organized along secular lines and government funding is denied to denominational schools, Canada's public education system has traditionally been characterized by a distinctive blend of modern secularism and selective public support for denominational education. Unlike the republican-minded American founding fathers, public policy-makers in early 19th century Canada were much more influenced by the dominant and powerful sectarian forces of the day. In Upper Canada (later Ontario), for example, political power was wielded by those

3 However, as part of the controversial debate in the United States about "school choice" and a "voucher" system for education, the California legislature proposed to include in a November 1993 state referendum the question of whether public funds (US$2,600 for each child) should be made available to students attending private or parochial schools. New York Times, August 4, 1993, p. B8.

4 Parliamentary monarchies during the modern period -- the prototype being Great Britain -- have tended to separate the civic from the religious, but there still exists a strong connection between the two through the head of state, the monarch, also being the head of the church. This situation creates a symbolic mixture of the civic and religious realms, that is, in popular consciousness the head of state is also the religious head. This notion carries over in British influenced parliamentary monarchies around the world such as Canada, and distinguishes them from republics such as the United States. It is interesting to note that
associated with the Church of England, and in Lower Canada (later Quebec) by those associated with the Roman Catholic church. Given the pervasive and important influence of the Protestant and Catholic denominations in the governments of Upper and Lower Canada, it was natural that religion constituted a major dimension of the public school curriculum. Canadian educators in the 19th century believed that religion was the cornerstone of character development and the vehicle by which moral values were instilled in young children. Indeed, because religion played such an important role in moral education, religious training was considered to be more significant than traditional academic subjects such as literature or mathematics. In this spirit, the Right Reverend John Strachan, the Church of England's first bishop of Toronto, asserted: "Knowledge if not founded on religion is a positive evil." Dr. Egerton Ryerson, a Methodist minister and the Chief Superintendent of Education for Upper Canada between 1844 and 1876, agreed with Strachan's view of religion and education and endorsed the teaching of "common Christianity" in all spheres of the public school curriculum. Expressing his commitment to this educational philosophy, Ryerson asserted in a lecture in 1847:

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even in republics where the monarch is absent and there is some principle of separation of church and state, it is not unusual to find some symbolic religious dimensions, e.g., legislatures may open with prayers and the pledge to the flag may acknowledge "one nation under God."

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I do not regard any instruction, discipline, or attainments, as Education, which does not include Christianity....It is the cultivation and exercise of man's moral powers and feelings which forms the basis of social order and the vital fluid of social happiness; and the cultivation of these is the province of Christianity.⁶

During the 20th century, government financed non-denominational schools were gradually replaced in Canada by schools organized on either a sectarian or secular basis.⁷ In both systems, however, religion was still viewed as an integral and necessary element of moral education. For example, a 1950 Royal Commission sponsored by the Ontario government suggested that religious and moral education were necessarily one in the same:

Without proclaiming any creed or doctrine we know that in our democracy the Christian ideals as personified and exemplified by Jesus have an appeal to all persons of good will, and are the surest common ground for an educational programme related to the pupil as a person. The attitude of Jesus toward children, His understanding of human nature and behaviour, His charity and loving kindness toward all men, form a perfect model for a true democracy in the classroom, the community, and the nation.⁸

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⁸ *Hope Royal Commission on Education* (Toronto: Queen's Printer, 1950).
Prior to the adoption of the Charter of Rights and Freedoms in 1982, religious instruction in secular public schools along the lines advocated by Ryerson over 100 years ago remained prevalent in contemporary Canada. The increasing ethnic, racial, and religious heterogeneity of Canadian society prompted growing criticism, however, that the traditional relationship between public education and Christianity in Canada was unsuitable and anachronistic.

In the 1960s and 1970s many educators and school officials called for the fuller secularization and modernization of the public school curriculum, advocating a Canadian version of church-state separation. Implicit in this philosophical and policy perspective was the conviction that teaching religion was not the only way, or even the best way, of instilling moral values. Advocacy of church-state separation naturally stimulated broader discussion and questions concerning the role of religion in the public school curriculum. In 1966, for example, the Ontario Ministry of Education commissioned a major study of religious and moral education in the Ontario public school curriculum, which culminated in the controversial 1969 Mackay Report on Religious Information and Religious Development. The Mackay Commission speculated that its findings would arouse controversy in at least three areas:

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While recognizing the duty of public education to foster "character-building," the Mackay Report also recommended the separation of moral and religious education programs.\textsuperscript{11} Moral education should not, according to the Commission, be equated with indoctrination in specific religious precepts; rather, it should offer students an awareness of how individuals arrive at moral judgments and decisions. The Report also suggested that religious education should be limited to factual information about the various religious positions present in society. The Ontario Government cautiously reviewed the Mackay recommendations, waiting until 1974 before revising moral and religious education programs in accordance with the Commission's findings. Announcing a novel departure from traditional curriculum development the Ontario minister of education rhetorically asked:

Can we develop a system of moral education that is not based on a definite foundation of beliefs such as are found in a religion? I think we probably can, and a good start has already been made. In doing so we must be careful to present a program that eliminates any narrow sectarian approach. Perhaps, then I have already implied my answer to the question, "Should we attempt moral education in the public schools?" For me, both as a private citizen and as Minister of Education, the answer


\textsuperscript{11} It is interesting to note that despite its recommendations to separate moral education from religious instruction, the Commission still expressed the view that religious exercises (e.g., Bible reading and prayer) were essential components of the public school curriculum.
must be an unqualified "Yes". 12

If religion were removed as the moral guide to education, as the Mackay Report suggested, what philosophy should provide a moral foundation for the public school curriculum? This question was addressed by the Moral Education Project of the Ontario Institute for Studies in Education (OISE), the architects of the revised education curriculum. OISE's educational specialists argued that an "ultimate life goals" or "reflective values" approach should be central to any viable program of education that could be expected to promote a moral education:

Discussion with teachers and students and detailed interviews continue to confirm that the great majority of human beings pursue ultimate life goals or fundamental human (and humanistic) values, such as survival, happiness (enjoyment, pleasure, etc.), health, fellowship (friendship, love, etc.), helping others (to some extent), wisdom, fulfilment (of our capacities), freedom, self-respect, respect from others, a sense of meaning in life, and so on.13

As anticipated by the Mackay Commission, the OISE proposals provoked a public outcry by various individuals and organizations. One of the criticisms levelled by fundamentalist Christians concerning the reflective values approach was that the approach did not constitute a secular philosophy at all, but rather replaced Christian values with the "religion of secular education".


humanism." Asserting that the proposed curriculum would "greatly elevate the undisclosed religion of secular humanism in the schools," and that "the religious face that lies behind the secular philosophy of education" must be unmasked, one conservative Christian group suggested:

It is not a question of whether or not religion will be taught. The question rather is what religion will be taught and how it will be taught. For example, if the teacher communicates that the greatest value in life is "success - in terms of prestige, wealth, or power - then a particular religious attitude, loosely called the "American way of life" has been taught. So whether it is understood as religion by either the educator or the student, religion is an integral part of all teaching which interprets the meaning of life or its depth values. While children are not allowed to be introduced at school to the basic principles of the Christian Faith, they are being constantly indoctrinated in the Faiths of Secular Humanism and allied religions.¹⁴

Despite such opposition from conservative Christian groups across Canada, provincial ministries of education gradually moved toward an increasingly secular public school curriculum during the 1970s through to the early 1980s. Notwithstanding this trend, by the time the constitution was entrenched in 1982, many provincial education statutes still prescribed mandatory religious exercises comprised of Christian school prayer, bible reading, and some religious instruction.

As the next section of the chapter will discuss, parents of students opposed to these aspects of religious indoctrination were among the first litigants to utilize the Charter's guarantee of religious freedom to challenge this aspect of the public education curriculum. The concern manifested by such activists respecting these issues (closely paralleling the

activity of their peers in the field of special education discussed in Chapter 3), was an early indication that Canada’s new constitutional environment with regard to the question of rights would be utilized in the sensitive area of church-state relations, and was also a precursor of emerging changes in the country’s legal culture.

II. SCHOOL PRAYER AND RELIGIOUS EXERCISES: THE FIRST ROUND OF CHARTER CASES

1. The Zylberberg Case

Twenty years after the Mackay Report was commissioned, the controversial question of how to teach moral values in the public education system resurfaced in Canada’s first constitutional school prayer case. In the 1986 case of Zylberberg v. Sudbury Board of Education,\(^\text{15}\) several Ontario parents challenged a regulation made under the Ontario Education Act\(^\text{16}\) which stipulated that Ontario’s public schools must offer compulsory religious exercises. The legislation also provided that should students have a religious objection to participating in this aspect of the curriculum they could, upon parental request, be exempted from the religious exercises. The petitioners in the Zylberberg case raised two main objections to the legislation. First, they contended that requesting exemption from religious activities pressured or coerced pupils into participating in the exercises, thereby

\(^{15}\) (1986), 55 O.R. (2d) 749 (Ont. Div. Ct.).

\(^{16}\) R.S.O. 1980, c. 129. Section 28(1) of Reg. 262, R.R.O. 1980, stated: "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."
infringing their constitutional right to freedom of conscience and religion under Section 2(a) of the Charter. Second, they charged that the same regulation -- which only prescribed Christian religious exercises -- discriminated against non-Christians contrary to the constitution's equality guarantees.17

The majority of the three-member Ontario Divisional Court panel which heard the case was not persuaded by either of these two arguments and dismissed the parents' claim. In ruling against the parents the two members of the court concluded that the Ontario Education Act provisions were not unconstitutional, and that pressure tending to influence a pupil to participate in religious exercises against the dictates of the student's conscience did not violate the student's freedom of conscience or religion. With respect to the equality argument raised by the plaintiffs, Mr. Justice O'Leary who wrote the court's majority judgement, ruled that the regulation was not discriminatory because it did not stipulate specific Christian exercises. Stating his position on the issue of "religious tolerance," Mr. Justice O'Leary remarked:

Where a country is founded on the principle of the supremacy of God there is no obligation on the schools to spend the same profit reinforcing the belief of non-believers that God does not exist as in teaching believers about the nature of God. Religious exercises for those who wish to take part, in the absence of any attempt to support the proposition God does not exist is no more than a reasonable limit, prescribed by law, reasonably justified in a free and democratic society, on the right of a non-believer to equal educational benefit.18

17 Section 15(1) of the Charter provides that every individual is equal "before and under the law" and guarantees every one the "equal benefit and equal protection" of the law, regardless of ethnic or religious origin.

