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RIGHTS IN CONFLICT:
THE MARGARET CALDWELL CASE

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ABSTRACT

This thesis focuses on the case of Margaret Caldwell, whose contract was not renewed by the Catholic school at which she was teaching because she married a divorced Methodist in a civil ceremony. The decision not to renew her contract has immersed the school involved, its controlling school board and the Human Rights Branch of British Columbia in a series of judicial disputes that have yet to reach a final solution. Conflicting judgements at the provincial level have favoured both parties, and the case now faces adjudication by the Supreme Court of Canada. The thesis contends that this Court's judgement will favour the school.

The investigation in this thesis used six methods of inquiry:

(a) a literature review examining the historical relationship between Church and State, independent school growth and the development of human rights legislation in Canada;

(b) a content analysis of the legal transcripts and exhibits used in the hearings;

(c) a review of other disputes with similar concerns and relevant Case Law;

(d) in-depth focused interviews with the main people involved in the case;

(e) information obtained from eminent professors of law and Canadian Human Rights Commissions; and

(f) related secondary material reflecting Canadian life and times.

The case generates a number of key questions: to what extent are denominational schools afforded constitutional sanctity; does this case demonstrate a further example of the tradition in Canadian human rights jurisprudence whereby collective rights are favoured over individual rights; and is liberal human rights legislation destined to be frequently frustrated by judicial conservatism, or does the 1981 Charter of Rights and Freedoms herald a new era in which individual rights will find greater protection?

The Supreme Court's judgement will have implications for both sides. If the Court upholds Margaret Caldwell's rights, the decision will directly affect the hiring policies and practices of denominational schools by restricting their autonomy. Should the decision favour the school, this would be regarded as a setback by human rights advocates, and indicate a possible need for legislative amendment. Inevitably, as in all adversarial litigation, one side will emerge dissatisfied.

To my husband,

William

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I wish to express gratitude to my Supervisory Committee for their constant support, and insightful suggestions. My thanks also go to Margaret Caldwell, the namesake of my thesis, who was kind enough to provide important interviews. Of equal assistance was Ian Charles Stuart, past principal of St. Thomas Aquinas High School, and other members of the Vancouver Catholic Community, particularly: the Right Reverend Monsignor Stewart, Chancellor of Vancouver Archdiocese; Reverend James R. Roberts; Reverend Stephen Jensen; and Mrs. Molly Boucher, President of the Federation of Independent Schools in Canada. The respective legal counsel involved in the judicial hearings: David H. Vickers; Alfred T. Clarke and Jack M. Giles, all gave valuable assistance. I am indebted to the Human Rights Commissions of Canada, as well as several Canadian Law Schools, for the information they provided. Worthy of special mention are: Hanne Jensen, Director, and April Katz, Chief of Compliance, B.C. Human Rights Branch; and Charles B. Paris, Chairman of the B.C. Human Rights Commission and Regional Director of the Canadian Council of Christians and Jews. Finally, I wish to thank Dr. Jean Barman, Faculty of Education, U.B.C. and Professor William W. Black, Faculty of Law, U.B.C., for their time and comments which provided a useful background for the thesis.

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Chapter 1: Introduction

Statement of the Problem

Historically, there has existed a conflict between the State and the individual and, in essence the Margaret Caldwell case is a variation on this theme, in that a dispute has evolved between one teacher and an established authority. It highlights a complex situation whereby the rights of a denominational school are perceived to be at odds with those of an individual teacher as specified in human rights legislation. The case has been adjudicated in three provincial hearings which have produced contradictory decisions.

The decision as to whose rights are to be upheld, those of the teacher or her employer's is presently unclear. The case, nevertheless, generates a number of questions that are addressed in this thesis, namely: to what extent are denominational schools afforded constitutional sanctity; does this dispute demonstrate a further example in Canadian human rights jurisprudence whereby collective rights are favoured over individual rights; and is liberal human rights legislation destined to be frequently frustrated, as in the past, by judicial conservatism, or will the Constitution Act of 1981, with its entrenched Charter of Rights and Freedoms, herald a new era in Canadian human rights development?

Background

The decision not to renew Margaret Caldwell's contract immersed St.Thomas Aquinas High School, the Catholic Public Schools of Vancouver Archdiocese, and the Human Rights Branch of British Columbia, in a series of judicial disputes that have yet to reach a satisfactory conclusion.

Margaret Caldwell commenced employment at St.Thomas Aquinas School in North Vancouver, in 1973, as a teacher of Commercial subjects and was considered competent in that position. In December, 1977 she married a divorced Methodist, in a civil ceremony, and in consequence broke two important Church rules, namely that a Catholic should not marry a divorced person and that if a Catholic marries a non-Catholic, it should take place in a Catholic church. As a result, the school decided not to renew her annual contract when it expired in 1978. The school's position was that Margaret Caldwell's action had violated the Church's teachings and as such she had set herself apart from the Catholic community.

After receiving notification from the school that she would not be re-employed, Margaret Caldwell approached the Human Rights Branch of British Columbia alleging discrimination. In the ensuing court actions both Margaret Caldwell and the school have received successful rulings from the provincial legal system. The case now comes before the Supreme Court of Canada for definitive interpretation of sections of the B.C. Human Rights Code that have caused confusion in the dispute. Implicit in the Court's interpretation will be an indication as to whether Margaret Caldwell's allegation of discrimination is justified, and in consequence, whose rights are to be upheld.

Key Terms and Definitions

(a) Independent Schools

It is, at the outset, useful to set forth a definition of the term "independent school" used repeatedly in this thesis. Gossage (1977) states:

> ... the kind of schools most people think of as "private schools" are more properly known as "independent schools" .... [they] ... are privately supported, non-profit institutions that offer university preparatory courses and often elementary education as well .... The fate of the school rests essentially with its Board of Governors, trustees or directors, a body whose duty it is to set financial and educational policy ... (p.1-3).

In the broadest sense, private schools embrace any educational institution which operates outside the public school system. In that category falls parochial or denominational schools, pre-schools and exclusive schools which enrol a select elite. The term "separate school" is used in some parts of Canada to describe denominational schools, normally Roman Catholic, which are part of the public school system. According to Downey (1979), in his study of the development of B.C. independent schools, "private" has been used "to imply profit-making" and "'denominational' ... to imply religious separatism" (p.11). He concludes that the term "independent school" is used today to describe

private schools which are both denominational and non-denominational. (Figure 1 provides a fuller explanation of this point.) Downey's definition is pertinent to this thesis and will be adhered to throughout.

(b) Human Rights

Human rights is a modern variation of what used to be referred to in Canada as "civil liberties". Since the Second World War, the concept has increasingly been referred to as "human rights" and also "fundamental freedoms". This development has been affected by the United Nations Charter and the Universal Declaration of Human Rights, to which Canada is a signatory. Although the terms "human rights" and "civil liberties" are often interchangeable, it is intended throughout this thesis to use the term "human rights".

Organization of the Thesis

This study consists of seven chapters. This chapter serves as the introduction by describing briefly: the background and statement of the problem; the key terms and the methods of investigation. Chapter 2 provides an historical perspective that traces Church/State relations, the development of independent schools in Canada generally, and in British Columbia, specifically. Further, the chapter examines the development of human rights legislation. The focus of Chapter 2 is the origins of the legal arguments used in the Caldwell case. Chapter 3 provides a context in which to examine the issue, profiling Margaret

Figure 1 School Classification in Canada

Canadian schools can be categorized as follows:

	Public	Private
Denominational	1	2
Non-Denominational	3	4

Cell 1: public-denominational or "separate schools", were established in Canadian provinces, other than B.C.

Cell 3: public, non-denominational schools - the only kind recognized in British Columbia before the 1977 Independent School Support Act.

Cell 2 & 4: Private schools, either denominational or non-denominational. Today referred to as independent schools.

Note: From The Anatomy of a Policy Decision B.C.'s Bill 33-- The Independent School Support Act by L. W. Downey, 1979, p.11.

Caldwell and the events that culminated in her loss of further employment in St.Thomas Aquinas School. In addition, the chapter outlines the nature of a Catholic school and its distinct requirements of faculty members. Chapter 4 examines the three judicial hearings handed down thus far; and gives particular emphasis to the legal concerns of the dispute. Chapter 5 analyzes the points at issue emanating from the judicial deliberations with reference to related cases. Chapter 6 addresses the hypothesis stated initially in this work and discusses the wider issues generated by the dispute. Chapter 7 concludes the thesis with a discussion of the potential implications, of the Supreme Court of Canada's decision, for all concerned parties.

Method

This thesis used six methods of inquiry:

(a) a literature review examining the historical relationship between Church and State, the growth of independent schools in Canada, and the development of Canadian human right legislation;

(b) a content analysis of the legal transcripts* used in the three hearings;

(c) a review of other disputes with similar concerns and relevant Case Law;

(d) in-depth focused interviews with the major personalities involved in the case;

---

* These included: the "Reasons for Judgement" of the Board of Inquiry; the Supreme court of British Columbia and the Appeal Court of British Columbia; the Appeal Book (2 vols) of the Court of Appeal containing evidence given during the Board of Inquiry; and the Factum of all parties in the dispute.

(e) information obtained from eminent professors of law and Canadian human right commissions; and

(f) related secondary material, reflecting Canadian life and times.

Discussion

The Caldwell case has relevance since it allows us to examine important issues in non-public education. The investigation looks at the nature of a denominational school, and its perceived autonomy under constitutional arrangements. Although a denominational school is central to the conflict, the implications emerging from this case have relevance for all independent schools because application of the B.C. Human Rights Code may have the effect of limiting the autonomy of such schools, especially in the area of hiring policies. If the teacher's rights are upheld, denominational schools specifically and independent schools in general, would indirectly be informed as to who they may or may not employ. This possible infringement on hiring policies would dramatically affect their presently-enjoyed autonomy. Additionally, a decision in the teacher's favour may necessitate a reassessment of employment policy, and alter a history of non-involvement by the government in this area.

The dispute facilitates an understanding of the role of teachers who serve in the non-public sector and the distinct obligations and requirements that set them apart from their counterparts in the public school system. Whilst the provincial judiciary has experienced difficulty adjudicating equitably for both parties, in the majority of the decisions there has been an apparent reduction of the teacher's

rights vis-a-vis those of the school. Concurrently, the Caldwell case occurs at a time when there is greater awareness and expectation of individual rights, which in some instances may only be attainable as a result of litigation.

Finally, the Caldwell case has broader significance in that it illuminates the relationship between individual and group norms in society. The Charter of Rights and Freedoms may well encourage litigation by individuals which may challenge existing notions of group rights. As such the new legislation will impact not only on educational policy making, or organizations characterized by religion, but on other sectors in the community, such as women and the handicapped. The dispute carries within it the seeds of a radical shift in established practices in Canadian society, if the final judgement is in Caldwell's favour. The implications of that decision are wide-ranging and will dramatically alter the pattern of institutional arrangements which have existed since Confederation.

It is not intended to assume the role of advocate for either party in the case, but the thesis hypothesizes that when adjudicated by the Supreme Court of Canada, the decision will be in favour of the school. This thesis rests on:

(a) the constitutional sanctity traditionally afforded denominational schools;

(b) the tendency in Canadian human rights jurisprudence to favour collective over individual rights; and

(c) the traditional judicial conservatism, in Canada, which frequently has frustrated liberal human rights legislation.

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1. Downey, L. W. The Anatomy of a Policy Decision, B.C.'s Bill 33 - The Independent Schools Support Act. A report prepared as part of the study of the Consequences of Funding Independent Schools (COFIS). University of British Columbia, September, 1979, unpublished manuscript.

2. Gossage, C. A Question of Privilege: Canada's Independent Schools. Toronto: Peter Martin Associates Ltd., 1977.

Chapter 2: Historical Perspective

The historical origins of the Margaret Caldwell case are rooted in the development of independent schools in Canada, generally, and in British Columbia specifically; and in the development of Canadian human rights legislation. Throughout the Caldwell case two themes reoccur, the traditional rights of denominational schools and the employment rights of an individual teacher. That both parties have valid rights is not in question, the problem lies in determining the extent of those rights. It is important to comprehend the origins of these issues that form the basis of legal arguments and which render the case difficult to adjudicate.

Independent School Development in Canada

Independent schools are rooted in Canadian history and were established in all the provinces. During the 19th century, a pattern was delineated that facilitated a constitutional guarantee of state aid for denominational schools. This has meant that in a number of provinces, such schools have co-existed with government support for almost 150 years:

> Fundamental to the creation of a system of free and universal education was the notion, then common, that education and religion were inseparable, and that the state had a responsibility to foster,

wherever possible, a harmonious relationship between the two (Wilson and Lazerson, 1982, p.2).

The provinces attempted to accommodate the needs of the minorities in the matter of education, believing that, "schools should be responsive to parental demands in matters relating to moral and religious education" (Ibid, p.3). Religion and education were traditional partners in the Canadian system and school initiators were often clergymen. Religion in education has been cited as necessary and even crucial: "Knowledge if not founded on religion is a positive evil", was the belief of John Strachan, Anglican Bishop of Toronto, 1840 (Ibid, p.2). Catholics and Anglicans were associated with potential political power and a non-denominational common school system, which did not make legal and financial provision for denominational parties, was unacceptable to them:

> ... the tensions they engendered, with nonanglican Protestants and Catholics fighting for their legitimate rights in Upper Canada and Anglo-Protestants seeking security against French Catholic domination in Lower Canada, impelled the state to avoid establishing a nondenominational common school system and moved it instead to assume legal protection and support for denominationally based schooling (Ibid, p.3).

Constitutional Arrangements

The educational framework in Canada was established by provisions of the 1867 British North America Act (BNA)[1]. Section 93 of the Act states that each province is given exclusive power to pass laws relating to education, but:

> (1) Nothing in any such Law [enacted by a provincial legislature] shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the province at the Union;
>
> (2) All of the Powers, Privileges, and Duties of the Union by Law Conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec (emphasis added, see Appendix C for full text of section 93).

There was no uniformity in education in Canada, for section 93(1) of the BNA Act ensured that it was to be a local matter, and each province developed its own system. Ideas of uniformity were not prevalent since "the new nation was too diverse religiously,

linguistically, and regionally for this to be practical" (Wilson & Lazerson, p.5). Each province retained its own traditions and values, which served to reinforce the belief that "there were at least two ways, if not more, to be Canadian" (Ibid). Constitutional arrangements attempted to accommodate these diverse needs. As a result, section 93(1) of the BNA Act had implications which were "profound and controversial, for its effect was to give all legally established existing denominational schools at the time of Confederation perpetual rights to public funds" (Ibid, p.6). State responsibility "to support denominational schools in some form has remained intact in most provinces" (Ibid p.3).

Past disputes demonstrate the recognition of "constitutional sanctity" for such schools: the Manitoba School Question (1890) and the Roman Catholic Separate School Trustees for Tiny vs. the King (1927). For example, Trustees of the Roman Catholic Separate Schools of the City of Ottawa vs. Mackell (1917) held "that the protection given separate schools by the Act conferred a right or privilege 'determined according to religious belief'" (Hudon, 1980, p.464). This issue of constitutional sanctity for denominational schools is central to the Caldwell case, and was used as a legal argument by Stuart et al. (Chapters 4 and 5 address this issue in further detail).

Most of the Provinces and the Territories tended to develop their own particular educational systems, while maintaining constitutional provisions to facilitate funding of independent schools. In Ontario, Saskatchewan, Alberta, the Northwest Territories and the Yukon, separate school systems were founded; in Quebec and Manitoba (up to

1890) it was a dual confessional system; in Nova Scotia, New Brunswick, Prince Edward Island and Manitoba (since the late 1960's) informal arrangements were made for denominational schools; and in Newfoundland a "true" denominational system was established (Wilson & Lazerson, p.6-7). The evolution of funding independent schools depended on "particular political alignments within each province" (Ibid, p.7-8). It is the 19th century pattern of educational funding provisions that has had a powerful impact on present day practices and policies in pedagogy.

Historically, a pattern has evolved in Canada, whereby Church and State have not been "hostile and incompatible forces that must be kept at a distance," but working partners (Ibid, p.3). It would be wrong to assume, however, that Canadian Church/State relations have always been harmonious. Sissons (1959) notes that tensions existed in Manitoba in 1912 and Ontario in 1917, whilst Brent (1976) outlines disputes in British Columbia specifically, regarding taxation protests by Catholics, and resistance by Doukhobors to having their children educated in the public system. What has occurred is that each province has achieved its own settlement, frequently via the legislature. Hence, whilst there have been strongly contended disputes over education and religion, reconciliation has been affected in Canada, unlike for example, the United States. In the event that Margaret Caldwell should finally succeed in her claim of discrimination, problems may be generated between the Catholic Church and the provincial government, especially if an order of reinstatement were to be handed down.

To date, the 19th century practice of state funding for denominational schools still exists. The 20th century has witnessed the

parallel evolution of both public and non-public school systems. British Columbia, however, differs significantly from all other provinces in that its independent schools did not receive state aid until 1977.

Independent School Development in British Columbia

British Columbia is uniquely situated among the Canadian provinces in that its legislature did not make provision for financial aid for independent schools until 1977. This is attributable to the early history of the Province[2]. The Hudson's Bay Company was involved, initially, in the operation of schools in the Pacific North West. Most historians concur that 1849 saw the first schools established in New Caledonia (later British Columbia) by the Company whose charter required that "it bring civilization to the inhabitants of its territory" (Downey, 1979, p.6). The Company provided "grants-in-aid" to encourage Anglican and Catholic missionaries to enter the area and establish schools (Johnson, 1964, p.16). Lupul (1970) states that social class had an effect on Vancouver Island where "it was quite prominent" (p.250). What then developed was a situation in which the Church of England's chaplain, the Reverend Robert J. Staines (1820-1853) and his wife, taught the children of the Company's "gentle-man officers", whilst the Roman Catholic Oblate missionary, Father Honore T. Lempfrit, instructed the Company's children of the "labouring and poorer classes" (Ibid, p.250-251). An officer of the Company, James Douglas, was appointed Governor of the Vancouver Island Colony in 1851 and under him an educational policy was developed by the Anglican Reverend Clidge, who

succeeded the Reverend Staines. This policy implied that "a denomination-based system of education, similar to those in other parts of Canada, was about to take firm hold in British Columbia" (Downey, p.7).

This was not to be the case, however, as the Province had a new influx of immigrants, many with strong opinions regarding education. It was the discovery of gold on the British Columbia mainland in 1858, and the relative demise of the California gold rush, which brought 25,000 people, mostly American, into the colony. This phenomenon was pivotal for British Columbia, as it entered a new era requiring a new approach to educational policy. The predominant idea was not, according to Sissons, a sentiment averse to religion, but averse to "particular concessions to any denomination in the schools" (p.376). Barman (1982) notes further changes caused by the gold rush in British Columbia. The Hudson's Bay Company lost its governance of Vancouver Island as well as the mainland, where a new colony of British Columbia was created on August 2nd, 1858. The impact of the gold rush on education was threefold: the expansion of Catholic education; the opportunity for the Church of England "to further the British concept of class-based education" (p.13); and the development of "the concept of common schooling" (p.18). Johnson (1964) cites the establishment of Roman Catholic schools in 1858 by sisters of St. Ann, Montreal, as well as the development of schooling by other denominations, such as the Methodists. Table 1 shows the statistics of early denominational schools in the Vancouver Island colony and Table 2 demonstrates the growth in the public school sector in British Columbia.