Mr. Justice O'Leary went on to voice his moral convictions regarding the exercise of Christian exercises in public schools:

Our schools have an obligation to teach morality. While some may argue that morality can be taught without associating it with God, few would deny that in the minds of most persons morality and religion are intertwined and that to associate God and morality is an effective way of teaching morality.  

Moreover, he asserted, because Canadian society is founded on the supremacy of God -- and considering that regular church attendance is the exception rather than the rule -- care must be taken not to put "unnecessary obstacles" in the way of public schools "bringing our children in touch with God by prayer, reflection and meditation as a means of instilling in them the morality required for social order and individual happiness."

Another member of the panel disagreed with the majority ruling in the Zylberberg case, and concluded that the Education Act regulation was contrary to Section 2(a) of the Charter. Suggesting in his dissenting judgment that the quality of freedom of any society is measured by the way it treats its minorities, Mr. Justice Reid concluded that any form of religious exercises violates the Charter's guarantees of universal equality and freedom of

19 Ibid., p. 720. It is interesting to note that Mr. Justice O'Leary reinforced this view by referring to the 1950 Hope Commission on Education which advocated the teaching of morals through religion. "In my view it is as true today as it was in 1950 when these words appeared in the Hope Commission Report on Education in Ontario that "religion and morality, though not sectarianism, must have a central place in any system of education." He did not mention, however, the more recent Mackay Report, which abandoned this earlier view in favour of a secular approach to morality. The Mackay Report is discussed, however, in the Zylberberg dissenting opinion (p. 727).

20 Ibid., p. 721.
conscience and religion. Moreover, while recognizing the importance of teaching moral values in the public school system, he did not agree that religious exercises constitute the "cornerstone" of a moral education. "I accept that [religious exercises] may be helpful," Mr. Justice Reid remarked, "but necessity I cannot accept. I have, in my time, met dedicated non-religionists who are nevertheless moral."  

Interestingly, one of the central concerns addressed by the Divisional Court's dissenting opinion was the allegation often made by conservative Christians that secular humanism constituted a religion. The issue of secular humanism arose in the context of the Zylberberg case when, in reaction to the legal challenge, the Sudbury School Board had offered to substitute the Christian scripture traditionally read in Sudbury schools with the Toronto School Board multi-confessional publication, "Readings & Prayers for Use in Toronto Schools."  

Toronto's multi-confessional approach to religious exercises, the Sudbury School Board maintained, would satisfy both the mandatory regulation for school prayer and the constitutional requirements of equality and freedom of religion. While commending the Toronto School Board collection for "saluting the multi-cultural diversity of Toronto," Mr. Justice Reid did not agree with the Sudbury School Board that the readings would satisfy either the regulatory or the constitutional requirement. With respect to the school prayer regulation, for example, he ruled that many of the Toronto selections were not even remotely religious. In particular, the judge disagreed with the assertion in the Toronto readings that "secular humanism" could be defined as a "religion."

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21 Ibid., p. 731.

Is secular humanism a religion? Many people, both humanist and other, would argue that it is not. On the other hand, both theists and humanists...take the contrary position. Some theists may try to limit religion to theism, a definition which eliminates some other important Eastern religious traditions. It also fails to recognize the element of faith in the secular world view. The faith is different from that of the theist, but is nevertheless faith, and a number of humanists find no contradiction in affiliating with bodies that call themselves religious. Some humanists argue that what others believe is religion but what they themselves believe in anti-religion. But it can be held that their anti-religion is also a religious perspective.23

Encouraged by the Divisional Court's strong dissenting judgement, parents of the children opposed to the mandatory religious exercises, appealed the majority decision. On September 23, 1988, the Ontario Court of Appeal overturned the lower court Zylberberg decision and ruled that the regulation in the Ontario Education Act mandating school prayer was contrary to Section 2(a) of the Charter.24 In a 4-1 opinion, the Court of Appeal concluded that requiring public school students to participate in school prayer is "antithetical" to the constitution's objective of promoting freedom of conscience and religion. Moreover, the Court remarked, "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."25 Overturning the Divisional Court majority opinion, the Court of Appeal rejected the argument that the


school prayer exemption in the regulations to the Education Act -- which allowed students to abstain from prayer at parental request -- offered genuine freedom of choice for religious minorities. The exemption provision, according to the court, served to impose a penalty on pupils from religious minorities who utilized it, "by stigmatizing them as them as non-conformists and setting them apart from their fellow students who are members of the dominant religion." Moreover, the court pointed out:

While the majoritarian view may be that s. 28 [of the Ontario Education Act regulation] confers freedom of choice on the minority, the reality is that it imposes on religious minorities a compulsion to conform to 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...are real and pervasive and operate to compel members of religious minorities to conform with majority religious practices.26

As in earlier Supreme Court of Canada decisions considering the Charter's guarantee of religious freedom, the Ontario Court of Appeal's conclusions in the Zylberberg case were based in large measure on U.S. decisions relating to the guarantee of religious freedom in the First Amendment to the U.S. constitution. Thus, notwithstanding the differences in wording between the religious freedom clauses in the U.S. and Canadian constitutions27, the Court of Appeal relied on two landmark American school prayer cases from the 1960s

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26 Ibid., p. 655.

27 The First Amendment to the American Constitution states that "Congress shall make no law respecting an establishment of religion." This "establishment clause" as it has come to be known is the basis for the separation of church and state which characterizes the American system.
which ruled that mandatory religious exercises were unconstitutional. Referring to the two U.S. cases of *Abington v. Schempp*\(^28\) and *Engel v. Vitale*\(^29\) the Ontario Court of Appeal remarked:

Two conclusions can be drawn from the American decisions. The first is that the absence of an establishment clause in s. 2(a) [of the Charter] 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 [U.S.] decision on school prayer, for our conclusion that the compulsion on students to conform and not exercise the right of exemption is a real constraint on the freedom of conscience and religion guaranteed by the Charter.\(^30\)

Thus, in the Ontario court's view, the essence of the concept of freedom of religion is the "right to entertain such religious beliefs as a person chooses," and the right to be free from a compulsion "to conform to the religious practices of the majority." Like the American constitution, the decision pointed out, the Canadian *Charter of Rights and Freedoms* serves to "safeguard religious minorities from the threat of the tyranny of the majority."

The *Zylberberg* case constituted a fundamental benchmark in Canadian jurisprudence and was also a key indicator that a profound change was occurring in Canada's legal culture. Traditional resistance and obstacles in the Canadian legal culture with regard to the expansion of rights (see Chapter 2) -- a feature of the Canadian legal culture which

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\(^{29}\) 370 U.S. 421 (1962).

\(^{30}\) *Zylberberg*, 1988, p. 659.
distinguished it from trends south of the border -- were gradually being eroded by the impact of the *Charter* and the new mindset of Canadian legal professional and interest activists. After Zylberberg, members of Canada’s legal community would not be surprised when important aspects of American rights-oriented jurisprudence would be selectively utilized and incorporated by Canadian judges to underwrite or uphold more expansive notions of minority rights.

2. *The B.C. and Manitoba School Prayer Cases*

By 1989 British Columbia and Manitoba were the only provinces requiring public schools to conduct religious exercises. Following the lead of the plaintiffs in the Zylberberg case, parents and students in both B.C. and Manitoba launched constitutional challenges to school prayer legislation that was similar to the statutory provisions attacked in Ontario's *Zylberberg* case.

In 1986 the B.C. Civil Liberties Association, along with two mothers of school-age children, challenged legislative provisions in the B.C. *School Act* that authorized mandatory school prayer and bible reading. At the time the court case was initiated recitation of Christian school prayer and Christian bible readings were widespread in British Columbia classrooms, particularly in rural areas and in elementary schools. The central concern of the parents in the school prayer case of *Russow and Lambert v. Attorney General of B.C.*[^31](#) was that the mandatory education legislation compelled their children to follow a particular

religious belief. At issue in the case was a provision in the B.C. *School Act* which stipulated:

All public schools shall be opened by the reading, without explanation or comment, of a passage of Scripture to be selected from readings prescribed or approved by the Lieutenant Governor in Council. The reading of the passage of Scripture shall be followed by the recitation of the Lord's Prayer, but otherwise the schools shall be conducted on strictly secular and nonsectarian principles. The highest morality shall be inculcated, but no religious dogma or creed shall be taught.32

As in Ontario, a regulation to the B.C. legislation further provided that children could be exempted from the religious exercises should their parents make that request.33 The parents in *Russow and Lambert* argued, however, that this exemption was coercive and insensitive to the views of minorities, and maintained that even though the mandatory school prayer legislation contained exemption options, the statutory provisions were contrary to Section 2(a) of the *Charter*.

Prior to the B.C. Supreme Court ruling, the B.C. Social Credit government -- headed by Premier Bill Vander Zalm and characterized by a strong conservative Christian element34 -- toyed with a possible compromise solution to the school prayer issue, namely,

32 Section 164, R.S.B.C. 1979, c. 375.

33 Regulation 436/81, s. 140.

34 For example, in 1987 the B.C. government became the first provincial legislature to designate a special legislative "prayer room." Newspaper coverage reported that "ensconced in a third-floor room in the legislature building [about 25 people] spent an hour offering up prayers for B.C. Premier William Vander Zalm, Cabinet ministers, the opposition, even reporters....They prayed for tougher liquor laws, for no increase in gambling in the province; for "proper" legislation to be passed." The prayer room initiative was not surprising, originating as it did from a Premier who had expressed public support of certain policies and practices, (e.g., school prayer, an increase in private school funding, a ban on abortion clinics, curtailment of sex education, etc.) on the basis of his private Christian beliefs. Within less than one week, heated disputes erupted between different fundamentalist
the introduction of legislation requiring students to participate in a minute of silence each day. While the idea was novel for Canada, similar legislation in the United States had been struck down as unconstitutional, and before the provincial government had an opportunity to move ahead with the idea, the B.C. Supreme Court -- concluding that the mandatory school prayer legislation in B.C. was "indistinguishable" from the Ontario legislation considered in the Zylberberg case -- struck down the school prayer provisions in the B.C. School Act as unconstitutional. When the B.C. education legislation was revamped in 1989 the new legislation (Section 95) simply provided that: all schools "shall be conducted on strictly secular and non-sectarian principles," and that "the highest morality shall be inculcated, but no religious dogma or creed shall be taught in a school."35

Meanwhile in Manitoba, Premier Gary Filmon remained adamant that Manitoba's compulsory school prayer law would not be amended despite the B.C. and Ontario court cases. Manitoba's school prayer case had been initiated in 1986 under the province's human rights legislation, when a 17-year-old student, Christopher Tait, challenged his five-day expulsion from his rural Manitoba high school for refusing to stand for the Lord's prayer.36 The student, who was an atheist, said that if he stood during the reading of the Lord's prayer "it would be a tribute to the Lord God" and unacceptable to him. Tait was

individuals and groups with respect to control and scheduling of the room. Globe and Mail, March 19, 1987, p. 1. The room was abolished when the New Democratic Party took power in the province in 1991.

35 This language was framed by the B.C. Supreme Court in the Russow and Lambert case.

36 The Manitoba Public School Act, R.S.M. 1987, c. P250 provided local school boards with discretion authority to offer compulsory religious exercises. In this case, the local school board had authorized compulsory school prayer.
eventually reinstated in school and allowed to remain outside the classroom during prayer exercises. The student's human right case was eventually settled in 1989, but since then, another Charter challenge has been initiated against the Manitoba Public Schools Act legislation.

3. Religious Instruction and the Elgin Case

At the same time the various school prayer cases were being litigated, an Ontario school board -- reacting to pressure from conservative Christian parents and groups who opposed the increasing secularization of the public school curriculum -- adopted a new curriculum of religious education for its elementary schools. A number of Christian fundamentalist groups offered to assist in the instruction of the "comparative religion" component of the new public school curriculum. Thus, at the same time a group of Ontario parents had launched constitutional challenges aimed at removing religion from the public


38 Settlement Agreement, March 17, 1989.

39 Manitoba Association for Rights and Liberties, Jess Vorst and Ivan Polus v. The Government of Manitoba and the Minister of Education. The decision in the case was still pending as of early 1994.

40 Although it is beyond the scope of the topic addressed in this chapter, it is interesting to note that there have been some education-related Charter challenges concerning the religious freedom provisions of Section 2(a). These cases generally concern provincial compulsory attendance education laws. The courts, including the Supreme Court of Canada, have held in these cases that such mandatory attendance laws do not infringe the constitutional protections contained in Section 2(a). See, for example, Thomas Larry Jones v. Her Majesty the Queen, [1986] 2 S.C.R. 284; and R. v. Powell (1985), 39 Alt. L.R. (2d) 122.
school curriculum, other Ontario parents were endorsing the idea of introducing into the public school curriculum religion classes taught by fundamentalist groups.\textsuperscript{41}

The Canadian Civil Liberties Association (CCLA), which had been monitoring these developments in Elgin County, charged that the Christian fundamentalist groups were not in fact teaching comparative religion, but were rather seeking to propagate fundamentalist Christian doctrine under the guise of education. In support of this contention, the CCLA referred to lesson plan objectives designed by fundamentalist teachers which proposed "to teach students that the believer's task is giving of the Gospel to all the world." In addition, the CCLA contended, students were encouraged by the fundamentalist instructors to give money to help "the cause" and "to spread the Gospel" to their neighbours.\textsuperscript{42} Responding to allegations that they were using the public school system as a vehicle for religious indoctrination, the fundamentalists maintained that their focus on Christianity fell within the curriculum guidelines and a regulation under the Ontario \textit{Education Act} which required school boards to provide two, one-half periods a week "devoted to religious education" with instruction "by teachers, clergy, or lay people." Moreover, these groups referred to Ontario's religious curriculum guide, the 1949 "Brown Book" (that had been out of print and circulation for over a decade), which informed teachers that "the wakening and guidance of the spiritual sense in children is the first factor in creating the finest fruit in individual

\textsuperscript{41} Groups such as the Child Evangelism Fellowship, Christian Service Centres of Canada, the Scripture Union and the Bible Club Movement flourished in public schools in Ontario's smaller communities. For example, in the mid-1980s the Christian Service Centre of Canada taught religion in 42 schools in two Ontario counties.

\textsuperscript{42} \textit{Globe and Mail}, May 9, 1986, p. A2.
character, and consequently in the happiness and right development of the race."

When the Elgin County School Board refused to abandon its practice of allowing fundamentalists to teach religion courses, the CCLA launched a constitutional challenge against the school board which maintained that fundamentalist instruction in the public schools violated Section 2(a) and Section 15 of the Charter.\(^{43}\) In essence, the CCLA lawsuit maintained that instruction weighted in favour of Christian religious beliefs constituted religious indoctrination in the guise of education contrary to the constitutional guarantees to religious freedom and equality regardless of religious beliefs. On March 28, 1988, a panel of the Ontario Divisional Court ruled in a split decision that the Ontario education regulation governing religious instruction, and the use of evangelical Christians to teach religion courses, were not contrary to the Charter's religious freedom and equality sections.\(^{44}\) In a 250-page judgment, the majority of the court concluded that there was nothing in the regulation or the Education Act "which evinces a sectarian purpose of religious indoctrination in majority Christian precepts." Moreover, the Court noted the regulation could hardly be considered unconstitutional as it stipulated that issues "of a controversial or sectarian nature shall be avoided." Notwithstanding that evangelical "volunteers" had been used to teach the religion curriculum, the court concluded that one of the factors giving rise to its conclusion that the regulation was constitutional was that "the instruction is offered through the Board's teachers, rather than clergy-nominated surrogates

\(^{43}\) Author's interview with Alan Borovoy, General Counsel to the CCLA, May 1986.

\(^{44}\) Corporation of the Canadian Civil Liberties Association v. Ontario Minister of Education (1988), 64 O.R. (2d) 577.
whose self-interest and fervour may tend to colour the nature or content of their instruction.\textsuperscript{45}

Mr. Justice Austin dissented from the majority opinion, remarking that he had no choice but to conclude that the regulation "was calculated to permit the indoctrination of school children in Ontario in the Christian faith and that it is being used for that purpose at the present time." Therefore, in his view, the regulation was unconstitutional and should be declared void.

Largely on the strength of the court's dissenting opinion, the CCLA successfully appealed the majority opinion of the Divisional Court to the Ontario Court of Appeal.\textsuperscript{46} Thus, in 1990 the appellate court overturned the lower court decision, ruling that the Ontario Education Act regulation which authorized the Christian religious curriculum was unconstitutional. Of central concern to the appeal court was that the curriculum authorized by the education legislation taught students Christian doctrine as if it were the exclusive means through which to develop moral thinking and behaviour. It was this aspect of the legislation which, the court of appeal concluded, constituted "religious coercion" contrary to Section 2(a) of the Charter of Rights and Freedoms. Accordingly, the majority of the court maintained, in striking down the legislation:

The purpose of s. 28 [of the regulations]...is to permit indoctrination of school children in Ontario in the Christian faith....State-authorized religious indoctrination violates s. 2(a) of the Charter because it amounts to the imposition of majoritarian

\textsuperscript{45} \textit{Ibid.}, p. 685.

\textsuperscript{46} (1990), 71 O.R. (2d) 341.
religious beliefs on minorities.\textsuperscript{47}

III. THE FUNDAMENTALIST CHALLENGE TO PUBLIC EDUCATION: THE INFLUENTIAL U.S. EXPERIENCE

It is interesting that during the late 1980s and early 1990s, when Canadian parents and interest groups were initiating constitutional challenges aimed at removing Christian religious influences from the public school curriculum, church-state constitutional litigation in the United States was dominated by conservative Christian parents and interest groups who were attempting through court challenges to re-introduce Christian values into the public school curriculum. Thus, ironically while Canadian courts were adopting landmark U.S. Supreme Court rulings from the 1960s to support their constitutional decisions separating religious indoctrination from public school instruction, U.S. courts were re-examining those earlier decisions. Indeed, in many U.S. cases plaintiffs were beginning to make inroads on the traditional wall separating the church from state-sponsored activities, such as public education.\textsuperscript{48} Because of the important influence of the U.S. church-state

\textsuperscript{47} Ibid., p. 342.

\textsuperscript{48} For example in 1990, the United States Supreme Court considered the issue of whether extra-curricular religious school clubs were constitutional. In \emph{Westside Community Board of Education v. Mergens} 110 S.Ct. 2356 (1990), the U.S. Supreme Court concluded that public high schools must allow student prayer groups to meet and worship if other student clubs are permitted at school, and that such extra-curricular prayer meetings do not violate the constitutionally required church-state separation when high school religious groups are given the same access accorded to other extra-curricular activities. Critics of the decision argued that permitting Bible-study groups would mislead students into believing the school endorses a particular religion.
relationship on developments within the religious and judicial sectors of Canadian society, before turning to a discussion of the recent evolution of Canadian school/religion constitutional developments, it is useful to consider constitutional developments in the United States relating to the "religion" of secular humanism in the public school curriculum.

1. **Public Schools as Jungles: The "Destructive" Influence of Secular Humanism**

Seeking to reverse the alleged erosion of moral standards in contemporary society, the religious right in the United States chose the public school system in the mid-1980s and early 1990s as one of the major arenas in which to crusade for a "moral renaissance" grounded upon conservative Christian values. American fundamentalist Christians voiced particularly harsh criticism about the absence of Christian values and examples from the public school curriculum, maintaining for example, that "public schools have become conduits to the minds of our youth, training them to be anti-God, anti-moral, anti-family," and that public schools are "so fallen that they have become jungles."

In challenging the curriculum of the public schools, the fundamentalist right in the United States advocated a conservative religious agenda which included the censorship of

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school texts and library books, the elimination of sex education courses, the teaching of "creationism" as an alternative to the theories of evolution, and the introduction of school prayer and religious values in the public school curriculum. During the late 1980s and early 1990s members of the religious right were particularly vocal in their denunciation of the "anti-moral religion of secular humanism" in the North American public school system as the major obstacle to a moral and ethical education. Like the fundamentalist Christian critics of the secularized Ontario curriculum, the Christian right in the U.S. defined secular humanism as an anti-Christian "religion" that asserted the primacy of humans rather than God.