Table 1: Number of Scholars of the Vancouver Island Colony, 1864-65

Colonial (Public) Schools

Victoria	(approx.)	56 boys
Craig Flower	"	20 boys and girls
Nanaimo	"	30 boys and girls
Cedar Plains	"	15
Cowichan	"	12
	Total	133

Denominational Schools

Victoria

Church of England Collegiate School	58 boys
Church of England Ladies' College School	45 girls
Roman Catholic Boys' College	40 (probably)
Roman Catholic Ladies' College	50 (probably)

Nanaimo

Church of England Girls' School	20 (approx.)
	213

Note: From The History of Education in the Crown Colonies of Vancouver Island and British Columbia and in the Province of British Columbia by D. L. MacLaurin 1936, p.41-42. (Unpublished doctoral dissertation).

Table 2: Total Enrolment and Percentage of Average Daily Attendance in Public Elementary and Secondary Schools in British Columbia, Selected Years, 1875-1975

School year beginning in	British Columbia	
	Enrolment	ADA
	,000	%
1975	542.7	..
1974	541.6	..
1973	549.0	..
1972	537.1	..
1971	524.3	..
1970	527.0	..
1969	513.2	..
1968	490.9	..
1967	468.7	..
1966	445.6	..
1965	420.8	..
1964	399.9	..
1963	378.4	..
1962	359.3	92.5
1961	341.2	91.7
1960	321.3	92.4
1959	306.0	91.8
1958	292.4	91.3
1955	241.5	90.6
1950	173.4	88.9
1945	130.6	87.7
1940	119.6	86.3
1935	116.7	87.3
1930	113.9	87.3
1925	101.7	83.9
1920	86.0	79.8
1915	64.6	78.8
1910	44.9	72.4
1905	28.5	69.5
1900	23.6	64.8
1895	14.5	64.1
1890	9.3	54.8
1885	4.5	55.6
1880	2.6	53.8
1875	1.7	58.8

Note: From Statistics Canada, Historical Compendium of Education Statistics from Confederation to 1975, ref. no. 81-568, p.33.

The major impact of immigration into British Columbia from 1858 was the establishment of a tradition whereby denominational schools did not receive financial aid from the state. The initial policy of supporting such schools was shortlived as the province's politically active residents were interested in different educational policies from other regions of Canada. Johnson contends that the new "permanent residue of merchants and settlers ... [constituted] ... a more stable element" that demanded a public education system (p.22). The press played an important part in the active campaign for such a system, and a public rally in New Westminster in 1864 passed a resolution "favouring a non-sectarian system, supported by public funds" (Downey, p.7). Newspaper editors, Amor de Cosmos of the British Colonist in Victoria and John Robson of the British Columbian in New Westminster, who both went on to become premiers of the province, kept the issue constantly in the public eye (Ibid). Barman notes other active protagonists: John Jessop, first superintendent of schools for the province; parents who were unable to afford school fees; and those who clearly were intolerant of religious-based schooling. Church group support then extant was too weak to counter the prevailing opinion. As a result of the strong public opinion, the Free School Act (1865), enacted by the Legislature of the Colony of Vancouver Island stated:

> All schools established under the provisions of this Act shall be conducted strictly upon non-sectarian principles ... and books of a religious character, teaching denominational dogmas shall be strictly excluded therefrom ... (as cited in Downey, p.8).

Although the Act made provision for religious instruction by any Church group, at specified times and "in separate classrooms", the result of the legislation was that of "establishing the precedent of secular education in a part of the territory which was to become the Province of British Columbia" (Ibid).

The mood of the time is evidenced in the following statement by the Governor of B.C. in 1867, Seymour:

> The Government has not undertaken to prove to the Jew that the Messiah has indeed arrived; to rob the Roman Catholic of his belief in the merciful intercession of the Blessed Virgin; to give special support to the Church of England; to mitigate the acidity of the Calvinistic doctrines of some Protestant believers, or to determine, authoritatively, the number of the Sacraments ... (Lupul, 1970, p.253).

In 1866 the colonies of British Columbia and Vancouver Island were joined together and in 1869 the Common School Ordinance, passed by the new Legislature, upheld the policy that disallowed a denominationally-based public education system. Johnson states that the 1869 Act "was a final blow to any public recognition, prior to Confederation, of a sectarian school system" (p.38). When in 1871 British Columbia entered the Confederation, no denominational schools supported by the state existed and the provision of Section 93(1) of the BNA Act did not apply. British Columbia became the first and only province in Canada with "a constitutionally-established, unitary, non-sectarian system of

education" (Downey, p.9). The first Public Schools Act of 1872 reaffirmed this tradition: "though the highest morality was to prevail in education, no religious dogma or creed was to be taught" (Ibid). Barman describes the situation which emerged as one in which:

> unregulated private schools seeking to maintain class and religious separation continued to be accepted as suitably co-existing with a state system based on the common school (p.9).

Some independent schools, however, did not survive without financial funding and, towards the end of the nineteenth century, many closed down, especially those of the Anglican Church. Only the Catholic schools in British Columbia could maintain strength:

> Catholic education expanded steadily through the devotion of the Oblates and Sisters of St. Ann to service the 15 to 19 percent of the white population of that faith ... Through the assistance of such other orders as the Sisters of Charity of Halifax and the Christian Brothers of Ireland, they became the basis of a provincial network of a private and parochial education continuing strong into the mid-20th century (Ibid, p.38-39).

In spite of the lack of state funding, independent schools attracted support that ensured survival for some of them. Downey explains the reason for this:

> The denominational schools ... found strength in the view that religion should permeate all aspects of education ... [and] the private, non-denominational schools developed as another kind of alternative; they found their support among clients who opposed the concept of 'mass education' and favoured, instead, a kind of educational elitism (p.9-10).

Statistics indicate the growth of independent schools in British Columbia: from two in 1849 to 180 in 1978, representing; Christian, Mennonite, Catholic, Seventh Day Adventist, and "fundamentalist" groups, in addition to non-denominational organizations (Ibid, p.10). According to Boucher (1977) there were twenty-six Catholic schools in British Columbia by 1880, ten of which were in the New Westminster (Vancouver) diocese. Today there is a total of sixty-two Catholic schools in the Vancouver area, as shown in the 1981-1982 literature of the Federation of Independent School Associations (FISA).

Discontentment with the provincial policy of non-funding independent schools was to increase during the initial half of the 20th century, and later be articulated by FISA. Boucher notes that the 1950's witnessed the extreme dissatisfaction shown by the Catholic community in the Maillardville Incident when three Catholic schools were deliberately closed down, throwing eight hundred students onto the public school system, to protest property taxes in 1951. The 1960's saw both arms of FISA, religious and non-religious, working together "to chip away, incrementally, at the wall of resistance erected by the government" (Downey, p.13). FISA was consistent in its lobbying to gain

formal recognition and aid for independent schools. The work of this interest group saw reward in the Independent Schools Support Act (1977) which gave aid to independent schools, and enabled British Columbia to fall into line with the other provinces. This Act retained the term "independent" in its definition of non-public schools, despite the fact that they are now in receipt of state funding, at a maximum of 30% of the state school's operating costs. Other than stipulations regarding curricula and teacher certification, the Independent School Support Act has done little to encroach upon the autonomy which independent schools in British Columbia have enjoyed in the past.

This historical perspective facilitates an understanding of the development of independent schools in Canada, and in particular, the survival of such schools in British Columbia, despite the lack of government aid until 1977. A number of issues emanating from the Caldwell case have their origin in the history of the province. In particular, independent schools in British Columbia have followed policies and practices in a manner quite different from non-sectarian state schools, and normally with little or no government interference. The question of independent school autonomy is a key issue in the case, as St.Thomas Aquinas, and other denominational schools, are unwilling to lose the freedom to administer school policy according to past practice and religious considerations, in order to satisfy the dictates of provincial legislation. Herein lies the major problem in the Caldwell case, the conflict between the perceived rights of a denominational school, whose origins predate the BNA Act, and the perceived rights of an individual teacher, as contained in a recent human rights statute.

It is within the field of human rights legislation that a further understanding of this conflict of interest is obtained. Human rights legislation, and the principles contained in it, form an important background to the Caldwell case, and are examined in the following section.

The Development of Human Rights Legislation in Canada

The principles of human rights have long been recognized, however, the legislation enacted to protect them has not, until late, found expression in the statute books. Ideas of justice and natural rights were considered by 5th century Greek philosophers, Plato and Aristotle. After the Renaissance, "the notion gradually gained currency that man possessed certain fundamental rights in a state of nature, and that when civil society came into being he took over those rights into his newly gained civil status and these still remained protected by natural law" (Lloyd, 1964, p.83-84). Fundamental documents, such as: Magna Carta (1215); the Petition of Right (1628); the Bill of Rights (1688); and the Habeas Corpus Acts, established the foundations of a tradition that was furthered by the writings of Milton and Locke. The North American colonies incorporated numerous aspects of these statutes into legislation aimed at protecting the fundamental freedoms of their subjects. Canada is, along with other countries, a signatory of the Universal Declaration of Human Rights (1948) which, according to Humphrey (1970), "has now become part of the customary law of nations and is, therefore, now binding on all states, including Canada" (p.44).

Human Rights Terminology

The terms "rights, liberties and freedoms", and "discrimination", are key elements in human rights legislation and require clarification here.

(a) Rights, Liberties and Freedoms

A definition of the term "human rights" can be broad in scope, in order "to throw a mantle of respectability around whatever private interest is being espoused at the moment", or narrow, "focusing on what might more accurately be called antidiscrimination legislation" (Hunter, 1979, p.78). Fairweather (1979), quoting from the Task Force on Canadian Unity, Coming to Terms: The Words of the Debate, classifies human rights as "rights, liberties and freedoms [which] define the relationships between an individual or group and the state and between individuals and group themselves" (p.309).

There is an important distinction to be made between "rights, liberties and freedoms". A "liberty" tends to be very broad in nature, and enables a person to do anything which is not specifically prohibited by law. The words "freedom" and "liberty" are often used interchangeably. The fundamental freedoms, as stated in the Canadian Bill of Rights (1960) include freedom of religion and freedom of assembly. Conversely, a "right" is more narrowly defined, and is something granted to a person which requires positive action on the part of the government to ensure it. The word "rights" is an umbrella which incorporates

political, legal and egalitarian rights. The latter category, that generates most of the work of human rights branches, includes the right to equality of opportunity in employment without discrimination on the basis of such characteristics as race, religion, sex or marital status.

Kallen (1982) states that "rights" can also be categorized as individual or collective. In a claim of individual rights, "claimants seek recognition and protection of their right to equality of societal opportunity (access to political, economic and social power) and their right to equality as persons before the law" (p.76). In collective rights, she posits, "claimants seek recognition and protection of their collective rights to freely express and enjoy their distinctive language, religion, and culture, in community with their ethnic fellows" (Ibid). It is the conflict between these two archetypal rights which permeates the Margaret Caldwell case, rather than a conflict between the individual and the state. In this instance, Margaret Caldwell claims to have equality of opportunity in employment, without being discriminated against because of her religion or marital status. At the same time, Stuart et al. claim the right to freedom of religion, without interference by a provincial government, as well as denominational school rights, provided by the BNA Act.

(b) Discrimination

In its modern context, the term "discriminate" is something of a misnomer and often leads to confusion over its true meaning. To

discriminate was classically regarded as "characteristic of a cultivated intellect and as the hallmark of civilized societies", today the word has undergone a metamorphosis and has become "epithetical, suffused with derogatory innuendo" (Hunter, 1976, p.28). The Oxford English Dictionary defines the word "discrimination" as "the act of discriminating; the perceiving, noting or making of a distinction or difference between things; a distinction (made with mind, or an action)". To discriminate against is "to make an adverse distinction with regard to; to distinguish unfavourably from others". Webster's New World Dictionary categorizes the term "discrimination" in three ways: "neutral, laudatory, or adverse". It is the third term which is the major concern of Canadian human rights legislation:

> an action or policy showing partiality or prejudice in treatment directed against members of certain specified groups.

In addition, the human rights branches, are not primarily as concerned with the motive of discrimination, but rather the impact of it: "And if the effect of an action is discriminatory, that action could be contrary to human rights legislation, even in the absence of discriminatory intent" (Tarnopolsky, 1979, p.299-300).

The Quebec Charter of Human Rights and Freedom is unique in that it is the only provincial code that seeks to give a clear definition to the word "discrimination": "Every person has a right to full and equal recognition and exercise of his human rights and

freedoms, without distinction, exclusion or preference based on race, colour, sex, civil status ... [etc] ... Discrimination exists where such a distinction, exclusion, or preference has the effect of nullifying or impairing such a right" (Ibid, p.300). Hunter (1976), in his examination of the subject concludes:

> Extracting a definition of discrimination for the purpose of Canadian human rights legislation from [Board of Inquiry] decisions, it would be this: discrimination means treating people differently because of their race, colour, sex, etc. as a result of which the complainant suffers adverse consequences, or a serious affront to dignity ... (p.17).

One final note on this term is that "discrimination" per se is not objectionable, but unjustifiable or unacceptable discrimination is frowned upon. For the most part, Canadian courts have avoided assessing the substantive worth of discriminatory provisions. Equality before the law has been ascribed a strict procedural meaning as in the Lavall and Bedard cases. Inequality in the administration of law has been deemed beyond the purview of the courts, evidenced in Smythe. Nevertheless, remarks have been made obiter drawing a distinction between discrimination with a beneficial aim and that which has a detrimental effect: Bliss and Burnshine are examples of this. The Charter of Rights and Freedoms (1981) also recognizes this: section 15(2) allows affirmative action programs which discriminate for disadvantaged individuals or groups. Provincial human rights statutes also provide for discrimina-

tion, for affirmative action purposes, as evidenced in section 11(5) of the Human Rights Code of British Columbia.

The History of Canadian Human Rights Legislation

Human rights legislation in Canada commenced initially with the freeing of slaves in 1793 when Upper Canada passed an Act, "to prevent the further introduction of slaves and to limit the term of Enforced Servitude ..." (Ibid, p.12). This legislation was redundant by 1833 when the English Emancipation Act abolished slavery in the British colonies (Ibid). The British North America Act "was silent about human rights," except for the preamble which stated that Canada's constitution was "similar in principle to that of the United Kingdom," whose unwritten constitution had in part a large element of common law which acted as a source of remedy for racial discrimination in the absence of statute law (Ibid, p.12).

There are two basic models for ensuring human rights. One is the English, Common Law approach which relies on specific statutes and decisions to protect the individual vis-a-vis the state. The second is the American, Bill of Rights approach which is based on the premise that in order to protect individuals from the power of the state, it is necessary to have a concrete statement of their rights. Unfortunately, the Canadian Common Law tended not to be an arena whereby a person's claims of discrimination were likely to be upheld. Tarnopolsky cites the cases of Franklin vs. Evans (1924), Lowe's Theatres vs. Reynolds (1921), and Christie vs. York Corporation (1940) as evidence of this (p.293-294).

Although there were a few provincial statutes prohibiting racial and religious discrimination, enacted in the 1930's, it was not until the late 40's and 50's that Canadian legislatures undertook the responsibility of passing legislation aimed at prohibiting discrimination in many areas. Canadian courts "regarded racial discrimination as neither immoral nor illegal", and the trend in judicial decisions favoured the advancement of commerce or "mercantile privilege rather than a code of human rights" (Hunter, 1976, p.13). The laissez-faire approach towards commerce characterized the Canadian system in the early 20th century. As a result of the priority given to "mercantile privilege" and the Courts' general unwillingness to champion human rights, it remained the responsibility of provincial legislatures to move into this area.

When compared to the United States, for example, Canada did not enjoy the benefits of an extrenched Bill of Rights until 1981, and "there is no tradition of interpreting civil rights in constitutional terms" (Manley-Casimir, 1981, p.86). In Canada, the emphasis has been on "the preservation of social order", rather than on the "preservation of individual freedom", as in the United States, and consequently, "the tradition of civil rights in Canada is much weaker" (Ibid, p.87). Canada's evolutionary pattern has been counter-revolutionary and compared with Her neighbour, states Naegele, Canada is "a country of greater caution, reserve and restraint" (as cited in Manley-Casimir, p.87).[3]

The post Second World War period witnessed the development of legislation aimed at dealing with these deficiencies in the Canadian legal system. Up until this point, the English, Common Law approach had

been followed. Government grew generally during the War, with the beginning of a welfare state, and greater governmental involvement in the life of the individual. At the same time, an interest in anti-discriminatory legislation developed during the War: "knowledge of racist atrocities committed under Nazi policies of genocide began to penetrate the Canadian consciousness forcing at least some Canadians to reflect on racism within their own borders" (Kallen, p.43). Governments in Canada delved cautiously into the area of human rights legislation "as various pressure groups began to lobby for anti-discrimination legislation and for more adequate means of implementation and enforcement of the laws" (Ibid). For example, the Jewish Labour Committee of Canada (JLC) was such a pressure group whose main objective, states Bruner (1979), was "to eradicate religious, racial, and ethnic discrimination from Canadian society" (p.237).

The Ontario Racial Discrimination Act (1944) and the Saskatchewan Bill of Rights (1947) were among the first pieces of legislation aimed at protecting human rights. Since 1962 all the Provinces and the Territories have enacted anti-discrimination legislation, whilst "the Courts have generally demonstrated greater sensitivity to the pervasive and invidious consequences of racial discrimination and, obversely, the corresponding importance of legislation attempting to secure human rights" (Hunter, 1976, p.13). Examples of this can be seen in the cases of John Murdock Lte vs. La Commission des relations ouvrieres (1956); R. ex rel Nutland vs. McKay (1956) and Gooding vs. Edlow Corporation (1966).

In addition to support for provincial human rights statutes, there was a growing demand for some kind of national statement regarding human rights. The Canadian Bill of Rights (1960) was the first such statement. It was a compromise constitutionally because it covers federal legislation only. Further it did not have a special constitution which is entrenched and hence, more difficult for a subsequent government to alter. The new Charter of Rights and Freedoms is entrenched in the 1981 Constitution Act, and is more dogmatic about rights and their protection than previous declarations. Legislation such as the Canadian Bill of Rights and provincial human rights legislation are statutes which can be overridden by a simple majority, whilst the Charter has been given constitutional status and repeal is made much more difficult. The Charter demonstrates that Canada is moving more unequivocally toward the Bill of Rights approach. This latest declaration has the support of the federal, provincial and territorial governments, and aims to guarantee, among others, fundamental freedoms, democratic rights and equality rights, to all Canadians. It is anticipated that the entrenched Charter will have a major impact on the dynamic of Canadian life and promote human rights principles, despite the rather poor record of the Supreme Court of Canada in dealing with the Canadian Bill of Rights[4]. In the Caldwell case, the Charter may have an effect in that it impacts on the attitudes and expectations of those involved. (This point is further examined in chapter 6.)

The Charter and similar declarations of rights are meaningless without an organized system providing remedy when these rights are

violated. Human rights commissions are the agencies designed to handle allegations of discrimination.

Human Rights Commissions

"Recognition of rights is one thing; a mechanism of redress is another" (Fairweather, p.310).

Legislation aimed at prohibiting discrimination was an important advancement, however, "a major weakness" remained in that "the victims of discrimination were responsible for lodging the complaint" (Kallen, p.44). As Tarnopolsky adds, legislation still continued "to place the whole emphasis of promoting human rights upon the individual who has suffered most, and who is therefore in the least advantageous position to help himself" (as cited in Hunter, 1976, p.14).