To a considerable extent, the fundamentalist opposition to secular influences in U.S. public education -- and especially secular humanist values -- derived from a basic disagreement over the constitutional separation between church and state which is inherent in the American system of government. Thus, the dynamism of the fundamentalist right in the late 1980s and early 1990s followed a long historical period during which there was considerable pressure by secular forces to eliminate any trace of religious teaching from the public school system. As a result of such pressures in favour of "secularization," fundamentalists charged that by the mid-1980s religious values had in large measure been purged from public schoolrooms. For example, the fundamentalists contended that American textbook publishers had adopted the commercially safe route of steering clear of

50 The term "creationism" refers to a Christian-based belief system which posits that the universe and all life did not evolve over long periods of time, but was created relatively recently by God.
religion and religious values as suitable subjects for their public school curriculum materials rather than attempting to reconcile conflicting viewpoints concerning important philosophical controversies (e.g., the contending theories of creation and evolution).\footnote{Fundamentalist concerns about the issue of school textbooks received some confirmation by two major studies of textbooks, which found, for example, that a widely used Grade 6 social studies text failed to mention God in its discussion of Joan of Arc, and that other books neglected to mention that Martin Luther King Jr. was a Baptist minister. One study was a federally financed report by Paul C. Vitz, a New York University researcher, and the other was sponsored by People for the American Way, a liberal lobbying group.} There was also evidence, the religious right charged, that school officials -- intimidated by lawsuits initiated by parents threatening to boycott schools that discussed "religiously offensive" ideas -- frequently advised teachers to avoid any reference to religion in the classroom.\footnote{In the 1986 publication "Religion in the Public Schools," the American Association of School Administrators suggested the following guidelines for teaching about religion: (1) the school may sponsor the study of religion, but may not sponsor the practice of religion; (2) the school may expose students to all religious views, but may not impose any particular view; (3) the school's approach to religion is one of instruction, not one of indoctrination; (4) the function of the school is to educate about all religions, not to convert to any one religion; (5) the school's approach is academic, not devotional; (6) the school should study what all people believe, but should not teach a student what to believe; (7) the school should strive for student awareness of all religions, but should not press for student acceptance of any one religion; and (8) the school should seek to inform the student about various beliefs, but should not seek to conform him or her to any one belief.} The removal of religion as a subject of study was especially troubling to many parents and organizations who maintained that public schools had the right to teach about religion\footnote{Ironically, Christian fundamentalists have been very vocal in rejecting classes on "comparative world religions." James K. Uphoff, Professor of Education at Wright State University, has commented, for example: "Most challenges to the public schools' teaching about religion comes from those who say "The truth is known, so you can't examine it critically." Education Week, November 26, 1986, p. 15.} based on the U.S. Supreme Court's 1963 decision in \textit{Abington Township v. Schemp},\footnote{374 U.S. 203 (1963).} which
prohibited Bible reading in public schools but expressly sanctioned non-sectarian religious education.

3. **The U.S. Secular Humanism Challenges**

(a) **The Smith Case**

In 1987, increasingly dissatisfied by the secular nature of the school curriculum, 624 parents, teachers and students -- the majority of whom were fundamentalist Christians -- sued an Alabama school board. The plaintiffs' central claim in *Smith v. Board of School Commissioners of Mobile County*,\(^{55}\) was that the school curriculum -- particularly 44 elementary and secondary school texts in home economics, history and social studies -- promoted the nontheistic religion of secular humanism while ignoring the important role of the Christian religion in American life. They charged, for example, that history and social studies texts systematically omitted references to the religious aspects of American history, neglecting key components such as the Puritans, colonial missionaries, women's suffrage, temperance, civil rights and the peace movement. Such omissions, the plaintiffs alleged, inhibited the free exercise of religion. Moreover, they maintained, imposing secular humanist beliefs through the public school curriculum was tantamount to enshrining the new religion of "secular humanism," which violated the separation of church and state.

In a surprising decision Alabama Federal District Court Judge W. Brevard Hand agreed with the allegations of the fundamentalist Christian parents, and ordered the removal of 44 textbooks from Alabama public schools. In a 172-page ruling, Judge Hand concluded that the school texts unconstitutionally promoted the "religious belief system of secular humanism," and omitted the role of Judeo-Christian religious teachings in American history. This decision represented the first recognition by a North American court that secular humanism constituted a "religion."

At the time of the Smith decision, secular humanism was a relatively new concept in litigation and many observers characterized the concept as a "term of art" relied upon by conservative Christians to explain all the shortcomings and evils present in North American society. One editorial columnist concisely described the scope and meaning of secular humanism as the concept was used by the fundamentalist plaintiffs:

To some adherents of the religious right, 'secular humanism' had a definite meaning. It stands for everything they are opposed to, from atheism to the United Nations, from sex education to the theory of evolution, to the writings of Hemingway and Hawthorne.

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56 The concept of "secular humanism" was mentioned as a footnote in the U.S. Supreme Court case of Torcasso v. Watkins, 367 U.S. 488 (1961), where the Court recognized in dicta (p. 495, n. 11) that secular humanism is "among the religions in this country which do not teach what would generally be considered a belief in God." It is unlikely that in 1961 the Court could have foreseen the legal implications of this passing reference. For other cases which also refer to, but do not resolve this issue, see: Grove v. Mead School Dist. No. 354, 753 F.2d 1528 (9th Cir.), cert. denied 106 S. Ct. 85 (1985); Malnak v. Yogi, 592 F.2d 197 (3d. Cir., 1979); Jackson v. California, 460 F.2d 282 (9th Cir., 1972).

Self-professed humanists conceded that humanism, along with the great world religions, involves a moral posture and expresses normative values. However, they did not agree with the Christian fundamentalist viewpoint that secular humanism is a religious movement in the conventional sense, i.e., a belief system that endorses a divine or supernatural authority dictating man's moral obligations and prescribing how man should lead his everyday life.  

Commenting on the Smith case, a supporter of the Mobile County School Board, thus observed:

I think this is the first time a religion has been defined and created by its antagonists. It might be called the emperor's new religion -- it appears to exist only in the eyes and minds of the beholders....It apparently means anything with which the religious right disagrees.  

The court order to remove the suspect textbooks from Alabama public schools -- at least some of the 44 books were used in 114 of Alabama's 129 school districts -- threatened to disrupt the completion of many of the 1987 spring semester activities. The Mobile County consequently appealed the court order. Describing the court-ordered immediate ban as a "draconian remedy," a federal appeals court temporarily suspended Judge Hand's order pending an appeal on the merits of the case. Shortly thereafter, the 11th Circuit appeals court reversed Judge Hand's ruling completely, concluding that his decision had improperly

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changed the constitutional requirement that the government should be neutral with respect to religion into an affirmative obligation for the government to speak about religion.\textsuperscript{60}

\textit{(b) The Mozert Case}

For many observers, Judge Hand's unusual ruling in the \textit{Smith} case represented judicial activism at its worst. If the case had not been part of a burgeoning litigation strategy by evangelical Christians aimed at eradicating the alleged anti-Christian threat to public schooling, observers would have simply dismissed the ruling as a bizarre anomaly. But similar litigation in other parts of the U.S. was also being upheld by district court justices. For example, in a 1984 Tennessee case, a group of fundamentalist Christian parents succeeded in obtaining a court order sheltering their children from the "godless influence" allegedly present in certain public school textbooks. Charging that the Tennessee textbooks promoted the "religion of secular humanism," the plaintiffs in \textit{Mozert v. Hawkins County Public Schools}\textsuperscript{61} requested that the District Court "protect" Christian children from schoolbooks "infected" with this creed. Asserting that "the word of God is the totality of my beliefs," one of the plaintiffs testified that she was offended by such stories as "A Visit to Mars," which she said seemed to embody thought transfer or telepathy and supernatural powers — beliefs which she considered were matters only within God's domain. Objections were also raised to Anne Frank's \textit{Diary of a Young Girl}, ostensibly because the young Jewish

\textsuperscript{60} 827 F. Supp. 684 (11th Cir., 1988).

\textsuperscript{61} 582 F. Supp. 201 (E.D. Tenn., 1984).
girl believed that having "some religion" was more important than having a particular religion; to *Cinderella*, because of its discussion of magic; to *MacBeth*, because of the presence of witchcraft; and to *The Wizard of Oz*, because it contains a "good" witch and implies that virtues can be achieved without the help of God. "Our children's imaginations have to be bounded," one plaintiff testified, after describing a reading exercise in which seventh graders were asked to imagine themselves a part of nature. Following the court ruling upholding the plaintiffs' claims, children in Tennessee school districts were provided with the opportunity to "opt out" of classes using textbooks that discussed, for example, the "philosophies" of super-naturalism, male-female role reversal, pacifism and situational ethics.

The Hawkins County school board appealed the court order, and just days before the 1987 appellate decision overturned the book ban in *Smith v. The Board of School Commissioners of Mobile County*, the *Mozert* decision was also reversed. In overturning the lower court decision, the appellate court concluded that public school students may be required to read and discuss textbooks even though the lessons do not reflect their religious beliefs.

Christian fundamentalists were handed another legal blow in 1987 when the U.S. Supreme Court ruled in a 7-2 decision that Tennessee legislation which permitted the

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62 *Education Week*, November 6, 1986, p. 19. Objections were also raised to stories "advocating Roman Catholicism," concepts of death contrary to Biblical teaching and Greek and Roman mythology for their advocacy of idol worship.

63 827 F.2d 1058 (6th Cir., 1987).
teaching of creationism as an alternative to evolution was unconstitutional. According to Christian fundamentalists evolution is the cornerstone of the secular humanism religion. In reaching its decision, the majority of the Court held that no evidence had been adduced to support the state's contention that the legislation was designed to offer a "balanced" curriculum and to advance academic freedom. In fact, the Court ruled, the legislation was clearly intended to advance the religious viewpoint that a "supernatural being" created humankind. Despite these setbacks, the religious right in the United States declared its intention to carry on with its opposition to the secular public school curriculum. For example, referring to their commitment to fight "the promotion of godlessness and secular humanism" despite three successive failures in court, one fundamentalist spokesman asserted: "We're going to utilize the system that's made America great and proceed to exhaust all those possibilities." 65

IV. THE RELIGIOUS RIGHT IN CANADA FIGHTS BACK: THE REACTION TO THE FIRST WAVE OF CHARTER CASES

Although the debate about the absence of religious values in the public school


65 New York Times, August 29, 1987, p. 6. On February 22, 1988, the United States Supreme Court decided not to hear an appeal from the Christian fundamentalists in the Mozart case. Although further appeal by the Tennessee fundamentalist plaintiffs is no longer possible, the nature of the court's ruling -- without comment and no recorded dissent -- opened the possibility of future legal action by those opposed to secular humanism.
curriculum generated more litigation in the United States than in Canada during the 1980s and early 1990s, the same elements that gave rise to the highly contentious 1987 Alabama and Tennessee court challenges could be identified in Canada during this period of time. For example, conservative religious activists in Canada have clearly been distressed by the post-Charter judicial activism which has removed religious exercises and materials from the public school curriculum, and which has allegedly resulted in the disintegration of academic and moral standards. As in the United States, Canada's religious right has condemned public schools for failing to provide children with religious values, a practice which is tantamount they charge, to promoting and teaching the anti-Christian philosophy of secular humanism. The division of parents into camps based on their attitudes and views about the proper role of religion in the public schools exemplifies some of the diverse pressures brought to bear on Canada's changing legal culture during the last decade. Thus, in reaction to the first wave of Charter cases discussed in Part II of this chapter, conservative Christian parents in the late 1980s and early 1990s began to demand that their children's constitutional rights to freedom of religion should also be recognized by local school boards. This section of the chapter will discuss the first signs of a backlash on the part of conservative Christians against the successful efforts by Canadian litigants to reduce the role of religion in the public school system.
1. **The Impressions Series**

During the early 1990s a number of local school boards throughout Canada were faced with irate fundamentalist Christian parent groups threatening to remove their children from classes if school officials did not ban a particular series of readers -- the *Impressions* series -- from the school curriculum. The Canadian readers which, it was estimated in 1992, one out of every two Canadian elementary schoolchildren read⁶⁶, included works by authors such as Lucy Maud Montgomery, Margaret Atwood, Chief Dan George, Dr. Seuss, A. A. Milne, C. S. Lewis and Rudyard Kipling. The series is comprised of some 60 books and support manuals, as well as transparencies, work sheets and audiotapes for teaching children in grades one through seven. By 1993, all Canadian provincial education ministries, but three (Newfoundland, New Brunswick and Prince Edward Island) had adopted the *Impressions* curriculum material.