Ontario was the first Province to address this problem, when, in 1962 it "consolidated its legislation" forming a human rights code with the Ontario Human Rights Commisssion as the administrator of it (Kallen, p.44). All Canadian provinces established their own commissions by 1975 and in 1977 a federal commission was established under the Canadian Human Rights Act (Ibid). The raison d'être of the Canadian Human Rights Commission was, according to Fairweather its first Chief Commissioner, to be that of "the principal agency within federal jurisdiction for the creation of a favourable climate for equality of opportunity, and as a means of ending a wide variety of discriminatory practices" (p.310). He adds further that an objective is "to develop a national consciousness of the nature of discrimination and its costs"

(p.316). Part of the Act instructs the Commission to maintain close links with the provincial human rights commissions "to foster common policies and practices" (Ibid, p.313).

Tarnopolsky in 1978, while acting as a part-time commissioner of the Canadian Human Rights Commission, had first-hand experience of the administration of the organization. He states that initially, a complaint of discrimination is submitted whereupon the agency is firstly, involved with investigation and secondly, attempts to effect a settlement. If this endeavour fails and the complaint is still considered valid, the third step is a hearing, convened by a Board of Inquiry, which reviews the case. Should the complaint be upheld in the complainant's favour then the fourth stage, enforcement takes place. If an allegation is considered to be justified, the person contravening the human rights legislation is ordered to compensate the victim of discrimination. This can be in the form of financial compensation, or by the provision of opportunities or rights, which have been denied the complainant. (In the Caldwell case, both financial compensation and job reinstatement have been sought.)

Although varying slightly in detail, all of the provincial commissions follow a similar procedure involving investigation, attempted settlement, a Board of Inquiry review, and enforcement. It should be noted that concerted efforts are made by the Commissions to use a conciliatory model in the early stages of a dispute as opposed to an adversary system. Both sides meet with a mediator who attempts to resolve the matter amicably and to the mutual satisfaction of the concerned parties. The conciliatory process is "highly flexible",

states Hill (1969), with the focus "rather less on the issue of legal guilt than on the issue of effectuating a satisfactory settlement" (p.392).

The Canadian Human Rights Commission has jurisdiction over discriminatory practices in the provision of goods, services or accommodation and in employment in the federal sphere. The objective of the Federal Commission is not simply to uphold the rights of the complainant. As Hill, former Director of the Ontario Human Rights Commission, explains:

> Modern day human rights legislation is predicated on the theory that actions of prejudiced people and their attitudes can be changed and influenced by the process of free education ... Human Rights on this continent is a skillful blend of educational and legal techniques in the pursuit of social justice (as cited in Tarnopolsky, 1979, p.297-298).

The guiding principle of the Commissions, both federal and provincial, is to use education to assist people to reassess their attitudes and values. MacKay (1978) contends that most Commissions are reluctant to use "harsh penalties and public exposure" except as a "last resort" (p.753). If the educational approach fails, then the agencies try persuasion or conciliation, and finally, if necessary, enforcement: "the iron hand in the velvet glove" (Tarnopolsky, p.298).

Canadian Human Rights legislation is a relatively recent phenomenon and as such it is perhaps too soon to anticipate its success

in combating discrimination. What is believed by some, however, is that "in order for legislation to be effective in practice, it must have teeth in it" (Kallen, p.48). MacKay (1978) concurs with this, stating, "the law must escape the illusion that declarations of rights per se solve problems. The real test of a right is the kind of remedy provided upon violation" (p.751). This is the challenge which confronts Canadian governments that seek to enact statutes which proclaim human dignity and, in consequence, human rights. That the Commissions are a necessary aspect of Canadian life is a belief shared by many. As Humphrey states:

> I can have no rights unless there is some more or less organized social machinery for protecting them ... for every right that I have someone else - perhaps everybody else - must have a corresponding duty to respect my right; and if it comes to a showdown, there must be some organization in society with the authority and power to enforce that duty and hence protect my right. Otherwise my right is meaningless (p.48).

This discussion of Canadian human rights legislation provides a useful framework in which to examine the Human Rights Code of British Columbia which contains similar principles.

Human Rights Legislation in British Columbia

A Human Rights Act was passed in British Columbia in 1969 but was not vigorously enforced. In 1973 the Human Rights Code of British Columbia was enacted and subsequently played a greater role in the promotion and protection of human rights.

The provincial Commission is responsible for:

> promoting the principles of the Human Rights Code; promoting an understanding of and compliance with the code; developing and conducting educational programs designed to eliminate discriminatory practices [and] encouraging and coordinating programs and activities which promote human rights and fundamental freedoms (1980 Annual Report, p.6).

The Commission falls under the jurisdiction of the provincial Ministry of Labour, and the chief executive of the Code, the Director, reports to the Legislature through this ministry. The procedure followed by the B.C. Branch is similar to that of other provinces, but a major difference is that the Director has to report all cases to the Minister of Labour, when a settlement has not been effected. Independent human rights commissions exist in some provinces, which alone make a decision as to whether a Board of Inquiry is required for an unsettled dispute.

Since September, 1980, the Commission has been integrated with the Human Rights Branch and is now known collectively as the Human Rights Branch of British Columbia (Ibid). There is a distinction

between the functions of the two agencies: the Commission is concerned with promoting human rights and the dignity of the individual; whilst the Branch is responsible for enforcement of the Code. Using a variety of techniques, for example, forums, committees, publications and media projects, specific issues have been addressed by the Commission, namely, "mandatory retirement, the rights of the disabled, and racism" (Ibid, p.7). As the needs of society change so must legislation, and it is with this foremost in mind that the Commission has proposed changes in the Code, which seek to extend protection to such groups as the disabled and "racial minorities threatened by hate propaganda" (Ibid).

Contravention of the Code is, according to section 24, a summary offence. A summary offence, as opposed to an indictable offence, is characterized as an offence in which the case is conducted by a magistrate without a jury. Further, "the classification of offences as indictable and summary broadly reflects a distinction between serious and minor crimes" (Smith and Hogan, 1973, p.26). The majority of cases involving human rights violations, however, tend to involve civil rather than criminal proceedings, and usually originate within the classification of section 15 of the Code, "allegations" (Black, 1978, p.206). Hence, if Stuart et al. are finally held to have contravened the Code, they will not be guilty of a criminal or indictable offence, but rather a summary offence.

Professor William Black, law professor at the University of British Columbia, has extensively researched the B.C. Human Rights Code and its promotion by the provincial commission. He states that during the investigation and settlement of a claim "great emphasis is placed on

conciliation and voluntary settlement on the assumption that such a resolution is more likely than litigation to eliminate discriminatory attitudes" (p.206). If an amiable settlement cannot be reached, the Director has to report the matter to the Minister of Labour who uses discretion to appoint a Board of Inquiry to adjudicate the case. Such Boards normally consist of "from one to five persons; the chairman of the Board is invariably a member of the bar" (Ibid, p.207). At the Board of Inquiry, all parties involved in a dispute have the opportunity to retain legal counsel, and to call witnesses for cross-examination. This is the procedure which was followed in the Caldwell case. Compensation for discrimination takes the form of a financial settlement or other such remedies as mandatory orders "to make available to the person discriminated against such rights, opportunities, or privileges, as in the opinion of the Board, he was denied" (s.17(2)). If either party is dissatisfied with the Board's decision, then appeal can be sought under section 18 of the Code. In the Caldwell dispute, both parties have exercised this prerogative.

The B.C. Human Rights Code contains sections covering most areas of commercial activity, but it only pertains to those areas within provincial jurisdiction. Both provincial and federal governments are concerned with human rights, and as there is often overlap between jurisdictions, problems can emerge regarding the distribution of power between legislatures. Tarnopolsky (1978) explains that questions arise as to who has the power or responsibility to "confer the 'rights' or delimit the 'freedoms'" (p.29). Generally, legal and political rights tend to be of federal concern, whilst egalitarian and economic rights

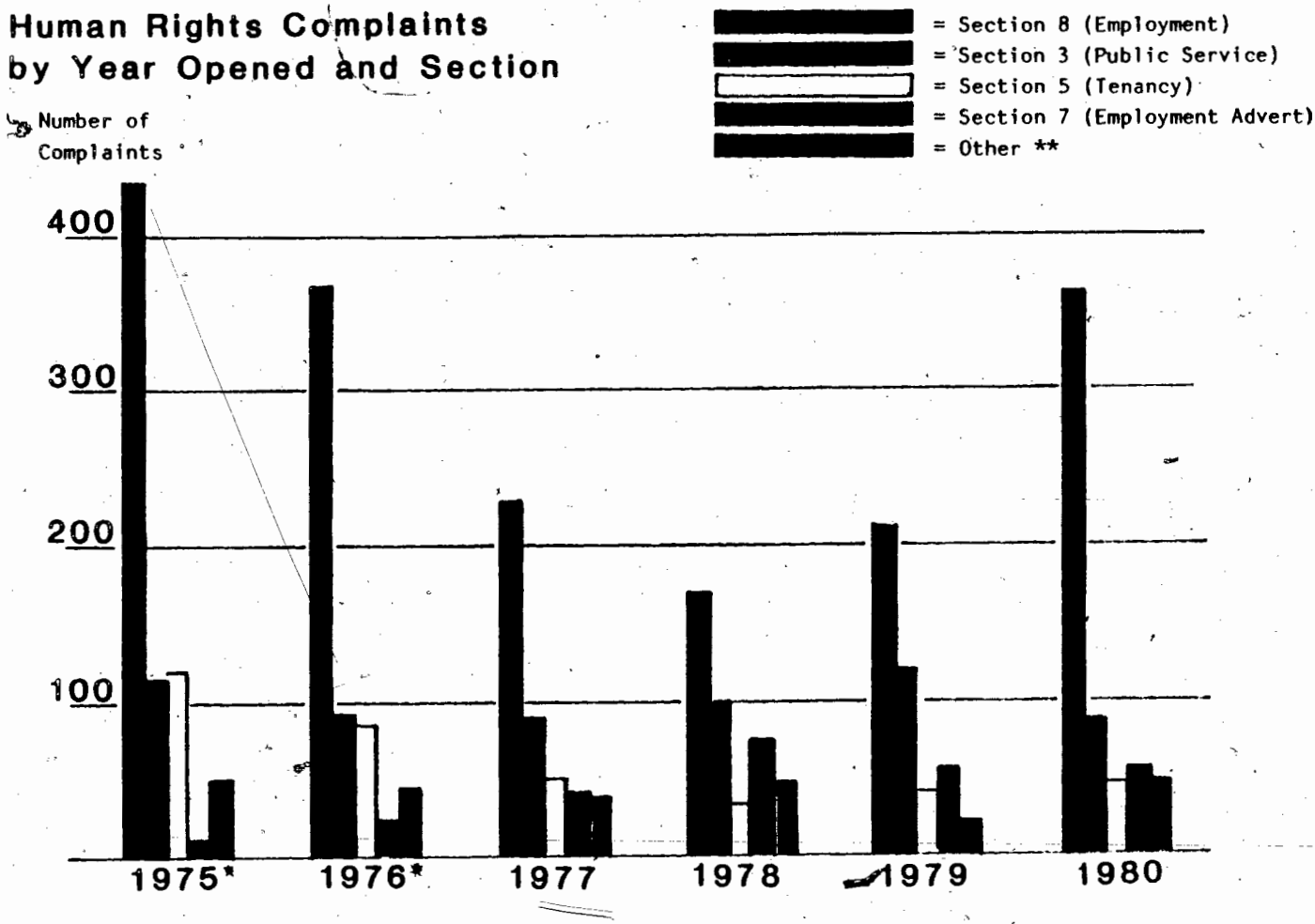
tend to fall under provincial jurisdiction[5]. In the Caldwell case, the school claimed that the application of the B.C. Code in the dispute is invalid in that it purports to apply to freedom of religion, which is normally regarded as a federal concern (chapters 4 and 5 further analyze this disagreement over legislative jurisdiction, which forms a legal argument in the case).

The sections of the Code involved in the Caldwell case are those relating to employment and private organizations whilst other sections cover such areas as service industries and accommodation. The Code is founded on "the principle that equality of opportunity is a right of all British Columbians" (1980 Report, p.17). Statistics give an indication of the scope of the organization: during 1980, the Branch received over 7,000 inquiries (Ibid). Equality of opportunity is afforded "regardless of sex, race, colour, religion, place of origin, marital status or other group characteristics" (Ibid). Figures 2 and 3 demonstrate this classification, indicating the number and nature of complaints dealt with since the Branch opened.

During its short history the B.C. Human Rights Code has dealt with complaints of a differing nature. Many issues have yet to be decided as not all sections of the Act have been allegedly violated and consequently, investigated by the Branch. The Caldwell case is precedent-setting in that it is the first dispute involving sections 8 and 22 of the Code. Cases which demonstrate the variety of concerns dealt with by the Branch are: Foster vs. B.C. Forest Products Ltd. (1979) which involved alleged unreasonable occupation qualifications,

Figure 2:

Human Rights Complaints by Year Opened and Section



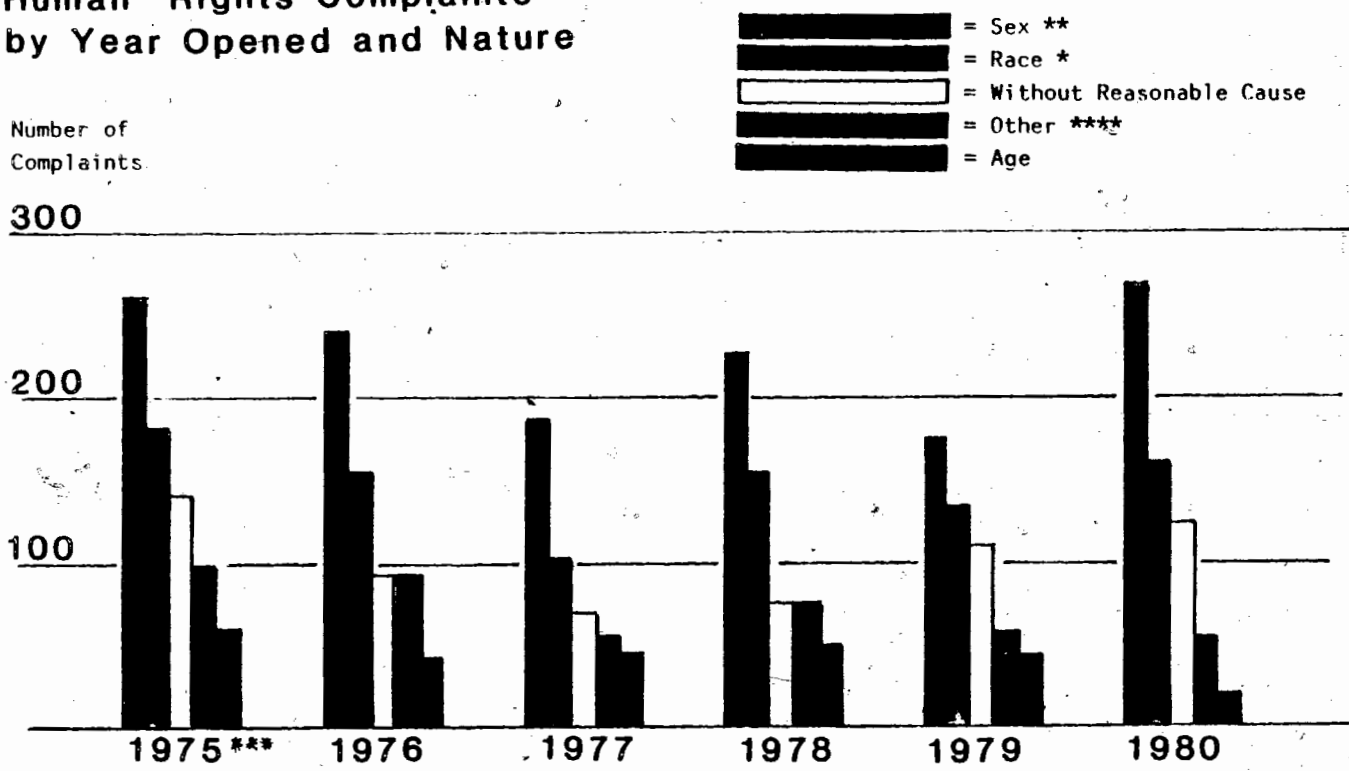
* 1975 & 1976 figures include complaints opened in previous years and carried over.
** Other includes sections 2, 4, 6, 9, 10 (Discriminatory Publication, Purchase of Property, Wages, Occupational Associations, Retaliation).

Note: From the Human Rights Commission of British Columbia, 1980 Annual Report, p.24.

COLOURED PICTURES

Figure 3:

Human Rights Complaints by Year Opened and Nature



* Race includes colour, place of origin, ancestry.
** Sex includes "sex and marital status".
*** 1975 figures include complaints opened in previous years and carried over.
**** Other includes marital status, religion, political belief, criminal conviction, retaliation.

Note: From the Human Rights Commission of British Columbia, 1980 Annual Report, p.23.

restricting women's access to equal opportunity in employment; and Gay Alliance Towards Equality vs. the Vancouver Sun (1976) in which a newspaper refused to publish a classified advertisement aimed at promoting a homosexual magazine. It is through such litigation that the B.C. Human Rights Branch, and its counterparts in other provinces, are able to assess the applicability and effectiveness of human rights legislation.

This historical perspective of human rights legislation and independent school development in Canada, provides an understanding of the basis of legal arguments in the Caldwell case. The main issues examined pertain to: constitutional sanctity for denominational schools; independent school autonomy; the conflict between individual and collective rights; and the expectation of redress through human rights legislation. The forthcoming chapter amplifies this discussion by documenting the context of the issue and the profiles of both parties in the dispute.

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[3] See also Presthus, R. Evolution and Canadian Political Culture: The Politics of Accommodation. In Preston, R. (Ed.), Perspectives on Revolution and Evolution. (Durham, N. C.: Dale University Press, 1979).

[4] Professor Tarnopolsky has written extensively on this theme. See Tarnopolsky, W. S., The Canadian Bill of Rights (2nd edition). (Toronto: The MacMillan Company of Canada Ltd., 1978).

[5] For more information on this point see Tarnopolsky, W. S. Legislative Jurisdiction With Respect to Anti-Discrimination (Human Rights) Legislation in Canada. Ottawa Law Review, 1980, Vol. 12, p.1-47.

Chapter 3 - Context of the Issue

An examination of the background of the two main parties involved in this dispute, Margaret Caldwell, and the St.Thomas Aquinas Catholic High School, provides a useful context for comprehending the events which culminated in this case, and the issues emanating from it.

Margaret Caldwell - A Profile*

Born in England in 1946, Margaret Rose Caldwell (nee Harris) was exposed to a Catholic upbringing from the outset. Her baptism into the Catholic Church took place in Birmingham, and when her family later moved to Dundee, Scotland, she was educated in Catholic schools: St.Mary's Primary and Lawside Academy. Whilst growing up, Margaret attended church regularly in Dundee: St.Joseph's; St.Fergus'; and Our Lady of Good Counsel. Having decided to enter the teaching profession, she studied Commerce at Dundee College of Technology from 1965-68 and upon graduation undertook a one year teaching course at the Dundee College of Education. The nearest Catholic Teachers' Training College, Craiglockart College of Education in Edinburgh, did not offer a Commerce course, therefore Margaret Caldwell obtained special permission from the Bishop of Dunkeld, to train at the non-Catholic, Dundee College of Education. In order to be eligible to teach later in Catholic schools, night classes in Catholicism, once a week, were a prerequisite for teachers in this position. When

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* Information for this profile was provided and checked by Margaret Caldwell (See Appendix A).

Margaret Caldwell left with her teaching certificate in 1969, she was, in consequence, qualified to instruct in both Catholic and non-Catholic schools. Having had an upbringing steeped in Catholicism, however, it was not surprising that she should opt to teach in a Catholic school. Between 1969 - 1973, she was employed in St.John's Catholic Secondary school, a public school operated by the Dundee Educational Authority, where she taught Commercial subjects and half an hour of religious instruction daily.