After some Canadian educators protested that the series was too morbid, a new version was published in 1988, eliminating the offending passages. Despite such revisions, however, many parents on the religious right continued their opposition to the series. In Calgary, for example, a group called Parents for Quality Education, argued beginning in 1990 that the series promotes "secular humanism in the classroom." According to a spokesperson for the group (which reportedly had over 1,000 members), the parents wanted

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⁶⁶ According to David Booth, a professor of literature at the University of Toronto and one of the series' five author-editors. *Canadian Press*, April 12, 1992.
the series banned from the public school curriculum because they "felt that type of literature did not belong in an elementary school and in the hands of kids who are starting to develop standards." He added, "the type of negative things we're talking about is an emphasis on disrespect for parents and authority, a lot of cruelty type stories, violence, a predominance on witchcraft and things like that." Parents in other parts of the country voiced similar objections were highly critical of the new secular emphasis in the public school system which they equated with the Impressions series. "This material -- necromancy and crystal ball-gazing -- is directly opposed to what we believe as Catholics," one Ontario parent explained. In criticism representative of the religious right the parent complained that since recent court rulings provincial education ministry guidelines bar religion from the classroom. But she added, "new age and occultism is a religion and they're indoctrinating children into it."

Those individuals and groups opposed to the growing pressure from parents, considered that the activities by the religious right were "an insidious attempt by a network of right-wing activists to undermine the secular school system." Thus, while the parents' group alleged that the series exposes students to themes of violence, witchcraft, death and


69 Ibid.

70 In May 1993, a British Columbia school board in Burns Lake voted to remove the series from the elementary curriculum. Later in the year -- seeking to garner a 2/3's vote in favour of the series being reinstated -- the board held a referendum targetted at the parents of students enrolled in its elementary schools. However, only two of the eight elementary schools voted to reinstate the series.
despair, educators praised the stories as imaginative fantasy that stimulates a love of reading in children and exposes them to various authors and cultures.\textsuperscript{71}

Although Canadian-based opposition to the \textit{Impressions} series in the early 1990s was limited to protest campaigns targeting local school boards as opposed to constitutional challenges, the Canadian series sparked legal action in four U.S. states where school boards had adopted the series.\textsuperscript{72} For example, in California a lawsuit on behalf of fundamentalist Christian parents alleged the \textit{Impressions} series promotes witchcraft, "neo-paganism," and the "New Age religion" of secular humanism in the public school curriculum in violation of the U.S. constitution's first amendment. The American Family Law Association, a religious right organization that represented the parents, argued that U.S. Supreme Court rulings that banned prayer from U.S. schools ought to apply to all religions equally and that the \textit{Impressions} series should be banned from schools. In mid-1992 a U.S. judge rejected the parents' claim and ruled that the series are part of folklore and literature and do not represent a New Age religion as claimed by the parents. Suggesting that an appeal would be filed in the case, the lawyer for the American Family Law Association criticized the

\textsuperscript{71} Objectionable stories cited by the parents included a story from a Grade 3 teacher anthology where a witch apprentice is told: "You deserve to die for this, but I will spare your life on one condition. Bring me the hearts of your mother and sister and you shall live. Not only shall you live, but you shall become one of us. We will turn you into a mighty witch, and you shall help your wife to work evil." Another example is "Inside My Feet," a story in a Grade 4 teacher anthology, about a boy who does battle with a pair of enchanted boots. "Underneath my bed was a large and cold hand that also watched and waited for me to dangle a naked arm or leg over the side so it could drag me screaming into that dark pit where it would rip and smother me until I was dead and torment me afterward. But there was nothing unusual in that. It has been waiting since I was five."

\textsuperscript{72} The series is reportedly used in approximately 1,500 schools in 34 states.
decision, remarking "The net result [of the ruling] is that the only thing that's been done is to sterilize christianity from the classroom and not New Age cultish religions." 73

2. Evolution v. Creationism in the School Curriculum

In addition to protests over the Impression series, during the late 1980s and early 1990s members of the religious right in Canada also challenged public school curricula which taught the theory of "evolution" as opposed to the theory of "creationism." In 1984, for example, a science lab in a British Columbia school became the focus of tension between school officials and a fundamentalist parent lobby. Arguing that the high school biology curriculum indoctrinated students with the false theory of "evolution" -- a theory which the Christian right in Canada like their counterparts in the U.S. identifies with the religion of secular humanism -- the parents demanded that creationism also be included in the biology curriculum. Maintaining that creationism was a legitimate and strict science (based on the belief that fossils disprove evolutionary theory by indicating that some species became extinct, while others appear abruptly, i.e., they are created by God), the fundamentalist group offered the school board alternative curriculum materials that had been developed by the San Diego-based Institute for Creation Research. After a long and rather heated public debate, the fundamentalist lobby succeeded in having creationism included in the biology curriculum as an alternative theory to evolution. The British Columbia Ministry of Education also agreed to alter the evolution question on the Grades 11 and 12 provincial curricula.

biology examinations. At the beginning of the 1990s at least two of B.C.'s 75 school districts authorized creationism to be taught in science classes.

A similar incident occurred in Ontario in 1998 when new biology education guidelines for the Ontario public school system came under attack by fundamentalist Christians advocating the "science" of creationism. The Creation Science Association of Ontario strongly opposed the drafts of the biology guidelines, and particularly objected to those sections of the guidelines which suggested that vestigial organs and embryological similarities demonstrated the validity of the theory of evolution. An Ontario Ministry of Education official denied that the new biology curriculum was attempting to promote a completely a-religious and secular view of development. Defending the guidelines he stated that: "What we are trying to show the kids is how scientists view the world and not that religion is wrong."

The creationism debate followed on the heels of earlier criticisms from fundamentalist Christian parents about Ontario's draft physics curriculum. In mid-1987, a University of Toronto astronomy professor working on the draft revisions for Ontario's high school physics courses charged that pressure from creationists and the religious right was "forcing the ministry to distort the science curriculum." In particular, the Toronto astronomer objected to the Ministry's directive -- prompted by strong parental pressure -- that he substitute the words "development" and "change" for "evolution" in descriptions of the history of the universe. The astronomy professor also took issue with the Education Ministry's request that the new physics curriculum not make reference to the "scientifically"

determined age of the sun. The Ontario Ministry of Education later reversed its position on both these issues to the satisfaction of the scientists involved in the draft curriculum changes.

V. CHAPTER SUMMARY AND IMPLICATIONS FOR LEGAL CULTURE

Issues touching on religious beliefs, and also the appropriate boundaries between the state and religious values, have been among the most contentious and difficult problems facing democratic societies. It is therefore not surprising that Canada's new Charter of Rights and Freedoms would engender special concerns and sensitivities on the part of those citizens attuned to the protection, retrenchment or expansion of religious beliefs in the educational setting.

Concern in Canada during the last decade regarding the appropriate role of religious beliefs in the public school curriculum revealed important changes in Canadian rights consciousness and legal culture. For example, following the entrenchment of the Charter in 1982, parents and students in different regions of Canada espousing a secular public school curriculum were willing to advance their claims and expectations through constitutional court challenges. A landmark school prayer case in Ontario\textsuperscript{75} had a ripple effect on parents, courts and legislatures throughout the country, and by the early 1990s

virtually all provincial education legislation mandated the separation of religion from the Canadian public education curriculum. Thus the legal system, in responding positively to new demands made by the external legal culture -- in this case (not unlike the area of special education) on the part of parents -- generated new expectations and a fresh round of demands by citizens concerned about the role of religion in the public schools.

The emergence of such new demands did not, however, always flow in the same direction, as in the first wave of rights claims made by concerned parents. For example, the expansion of rights on the part of litigants seeking to secularize the Canadian public school system fostered a backlash in the early 1990s by parents who claimed -- using arguments borrowed from members of the American Christian right -- that the court-ordered exclusion of religion from the curriculum was discriminatory and unconstitutional. This legal response, it was argued, constituted an infringement of the rights of children who sought an explicitly Christian or traditional religious education. This second wave of parental concern challenged the recent secularizing trend in the public school curriculum. Such contending claims revealed that a change was taking place in the Canadian legal culture, particularly as it related to citizen views about their rights, although the outcome of the change in terms of educational policy was still not a settled matter.

The analysis in this chapter clearly demonstrated that when feelings and expectations about rights multiply within the legal culture, they tend to encourage demands on the law and legal institutions. When legal institutions operate effectively, these demands are in

turn processed by members of the legal community and legal institutions. If these components of the legal system (i.e., the internal legal culture) respond positively to the rights claims made by citizens and groups (i.e., the external legal culture), there is an incremental expansion in the framework for rights adjudication, protection, and expansion, all which in turn creates increased expectations and a fresh round of citizen demands. The end result of this spiral may be, as the Canadian case amply indicates, a radically altered legal culture.
PART III
CHAPTER 7

THE CHARTER, PUBLIC EDUCATION AND CANADIAN LEGAL CULTURE: CASE STUDY FINDINGS AND FUTURE TRENDS

The public now wants its rights. They've been told that they have these rights and they want them. And they know if they are correct the court will give it to them....Legal positivism says that what is right is what the law says is right -- and legal positivism was our system....In 1982 we put an end to most legal positivism. Now that's a revolution. That's like introducing the metric system. It's like Pasteur's discoveries....It was a great event.

Chief Justice Antonio Lamer, April 1992

I. THE DISSERTATION'S FOCUS AND FINDINGS: A SUMMARY

Rule-of-law is the quintessential element of a democratic society. Without the presence of institutionalized legal norms that are valued and supported by both ruling authorities and citizens, other dimensions crucial to the operation of the democratic process -- such as the regular alteration of political leaders, a framework of civil liberties, and the free interplay of economic relationships -- are devoid of significance. Fundamental changes in the principles and practices of a legal system become, therefore, a moment of profound importance in the development of a democratic society. The repatriation of the Canadian constitution in 1982 and its elaboration with a "made in Canada" Charter of Rights and Freedoms represented just such an historical benchmark and new beginning for the functioning of Canadian democracy.