Margaret Caldwell's decision to emigrate to Canada in August, 1973, was based partly on the fact she had relatives living in Vancouver. Still intent on continuing a teaching career, she initially sought employment as a substitute teacher for the Burnaby School Board of British Columbia. She had applied for and received a British Columbia Teaching Certificate. Pursuing an advertisement for a position as a Commerce teacher, Mrs. Caldwell interviewed for the post at St.Thomas Aquinas Catholic High School in September, 1973. The position was offered to her by the principal at the time, Sister Jessie Gillis. According to Margaret Caldwell, the appointment was secured on the basis of her professional qualifications, and her religious background was not a major factor in the interview.

It is perhaps worth noting at this juncture, that today, prospective teachers seeking employment in Catholic schools in Vancouver, are screened by the Catholic School Board, and have to provide a letter from their parish priest, attesting to their adherence to the Faith. At the time of Margaret Caldwell's initial appointment, this procedure was not

followed: individual principals interviewed their own staff, and a letter verifying a candidate's religiosity was not mandatory.

For the five years 1973 - 1978, Margaret Caldwell taught Commerce at St.Thomas Aquinas. She was required to teach Typing, Shorthand, Bookkeeping, Office Practice and occasionally, General Mathematics, grades 9 through 12. Throughout this time she was the only teacher in the Commerce Department, and her teaching ability was deemed to be of a high standard (Board of Inquiry, Exhibit 6). Whilst not specifically teaching "Christian Doctrine", she participated in morning prayer with her homeroom, as well as in Mass. She was expected to support the school philosophy, as were all members of the faculty.

In 1976, Charles Ian Stuart was appointed principal of St.Thomas Aquinas. Mr. Stuart had worked in the school as a Social Studies teacher and as Vice-Principal. By this time, a system of interviewing all members of staff regarding their performance in the school had been instituted. Margaret Caldwell's interview took place on March 14th, 1978 with Mr. Stuart. The purpose of such meetings was to review each teacher's performance and to indicate whether his/her yearly contract would be renewed. Margaret Caldwell had signed annual contracts throughout her time at the school, and her fifth one was dated September 6th, 1977, (Ibid, Exhibit 5). Although having changed in format during the 1970's, the contract clearly specifies the professional and religious requirements of teachers in a Catholic school, in addition to a particular clause, stating that a teacher not receiving a contract renewal would be given at least thirty days notice of the fact, prior to June 30th of that academic year.

During Margaret Caldwell's interview with Mr. Stuart, he indicated that her contract would not be renewed for the school year 1978 - 1979, because on December 30th, 1977, she had married a divorced member of the Methodist Church, in a civil ceremony at the District Registrar of New Westminster, British Columbia. According to the doctrine of the Catholic Church, members of the Faith "must not marry a divorced person because in the eyes of the Catholic Church a divorced person is still married" (Board of Inquiry, "Stated Case", 1979, s.s.2). Margaret Caldwell's marriage is therefore considered by the Catholic Church to be bigamous, since the Church does not recognize divorce. She informally mentioned to a senior member of staff the circumstances of her intended marriage in the Fall of 1977, but disagreement exists here between Mrs. Caldwell and the school. At issue is the fact that:

> Though she informed her colleagues in the School (including the Principal, Mr. Stuart) of her forthcoming marriage, she did not inform them either that her husband was divorced or that the marriage ceremony would be a civil one (Ibid, s.s. 11).

Upon learning the circumstances surrounding Mrs. Caldwell's marriage early in 1978, Mr. Stuart sought advice from Mr. Alexander Blesch, the Superintendent of Catholic Schools for the Vancouver Archdiocese. It was decided that "if Mr. Stuart's understanding of the facts were correct, Mrs. Caldwell could not remain a teacher in St.Thomas Aquinas" (Ibid, s.s.14). The interview with Mrs. Caldwell confirmed the Principal's

information on the matter and led ultimately to the non-renewal of her contract for the academic year 1978 - 1979. She complained of the unfairness of the decision at the time, but still received notification of the intention not to renew her contract, dated April 28th, 1978, and she remained in her position until the end of the school year (Board of Inquiry, Exhibit 9).

No new teacher was employed thereafter by St.Thomas Aquinas to fill the position vacated by Mrs. Caldwell, and her classes were absorbed by existing staff of the school. When she left the school's employ on June 30th, 1978, she had references from Mr. Stuart stating that she "handled the entire Commercial programme of the school with exceptional competence and responsibility", and from Sister Gillis who concluded: "I do not hesitate to recommend her as a very fine Commerce teacher". (Ibid, Exhibits 7 and 8.)

It was suggested to Mrs. Caldwell, during her interview with Mr. Stuart, that she seek counsel with Father Brown to determine whether there was a way of rectifying her marriage in the eyes of the Church. In addition to breaking important Church laws, her standing in the Catholic Community had diminished as a result of the marriage. During a meeting between Mrs. Caldwell and Father Brown, which took place after she laid a complaint before the Human Rights Branch of British Columbia, the question of marriage annulment was mentioned, although it was made clear that the procedure could take several years. This approach did not lead to a satisfactory conclusion by improving Mrs. Caldwell's standing in the Catholic Community: "she realized that its focus would be Mr. Caldwell's

first marriage. She did not wish to involve him in a problem which was created by her religion" ("Stated Case", s.s.17).

With the knowledge that her contract would not be renewed for 1978-79, Mrs. Caldwell sought counsel from the Human Rights Branch in Vancouver, British Columbia. Ms. Hanne Jensen was the investigating officer involved with receiving the complaint. As a result of the consultation, Mrs. Caldwell alleged that she had been discriminated against, by Mr. Stuart, St.Thomas Aquinas High School and the Catholic Public School Board of the Archdiocese of Vancouver, on three separate grounds: religion, marital status and "without reasonable cause" (Board of Inquiry, Exhibits 1 and 2). This led eventually to three judicial hearings to determine the validity of the complaint. (Figure 4 summarizes the chronological events in the dispute.)

Before examining these hearings and the decisions flowing from each, it is necessary to examine in more detail the character of the environment in which Margaret Caldwell taught. In particular, the analysis presented here reflects the viewpoint of the Catholic Church, as set down in religious publications and legal documents, and details the Church's institutional expectations for Catholic education through the medium of a "Catholic school".

Figure 4: Caldwell Case Chronology

Aug., 1973:	Margaret Caldwell (nee Harris) emigrated to Canada.
Oct., 1973:	Began working at St.Thomas Aquinas High School, as Commerce Teacher.
Sep., 6, 1977:	Last annual contract given to Margaret Caldwell by the school.
Dec., 30, 1977:	Marriage to Ronald Caldwell.
Feb., 1978:	Ian Stuart, principal of St.Thomas Aquinas, learns circumstances of the marriage.
Mar., 14, 1978:	Margaret Caldwell interviewed by the school principal and informed her contract would not be renewed for the forthcoming academic year, 1978-79.
Mar., 23, 1978:	Margaret Caldwell received two professional testimonials from the school.
Apr., 27, 1978:	Complaint filed, by Margaret Caldwell, with the B.C. Human Rights Branch alleging discrimination on three counts: marital status, religion and without reasonable cause.
Apr., 28, 1978:	Written notification of contract non-renewal.
May 15, 1979:	Board of Inquiry hearing.
Jul., 6, 1979:	Board of Inquiry Judgement.
Feb., 7, 1980:	B.C. Supreme Court hearing.
Aug., 8, 1980:	B.C. Supreme Court Judgement.
Nov., 25, 1981:	B.C. Appeal Court hearing.
Feb., 12, 1982:	B.C. Appeal Court Judgement.

The Nature of a Catholic School*

Registered under the "Societies Act" of British Columbia, the Catholic Public Schools of Vancouver Archdiocese is a society responsible for the administration of member schools within the district. The object of the organization is to maintain and administer schools ranging from primary to university level, including seminaries. The Society's 1957 Constitution states as a further objective:

> To promote, direct, advise on, and carry out a curricula of religious, moral and secular education and instruction;.... The religious and moral education shall be according to the teachings, customs and usages of the Catholic Church, and shall be under the direction of the Archbishop of the Archdiocese... (p.1).

Today, there are 62 Catholic Schools in the Vancouver area, with an enrollment of over 10,000, governed by the Society. St.Thomas Aquinas, established in 1959 in North Vancouver, is typical of constituent schools, in that it adheres to the philosophy promoted by the Society: "The Catholic Schools of Vancouver Archdiocese are inter-related and inter-dependant not only academically and financially, but also in their Catholic character and mission". (Arch. Carney, 1978, p.9). The school

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* Information for this section was provided and checked by members of the Catholic clergy in the Vancouver Archdiocese.

provides co-educational instruction, to grades 8 through 12, and, according to the 1981-82 FISA data, it has an enrollment of 185 students. Its statement of philosophy reads:

> We, at Saint Thomas Aquinas Catholic High School, are a learning and teaching community under God, growing by sharing our Faith, Knowledge, Love, and Hope, to foster the spiritual, intellectual and physical development of the students to enable them to become more responsible Christians (Board of Inquiry, Exhibit 15).

What distinguishes a Catholic School from its non-sectarian counterpart is that the Christian "way" or "lifestyle" permeates the school, whereas in a non-sectarian school, religious education may be omitted altogether or exist simply as a timetabled academic subject. Barnard states, "the purpose of a school, or any organization is defined more nearly by the aggregate of actions taken than by any formulation in words" (as cited by Rev. Carter, p.2). What actually occurs in the school is reflected in the interactions between the staff and students. Catholic schools endeavour to maintain a Christian community within the school, involving all school personnel, as well as parents and alumni. What makes a Catholic school distinct from other schools, is the Christian way of life. The school has a faith dimension, based on Church teachings, and is seen in the context of the Church Community as a whole. The philosophy of the school and the teachings of the Church are regarded as inseparable: the Catholic view of life permeates the school. To understand further the

distinctiveness of a Catholic school, three facets of the school require attention: the doctrinal basis; administration of the schools; and the role of the teacher.

Doctrinal Basis

Since the beginning of Christianity, the Church has justified Her right to formulate laws representing Christ's teachings with binding effect on Church members. There are a number of Canons, in the Code of Canon Law, dating back to the Middle Ages, concerned with the establishment and operation of Catholic schools. Father Jeremiah Kellier, a theologian and expert on Canon Law, quotes Canon 1381, which states that:

> Local Ordinaries have the right and the duty to watch over all schools in their territory lest anything contrary to the Faith and to good morals be said or done therein (Appeal Bk. Vol. I, 1979, p.82).

In 1978, the Most Reverend James F. Carney, Archbishop of Vancouver, issued a pastoral letter entitled "The Catholic School--Its Character and Mission", which is made available to all teachers in Catholic schools. This is taken in part from "The Catholic School", issued by the Sacred Congregation for Catholic Education, Rome, dated March 19th, 1977. Based on the documents of Vatican Council II, this publication is accepted as authoritative for all Catholic schools in the Vancouver Archdiocese. It is from these key documents that one obtains an understanding of the nature of a Catholic school.

"Education" is defined in the Vatican document as:

> the development of man from within, freeing him from that conditioning which would prevent him from becoming a fully integrated human being. The school must begin from the principle that its educational program is intentionally directed to the growth of the whole person (p.13, s.s.29).

A further explanation of Catholic education, from Archbishop Carney, reveals: "the Catholic School communicates Christian values. It is defined by a concept of life that is centred on Jesus Christ as the foundation of the whole educational enterprise". (p.1). When the word Christian is employed, in the context of such documents, it is with a Catholic interpretation of what is Christian. It is the desire to teach Christian principles that motivates the Church to establish and maintain Catholic schools, the conviction "that Christ and His Revelation answer man's deepest needs and offer him the means of the noblest freedom and ultimate human happiness" (Ibid). A Declaration on Christian Education states that the responsibility of "proclaiming the way of salvation for all men", is reflected in the Catholic Church's concern with education. (Exhibit 10, p.3) The third Synod of the Archdiocese of Vancouver (1959), whose principles are incorporated into Catholic school contracts, adds further to this theme:

> It is the inalienable right as well as the indispensable duty of the church to watch over the

> entire education of her children... (as cited in Appeal Bk., Vol. I, p.54).

Catholic schools can be seen as a venue for people who share similar Christian values. The school does not operate in isolation, but interacts with other Christian units, such as the home and Church associations. The task of a Catholic school is "fundamentally a synthesis of culture and faith, and a synthesis of faith and life" ("The Catholic school," p.15, s.s.37). The school is just one means, as well as several others, to carry out the "saving mission of evangelization." ("Stated Case," s.s.21). The religious distinctiveness of the Catholic school is summarized in the Vatican Council II document:

> Christ is the foundation of the whole educational enterprise in a Catholic School .... The fact that in their own individual ways all members of the community share this Christian vision, makes the school "Catholic"; principles of the Gospel in this manner become the educational norms since the school has them as its internal motivation and final goal (p.14, s.s.34).

The Administration of a Catholic School

The religious emphasis of a Catholic school manifests itself in the administration of the institution. Due to its distinctive nature, certain principles govern the hiring of faculty members. Teachers are

selected and hired on the basis of their commitment to Catholicism, in addition to their professional ability. Most Catholic schools prefer to have a staff consisting entirely of Catholics, whenever possible. Alexander Blesch, Superintendent of the Catholic Schools of the Vancouver Archdiocese, states that in respect to hiring policies and priorities, academic and religious qualifications are the principles governing the criteria: "Our preferences... are [for] qualified, practising Catholics" (Appeal Bk., Vol.2, p.203). Catholic teachers must supply written verification from their parish priest that they are practising Catholics. If circumstances dictate that non-Catholics are employed, they are made aware of the special nature of a Catholic school to ensure mutually-agreeable working relations will develop. Whilst adhering to the tenets of their personal faith, non-Catholic teachers are expected to support the philosophy of the school.

All faculty members are obliged to sign a yearly contract of employment which specifies that they "shall exhibit the highest model of Christian behaviour" ("Stated Case", s.s.24). Teachers are assessed annually and given an appraisal form which is similar in nature to that of a public school, but reflects the religiosity of the school, including a section entitled, "Teaching in the Spirit of the Catholic School - Its Character and Mission". This section addresses the issue of "how well the teacher performs as a Christian witness to the students" (Ibid).

Administrators of Catholic schools are charged with two major obligations. According to the Society's "Constitution," they must ensure that "secular education and instruction shall be at least equivalent to

that of its counterpart furnished in a public school" (p.1). In addition, they must promote in the school "the art of teaching in accordance with the principles of the Gospel" (Arch. Carney, p.7). There is stress placed on integrating the pursuit of knowledge with the acquisition of religious values:

> the Catholic school sets out with a deep awareness of the value of knowledge as such. Under no circumstances does it wish to divert the imparting of knowledge from its rightful objective (Vat. Counsel II, p.15, s.s.38).

Concurrently, religious instruction is not intended to be another academic subject on the curriculum. The formation of the whole person is involved in the school activities: "the spiritual, the psychological, the intellectual, the physical" (Appeal Bk., Vol.1, p.83). It is with the religious and academic needs in mind, that the administrator selects teachers to further the school's goals.

The Role of a Teacher in a Catholic School

The importance of the teachers' role in a Catholic school is emphasized considerably. Teachers are expected to support the philosophy of the school and act as role models to the students. Their commitment to the school's Christian tradition is reflected both in their school life and in their private life. Consequently, the demands on teachers in a

Catholic school are more inclusive than those on their public school counterparts. As Archbishop Carney explains:

> the extent to which the school is and remains Catholic and the extent to which the Christian message is transmitted through instruction, depends very largely on the teachers, on their commitment to the faith as well as their professional competence (p.7).

The reason why so much emphasis is placed on the adherence of teachers to the Faith is due to the fact that students are exposed to their influence for a major part of their early life. It is considered that teachers are "in an excellent position to form the minds and hearts" of students, and as such should exhibit an example consistent with the school's teachings ("Stated Case", s.s.22). Teachers are therefore, expected to practise the principles of the faith in their behaviour and lifestyle: "for a Catholic teacher to be credible, he must proclaim the Catholic philosophy by his action, both within the school and outside it" (Ibid).

The values of the Catholic school are communicated through inter-personal relationships within it and provide an outlook indicative of the system. In order to maintain and develop the aims of Catholic education, spiritual retreats, involving the Faculty, are conducted. On these occasions, opportunity is provided to examine the school's philosophy and determine specific goals for the school. Moral training occupies a major part of the curriculum and considerable time is given

over to foster this aim. The school has a mission of initiating people into the Christian lifestyle, rather than just advocating the adherence to commandments or rules. The emphasis is on what Catholics believe and cherish, namely, that they share the life of the Risen Christ and the rules and commandments are ways of putting into action the Christian way of life, a personal response to God. A rejection of this lifestyle, through personal choices, is considered more than just a matter of breaking a rule, and its effects on others is considered a serious implication of such rejection. As Ian Stuart, principal of St.Thomas Aquinas from 1976-1980, explains succinctly: "We're not just teaching them how to read and write ... we're teaching a way of life" ("Stated Case", s.s.23). This objective is furthered by a number of means, such as the inclusion of religious worship, and particularly through the quality of the teachers. In essence, "Catholic teachers in Catholic schools, therefore, must be special examples of that faith, and by word and example they are to teach that faith to their students". (Appeal Bk.1, Vol. I, p.89).

The Catholic Community places great importance on its academic institutions and is committed to perpetuating them in accordance with their Christian tradition. As Archbishop Carney concludes:

> Our schools have been built and maintained in a spirit of deep faith, sacrifice and cooperation. May these qualities never be lost (p.10).

It is this inherently distinctive character of a Catholic school, with its axiomatic Christian doctrines, defining the parameters of its administrative policies and determining the selection of suitable staff, which was considered by all three provincial courts in reaching a decision on the Caldwell case.

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Chapter 4 - The Three Judicial Decisions

The purpose of this chapter is to examine the three judicial decisions handed down, thus far, on the Margaret Caldwell case. Three provincial tribunals have adjudicated her claim of discrimination: A Board of Inquiry (1979); The Supreme Court of British Columbia (1980); and the British Columbia Court of Appeal (1981). Throughout the hearings, consideration was given to the special nature of a Catholic school and its requirements. It is intended here to focus primarily on the main points of law arising in the hearings, and the basis upon which the decisions were made. Each hearing will be analyzed with the particular reference to sections 8 and 22 of the Human Rights Code of British Columbia[1]; the dispute arising out of the constitutional provisions based on section 93 (1) of the British North America Act[2] (1867); and the more nebulous claim of freedom of religion. Section 8 of the Human Rights Code of British Columbia, specifies an individual's right to equal opportunity in employment and, according to Margaret Caldwell, provides for her rights in this case and supports her claim of discrimination. Section 22, conversely, recognizes the rights of private organizations and facilitates their exemption from the general principles of the Code: St.Thomas Aquinas School believes this section upholds their rights as a group to further the goals of their religion. Specific points in issue emerging from the case, which demonstrate its dimensions and complexities, will be addressed in the subsequent chapter. At this juncture, it is intended to elucidate the verdict of each hearing. The chapter concludes with a fourth section which presents salient points arising from the three hearings.

Judgement I: The Board of Inquiry

The first hearing of the Margaret Caldwell case was undertaken by the quasi-judicial Board of Inquiry, between May 15th and May 17th, 1979, in Vancouver, British Columbia. It was chaired by lawyer, Sholto Hebenton, who was assisted by Professor James MacPherson and Ms. Valerie Meredith. As provided by the British Columbia Human Rights Code, (hereinafter referred to as the Code), the Minister of Labour had called for a Board of Inquiry to adjudicate the case, as attempts at conciliation had failed and a settlement had not been attained. At this hearing, David H. Vickers was counsel for both the Complainant, Margaret Caldwell, and for the Director of the Human Rights Code of British Columbia. The Director of the Code was represented in all three hearings since the Director's role is as an advocate for the non-discrimination principles, contained in the legislation, in addition to being concerned with the interpretation and application of such principles. Alfred T. Clarke represented the Respondents: Mr. Ian Charles Stuart, Principal; St.Thomas Aquinas High School; and the Catholic Public Schools of Vancouver Archdiocese, (Stuart et al.)[3], for the three hearings. The terms Complainant and Respondent refer, respectively, to the party who has complained of an injustice, and to the party who is called to answer, or respond to, the allegation, here Margaret Caldwell and the school.

It was determined by the Board that "the issue in this case is whether St.Thomas Aquinas School ... violated section 8 of the Human Rights Code of British Columbia ... when it decided not to renew the

contract of Margaret Caldwell, a teacher of commercial subjects, on the ground that she had married a divorced Protestant in a civil ceremony outside the Roman Catholic Church" (Reasons for Decision, 1979, p.2). The Board had to judge on three separate grounds of discrimination alleged by Margaret Caldwell: religion, marital status and without reasonable cause. As detailed in Chapter 2, the B.C. Human Rights Code specifies areas in which discriminatory practices are forbidden, and section 8 refers specifically to discrimination in employment. The basis of Margaret Caldwell's argument rests on factors proscribed in section 8, namely, religion, marital status and without reasonable cause. Firstly, she maintained that she was unfairly discriminated against because as a Catholic, more was expected of her, than if she was a Protestant. Secondly, she maintained that her marriage had caused her to be treated differently from when she held single status. Thirdly, she felt that there was no reasonable cause which could have been used as a reason to refuse her further employment in the school.

During the hearing, a substantial amount of time was given over to examining the nature of a Catholic school. Evidence was obtained from oral testimonies of individuals in the Vancouver Catholic Community, in addition to information acquired from written documents. Further evidence was provided in the form of the school contract, which Margaret Caldwell signed in September, 1977, which states in part: "The employee agrees ... to exhibit the highest model of Christian behaviour ..." (Board of Inquiry, Exhibit 5).

The Board also examined carefully two major publications; "The Catholic School", formulated by Vatican Council II; the "The Catholic School---Its Character and Mission" by the Most Reverend Archbishop Carney, and based its understanding of the subject matter on them. (These were reviewed in the previous chapter). It was acknowledged by the Board that "the goal of the Catholic school is that its whole educational program shall be permeated by the Christian spirit" (Reasons for Decision, p.14). Finally, the Board noted the judicial recognition given to denominational schools in Tiny Separate School Trustees vs. The King (1927) in which it was stated:

> Common and separate schools are based on fundamentally different conceptions of education. Undenominational schools are based on the idea that the separation of secular from religious education is advantageous. Supporters of denominational schools, on the other hand, maintain that religious instruction and influence should always accompany secular training (Ibid).

The Board was also concerned with the denominational makeup of the St.Thomas Aquinas staff. It was noted that in the academic year 1977-78, St.Thomas employed six teachers, out of a total of twenty, who were non-Catholic: "there was some 'spiritual' benefit in employing non-Catholics in that hiring such persons is an example of tolerance" (Ibid, p.15). Of the six non-Catholics, one was an Anglican who had been divorced and had subsequently remarried. This was acceptable to the school if it was evident that such an action was within the doctrine of

the Protestant faith, which recognizes marriages to divorced persons. For Margaret Caldwell the situation was very different because the Catholic Church does not recognize such marriages. Hence, she "was treated in a different manner than she would have been if she were not a Catholic. More was expected of her because she was a Catholic" (Ibid, p.17). Ian Stuart explained the school's position in this matter by stating that "he would rather have a subject not taught than have it taught by a person who, being a Catholic, failed to life up to Catholic standards in his private life" (Ibid, p.17-18).

The Board accepted that the school's decision not to employ, or re-employ, a Catholic who had married a divorce, was founded on a general policy adhered to by other Catholic schools. Margaret Caldwell held the view that marriages similar to hers were commonplace, and they did not necessarily indicate withdrawal from the Faith.

Having examined the nature of a Catholic school, and the fundamental disagreement between Stuart et al., and Margaret Caldwell, the Board turned next to the legal concerns of the case. In order to determine whether the hiring policy of St.Thomas Aquinas, based on Church law, is contrary to secular law as specified by the Code, the Board focused on four legal issues; (a) bona fide employment qualifications detailed in section 8 of the Code; (b) the exemption for private organizations contained in section 22 of the Code; (c) the provisions of section 93(1) of the British North America Act (1867); and (d) the right of freedom of religion.

(a) Section 8 of the Human Rights Code of British Columbia

Section 8 of the Code deals specifically with discrimination in respect of employment and is central to the Margaret Caldwell case. The section is concerned with the right of equality of opportunity based on bona fide, or legitimate, qualifications for employment, and the grounds upon which discrimination in the workplace are unacceptable. All three judicial hearings had to determine the correct interpretation of the section and the purpose of it, as envisaged by the B.C. legislature. The section reads:

8. (1) Every person has the right of equality of opportunity based on bona fide qualifications in respect of his occupation or employment, or in respect of an intended occupation, employment, advancement or promotion; and, without limiting the generality of the foregoing,

(a) no employer shall refuse to employ, or to continue to employ, or to advance or promote that person, or discriminate against that person in respect of employment or a condition of employment; and

(b) no employment agency shall refuse to refer him for employment, unless reasonable cause exists for the refusal or discrimination.

(2) For the purposes of subsection (1);

(a) the race, religion, colour, age, marital status, ancestry, place of origin or political belief of any person or class of persons shall not constitute reasonable cause: (for complete text of section 8 see Appendix B).

The main issue here, was whether any of the factors listed in section 8(2) could be used as "bona fide qualifications", i.e., could "marital status" and "religion" be regarded as legitimate qualifications required of a person who seeks employment or re-employment in a Catholic school? The Board indicated that "an enormous loophole would be driven through the anti-discrimination provisions of the statute if employers were free to treat as bona fide employment qualifications the various categories such as religion and marital status which are prevented by section 8(2) from constituting reasonable cause" (Reason for Decision, p.19). Nevertheless it was decided by the Board, that there were some occasions, when the characteristics detailed in section 8 (2), could be deemed bona fide or legitimate requirements for employment, within the terms of section 8 (1). Having agreed upon this issue, the Board had to consider next, whether it was reasonable for a Catholic school to require that a Commerce teacher be a practicing Catholic. A distinction was made throughout all three hearings between a Catholic who adhered to the tenets of the Catholic faith, as opposed to one who did not live a life, according to the Church's teachings. In order to resolve this dilemma, the Board made mention of the Ontario Human Rights Code which allows discrimination, based on an individual's creed, if it can be viewed as a reasonable occupational requirement. The Board concluded that "though the position is less clear in B.C.,... religion and marital status can be considered as bona fide qualifications in respect of employment" (Ibid, p.21).

On the interpretation of section 8, the Board decided that the Catholic school's policy of not hiring, or re-hiring, a teacher who had acted contrary to the Church's teachings, could be reconciled with the

Code. This verdict was based firstly, on the special nature of a Catholic school, which was not challenged by any party in the proceedings, and secondly, on "the Board's willingness to accept the proposition that, as a legitimate means of fostering that special nature, a Catholic school can demand that Catholic teachers practice what the Church preaches, namely that one should not marry a person who, in the Church's eyes, is married to someone else" (Ibid, p.22-23).

Having reached this conclusion, the Board stated that it was unnecessary to take into account the remaining legal issues, but that they would make comment on them nevertheless, thus giving them the status of obiter dicta.

(b) Section 22 of the Human Rights Code of British Columbia

Section 22 of the Code, permits exemption from the general principles of the statute, for certain organizations. This provides:

> 22. Where a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or group shall not be considered as contravening this Act because it is granting a preference to members of the identifiable group or class of persons.

The issue here was whether the school fulfilled these requirements. Stuart et al. maintained that their private organization fulfilled the requirements of section 22 and, according to their counsel, Alfred Clarke, it provides "a complete defence" for their action in the Margaret Caldwell case (Reason for Decision, p.23). Margaret Caldwell's counsel, David Vickers, disagreed with this, stating that the "identifiable group", in this instance, consisted of students only, as opposed to the total Catholic Community. He further argued that as there had been no complaints regarding Mrs. Caldwell's job performance, as a result of the marriage, the students had not suffered any adverse effects. All of the Board, except Professor MacPherson, disagreed with this latter definition of "identifiable group", stating instead that a broad interpretation should be used, which includes the Catholic Community in general. If the Board's final decision on the case had rested on the applicability of section 22, Professor MacPherson would, according to the "Reasons for Decision", have dissented from the Board's decision, which was in favour of Stuart et al..

It is important to note the Board's interpretation of "identifiable group" at this juncture because issue is made of it in the subsequent hearings. The Board did not categorically define the "identifiable group", but indicated that it was "those members of the Catholic faith residing in the five north shore parishes [sic.] which the school serves" (Ibid, p.24). In addition, consideration was given to extending the geographical boundary to include "those members of the Catholic faith who support the respondent society which owns and operates the Catholic schools in the Vancouver area" (Ibid). They concluded on this part of section 22:

> Whichever of these two geographical limitations is appropriate, the majority of this Board believes that the persons interested are not just the pupils in the School, but are the members of the Catholic faith who have created the School and who support it" (Ibid).

Having decided that the whole Catholic Community was the "identifiable group", the final argument concerning section 22 was the interpretation of the clause "granting a preference". The Board concluded that the facts of the case demonstrated in their opinion that Stuart et al. had fulfilled this requirement of the section. This was due to the fact that Margaret Caldwell's workload had been divided up among practicing Catholics in the school after her contract had expired. Based upon this, the Board concluded that section 22 was applicable for the school:

> The majority concludes that the purpose of section 22 is served by permitting the respondent to make the preference among the members of the Catholic community which it has made in this case (Ibid, p.25, emphasis added).

It is important to note carefully the Board's choice of words, because issue has been made of the expression "among the members", as the actual wording in the section clearly states "to the members". This point will be alluded to later in the chapter.

(c) Section 93(1) of the British North America Act (1867)

Before explaining why section 93(1) of the British North America Act (BNA Act) was an issue in the Caldwell case, it is necessary to explain the terms "ultra vires" and "intra vires"; and the importance of the Constitutional Questions Determination Act (1960), in the proceedings. "Ultra vires" and "intra vires" are terms concerned with areas of jurisdiction. Websters Third New International Dictionary (unabridged), defines "intra vires" as "within the powers", as opposed to "ultra vires" which is defined as "beyond the scope of, or in excess of legal power or authority (as vested in ... a legislative body)". As noted in Chapter 2, there is overlapping jurisdiction in some areas between the provincial and federal legislatures in Canada, but if a level of government attempts to enforce statutes which clearly go beyond its boundary of jurisdiction, then it is considered to have acted "ultra vires" and the legislation is therefore invalid.[4] In the Caldwell case, Stuart et al. argued that the Human Rights Code of British Columbia is "ultra vires" the province in light of section 93(1) of the BNA Act: that is, its legislation is beyond its area of jurisdiction with regard to denominational school rights, as specified in the BNA Act. Whether this is in fact the case forms an important submission which is brought forth in each judicial hearing. Secondly, the Constitutional Questions Determination Act is of importance in this case. Under this statute, when a party intends to challenge the validity of a piece of legislation it is incumbent upon him to inform the provincial and federal Attorneys-General, which Stuart et al. did prior to each judicial hearing. Neither Crown official appointed counsel to

represent them at the Board of Inquiry (Appeal Bk., Vol. 1, p.11). The Federal Department of Justice indicated that it wished to be advised of the outcome of the hearing "should the matter be taken further" (Board of Inquiry, Exhibit 4). Having satisfied the requirements of the Constitutional Questions Determination Act, the Board was able to proceed with the examination of section 93(1) of the British North America Act which provides:

> In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions:
> (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the Union.

The importance of the legal issue concerning section 93(1) lies in the recognition of "any right or privilege" enjoyed by denominational schools at the time of a province's entry into the Union. The fundamental questions examined in the hearings concerned the "rights" of denominational in British Columbia, and the extent of these "rights" regarding employment and re-employment of staff.

At the Board of Inquiry, Stuart et al. submitted that when British Columbia entered Confederation, in 1871, Catholic schools had "the right to dismiss teachers for denominational reasons" (Reasons for Decision p.26). The Board concerned itself with trying to determine exactly what rights or privileges denominational schools in British

Columbia possessed in 1871. The Board was unwilling to accept the school's argument in this instance, stating instead that denominational schools in British Columbia possessed limited rights. Furthermore, the Board stated that section 93(1) refers to a law which specifically relates to education, rather than a general law such as the Human Rights Code. In consequence, the Board rejected the submission by Stuart et al., that the Human Rights Code is ultra vires the province of British Columbia, by virtue of section 93(1). Section 8 of the Code did not, in the Board's opinion, inhibit the rights of Catholic schools.

(d) Freedom of Religion

Finally, the issue of religious freedom was aired by counsel for the school who argued that this fundamental freedom comes within the jurisdiction of the federal government and that the Code is inapplicable in this particular case because, "its application would violate rights granted to the respondents as religious freedoms under the constitution of Canada" (Ibid, p.28). The Board was not convinced that the provincial legislation, as exhibited in the Code, inhibits freedom of religion. Quoting from Mr. Justice Tysoe in the decision of the B.C. Court of Appeal in Regina vs. Harrold (1971), the Board further added:

> The right to freedom of religion does not permit anyone, acting under the umbrella of his religious teachings and practises, to violate the law of the land, whether that law be federal, provincial or municipal (Ibid).

The conclusion was that the same principle was applicable to St.Thomas Aquinas School, and other Catholic schools. The issue of freedom of religion was considered to have no bearing on the case and the authority of the Code was recognized:

> The Human Rights Code is in pith and substance a law respecting civil rights within the province and is valid provincial legislation notwithstanding that it governs employment policies of denominational schools (Ibid, p.29).

The Board of Inquiry dismissed Margaret Caldwell's complaint, effective July 6, 1979, on the ground that the school's employment policy could be "reconciled with section 8(1) of the Human Rights Code" (Ibid, p.22). She then exercised her right to appeal under section 18 of the Code. Margaret Caldwell and the Director of the Code disagreed with Board's interpretation of section 8. They felt that religion and marital status cannot be considered bona fide qualifications. (Appellants' Factum, 1981, p.2) It was also felt that the school's action could not be reconciled with section 8 of the Code, and that the Board's conclusions in the interpretation of this section were errors of law. Margaret Caldwell also stated that the Board erred by allowing Stuart et al. to qualify for the exemption provided by section 22. As Margaret Caldwell and the Director of the Code had slightly different interests in the case they retained separate counsel for the appeal to the Supreme Court of British Columbia. Although the Board's decision favoured the position of

the school, Stuart et al. were far from satisfied with the outcome. They filed a cross-appeal on the "freedom of religion" issue.

Judgement II: The Supreme Court of British Columbia

In brief, the Supreme Court of British Columbia overturned the decision of the Board of Inquiry, thereby upholding Margaret Caldwell's claim of discrimination. Mr. Justice Toy heard the case in February 1980 in Vancouver, and based his decision on the same four legal issues examined by the Board of Inquiry, namely: sections (a) 8 and (b) 22 of the Code; (c) section 93(1) of the BNA Act; and (d) the right of freedom of religion.

Before discussing the reasoning behind Mr. Justice Toy's decision, it is necessary to make mention of the legal counsel who represented each party during the Supreme Court hearing. Margaret Caldwell and Stuart et al. retained the counsel who represented them at the Board of Inquiry: David Vickers and Alfred Clarke respectively. The Director of the Code saw fit to retain a separate counsel, Louis F. Lindholm. It is not uncommon in human rights cases for the Complainants (both the party alleging discrimination and the Director of the Code) to retain separate counsel, especially if the case is very complex. If it is apparent, as in this case, that the Complainants are not in total agreement as to the aspects of a decision they wish to question, then in everyone's interest, separate counsel is retained. One final note regarding counsel in this hearing is that Louis Lindholm also represented the B.C. Attorney-General on the Constitutional issues. The Attorney-General of Canada had also

been informed of the appeals, but chose not to be represented (Appeal Bk., vol.2, p.270).

The appeal was by way of "Stated Case" which generally consists of two parts. The first consists of the facts as found by the Board and the second part deals with the questions of law upon which the Supreme Court's opinion is sought. The appellate judge reviews the questions of law on the basis of the facts contained in the "Stated Case", and cannot look beyond them. These legal issues will now be examined.

(a) Section 8 of the Human Rights Code of British Columbia

The initial question raised by this provision was whether the factors proscribed by section 8(2) of the Code, specifically marital status and religion, could be regarded as bona fide qualifications, within the terms of section 8(1). Both counsel for Margaret Caldwell and for the Director of the Code argued that the correct interpretation of this section is given by Professor McPherson in The Complaint of Janice Lynn Foster, Complainant, against B.C. Forest Products Ltd. (1979):

> The first point to be made about s.8 is that it provides that discrimination on certain bases - namely, those listed in s.8(2)-- is presumptively illegal. It does not follow, however, that discrimination on other grounds is automatically legal. Rather the legislature, by inserting the words "unless reasonable cause exists" in s.8(1), has left

> the door open for boards of inquiry and courts to find that discrimination on other grounds is illegal. Basically s.8 deals with two categories of employment discrimination. First, discrimination on the basis of any of the named heads in s.8(2) is always illegal. Secondly, discrimiantion [sic.] on other grounds may be illegal in some employment situations (as cited in Reasons for Judgement, 1980, p.12).

Whilst considering this interpretation of section 8, Mr. Justice Toy indicated that at first sight it appeared that Margaret Caldwell's loss of further employment at St.Thomas Aquinas School was indeed due to her marital status as "she was a bigamist according to a Church policy" (Ibid, p.13). In addition, she had been treated differently from non-Catholic teachers in the school, because she was a Catholic, and as such "more was expected of her" (Ibid, p.8). In this instance, therefore, it did appear that Margaret Caldwell's marital status and religion had led to the discrimination. It remained for Mr. Justice Toy to determine whether in fact this had been the case, and if so, whether this was permissible given the special nature of a Catholic school.

In determining the purpose of the Legislature in enacting section 8, Mr. Justice Toy found that its main function was to remove, from the work environment, specific types of discrimination. Counsel for the school suggested that the clause "'bona fide qualifications' should be interpreted as creating a subjective test to be applied to the employer's qualifications and that an objective test was to be applied when considering 'unless reasonable cause exists'" (Ibid, p.13). Mr. Justice Toy was

unwilling to accept this submission, stating that: "if subjectively the employer holds an honest and reasonable belief that he is creating a bona fide qualification it matters not that viewed objectively the failure to rehire was not done with reasonable cause" (Ibid, p:15). He further considered that such an interpretation "would be giving undue emphasis to the opening words of section 8(1)", which would render the rest of the section, especially "the apparent prohibitions in section 8(2) completely meaningless" (Ibid). Having decided to reject this submission of Stuart et al., he chose to adopt Professor McPherson's interpretation of section 8, as correct. The judge's first conclusion in the hearing was:

> I, therefore, find that the Board of Inquiry erred in law when it concluded that religion and/or marital status could be a bona fide qualification which they appear to have done... (Ibid).

He then proceeded to deal with the applicability of the section 22 exemption.