This dissertation has endeavoured to analyze and assess the first decade of legal

development under Canada's new constitutional framework through an examination of selected issues relating to the field of public education. The theoretical construct utilized to guide the analysis was the concept of "legal culture," that is, the values and attitudes of opinion-makers and citizens regarding the law and law-related facets of society. Special attention was focused on two key dimensions of the legal culture, its internal component and its external component. The internal legal culture encompasses the attitudes and values of the direct participants in the practice and adjudication of law, and particularly the outlook and behaviour of judges and members of the legal profession. In many respects, the internal legal culture can be termed the "lawyers' culture." The external legal culture refers to citizen or lay attitudes and values regarding legal matters, and constitutes the broader context in which the internal legal culture functions. These two major aspects of the legal culture are separate, but very closely related aspects of one essential phenomenon. Thus, the lawyers' culture is constantly shaped by the grievances, demands, and beliefs of the lay members of a society, while at the same time legal opinion-makers and practitioners, through their actions and priorities, shape the manner in which the broader society views the legal system.

The primary goal of this dissertation has been to ascertain how key issues relating to the system of public education in Canada have been affected by the constitutional changes in the post-1982 period, and whether those changes have contributed to a fundamental transformation or evolution in the country's internal and external legal cultures. The four issue areas selected for analysis were: (1) special education; (2) teachers and the AIDS crisis; (3) gender equality as it pertains to the Canadian school system, and; (4) the
treatment of religion in Canada’s public school curriculum.

The findings from the case studies in Part II of the dissertation suggest that the Charter's impact has led to major changes in the field of public education -- changes which have both contributed to, and are representative of, a very substantial alteration or transformation of Canada’s legal culture. For example, the case studies revealed that following the adoption of the Charter, members of the legal profession and citizens tended to have a much higher level of rights consciousness than before 1982. Thus, compared to the period before the patriation of the constitution, specific rights were more readily identified by litigants in the legal process (e.g., we have a "right" to have our special needs child integrated in our neighbourhood school; to teach in public schools even though we are infected with the AIDS virus; to allow girls to play on boys’ sports teams; to exercise or not exercise certain religious practices in the schools, etc.) in terms of both explicit Charter cases and human rights cases.

Moreover, in all four cases discussed, ground-breaking legal challenges were launched by litigants in order to enforce newly perceived rights, and courts also recognized the rights of litigants to a far greater extent than before 1982. As a result of a more assertive posture on the part of Canadian courts, and the Supreme Court of Canada in particular after 1982, the emergence of a body of cases, or what might be termed a "rights jurisprudence" in the area of public education, not to mention other areas of Canadian public policy could be discerned. As litigants became more active in enforcing their rights through the judicial system, and the courts responded by expanding education-related rights, new legislation was also enacted by the federal parliament and provincial assemblies to address Charter-related
rights (e.g., new legislation governing integration of children with disabilities, new statutory treatment of religious exercises, etc.). Within the school system itself, new policies and practices recognizing student and employee rights were also adopted.

The separate analysis of each of the four public education issue areas in Section II of the dissertation provide strong inferential evidence that profound changes were underway in Canada's legal culture during the first decade of the constitution's existence. The area of special education provided a particularly striking case of Charter-inspired change and the transformation of the legal culture. For example, during the 1980s and early 1990s Canadian parents and interest groups became active in utilizing the judicial system as a vehicle to advance their expectations and claims regarding their children's equality rights, and also in which to challenge governmental decisions that were seen to limit those rights.

Thus, almost immediately following the adoption of the Charter, parents and interest groups supporting the "right" of disabled children to be integrated in regular classrooms, took steps to initiate Charter challenges and human rights cases in order to enforce this right. In a marked departure from the pre-Charter trend of judicial deference to legislative provisions and local school board policies, the courts assumed a much more activist role in recognizing and expanding the education-related constitutional rights of special needs children. As discussed in Chapter 3 with respect to the case of British Columbia, the post-Charter trend of courts and human rights tribunals to strike down policies and practices that were seen to discriminate against children with disabilities, and also the emergence of increasingly influential interest groups committed to the expansion of student rights, prompted legislators to focus on a more inclusionary model of education for all children.
regardless of disability. Thus after 1982, statutory entitlements and local school board policies became oriented toward the "rights" or needs of the "individual learner" to appropriate educational opportunities.

Advocacy relating to the rights of AIDS-infected teachers to continue teaching in the Canadian public school system also revealed an expansion of rights consciousness in Canada. Thus, Canadian teachers with AIDS -- in large part inspired by successful AIDS-related litigation in the United States and in other sectors of Canadian life (e.g., the airline industry) -- initiated claims maintaining that their particular "disability" or "handicap" should not disentitle them from the right to continue teaching in the public school system. Interestingly, and in contrast to the area of special education, AIDS litigants concerned about rights tended to utilize provincial human rights legislation and collective agreement grievance provisions when advancing their claims rather through Charter-based litigation. Because the Charter's equality provisions were not available to AIDS litigants in the early 1980s, and once they were available after 1985, the fact that Charter litigation was both time-consuming and expensive, were factors which appeared to steer citizens toward human rights legislation and workplace contracts as the most realistic and efficient avenues for seeking legal recourse.

Despite the fact that the Charter was not the preferred legal vehicle for advancing AIDS-related claims, there is a strong inference that the rights claims advanced by AIDS litigants significantly contributed to important changes in the legal culture. For example, as discussed in Chapter 4, following the contentious and high-profile Smith case in Nova Scotia, and other cases litigated outside the education setting, Canadian national education
policies were developed which recognized the legitimate employment "rights" of employees infected with the AIDS virus. These policies encouraged (apparently successfully in view of the small number of Canadian education-related AIDS human rights cases), local school boards to treat AIDS as a constitutionally protected disability. Moreover, since the spate of post-Charter AIDS cases in both the Canadian public education setting and other sectors, many provinces and the federal government have amended their human rights legislation to explicitly provide protection to citizens of Canada who might be discriminated against on the basis of "sexual orientation."

The area of gender equality constituted another important area of expanding rights consciousness and the transformation of Canada’s legal culture. Drawing on three areas of Charter-inspired legal developments relating to gender equity issues in the Canadian public education system, the discussion in Chapter 5 demonstrated the potential impact of gender-related rights consciousness on the legal culture. Thus, Chapter 5 discussed how litigants attempted to make inroads into genderically discriminatory policies and practices in the field of education by: (1) explicitly utilizing the Charter (e.g., challenging the segregation of women teachers within a professional association); (2) advancing new rights claims utilizing human rights legislation and rights arbitration (e.g., the right not to be denied employment opportunities on the basis of sex), and; (3) lobbying for legislative changes (e.g., pay equity legislation). Although by the early 1990s, the Charter had still not resulted in what could be accurately termed a "sexual revolution" within the public education system, the initial cases discussed above, taken together with several other Charter-inspired developments in areas of Canadian social policy outside education, suggested that such changes in the
educational area would probably be forthcoming over the next several decades. Thus, as the cases in various areas of Canadian society discussed in Chapter 5 revealed, the adoption of the Charter and the new constitutional emphasis on genderic rights after 1982, resulted in a number of positive developments for women, e.g., the right to secure an abortion, the right to economic benefits during pregnancy, the right to equal pay for work of equal value, and the right to have sexual harassment treated as sexual discrimination.

The expansion of rights consciousness in the area of gender equity can also be traced to vigorous efforts at change by women's groups in the legal profession itself. In addition to giving gender equity rights greater visibility in Canadian society through various information campaigns, groups representing women lawyers have followed two special strategies to achieve their goals: (1) sensitizing future and practising members of the legal profession, and also judges, to gender rights; and (2) career advancement of women within the legal profession and judiciary. By 1993, impressive progress had been made in both areas, although such strategies were long-term efforts that would probably take several decades to yield a fundamental change in the internal legal culture. For example, by 1992 (Table 7.1 and 7.2) only approximately 10% of all Canadian judges were women. The Supreme Court of Canada, where in 1992 there were two women members out of nine justices, had made the best relative progress in this regard.

The contentious issue of addressing religious beliefs in the public school curriculum also revealed important changes in rights consciousness and legal culture. Prior to 1982, provinces with otherwise secular public school systems provided that Christian-based religious exercises were statutorily required as a compulsory and integral component of the
Table 7.1
Federally Appointed Judges (January 1, 1992)

<table>
<thead>
<tr>
<th></th>
<th>Total Judges in Office</th>
<th>Supernumaries</th>
<th>Grand Total</th>
<th>Total No. of Women Judges</th>
<th>(%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supreme Court</td>
<td>9</td>
<td>0</td>
<td>9</td>
<td>2</td>
<td>22.2</td>
</tr>
<tr>
<td>Federal Court</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appeal Division</td>
<td>10</td>
<td>1</td>
<td>11</td>
<td>1</td>
<td>9.0</td>
</tr>
<tr>
<td>Trial Division</td>
<td>11</td>
<td>2</td>
<td>13</td>
<td>1</td>
<td>7.6</td>
</tr>
<tr>
<td>Tax Court of Canada</td>
<td>19</td>
<td>3</td>
<td>22</td>
<td>2</td>
<td>10.9</td>
</tr>
<tr>
<td>Court of Appeal, Queen's Bench, Superior Court and Trial Division in Provinces and Territories</td>
<td>709</td>
<td>139</td>
<td>848</td>
<td>93</td>
<td>10.9</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>758</strong></td>
<td><strong>145</strong></td>
<td><strong>903</strong></td>
<td><strong>99</strong></td>
<td><strong>10.9</strong></td>
</tr>
</tbody>
</table>

### Table 7.2

**Provincial/Territorial Judges 1991/1992**

<table>
<thead>
<tr>
<th>Province/Territory</th>
<th>Total Judges</th>
<th>Total Number of Women Judges</th>
<th>(%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Newfoundland</td>
<td>24</td>
<td>1</td>
<td>4.1</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>3</td>
<td>0</td>
<td>--</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>28</td>
<td>3</td>
<td>10.7</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>28</td>
<td>3</td>
<td>10.7</td>
</tr>
<tr>
<td>Quebec</td>
<td>286</td>
<td>27</td>
<td>9.4</td>
</tr>
<tr>
<td>Ontario</td>
<td>252</td>
<td>30</td>
<td>11.9</td>
</tr>
<tr>
<td>Manitoba</td>
<td>39</td>
<td>4</td>
<td>10.2</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>44</td>
<td>1</td>
<td>2.2</td>
</tr>
<tr>
<td>Alberta</td>
<td>113</td>
<td>11</td>
<td>9.7</td>
</tr>
<tr>
<td>British Columbia</td>
<td>120</td>
<td>15</td>
<td>12.5</td>
</tr>
<tr>
<td>Yukon</td>
<td>3</td>
<td>0</td>
<td>--</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>5</td>
<td>1</td>
<td>20.0</td>
</tr>
</tbody>
</table>

**TOTAL** 945 96 10.1

*Source: Calculated on the basis of data provided in Appendix A and B of Gender Equality in the Canadian Justice System: Background Papers, Prepared by the Federal/Provincial/Territorial Working Group of Attorney-General Officials on Gender Equality in the Justice System, (April 1992). Released July 5, 1993.*
school curriculum. Parents and students in the pre-Charter period did not legally challenge such compulsory religious exercises, typically exhibiting the deferential attitude toward government and school officials that was characteristic in the pre-Charter period. However, following the post-Charter rulings by the Supreme Court of Canada which endorsed the "centrality" of the constitution's fundamental guarantees of religious freedoms, protests by parents, alternatively espousing either a secular public school curriculum or a religious-inspired curriculum, generated several interesting court cases and rights claims.