(b) Section 22 of the Human Rights Code of British Columbia

Margaret Caldwell alleged that the Board of Inquiry erred in law in extending the ambit of section 22 to St. Thomas Aquinas School. In order to decide this issue, Mr. Justice Toy stated that it was necessary to determine whether her marriage had indeed set her apart from the Catholic Community, whether in fact she was no longer in good standing

within this "identifiable group". Confined as he was to the information contained in the "Stated Case", he held that he could find no evidence to support such a proposition and further,

> there is a total absence of evidence that she has voluntarily withdrawn as a Catholic, practising or otherwise, or that the Church has taken steps to limit or qualify her right to be a practising Catholic or that she was or is "not in good standing" (Ibid p.19).

This being the case, when the school decided not to renew Margaret Caldwell's contract they were not granting a preference to members of an identifiable group within the terms of section 22. Rather, it was "making a selection or preference between Mrs. Caldwell and others all of whom were members of the identifiable group" (Ibid, P.20). Clearly then, section 22 had no applicability here, and the school could not benefit from the exemption therein.

(c) Section 93(1) of the British North America Act (1867)

The school cross-appealed the Board of Inquiry's decision on the ground that the Code is invalid, being an encroachment on federal jurisdiction. With respect to section 93(1) of the BNA Act, Mr. Justice Toy commented that it referred to pre-Confederation rights and privileges. Examining the history of the province he remarked: "In British Columbia there were no pre-Confederation statutes giving Catholics or any other

denomination any rights or privileges in the field of education" (Ibid, p.22). As denominational schools in the province had operated outside of the Public School Act, he continued, they had not received specific rights and privileges. Pre and post-Confederation statutes of British Columbia dealt exclusively with state schools, and for this reason, he was unwilling to accept the submission that the application of section 8 would infringe upon denominational school rights. In his opinion these rights were nonexistent before Confederation, and had no bearing on the present case:

> Accordingly, I reject the Respondent's submission that sec. 8 of the Human Rights Code of British Columbia is ultra vires or should be interpreted as inoperative insofar as it purports to apply to Catholic schools on the basis that the Respondents do not have any rights or privileges as envisaged in Sec. 93(1) (Ibid, p.22).

(d) Freedom of Religion

The final legal issue to be considered was whether section 8 of the Code infringed upon the right of freedom of religion. Stuart et al. stated that any interference by the Board of Inquiry with their decision not to rehire Margaret Caldwell, would amount to infringement of "their rights of evangelization, propagandizing and teaching of the Catholic way of life" (Ibid, p.23). Having considered the arguments in this submission, Mr. Justice Toy decided that the Respondents' right to freedom of religion had to be exercised within the laws of British Columbia, and he quoted from U. S. Supreme Court judge, Mr. Justice Frankfurter, in Board of Education vs. Barnette:

> The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma (Ibid, p.24 underlining for emphasis by Toy, J.).

In consequence, it was held that the right of freedom of religion does not remove the obligation of compliance with provincial legislation. Further, it was concluded that the effect of the Code, "on the Respondents' rights to propagate their religion is incidental and of a minimal incidence ..." (Ibid, p.25). In the view of the appellate court there was not a conflict between Stuart et al.'s fundamental right of freedom of religion, and the provincial legislation, as the decision not to rehire Margaret Caldwell had been a secular one:

> In essence it is my conclusion that the Respondents' conduct that is being called in question is a civil or secular matter and should not be characterized as an interference with a right to propagate one's religious beliefs (Ibid, p.26).

Thus all four legal issues were decided in Margaret Caldwell's favour at the B.C. Supreme Court level, her allegation of discrimination was upheld and the case remitted to the Board of Inquiry for an appropriate disposition. Before this could be done however, Stuart et al. served notice of their intention to appeal the decision. The appeal was heard by the B.C. Court of Appeal in November, 1981.

Judgement III: The Court of Appeal of British Columbia

In short, the Court of Appeal reversed the Supreme Court's finding of discrimination after reviewing the same four points of law. In this instance, the appeal was heard by a bench of five judges with Margaret Caldwell, the Director of the Code, and the Attorney-General of B.C., in the role of respondents, and Stuart et al. as appellants. There were four distinct parties in the dispute at this level: figure 5 delineates them and their arguments. An interesting development to note at this juncture is the divergence of the Attorney-General of British Columbia from the co-respondents on the applicability of section 22 of the Code. Unlike Margaret Caldwell and the Director, the provincial Attorney- General supported the contention that the Catholic school was exempted under this head. Information has yet to emerge which explains this difference.

The purpose of the Appeal Court hearing was to examine the points of law concerned in the Margaret Caldwell case, which was characterised as a dispute demonstrating rights in conflict:

> Like most human rights cases, the rights of one, here Mrs. Caldwell, touch the rights of others, here the school and those interested in it. The balancing of these rights requires care and sensitivity (Reasons for Judgement of the Hon. Justice Seaton, 1982, p.2).

Throughout the hearing, the justices reviewed the Board of Inquiry's "Stated Case" and also the arguments of all four parties, contained in the

Figure 5: Summary of the Main Arguments Presented in the B.C. Court of Appeal (1981)

Party	Counsel	Arguments
(1) Margaret Caldwell (Respondent)	David H. Vickers & Anthony J. Palmer	1. Neither "religion" nor "marital status" can be bona fide occupational qualifications for purposes of section 8(1) of the Code. 2. The refusal to renew Margaret Caldwell's contract was based on religion and marital status. 3. The refusal to renew the contract was without reasonable cause. 4. Stuart et al. are not protected by the provisions of section 22 of the Code. 5. The Code neither interferes with, nor abridges freedom of religion.
(2) Stuart et al. (Appellants)	Alfred T. Clarke & Jack M. Giles	1. Neither "religion" nor "marital status" constituted the reason for non-renewal of contract. 2. Reasonable cause existed for the refusal to re-employ Margaret Caldwell. 3. Margaret Caldwell ceased to be a member of the "identifiable group", within section 22 of the Code, namely Catholics who live a Catholic way of life. 4. Legislation in relation to freedom of religion, is solely within the legislative competence of the federal government. 5. Freedom of religion includes the freedom of parents to control the religious education of their children. The Code is constitutionally invalid if it interferes with denomination schools' employment policy which is governed by religious considerations.
(3) The Director of the B.C. Human Rights Code (Respondent)	Louis F. Lindholm	1. Religion and marital status cannot constitute bona fide occupational qualifications within the meaning of section 8(1). 2. No proper foundation for application of section 22 in this case. 3. The Code does not prejudicially affect any right or privilege with respect to denominational schools at time of Union (1871). 4. The Code is a law of general application in relation to property and civil rights in the Province and as such is intra vires the legislative assembly of B.C.. 5. The Code is not a law in relation to religion, nor does it violate any right to freedom of religion specified in the Canadian Constitution.
(4) The Attorney-General for B.C. (Respondent)	Dermod D. Owen-Flood	1. Stuart et al. are entitled to the benefit of exemption conferred by section 22, in this dispute. 2. Disagreement with Stuart et al. on other legal issues, i.e. interpretation of section 8, and the constitutional questions.

Note: From the Factum of each Party.

Factum. The Board of Inquiry has the responsibility, in a human rights case, to determine the facts and the validity of a complaint of discrimination. When a case is taken further to the Supreme Court and Appeal Court, it is to question the Board's findings. It is for this reason, that throughout the dispute, the Board of Inquiry's initial decision is constantly examined. The Appeal Court had the responsibility of determining the correct interpretation of the four legal issues at dispute in the Margaret Caldwell Case. (Figure 6 gives a further explanation of this).

(a) Section 8 of the Human Rights Code of British Columbia

Mr. Justice Carrothers noted the importance of section 8 when he stated:

> ...determination of the operative effect of each word, phrase and clause of s.8 provides the key to the interpretation and operative effect of the statute as a whole (Reasons for Judgement, 1982, p.3.)

The Appeal Court concerned itself initially with the correct interpretation of the section, and in particular, whether "religion" and "marital status" can ever be justifiable employment qualifications. Furthermore, if such factors can be considered bona fide qualifications, then failure to conform with them, could constitute "reasonable cause" for refusal to hire or re-hire. For this reason, Mr. Justice Seaton commented that the Court had to consider what is meant by the terms "religion" and "marital

Figure 6: Summary of the Reasons for Judgement in the B.C Court of Appeal (1982)

Legal Issues	The Honourable Chief Justice Nemetz	The Honourable Mr. Justice Seaton	The Honourable Mr. Justice Carrothers	The Honourable Mr. Justice MacDonald	The Honourable Mr. Justice Hutcheon
(a) Section 8 of the Human Rights Code of B.C.	The Board of Inquiry incorrect to consider conduct arising out of religion, separate from the term religion, which in itself cannot constitute reasonable cause.	Board of Inquiry correct in its conclusion that the conduct of Margaret Caldwell falls in category s.8 (1) - what you do lies within 8(1), what you are falls within 8(2).	Agreement with Seaton's judgement over interpretation of section 8 and the active and passive connotations given to grounds of discrimination proscribed in 8(2); namely religion and marital status.	Agreement with the reasons for judgement of Justice Seaton.	No specific comment.
(b) Section 22 of the Human Rights Code of B.C.	Case to be remitted to Board of Inquiry to clarify its findings.	Section 22 must be permitted to prevail over section 8 if it is to accomplish its purpose.	No specific comment.	ditto	Section 22 is the answer to the case - no need to consider meaning of section 8, as section 22 applies.
(c) Section 93(1) BNA (1867)	No specific comment.	Right to separate schools not affected.	ditto	ditto	No specific comment.
(d) Freedom of Religion	B.C. Code not ultra vires the Legislature of the Province.	Freedom of Religion not affected.	ditto	ditto	ditto

Note: From the Reasons for Judgement of the B.C. Appeal Court.

status". He concluded, in this instance, that religion, as specified in section 8(2) was "religion of itself", rather than a broad definition which could extend to "a cause based on religion" (Reasons for Judgement, 1982, p.7). In addition he stated:

> Section 8(2) lists characteristics that identify an individual in a passive not an active sense. Conduct is left to s.8(1). What you are is within s.8(2): what you do is not" (Ibid, p.8).

The passive and active connotation given to the section was correct, according to Justice Carrothers who further added that this interpretation "when applied throughout the section stands the test of logic and common sense and provides a practical application of the statute as a whole" (Reasons for Judgement, p.3). Stating that the Board of Inquiry was correct in viewing Mrs. Caldwell's conduct as falling into category s.8(1), Justice Seaton stated:

> There was a substantial body of evidence that Mrs. Caldwell's marriage outside the church to a divorced person was a serious breach of the rules of the church and that she could no longer be considered a practising Catholic (Reasons for Judgement, p.8).

It is apparent that on the issue of section 8, the Appeal Court's interpretation of the facts of the case led it to a conclusion totally opposite that of the B.C. Supreme Court. Agreement did exist,

however, in the opinion that the case should be remitted back to the Board of Inquiry, to clarify certain issues which are of importance to the court's decision-making.

Considering section 8 specifically, Chief Justice Nemetz stated that if a state school had taken the same action as St.Thomas Aquinas in refusing to rehire Margaret Caldwell, then the Code would definitely have been considered breached. The difference lay in the fact that St.Thomas Aquinas had presented itself as a school with a very distinct philosophy, and claimed total exemption under section 22 of the Code. Referring to the decision by Hutcheon J. in Burns vs. United Association of Journeyman Plumbing and Pipefitting Industry (1978), he concluded that "discrimination based on religion, marital status and the other proscribed categories is always illegal", as specified in section 9 (Reasons for Judgement, p.4). The same judgement was applied in Foster vs. B.C. Forest Products Ltd. (1979), when referred to section 8. It was these two opinions which led the Chief Justice to disagree with the interpretation of Seaton J. in this case. The category of religion, stated Chief Justice Nemetz, could not be interpreted so broadly as to include a person's conduct emanating from non-conformity to Church dogma, providing reasonable cause for action taken. In the Caldwell case, the decision not to rehire her, he continued, had not been based on "religion per se, but on conduct arising out of religion" (Ibid, p.5).

It is obvious that the interpretation of section 8 was not shared by all members of the Appeal Court on the case at bar. Figure 6 elucidates the opinions of each Justice on each of the four points of law,

according to his "Reasons for Judgement" (1982). That the five justices are not in total agreement on each point is not unusual in court cases: the final decision arrived at represents the majority decision of the Court. What is significant is the fact that the Caldwell case presents difficulties in adjudication, particularly as a result of the apparent ambiguities of section 8 of the Code.

The majority of the Appeal Court agreed with Justice Seaton's interpretation of section 8 in this instance. Thus it was decided that the bona fide qualifications demanded by St.Thomas Aquinas, namely religion and marital status, were acceptable criteria for employment or re-employment in the school.

The next task was to consider whether the school could claim exemption from the general principles of the Code by qualifying for section 22.

(b) Section 22 of the Human Rights Code of British Columbia

Chief Justice Nemetz's discussion of section 22 is useful because it sets down four criteria which the school must satisfy, if it is to be granted exemption from the Code, namely:

> "(a) St.Thomas Aquinas is an educational or religious organization; (b) it is not operated for profit; (c) its primary purpose is to promote the interest and welfare of its identifiable group; and (d) the identifiable group is characterized by a common religion" (Reasons for Judgement p.7).

He stated further that if the Board of Inquiry found that these four criteria exist, then it could lead to a determination as to whether the school "properly exercised its preference in selecting other teachers to undertake Mrs. Caldwell's work" (Ibid).

The main issue, according to the Chief Justice, centered around this question: assuming that Margaret Caldwell was "hired preferentially", as a member of the Catholic group, was she still a member of that group, "when it chose not to rehire her?" (Ibid, p.8). He continued that "...it is open to the organization to exercise a further preference but only in favour of other members of the identifiable group" (Ibid). Finally, the Board of Inquiry had to be satisfied that:

> the person not rehired has acted in such a repugnant manner that that person has by his or her conduct placed himself or herself outside the identifiable group because he or she is no longer in a position to promote "the interests and welfare of the group" (Ibid).

When discussing the Appeal Court's findings in Section 22, it is useful to begin with a comment made by Mr. Justice Hutcheon for it foreshadows the final decision:

> I view section 22 as the answer to this case. I do not find it necessary to consider the meaning of section 8 because if section 22 applies, as I think it does, there is no room for the operation of section 8 (Reasons for Judgement, 1982, p.6).

Hutcheon J. continued by stating that from 1969 to 1973, denominational schools were allowed to employ personnel who followed the Church's teachings, without being in contravention of the Code. He was referring to legislation before 1973, namely the Human Rights Code S.B.C. 1969 which, although slightly different in wording, is very similar to the present Human Rights Code of British Columbia. It was Mr. Justice Hutcheon's conclusion that section 22 has the same intent as the earlier legislation expressed in section 11(2), of the 1969 Human Rights Code, and that Stuart et al. were exempted from the Code's general principles. Section 11(2) reads:

> The provisions of sections 5, 7, and 8 do not apply to any exclusively charitable, philanthropic, educational, fraternal, religious, or social organization or corporation that is not operated for profit, or to any organization that is operated primarily to foster the welfare of a religious or racial group and is not operated for profit, but institutions operating under the Public Schools Act are not exempted (Ibid, p.7).

He further concluded, that the Board of Inquiry was right in its conclusion: "the 'identifiable group' in section 22, could prefer one member of the group over another" (Ibid, p.8). Mr. Justice Hutcheon's final comment on section 22 was:

> The rules of the identifiable group may call for such preferences within the group. One may not agree with these rules or with the discrimination that results. I think, however, that section 22 permits such rules to be enforced and exempts the institution, in this case St.Thomas Aquinas High School, from the provisions of section 8 of the Human Rights Code (Ibid, p.8).

Mr. Justice Seaton agreed with the purpose of section 22 stating that "without it the denominational schools that have always been accepted as a right of each denomination in a free society would be eliminated" (Reasons for Judgement, p.10). Concurring with Justice Hutcheon that "section 22 must be permitted to prevail over s.8 if it is to accomplish its purpose", Justice Seaton added:

> In a negative sense s.22 is a limitation on the rights referred to in other parts of the Code. But in another sense it is a protection of the right to associate. Other sections ban religious discrimination; this section permits the promotion of religion (Ibid p.10).

The clause "granting a preference", as detailed in section 22, was also carefully examined by the Appeal Court. Since no new teacher took over Margaret Caldwell's workload, it had been argued that no preference was shown and, as such, Stuart et al. were not fulfilling the requirements of the section. Considering this point Seaton J. stated:

> In my view, preference includes the granting of a favour or benefit and need not be restricted to electing between alternatives, and the words "granting a preference to members" in this section authorize the withholding or withdrawing of a favour or benefit from a non-member (Ibid, p.11).

Margaret Caldwell had, in the eyes of the Catholic Community, ceased to be a member, and could no longer be considered a practicing Catholic, according to the Church and hence, no longer was a member of the "identifiable group". It was due to this fact that he was willing to agree with the Board of Inquiry's conclusion regarding Margaret Caldwell's standing in the community:

> Thus the preference would be <u>to</u> members rather than <u>among</u> members. We do not have to decide in this case whether s.22 permits preference <u>among</u> members (Ibid, p.12).

From this statement it can be gathered that although the Board of Inquiry had concluded it was acceptable for St.Thomas Aquinas to grant a preference <u>among</u> members of the identifiable group, rather than <u>to</u> members of the identifiable group, the fact still remained, semantics notwithstanding, that Margaret Caldwell had ceased to be a member of the group. As such, a preference had been withheld from her, and this was considered acceptable, given the special nature of the group.

Mr. Justice Seaton concluded that:

> it was open to the Board to find that Mrs. Caldwell was no longer a practising Catholic, that within geographical limits such persons were an identifiable group, and that the refusal to re-employ was permitted by s.22 (Reasons for Judgement, p.13).

Thus the B.C. Supreme Court's interpretation of section 22 was overruled. It was decided that there was ample evidence to show that Margaret Caldwell was no longer a member of the "identifiable group", and as such could not be granted a preference by it. The Appeal Court next considered the constitutional arguments presented by Stuart et al..

(c) & (d) Section 93(1) of the British North America Act (1867) and the Right of Freedom of Religion.

The legal issues surrounding section 93(1) of the British North America Act, and the right to freedom of religion did not occupy a lot of space in the "Reasons for Judgement" of the B.C. Court. Only Chief Justice Nemetz and Mr. Justice Seaton made reference to them, and then only briefly, leading one to conclude that they were not major considerations in the final verdict.

Mr. Justice Seaton commented:

> When s.22 is interpreted in other than a narrow fashion, the constitutional arguments cannot be made - freedom of religion remain and the right to separate schools continues (Ibid).

Chief Justice Nemetz concluded: "the Human Rights Code is not ultra vires the Legislation of the Province" (Reasons for Judgement, p.18). Thus, the B.C. Appeal Court agreed with both the Board of Inquiry and the B.C. Supreme Court: the Code was valid legislation which was intra vires, and did not encroach upon the school's rights or limit the enjoyment of freedom of religion.

The ultimate conclusion of the B.C. Court of Appeal, as expressed by Hutcheon J. was that it should "restore the order of the board of inquiry dismissing the complaint of Mrs. Caldwell" (Reasons for Judgement, p.8). In addition, the Court decided that "the case should be remitted on the s.8(1) question and the Board should at the same time be free to reconsider the application of s.22" (Reasons for Judgement, Seaton J., p.13). The Board of Inquiry has not as yet, had the opportunity to re-examine the case, for Margaret Caldwell sought leave to appeal the third judicial decision, and the dispute will next be adjudicated by the Supreme Court of Canada, the final arbiter.

In summary, the Caldwell case involved four legal issues which were examined at all three levels of the provincial judicial system, with the main area of disagreement concerning the meaning of sections 8 and 22. On the other hand, there was unanimity on the constitutional questions. Figure 7 demonstrates graphically the varying results obtained from the three judicial hearings. The Margaret Caldwell case will next be heard by the Supreme Court of Canada. In the course of rendering a judgement in the case, it is anticipated that a definitive interpretation of sections 8 and 22 of the Human Rights Code of British Columbia, will be provided.

Figure 7: Summary of the Results of the Three Judicial Decisions

Legal Issues	Board of Inquiry - decision in favour of the school.	Supreme Court of B.C. - decision in favour of Margaret Caldwell.	Appeal Court of B.C. - decision in favour of the school.
(a) Section 8 of the Human Rights Code of B.C.	Its decision was based entirely on section 8. The action of the school could be reconciled with section 8(1) of the Code. Board found it unnecessary to consider (b), (c) and (d), but passed comment on them.	Factors proscribed in section 8(2), namely religion and marital status, cannot be regarded as bona fide qualifications for employment.	This Court allowed the school's appeal but was divided over reasons for decision. Justices Seaton, Carrothers and MacDonald found that 8(1) answers the case, not 8(2).
(b) Section 22 of the Human Rights Code of B.C.	Section 22 is applicable in this case.	Section 22 is not applicable in this case.	Section 22 is applicable in this case.
(c) Section 93(1) of the BNA Act (1867)	Section 8 of the Code not ultra vires, in respect to section 93(1) of the BNA. Rights and privileges of denominational schools, in 1871, considered minimal: they amounted to the right to establish and maintain denominational schools.	Section 8 of the Code not ultra vires in its applicability to Catholic schools as such schools do not have any rights or privileges as envisaged in section 93(1).	Given the interpretation of section 22, the right to freedom of religions remains and the right right to separate schools continues.
(d) Freedom of Religion	B.C. Human Rights Code does not infringe upon Freedom of Religion, and is valid provincial legislation.	B.C. Human Rights Code does not infringe upon Freedom of Religion because the school's decision not to rehire Margaret Caldwell was a secular decision. The Code is valid provincial legislation.	

Note: From the Reasons for Decision of the Board of Inquiry, the B.C. Supreme Court and the B.C. Court of Appeal.

Implicit in the interpretation will be who has finally won in the Caldwell dispute. The case will then probably be returned to the initial Board of Inquiry, the fact-finding body, which will amend or confirm its original decision. That "justice will prevail", is without question, but whether the final decision is regarded as fair, will be a subjective judgement for the parties involved.

REFERENCES

1. Board of Inquiry; Reasons for Decision, Vancouver Registry, July 6, 1979. (Available from Official Court Reporters, Box 34, Courthouse, 800 Hornby Street, Vancouver, B.C. V8Z 2C5).

2. Board of Inquiry; The Stated Case, Vancouver Registry, September 26, 1979. (Available from Official Court Reporters, Box 34, Courthouse, 800 Hornby Street, Vancouver, B.C. V8Z 2C5).

3. Brent, A. S., The Right to Religious Education and the Constitutional Status of Denominational Schools. Saskatchewan Law Review, 1974/76, Vol. 40, pp.239-267.

4. Court of Appeal, Appeal Book, 2 vols., May, 1979. (Available from Official Court Reporters, Box 34, Courthouse, 800 Hornby Street, Vancouver, B.C. V8Z 2C5).

5. Court of Appeal, Reasons for Judgement, of the Hon. Chief Justice Nemetz and the Hon. Justices Carrothers, Hutcheon, Macdonald and Seaton. Court of Appeal Registry, February 12, 1982. (Ref. No. CA00756)

6. Court of Appeal,

   (a) Factum of Appellant (Stuart et al.);
   (b) Factum of the Respondent Margaret Caldwell;
   (c) Factum of the Respondent, The Director, Human Rights Code of British Columbia;
   (d) Factum on Appeal of the Respondent and Factum on Cross-Appeal of the Appellant The Attorney-General for British Columbia. Court of Appeal Registry 1981.

7. Court Exhibits used in Board of Inquiry hearing.

8. Supreme Court of British Columbia, Reasons for Judgement. Vancouver Registry, August 8, 1980. (Ref. No. CC791204)

NOTES

[1] Revised Statutes of British Columbia, 1979, chapter 186.

[2] British North America Act, section 93, 30 Victoria, chapter 3.

[3] In the proceedings of the Board of Inquiry, the Respondents were referred to collectively as: Ian Charles Stuart, Principal, St.Thomas Aquinas High School; St.Thomas Aquinas High School Board; and the Catholic Public School Board of the Archdiocese of Vancouver. However, the Society which owns and operates the Catholic schools, the Catholic Public Schools of Vancouver Archdiocese, was considered the major Respondent, acting on behalf of the others.

[4] For a further discussion for this theme see A.S. Abel, & J.I. Laskin, Laskin's Canadian Constitutional Law (4th ed.). (Toronto: The Carswell Company Ltd., 1975).

Chapter 5: Points At Issue

This chapter examines the issues arising from the three judicial hearings in the Margaret Caldwell case. They demonstrate the dimensions and complexities of the dispute, namely: the religious concerns of sections 8 and 22 of the B.C. Human Rights Code (the Code);[1] the constitutional issues contained in section 93(1) of the British North America Act (1867);[2] and the right to freedom of religion. More specifically the chapter will address the questions: how broad is the term "religion"?; is it religion per se, or conduct arising out of religion?; what makes a Catholic "Catholic"?; if there are different categories of Catholics does the Code provide for a preference to be made between them?; exactly what rights were enjoyed by B.C. denominational schools at the time of Confederation (1871)?; and, is the right to freedom of religion abridged by the Code? In answering these questions the discussion draws on other cases with similar concerns to those in the Caldwell case.

A Issues Concerning Section 8 of the Human Rights Code of B.C.

(i) "Reasonable Cause"

One of the major issues in the judicial deliberations concerned the question of "reasonable cause" as specified in section 8(1) of the Code.

> ...no employer shall refuse to employ, or to continue to employ, ...unless reasonable cause exists for such refusal or discrimination (emphasis added).

The Board of Inquiry and the B.C. Appeal Court found that reasonable cause did exist for Stuart et al. to deny Margaret Caldwell further employment in the school since she had ceased to practice what the Church preaches, "namely, that one should not marry a person who, in the Church's eyes, is married to someone else" (Board of Inquiry, Reasons for Decision, 1979, p.22-23).

Rather than differ over the terms "religion" or "marital status" as cause for its action, the school argued that its reason not to renew Margaret Caldwell's contract, was due to her departure from denominational standards, a "reasonable cause" for refusing to continue her employment:

> It is reasonable to say that parents who send their children to St.Thomas Aquinas School should not have to accept as a teacher a person who by her conduct has contradicted the very principles which are the reason such parents send their children to such a school in the first place.* (Appellants' Factum, 1981, p.12)

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*It is noteworthy that the parents of the school did not lodge a protest with the school board, on Margaret Caldwell's behalf, contrary to the Heidt case, reviewed later in Chapter 6.

The school's counsel argued that a precedent had been established in Re Essex County Roman Catholic Separate School Board and Porter et al. (1978), an Ontario decision which held that the dismissal of Catholic teachers, for departure from denominational standards, was permissible. In this case two teachers were dismissed by a Catholic school because they had entered civil marriages. Zuber, J. A., of the Ontario Court of Appeal, stated on this issue:

> ...I take it to be obvious, that if a school board can dismiss for cause, then in the case of a denominational school cause must include denominational cause. Serious departures from denominational standards by a teacher cannot be isolated from his or her teaching duties since within the denominational school religious instruction, influence and example form an important part of the educational process. (Ibid, p.11).

In refuting this claim Margaret Caldwell maintained that as the "cause" was not job or performance-related, but due to her marriage, "reasonable cause" did not exist. She was supported in this claim by the Director of the Code who argued that separating the phrase "denominational standards" from the term "religion", was "an exercise in semantics without substance" (Director's Factum, 1981, p.2), and that according to subsection 8(2) of the Code,* religion cannot constitute "reasonable cause" for discrimination:

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*"8(2) For the purpose of subsection (1), (a) the race, religion, colour, age, marital status,... of any person... shall not constitute reasonable cause" (emphasis added).

> "Denominational standards" are inseparable from "religion", because it is just by such "denominational standards", dogma or rules that one can distinguish between one sect or another -- that is to say one religion or another (Ibid, p.10).

The central issue of "reasonable cause" was taken further, the argument being made that the "cause" was not religion per se, but conduct arising out of religion. Margaret Caldwell relied on the determination in Georgina Ann Brewer Against the Board of School Trustees, School District No. 62 (Sooke) and Percy B. Dillinger (1977) that

> the reasonable cause concept is intended to protect classes or categories of persons and individual members of such persons or categories from prejudicial conduct related to the differentiating group characteristics which distinguishes the class or category from others in society (Caldwell's Factum, 1981, p.12).

In relation to her case, however, it was submitted that "prejudicial conduct" may also come from members of one's own group and that Stuart et al. had discriminated against Margaret Caldwell on the basis of her "differentiating characteristic (measured against other Catholics) whilst ignoring the qualities which related to her employment" (Ibid, p.13).

A final argument in the "reasonable cause" debate was presented by the Director of the Code who contended that the school treated Margaret Caldwell more severely than other staff members:

> Because she was a Catholic she was treated disfavourably -- more harshly -- than she would have been were she a member of the Protestant or Islamic Faith. (Factum of the Director of the Code, 1981, p.5-6.)

If Margaret Caldwell alone can be victimized because of her departure from denominational standards, then essentially she is being discriminated against as a Catholic, by other Catholics. It was contended that

> ...the School Board must ... take upon itself the task of investigating and ensuring the Protestants, Jews and Sikhs in its employ are all meeting their <u>own</u> denominational standards. In addition, all denominational standards must be policed in respect of each employee. (Caldwell's Factum, p.10.)

This is clearly one of the more difficult themes to emerge from the hearings, as the school was seen to be genuinely committed to maintaining strict adherence to the Faith by its Catholic teachers whilst, conversely, being unable to monitor adequately the conduct of its non-Catholic teachers. This leads to a situation where, among denominational schools and school boards, there is not equitable treatment of staff. Both male and female "Margaret Caldwells" can be found amongst Catholic

school personnel, who have not faced the same consequences as Caldwell herself. Also, members of other religions may not be living up to the tenets of their own faith and yet may appear to be beyond reproach. The "reasonable cause" argument, therefore, rests upon the circumstances of each case, and subjective judgement on the part of the employer involved. If such judgement leads to legal proceedings, then it rests with the Court's willingness to accept a denominational school's right to terminate employment according to "reasonable cause" based on religious considerations.

Finally, it is useful to compare section 8 of the Code with the employment section of the Manitoba Human Rights Code to see how the "reasonable cause" clause may be averted:

> 6(1)(a) no employer ... shall refuse to employ, or to continue to employ ... because of race, nationality, religion, colour, ... marital status, (S.M. 1974, c.65, cap H175, emphasis added).

Comparing these two employment sections, Tarnopolsky (1982) notes the avoidance of the "reasonable cause" language in Manitoba's employment section:

> ...although the opening clause is identical to that of British Columbia, the closing clause lists the prohibited grounds rather than using the reasonable cause formulation. The result is that there is no contradiction as in the case of British Columbia... (p.221).

This leads one to speculate that a possible outcome of the Margaret Caldwell case might be a recommendation by the Canadian Supreme Court for legislative amendment, in order to remove any ambiguity or contradiction within the B.C. employment section. This is unlikely, however, because the doctrine of parliamentary supremacy serves to restrict the Supreme Court of Canada making such overt moves. (This doctrine is further examined in the following chapter, and the advantages and disadvantages of the "reasonable cause" language are addressed in the conclusion).

(ii) "Religion" as a Bona Fide Occupational Qualification

Central to the section 8 argument is whether "religion" can be considered a bona fide occupational qualification or requirement.* Although both "religion" and "marital status", as bona fide occupational qualifications, were considered during the judicial hearings, more time was allocated to the former characteristic. The school argued that Margaret Caldwell did not have the bona fide or correct qualifications to justify further employment in the school, due to her contravention of Church rules; she contends, however, that religion cannot constitute a bona fide occupational qualification. The B.C. Supreme Court alone agreed with her submission on the basis that:

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*"8.(1) Every person has the right of equality of opportunity based upon bona fide qualifications in respect of his occupation or employment" (emphasis added).

> ...unlike some other human rights statutes the principle is restricted to "qualifications" and, accordingly, its meaning does not include "requirements" or other standards or obligations that an employer may wish to impose. (B.C. Supreme Court's "Reasons for Judgement", 1980, p.11.)

This Court concluded, states Tarnopolsky, that "although the legislation could have made religion and/or marital status a bona fide qualification it did not do so" (p.221).

Professor Tarnopolsky's examination of the first two judicial hearings of the Caldwell Case, leads him to agree with the B.C. Supreme Court's decision on the issue of religion as a bona fide occupation qualification. He observes:

> ...it is difficult to see how any other conclusion could have been reached with respect to the provision that was before Toy, J. To have concluded that religion could be a bona fide qualification because of the opening clause of section 8(1), would have rendered the reasonable cause provision and subsection (2), which lists the grounds which "shall not constitute reasonable cause", totally contradictory or irrelevant" (p.221-p.222).

In his analysis of anti-discrimination legislation, Tarnopolsky has identified several provinces which do permit religion to be a bona fide occupational qualification, including Alberta, Manitoba, New Brunswick and Quebec. In Nova Scotia, for example, section 8(4)(b) of

its Human Rights Code allows for "a reasonable occupation qualification" based upon "religion" or "creed", applicable to organizations, such as Catholic schools, which are not operated for private profit and which aim to foster "the welfare of a religious ...group" (Ibid, p.208). Manitoba addresses the problem by specifically stating that an organization such as a denominational school, can demand that religion be a bona fide occupational qualification:

> 6(7) Exemption
> The provisions of this section relating to a limitation or preference in employment do not apply to an exclusively religious, philanthropic, educational, fraternal or social organization that is not operated for private profit and is operated primarily to foster the welfare of a group or class of persons characterized by a common race, nationality, religion, colour, sex, age, marital status, physical handicap, ethnic or national origin, where, in any such case, one or more of the above enumerated criteria is a bona fide occupational qualification and requirement. (S.M. 1974, c.65 Cap H17S, emphasis added.)

If one compares this section to B.C.'s section 8 or 22, it is clear that the Manitoba Act is more specific in detailing what employment qualifications a denominational school may require.

One case which highlights "religion" as a bona fide occupational qualification is that of Gore vs. Ottawa Separate School Board (1971). A secretary was denied employment in a denominational school because she

was not a Catholic. In this instance a Board of Inquiry found that it was not reasonable to expect a secretary to be a Catholic in order to maintain the Catholic "atmosphere" of the school (Gore Judgement, 1971). This case is pertinent to the Margaret Caldwell case because in the consideration of religion as a bona fide occupational qualification, the chairman of the Board of Inquiry concluded:

> ...I cannot see how a secretary can be expected to provide an example for the children. This is surely the responsibility of the teachers ...(Ibid, p.8).

Finally, Tarnopolsky observes that in relation to religion as a bona fide occupational qualification:

> ...whether "religion" or "creed" can be a bona fide qualification or restriction will depend upon the facts of each particular case. An educational institution claiming that right has a better chance of convincing a board of inquiry with respect to teachers than with respect to support staff...(p.223).

B Issues Concerning Section 22 of the Human Rights Code of B.C.

Theologians have debated the term "religion" ad infinitum, without obtaining a general consensus, therefore it is not surprising that faced with a similar task, the three courts reached different conclusions. "Defining Religion; Of God, The Constitution and the D.A.R.",

a comment in the University of Chicago Law Review (1965)[3], notes the importance of defining "religion", "religious belief" and "religious organization" as "the outcome of a variety of cases hinges upon the definition of these words" (p.533). The definition of the term "religion" is "a problem of statutory construction involving the particular legislature's intent in each statute where the word appears" (Ibid, p.534). With reference to the American judiciary:

> Courts have usually construed religion to mean "one's views of his relation to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will" (Ibid).

Without a definition of the term, it is difficult "to determine when an impermissible classification in terms of religion has been made" (Ibid, p.546).

Within the B.C. Code itself there is no guidance as to the meaning of religion. Both the Oxford and the Merriam-Webster dictionaries contain broad definitions of the term which include: devotion to a religious faith; religious beliefs and practices; a standard of spiritual life; and religious obligation. This broad definition was argued throughout the judicial hearings whenever the term "religion" was discussed with reference to sections 8 and 22 of the Code. As evidenced in the previous section, the courts were concerned with whether the term is religion per se, or conduct arising out of religion, i.e. departure from denominational standards. Two other major issues,

relating to the term "religion" as specified in section 22 of the Code, remain to be addressed: (i) what makes a Catholic "Catholic"; and (ii) if there are different categories of Catholics, does the Code provide for a preference to be made between them?

(i) What makes a Catholic "Catholic"?

According to the school, section 22 of the Code provides it with an exemption from the principles contained in the statute, but closer study of its provisions indicate problems which occurred when trying to defend this claim, particularly with the clause

> ...the promotion of the interests and welfare of an identifiable group or class of persons characterized by a common race, religion,... (emphasis added).

The Board of Inquiry and the B.C. Appeal Court found evidence to substantiate the claim that Margaret Caldwell had ceased to be a member of the "identifiable group of persons" within section 22 of the Code: namely, "Catholics who live a Catholic way of life" (Appellants' Factum, 1981, p.13). The concern is whether the Code provides for a definition of "identifiable group ... characterized by a common religion" to be so broad as to allow for different classes or categories of people within the religion. Stuart et al. have always maintained that Margaret Caldwell ceased to be a member of the "identifiable group" because she

failed to live up to the standards of the Catholic Church. Hence, this entitled them "to prefer over her that class of Catholics which did meet such standards" (Ibid, p.14). The school made a clear distinction between two "classes of Catholics, i.e. those who live their faith and those who don't..." (Ibid). Margaret Caldwell, on the other hand, argued that the exemption afforded by section 22 of the Code is not broad enough for the school to practice discrimination among Catholics. Both before and after her marriage she considered herself a Catholic and she contended that a moral judgement on the part of the school, regarding her standing in the Catholic community, is not provided for by the Code.

In her article, The Dismissal Policies of the Saskatchewan Separate School Board (1982), Myra Bucsis raises questions pertinent to this discussion. She makes the argument that exemption sections of human rights legislation, such as that within the Saskatchewan Code, were not invoked to allow a Catholic School Board

> complete and unfettered discretion to subject competent Catholic teachers to discriminatory treatment simply because they had "sinned" against church teachings (p.105).

Contrary to Margaret Caldwell, the school claimed that she was no longer a practicing Catholic and was no longer part of the "identifiable group ... of persons characterized by a common ...religion..." This begs the question, therefore, what makes a Catholic "Catholic"? Bucsis quotes Father O'Holloran, Chancellor of the St.Thomas More College, University of Saskatchewan, as stating that

> Once individuals are baptized in the Catholic faith they remain Catholic, unless or until they decide to repudiate their religion (Ibid).

Most Catholic clergymen would probably agree with this viewpoint because you cannot take away a person's baptism. However, the school argued that simply calling yourself a Catholic is not enough: there must be an active, not a passive criterion. This view is shared by those who believe that just being baptized a Catholic is not sufficient in itself; for a person to be Catholic he or she must accept and practice the Church's teachings. Furthermore, the Board of Inquiry and the B.C. Appeal Court were willing to accept the submission that a Catholic is a Catholic who practices the Faith. For this reason they found that Margaret Caldwell was outside the identifiable group, and as such the school could claim exemption from the Code's general principles as detailed in section 22.