For example, as discussed in Chapter 6 of the dissertation, Ontario parents who pursued two separate challenges to the Ontario Court of Appeal established that compulsory school prayer, religious exercises opening the school day, and the indoctrination of any religion through the public school curriculum, were all contrary to the Charter's guarantee of freedom of religion and conscience. Thus, for the first time since Confederation, and in a striking example of how the Charter was affecting Canadian society, the teaching of religious beliefs was deemed by the courts to be constitutionally inappropriate as part of the public school curriculum. The important Ontario cases had a ripple effect on parents, courts and legislatures throughout the country, and by the early 1990s virtually all provincial education legislation mandated the separation of religion from the Canadian public education curriculum.

In an interesting example of the complex competing rights present in liberal democracies, the expansion of rights on the part of litigants seeking to secularize the public school system fostered a backlash in the early 1990s by Christian groups and other members of established religions who claimed that the court-ordered exclusion of religion from the
curriculum was discriminatory and unconstitutional. Thus, it was argued, that a public school curriculum which was devoid of Christian or other established religious values, and which advocated the "religion" of secular humanism (including the notion of evolution) constituted an infringement of the rights of children who sought (or whose parents sought) an explicitly Christian or traditional religious education.

II. THE CHARTER AND PUBLIC EDUCATION: BEYOND THE FIRST DECADE

The case studies of selected issue areas in public education revealed striking changes in Canada's legal culture during the post-Charter period. By 1993, just over a decade after the patriation of the constitution, rights consciousness in Canada had clearly reached a relatively high level of crystallization. Indeed, one could reasonably conclude that rights consciousness had become a substantial element or component of the Canadian legal culture. One significant indicator of Canada's changing legal culture which emerged from the dissertation's qualitative case study analysis of education-related issues, was the new role of the Supreme Court of Canada. Statistical compilations of recent Charter cases have also revealed the transformation of judicial decision-making in Canada's high court. For example, the authors of a 1992 empirical analysis of constitutional cases\(^2\) decided by the Canadian Supreme Court remarked:

The Charter has ushered in a new era for the Supreme Court of Canada. Nineteen eighty-two marks a turning point for the Court equal in importance to the abolition of appeals to the Judicial Committee of the Privy Council in 1949....The Court has made a clean break with the British-style judicial self-restraint that characterized its interpretation of the 1960 Bill of Rights.3

The same study noted that in the post-Charter period, the Supreme Court of Canada has "sent a message to the legal profession and lower court judges that it was much more receptive towards rights claimants and an activist exercise of judicial review."4 Thus, during the period from 1982 to 1989, Charter litigation at the level of the Supreme Court of Canada surged ahead dramatically to account for 23% or almost one-quarter of the court's case load in 1989. Indeed by 1984, the Supreme Court of Canada had heard only four constitutional cases, but by 1989 the court had rendered 104 Charter decisions (Table 7.3). Moreover, of the first one hundred Charter claims brought to Canada's highest court, 35% of the claims were successful, and 19 statutes were declared unconstitutional.5


5 Since the adoption of the Charter in 1982, the role of the Supreme Court of Canada - - in terms of its heavily constitutional case load, the relatively high success rate of Charter litigants, and the exercise of judicial review to strike down unconstitutional legislation -- has made the role of the Canadian court much more similar to its American counterpart. Some analysts have suggested that this trend illustrates the "Americanization" of Canadian political culture. See, for example, Seymour Martin Lipset, Continental Divide: The Values and Institutions of the United States and Canada (Toronto: Canadian-American Committee, 1989), p. 116.
Table 7.3

**Charter Decisions as a Percentage of All**
**Supreme Court of Canada Decisions (1981-1989)**

<table>
<thead>
<tr>
<th>Year</th>
<th>All Decisions</th>
<th>Charter Decisions</th>
<th>Percent of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1981</td>
<td>111</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1982</td>
<td>117</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1983</td>
<td>87</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1984</td>
<td>63</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>1985</td>
<td>83</td>
<td>11</td>
<td>13</td>
</tr>
<tr>
<td>1986</td>
<td>81</td>
<td>11</td>
<td>14</td>
</tr>
<tr>
<td>1987</td>
<td>95</td>
<td>23</td>
<td>24</td>
</tr>
<tr>
<td>1988</td>
<td>104</td>
<td>25</td>
<td>24</td>
</tr>
<tr>
<td>1989</td>
<td>126</td>
<td>29</td>
<td>23</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>867</strong></td>
<td><strong>104</strong></td>
<td><strong>12</strong></td>
</tr>
</tbody>
</table>

In the field of public education, evidence drawn from the trend analyses and the preceding case studies indicates that the Charter made a very significant impact from 1982 to 1993. Indeed, following the Supreme Court of Canada's first Charter judgement in the 1984 Skapinker case, it became clear that the courts would use the new constitution to review and strike down unconstitutional federal and provincial legislation. The adoption of the Charter, the Supreme Court of Canada bluntly asserted in 1985, "has sent a clear message to the courts that the restrictive attitude which at one time characterized their approach to the Canadian Bill of Rights ought to be re-examined." As detailed in the dissertation's case studies, the more activist exercise of judicial review by the courts after 1982 resulted in several constitutional decisions invalidating education legislation which conflicted with constitutional guarantees of rights and freedoms. Thus, in the decade after 1982, an expanding body of Charter-inspired school law rights jurisprudence had emerged. By the fall of 1993, however, the Supreme Court of Canada had still not definitively ruled whether the Charter generally applied to local school boards, and it was not clear to what

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extent the policies and practices of school officials would ultimately be subject to future challenges based upon Charter-specified rights. The crux of the issue in this regard was whether school boards could be said to fall within the scope of "government," referred to in Section 32(1) of the constitution and were therefore subject to Charter interpretation. Although during the late 1980s and early 1990s some commentators concluded that the constitution did apply to school boards, the courts exhibited less consensus on this question. Thus, in the Charter cases that have challenged school board actions some judges have suggested that the Charter does apply to school boards. In other cases, courts have ruled that a specific school board action offended the Charter, but declined to rule on the question of whether the Charter generally applied to all school board activities.

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9 In an early Charter case involving minority language education rights, the Ontario Court of Appeal remarked, for example, that "although the judiciary is not the sole guardian of the constitutional rights of Canadians" and while "Parliament and the provincial legislatures are equally responsible," judicial intervention is, nevertheless, warranted in situations where local administrative discretion [by school boards] infringes upon certain constitutionally entrenched rights. Re Minority Language Education Rights (1984), 10 D.L.R. (4th) 491. In another case, R. v. H. (1985), 43 Alta. L.R. (2d) 250, a provincial court judge concluded (at p. 256) that "Parliament intended to extend the application of the Charter to include bodies such as school boards exercising a delegated legislative authority. I am satisfied that teachers and principals who are employees of school boards are governed by the provisions of the Charter." See also Lutes v. Prairie View School Division No. 74 (1992), 101 Sask. R. 232.

10 In R. v. J.M.G. (1986), 56 O.R. (2d) 705, for instance, the Ontario Court of Appeal assumed for the purpose of the issue before it (a school locker search) that the Charter did apply to actions of school officials, however, the court declined to deal with the underlying
other cases, judges have offered mixed decisions concerning this jurisdictional issue,\(^{11}\) while others have suggested that the *Charter* does not apply to school boards.\(^{12}\)

By 1993, the applicability of human rights legislation to local school boards was somewhat clearer. Thus, although prior to the entrenchment of the *Charter*, most human rights tribunals had concluded that schools were not "a service or facility customarily available to the public," and that human rights legislation could not therefore be used to challenge policies and actions by school officials,\(^{13}\) by the mid-1980s and early 1990s, this trend appeared to have been reversed with several important cases establishing that schools indeed were subject to provincial human rights legislation.\(^{14}\) This issue, however, will also

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jurisdictional issue. Thus, the judge hearing the case remarked (at p. 708) concerning the issue of whether the *Charter* applied to school boards: "I do not find it necessary to decide this difficult issue."

\(^{11}\) In *Ontario English Catholic Teachers Association v. Essex County Roman Catholic Separate School Board* (1987), 58 O.R. (2d) 545, a divisional court concluded (at p. 561): "...a school board is created under a comprehensive statute dealing with education...and the actions of a board may be properly be said to be, for the purposes of the *Charter*, the actions of the 'legislature' or 'government'." On the other hand, the court ruled, a school board mandatory retirement policy was not subject to *Charter* scrutiny because it could not properly be construed as "law" within the meaning of Section 32(1).

\(^{12}\) In his reasons for judgement in the appeal of *R. v. H.* (1985), 43 Alta. L.R. (2d) 250, Mr. Justice Dechene remarked: "It is not...necessary for me to decide whether the *Charter of Rights and Freedoms* applies to educational institution such as the school in question in this action. If it were necessary for me to do so...I would have held that the *Charter of Rights and Freedoms* does not apply."

\(^{13}\) For example, in *Winnipeg School Division v. MacArthur* [1982], 3 W.W.R. 342, the Manitoba’s Queen’s Bench held that Manitoba *Human Rights Act* did not apply to schools because tuition is not "customarily available to the public."

\(^{14}\) In particular, two rulings of human rights tribunals (one in Ontario and one in New Brunswick) concluded that schools are a "facility customarily available" to the public and that school boards are subject to human rights legislation: *New Brunswick School District No. 15 v. New Brunswick Board of Inquiry* (1989), 10 C.H.R.R. D/6427 (N.B.C.A.); *Pandor
not be definitively determined until the matter is decided by the Supreme Court of Canada. Until the question of the overall applicability of the Charter and other rights instruments to local school boards is resolved, the growing body of rights oriented jurisprudence will likely continue to influence Canadian education in an incremental manner. Constitutional adjudication is a future-oriented and dynamic process. Indeed, in one of its early Charter decisions, the Supreme Court of Canada underlined the importance of judicial flexibility in its Charter decision-making:

The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and when joined by a Bill or a Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts 'not to read the provisions of the Constitution like a last will and testament lest it become one.'

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Thus, in the second decade of the Charter's life there are likely to be some completely new areas of rights assertion and rights jurisprudence that develop out of challenges to public education policies and practices. For example, by 1993 new education-related Charter cases included a student's constitutional challenge (based on the Charter's guarantee of freedom of expression) to disciplinary action imposed by school officials after the student continued to sing a "banned" song about safe sex;\textsuperscript{16} a constitutional challenge initiated by a teachers' union against the Ontario government which alleged that the province's pay freeze legislation violated the teachers' guarantee of freedom of association;\textsuperscript{17} and constitutional challenges by Quebec school boards who opposed the Quebec government's plan to reorganize the province's school districts along linguistic as opposed to denominational lines.\textsuperscript{18}

The expanded role of a rights-oriented jurisprudence in the field of education and other sectors of society in Canada was not welcomed uncritically by all Canadians. While the enhanced role of the Supreme Court of Canada, and the impact of the Charter on Canada clearly transformed Canadian legal development after 1982, such changes did not


\textsuperscript{17} The court action was to be launched in the summer of 1993. Toronto Star, July 23, 1993, p. A10.

\textsuperscript{18} In mid-June 1993, the Supreme Court of Canada unanimously ruled that the province of Quebec did have the constitutional right, pursuant to Section 23 of the Charter, to carry out its school district reorganization plan. According to Mr. Justice Charles Gonthier, who wrote the majority opinion, "By legislating an education in this way, the Quebec government is pursuing a legitimate purpose which is in keeping with Section 23 [of the Charter]." He also indicated that the changes "will occasion a fundamental upheaval in the [educational] institutions to which the province has been accustomed for over a hundred years."
affect all areas of Canadian society in a uniform or uni-directional manner.\textsuperscript{19} Thus, in some cases, Charter-inspired changes in various sectors of educational policy and practice engendered considerable controversy and even strong counter-trends. Some observers felt, for example, that the new rights consciousness reflected the growing "Americanization" of Canadian law and society, a trend that was both negative in its legal and political implications for Canadians, and also antithetical to Canada's traditions and needs.\textsuperscript{20} For example, in a 1993 book Lawrence Martin expressed many of these reservations about the influence of American law on Canadian society when he argued that the Charter was having a detrimental decentralizing impact on Canada by fostering interest groups and citizens who had become imbued with an un-Canadian sense of individualism.\textsuperscript{21} Such criticism was seen to confirm trends which had been anticipated by critics of the Trudeau-inspired Charter

\textsuperscript{19} Some legal scholars have argued, for example, that judicial review under the Charter is essentially anti-democratic. For a discussion of this debate see Andrew Petter and Allan C. Hutchinson, "Rights in Conflict: The Dilemma of Charter Legitimacy," \textit{University of British Columbia Law Review}, Vol. 23, No. 2 (1989), pp. 531-548. Other commentators have been critical of the greater social policy-making role played by lawyers and judges, and also the growing politicization of the judiciary. For a representative argument on this topic see Peter H. Russell, "The Paradox of Judicial Power," \textit{Queen's Law Journal}, Vol. 12, No. 3 (1988), pp. 421-437. Marc Gold has argued that within the judiciary itself there are different perspectives regarding Charter interpretation. For a philosophical treatment of this controversy see Leon E. Trakman, \textit{Reasoning with the Charter} (Toronto: Butterworths, 1991).


during the constitutional debates and the end of the 1970s and beginning of the 1980s.

Other Canadian observers, however, took issue with such criticism arguing that the Charter was having a positive centralizing, and indeed nationalizing influence on Canadian society by giving rise to a cross-Canada sense of national citizenship that was distinct from local and regional identities. This was essentially the same argument that Prime Minister Trudeau had made during the constitutional debates which led to the adoption of the Charter (see Chapter 2). Indeed, according to the latter argument, it is the more "collectivist" or group-oriented impulses in Canadian political culture which have spawned "destructive" pressure group activities, such as the efforts to entrench a hierarchy of group rights in the constitution, or which seek special privileges for specific groups. Moreover, according to such defenders of the Canadian Charter of Rights and Freedoms, the new constitutional framework, unlike the American Bill of Rights, does not institutionalize or trigger a conflict between state regulation and individual liberties. Some revealing comments by Chief Justice Lamer tend to support the argument that an emphasis on rights, as well as a more activist role for the Supreme Court and reference to American case law

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does not necessarily constitute the wholesale Americanization of Canadian legal culture:

...the Charter has changed our job descriptions. Most judges were trained in the law prior to...the Charter, so we were trained, not to judge laws, but to apply them....And so many of us...had to adapt to this new role....We've had to change our libraries, and start reading a lot of American stuff that we weren't used to, and a lot of European stuff....It would be ridiculous if we wanted to reinvent the wheel here [in Canada]. Though we don't necessarily have to follow American jurisprudence.25

Another problem which sparked controversy in Canada after 1982 was the issue of whether greater concern with equality rights under the revamped constitutional framework benefitted all Canadians as individuals -- as promoters of the Charter often proclaim -- or have been to the special benefit of certain so-called "disadvantaged groups" in Canada.26 Debate concerning this issue came to the fore in mid-1993 after the Federal Court of Appeal unanimously rejected a Charter challenge which claimed that certain provisions of the Income Tax Act discriminated against married couples, as opposed to common law

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25 Globe and Mail, April 17, 1992, p. All.

26 However, one recent empirical study of Charter cases conducted by a self-professed "Charter skeptic" claims that individuals have actually been less successful since the Charter came into effect in 1982, as measured by overall successful claims made in the Supreme Court of Canada. Thus, the study reports individual litigants were only successful in 41.2% of Supreme Court cases during the period 1982-1993, compared with a success rate of 44.9% during the 1949-1982 period. Following publication of this data debates pitting "Charter skeptics" against "Charter optimists" quickly ensued, with Charter optimists playing down the importance of such statistical analyses for understanding social trends. For example, one member of this camp was reported to have claimed that such statistical reports were "next to useless, if not useless." "Charter of Rights No Help in Court, Academic Says," Globe and Mail, November 11, 1993, p. A5.
couples. In ruling that the differential treatment of married couples by the Income Tax Act was not discriminatory, the Federal Court ruled that simply showing differential treatment is not enough to prove a discrimination under Section 15 of the Charter. Rather, the court concluded, that in order not to "trivialize" the Charter, individuals must show that they belong to a group that has traditionally suffered discrimination, or failing that, demonstrate that there was clear prejudice against them because of their membership in a particular group. Thus according to the Court of Appeal, because married couples do not belong to a disadvantaged group, they therefore cannot avail themselves of constitutional remedies for discriminatory treatment. In this vein the court reasoned:

...it cannot be said that married persons have been socially, politically or historically disadvantaged in Canada....Rather members of our society who are married may well have experienced some privilege and advantage as a result of their status. Married people are not a discrete and insular minority, nor are they an independently disadvantaged group.

In contrast to the Charter's equality guarantees which provide that "every individual" is equal before and under the law and has equal protection and benefit of the law without discrimination, this ruling effectively concluded that only "disadvantaged groups" are subject to the constitution's anti-discrimination protection. Such a conclusion was justifiable, according to Mr. Justice Linden, because: "Advantaged groups have more power in our society; accordingly, it is assumed that distinctions that disadvantage them are not


28 Schachtsneider, p. 76.
discriminatory, unless there is clear evidence of prejudice or stereotyping."

Raising the controversial issue of whether the constitutional equality provisions should be interpreted to protect individual rights, or whether Section 15 is in fact an "affirmative action" guarantee designed to remedy historically disadvantaged groups, the Schachtschneider decision focused attention on the complex and often competing interests of individuals and groups in Canadian society. How the balance between group rights and individual rights will eventually play out in Canada's emerging rights jurisprudence remains a very open question at the end of 1993. What is more apparent, however, is that constitutional change in Canada in the 1980s and early 1990s has already profoundly altered Canadian legal development, legal debate, and legal culture. Thus, the controversy regarding group versus individual equality rights, in and of itself provides confirmation that rights have assumed a much higher profile in the Canadian legal culture. Prior to 1982, a debate regarding such equality rights would not have engendered much controversy because supportive popular assumptions and cultural attitudes toward rights, and the implementation of rights, were not a prime dimension of Canadian legal culture.

The important trends discussed in this dissertation, as well as the various controversies and open questions concerning Canadian legal development during the early

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29 Ibid.

30 Although group and individual rights need not necessarily be thought of as mutually exclusive. For example, while "group" rights are assigned to women as a "group," as the Schachtschneider case illustrates, such group rights are nonetheless an "outgrowth of expressive individualism." For a discussion of this concept see, for example, Lawrence Friedman, "The Concept of Self in Legal Culture," Cleveland State Law Review, Vol. 38, No. 4 (1990), pp. 517-533.
1990s -- with respect to Canadian public education and other areas of Canadian society -- suggest a legal culture that has already undergone fundamental changes, but which remains in transition. Canadian legal culture has not become, and most likely will not become, a mirror image of the American legal culture, but rather after 1982 was assuming its own character and dynamic. This new Canadian constitutional identity reflected a sharp contrast with the legal system that existed during the pre-1982 decades of the Canadian confederation. The values and attitudes that constitute a legal culture are not static, but rather are constantly evolving. Many of the new shoots that were planted during the first decade of Charter development by Supreme Court rulings, and also through the activity of rights oriented groups, had begun to blossom by 1993, but would most likely only reach a stage of mature growth during the next half century. Thus, Canadian legal culture had undergone a fundamental transformation after 1982, but legal development remained an ongoing process. Further interpretation of the Canadian Charter of Rights and Freedoms and the development of rights consciousness in the late 20th and early 21st centuries will undoubtedly be a fascinating voyage of discovery for both legal professionals and citizens, and also a journey that is likely to enrich the nature of Canadian democracy. Legal development in the field of public education will be an important facet in the future growth of a rights oriented jurisprudence that will require close attention and serious analysis.
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