It is interesting to contrast section 22 of the B.C. Code, with the exemption clause of Saskatchewan, because there is provision, within the latter, for a distinction between a practicing and a nonpracticing Catholic. Section 16(5) of the Saskatchewan Human Rights Code provides a broader exemption than B.C.'s section 22:

> 16(5) Nothing in this section deprives a school or a board of education of the right to employ persons of a particular religion or religious creed where religious instruction forms or may form the whole or part of the instruction or training provided by the

> school or board of education pursuant to the Education Act (Ibid, emphasis added).

It is arguable that whilst one's religion may be Catholic, one's creed or "religious beliefs" may be inconsistent with Catholic teachings. This is an observation of Bucsis' whose examination of the subject leads her to conclude that section 16(5) of the Saskatchewan Code provides a preference within or among a religious group. In this instance, a Catholic School Board can not only require a teacher to be a Catholic, but also to adhere to, and practice, Catholic teachings.

Even if section 22 of the B.C. Code was identical to section 16 of the Saskatchewan Code, a problem would still remain determining the severity of Church law contraventions. Buscis suggests that Catholic priests generally are not all in agreement on such controversial issues as birth control, yet they still belong to the same religion. Further, one can imagine that some Catholic teachers, working in Catholic schools, practice birth control, yet still retain employment. During the Board of Inquiry deliberations, the question of a transgression being "public knowledge" was considered relevant to Church law contravention. (This point is discussed further in the conclusion.)

Finally, Catholic communities differ among themselves as to what is acceptable or unacceptable and consequently, what contravention of the Church's teachings results in being in poor standing in the community. As mentioned earlier, there exist today "Margaret Caldwells" of both gender, teaching in Catholic schools, who have not forfeited their positions. It matters not what one considers valid cause for loss of

employment in a Catholic school, if the particular Catholic community involved perceives it to be valid, and if any action taken proves inviolate of the secular laws of the state. To the extent that a Margaret Caldwell may keep her job in one Catholic school, and lose it in another, the answer to "what makes a Catholic 'Catholic'" is dependent upon the views of each particular Catholic community, which is in turn determined by its religious head.

(ii) "Granting a Preference"

Section 22 contains provisions which, according to Margaret Caldwell, were not met by the school in order for it to qualify for exemption from the general principles of the Code. Of particular concern was the clause "granting a preference". Since a new teacher was not hired to replace her, it was argued that no preference was exercised. To elucidate the point, reference was made to G. F. Stephens vs. McArthur and Others (1894) in which it was stated:

> Preference and priority mean in these instances pretty much the same thing. One man gets paid in priority to another or the other may get nothing at all....it conveys the idea of giving one creditor a position more advanced than the others...(Caldwell's Factum, p.15-16).

Margaret Caldwell further states that even if a preference had been made, she was still a practicing Catholic and "section 22 does not sanction the

preferring of one Catholic over another", (Ibid, p.16), or allow "the establishing of a policy that would prohibit the employment of certain classes of persons" (Ibid, p.15).

This view was shared by the Director of the Code who argued that in order to qualify for exemption by section 22, the school had to grant a preference to a Catholic, as opposed to a non-Catholic. Granting a preference among Catholics, she argued, is not allowed:

> ...the Section was not intended to provide an umbrella for discrimination based upon the professed or claimed degree of adherence to dogma among members of the same identifiable group.... Preference on the basis of degree of conformity to dogma among members of the common religion is not contemplated nor sanctioned by Section 22 (Director's Factum, p.14).

Margaret Caldwell's responsibilities in the school were divided up among Catholic members of the staff who were considered faithful adherents to the Faith. According to the B.C. Attorney-General:

> The advantage that both the teachers and the other members of the group got, is that the primary purpose of the school was carried out, namely the promotion of the interests of active Catholics (B.C. Attorney-General's Factum, 1981, p.20.)

In examining the clause "granting a preference", both the Board of Inquiry and the B.C. Appeal Court, found that the school had fulfilled the requirements of section 22, and hence were exempted from the Code. The Board of Inquiry specifically stated, in its "Reasons for Decision", that "the purpose of section 22 is served by permitting the respondent to make the preference among the members of the Catholic Community" (p.25), and Mr. Justice Hutcheon of the B.C. Appeal Court concluded, in his "Reasons for Judgement", "the rules of the identifiable group may call for such preferences within the group" (p.8). Two courts have, therefore, been willing to accept that the clause "granting a preference" can be interpreted to extend to members of the same group. There have been few cases dealing with this issue which provide further elucidation.

The issue of "religion" overlaps in both sections 8 and 22 of the Code, and reoccurs in a slightly different sense, when analyzed in the constitutional questions of "rights or privileges" of denominational schools and the right to freedom of religion, addressed in the subsequent sections of this chapter.

C Issues Concerning Section 93(1) of the British North America Act (1867)

When the school was summoned to answer Margaret Caldwell's complaint of discrimination, its hiring policy was assessed in light of the rights and privileges enjoyed by B.C. denominational schools at the time of entry into Confederation (1871). The statutes existing in the province before 1871 determine whether a denominational school has acted

within its legal parameters today. As Bucsis explains, the central question is whether Catholic School Boards, according to the law at Confederation had "a completely unfettered discretion to determine the dismissal policies within their systems" (p.100). Although referring to Saskatchewan Catholic school boards in particular, her comments are relevant to those within other provinces:

> If an absolute discretion is enshrined... [in that law]... then, even if discriminatory, it is outside the ambit of judicial or legislative reproof. On the other hand, if nothing within... [the existing laws]... authorizes the school board's policies in this regard, there is no threshold barrier to attacking these dismissal practises. When assailed they would have to stand alone, without the protective shield of the BNA Act (Ibid).

The exact "rights or privileges" enjoyed by denominational schools in British Columbia, as a result of legislation before 1871, was a central issue during the judicial hearings. As explained earlier in chapter 2, a policy of non-sectarianism was strictly adhered to in British Columbia, both immediately before and after entry into the Union in 1871. In his key work, Church and State in Canadian Education (1959), Sissons states that the Act Respecting Common Schools (1865) set "definite limits ... for the activities of religious bodies, and no special privileges were permitted to anyone of them" (p.378). The Common School Ordinance (1869) and the Common School Amendment Ordinance (1870)

replaced the 1865 Act, and were extant when British Columbia entered the Union. These statutes maintained the policy of non-sectarianism within the province.

Section 93 of the BNA Act[4] applies to British Columbia, by virtue of section 10 of the Terms of Union, and states that although the Provincial Legislature may make laws regarding education

> 93(1) Nothing in any such law shall prejudically affect any right or privilege with respect to denominational schools which any class of person have by law in the Province at the Union

Hudon (1980) notes one judicial interpretation stating this to mean "the authority given the Provinces over education by the BNA Act is subordinate to the mandate of Article 93... that protects sectarian education" (p.467).

On the question of these "rights or privileges", Mr. Justice Lamont in Regina School District vs. Grattan Separate School Trustees (1914) stated:

> A right or privilege with respect to separate schools is some special right or claim belonging to, or immunity, benefit or advantage enjoyed by, a person or class of persons with reference to separate schools, over and above those rights enjoyed at common law or under statutory enactment ... It is some private or peculiar right or privilege as opposed to the rights possessed by the community (as cited in Bucsis, p.99).

In his analysis of these "rights or privileges" enjoyed by denominational schools in British Columbia in 1871, Sissons states:

> ... neither Roman Catholics nor the Anglicans nor any other religious denomination as such had any educational right whatsoever by law apart from freedom to conduct private schools under the common law. They might claim consideration as a privilege but could not in B.C. demand it as a right (p.379).

Legislation immediately following the province's entry into the Union reaffirmed this non-sectarian policy and in 1876 a statute was enacted barring the clergy from assuming a position within the public school system, be it "Superintendent,... Teacher or Trustee" (Ibid, p.381). He concludes that the educational system established in British Columbia ensured that

> there should be no minorities with special privileges which they might deem rights. All churches, all creeds, all individuals holding those creeds or worshipping in those churches were to have equal rights under the law, equal protection from the state in those rights (Ibid, p.387).

The situation still remains unclear as to what "equal rights under the law" might mean with respect to B.C. denominational schools. Brent in her article The Right to Religious Education and the

Constitutional Status of Denominational Schools (1976) attempts to define the "rights" and "privileges" specifically, by an examination of legislation. She maintains that:

> ... the only rights of denominational schools in British Columbia is that the minority may establish and maintain them (p.258),

and concludes that British Columbia can claim "the barest of 'rights or privileges'" (p.259). In other words, "the right to establish and maintain separate schools" (Ibid). This viewpoint was shared by the Board of Inquiry and the B.C. Appeal Court when adjudicating the Caldwell case. The B.C. Supreme Court, however, concluded that denominational schools enjoyed no rights whatsoever in 1871. There can be little dispute that such rights as existed in 1871 were limited, and certainly it is difficult to find any "right or privilege" on the statute book which specifically permits Catholic schools to deny further employment to a Catholic teacher, due to non-conformity with religious standards.

As the protected "rights or privileges" of denominational schools were such as existed at the time of entry into the Union, they vary among the provinces[5]. A brief comparison with some of the other provinces indicates how limited the rights were for B.C. denominational schools. In Newfoundland, the educational system has been established along religious lines and six main denominational groups have access to public funds. Ontario and Quebec also have extensive rights which include: (a) the right to establish denominational schools; (b) access

to state aid in the collection of takes; (c) tax exemptions; (d) religious instruction within the schools; and (e) the right to support the schools of one's choice (Brent, p.249-250). Compared with this situation, denominational schools in British Columbia have limited rights, narrowly defined as the right to establish and maintain separate schools, and, until 1977, they received no financial support whatsoever from the state. If the Northwest Territories or the Yukon were to be given provincial status, the rights of denominational schools would be those presently existing at law, i.e. the right of the minority to establish separate schools, co-existing with the public school sector (Ibid, p.265). Figure 8 graphically summarizes the "rights or privileges" enjoyed by denominational schools in all provinces at the time of Confederation.

Manitoba is of particular interest here since apart from having "an inalienable right to establish and maintain such schools as well as conduct them in an unfettered manner", (Ibid, p.256-257), a further provision states that nothing in any law shall prejudicially affect denominational school rights or privileges which:

> any class or persons have by law or practise at the time of Confederation (Ibid, p.253).

Figure 8: Rights and Privileges Afforded Denominational Schools at Confederation

1867 Ontario and Quebec	1867 New Brunswick and Nova Scotia	1870 Manitoba	1871 British Columbia	Pri
1. The right to establish denominational schools. 2. The right to invoke state aid in the collection of taxes necessary for the support of such schools from their supporters. 3. The privilege of exemption from taxation for the support of the public sources of the province. 4. The privilege of having taught in such separate schools the religious tenets of their denomination. 5. The right or privilege of any member of any denomination to choose which school he will support.	1. No special provision with regard to separate schools under constitutional arrangements. 2. Rights existing at common law, namely, the right to establish and maintain separate schools. 3. No right to tax revenues and no relief for supporting public schools. 4. A "gentleman's agreement" provides assistance for denominational schools.	1. At time of Confederation, 1870, important addition to wording of section 93(1) of BNA Act: "rights or privileges... which any class of persons have by law or practise, in the province at the union". Yet this provision has been ignored in the past. 2. Right to establish and maintain such schools "as well as conduct them in an unfettered manner". 3. No compulsory attendance at public school.	1. The "barest of rights or privileges". 2. The right to maintain and establish denominational schools. 3. No government aid until 1977.	1. sid ina und arr fed 2. sch pub fed tis 3. eme sup tic

Note: Information for figure taken from The Right to Religious Education and the Constitutional Status of Denominational Schools by A. S. Brent, 1976.

1871 itish Columbia	1873 Prince Edward Island	1905 Saskatchewan and Alberta	1949 Newfoundland	N.W.T. and the Yukon
The "barest of ghts or privileges". The right to intain and tablish denominational schools. No government d until 1977.	1. No special provisions made for denominational schools under constitutional arrangements at Confederation. 2. Denominational schools supported by public funds at Confederation by practise, not law. 3. Gentleman's agreement provides full support for denominational schools.	1. Right on the part of the minority to establish separate schools. 2. Ratepayers free to designate which school system is to receive their taxes, but what schools their children attend is predetermined by their classification as a member of the "minority or majority".	1. The "most liberal" rights. 2. All schools receive public funds on a non-discriminatory basis. 3. Extension of the right to denominational tax-supported schools to colleges.	1. If and when these territories attain provincial status, denominational schools would have those rights and privileges which exist by law at the time of union, namely: 2. The minority has the right to establish denominationally separate schools - whilst the majority can still have denominational schools, but they would be public schools.

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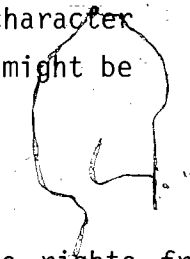
enal

According to Tarnopolsky this wording makes the Manitoba Act "wider in scope" (p.213). Certainly it is broader than the B.C. legislation, due to the words "or practise". This distinction between a "right" and a "practise" was noted in Trustees of the Roman Catholic Separate Schools for the City of Ottawa (1917):

> It has been decided by this Board that the right or privilege reserved in the provision is a legal right or privilege, and does not include any practise, instruction, or privilege, of a voluntary character which at the date of the passing of the Act might be in operation (Ibid).



Much of what denominational schools claim as rights from the past, may have been developed and accepted due to practice, for example, dismissal policies based on denominational reasons. Denominational schools in British Columbia, and Canadian independent schools in general, have pursued hiring policies designed to comply with the school philosophy. In practicing this policy they are maintaining an assumed right, rather than a legal right, if in fact there is no provincial legislation protecting that right. In the case of denominational schools in British Columbia, there may be an assumed right, due to practice or custom, to pursue employment policies based on religious consideration, nonetheless, the exact legal right specifies only the right of establishment and maintenance for denominational schools in 1871.

Professor Tarnopolsky discusses the issue of constitutional protection afforded denominational schools by virtue of section 93(1) of the BNA Act with reference to specific cases. In Roman Catholic Separate Schools Trustee for Tiny el at. vs. The King (1928) it was stated that although the needs of religious groups must be considered, there is provincial power "to mould the educational system in the interests of the public at large, as distinguished from any sector of it, however important" (p.214). Similarly, the Board of Inquiry in the Gore case concluded on this issue:

> Section 93(1) could not have been intended ... to prevent the legislature from enacting any law which affects the rights and powers of separate School Boards. It must have been contemplated that the province could, for the sake of health, or morals, or for public policy reasons, enact laws or legislation with respect to schools (Ibid, p.214).

Tarnopolsky illustrates this point with reference to the Ontario Schools Administration Act (1970), which contains provisions applying to both separate and public schools, regarding such matters as salary negotiations and compulsory attendance. He continues by citing the Gore judgement:

> If recognition of trade unions or teachers' associations can now be made applicable to schools boards, despite the fact that there could be an argument that the school boards were free to ignore such

> associations in 1867, then surely the province could decide to apply the Ontario Human Rights Code to schools unless the discrimination practised by the school is such as can be described as being "reasonable occupation qualification" (Ibid, p.214).

The present-day acceptance of such things as trades union and teachers' association is a valid point here, although it does not resolve the "reasonable cause" issue contained in section 8 of the B.C. Code.

With regard to the protection afforded by section 93(1) of the BNA Act, Tarnopolsky makes particular reference to the Margaret Caldwell case. He states that given the facts the B.C. Supreme Court had at its disposal, the conclusion that "section 93(1) of the BNA Act does not render anti-discrimination legislation ultra vires, must be correct" (p.223). More specifically,

> as far as section 93 of the BNA Act is concerned, since the opening paragraph grants the power to provincial legislatures to "make Laws in relation to Education", and since subsection (1) thereof provides that "nothing in any such Law shall prejudicially affect ... Denominational Schools", a restriction upon a general public policy statute, like a human rights code, could not have been intended (Ibid, emphasis added).

Notwithstanding the fact that denominational schools often had limited "rights" at the time of entry into the Union, as illustrated by Sissons and Brent; nor Tarnopolsky's argument above, court judgements may still be favourable to denominational schools. The reason for this lies in the court's sensitivity to the school's commitment to maintain its philosophy, and is evidenced by cases examined in the following chapter.

D Issues Concerning the Right to Freedom of Religion

The final section in this chapter is also concerned with constitutionally guaranteed rights, but in this instance it involves the right to freedom of religion. The exact status of this right is itself a contentious one. Prior to the recent passage of the Charter of Rights and Freedoms, there was in Canada no constitutionally entrenched guarantee of "freedom of religion". The British North America Act does not specify "religion as a constitutional head of power", states Godfrey (1964), but instead refers to "legislation in relation to freedom of religion" (p.60). Before Canada had a Bill of Rights, court decisions implied the sanctity of basic freedoms through cases such as Saumur vs. Attorney-General for Quebec (1953) and Switzmann vs. Elbling (1957), with the Courts relying on the preamble to the BNA Act which states that Canada is to have a "constitution similar in principle to that of the United Kingdom". Using this rationale Canadian courts have felt able to provide remedies for unacceptable infringements of basic rights and freedoms, even in the absence of any written authority.

The Canadian Bill of Rights (1960) states that "Every law of Canada shall, ... be so construed and applied as not to abrogate, abridge or infringe ... any of the rights and freedoms herein recognized and declared," and section 1(c) specifies inter alia "freedom of religion", as a basic right (Ibid, p.61). The Canadian Bill of Rights did not have any special constitutional status however, being an ordinary statute of the federal parliament which could be repealed by a simple majority; as noted in chapter 2 its twenty year history has not been an impressive one[6]. The passage of the Constitution Act (1981) with its constitutionally entrenched Charter of Rights[7] placed freedom of religion on a more solid legal base. Section 2 of the Charter provides:

> 2. Everyone has the following fundamental freedoms:
> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion...

Unless this is held to apply retroactively, however, it will be of little use in the Caldwell case. Decisions on freedom of religion under the Canadian Bill of Rights such as Robertson and Rosetani vs. The Queen (1963) are of limited use, because the Bill applied soley to federal legislation.

The general intention of the Code is to remove discrimination from the workplace and in certain commercial relations, as mentioned earlier in chapter 2. It involves matters within provincial jurisdiction

such as housing, employment and service industries. The Director of the Code describes it as:

> a law of general application in relation to property and civil rights in the province and, as such, is intra vires the legislative assembly of British Columbia (Director's Factum, p.18).

Sections 8 and 22 of the Code are concerned with the employer- employee relationship, and the exemption for certain private organizations from the general principles of the statute. These sections do not purport to apply to education specifically, but to any workplace situation. As commercial relations and civil rights lie within provincial jurisdiction, the legislation is generally considered to be intra vires. That is unless a party questions its real area of jurisdiction which occurred at every level of adjudication in the Caldwell case. All sides seemed to agree that freedom of religion is a federal matter.

The school argued that the Code infringed upon its right to practice freedom of religion for three main reasons. Firstly, it was submitted that freedom of religion includes the right of parents to select the religious education of their children through the patronage of a denominational school (School's Factum, p.16). Secondly, the school contended that the selection of teachers is governed by religious consideration and that choice lies within the area of "freedom to control religious education" (Ibid). Thirdly, the school maintained that legis-

lation which interferes with the right of choice in religious education, has the effect of reducing parents choice "in order to favour a claim to employment" (Ibid, p.17). The school submitted further that the freedom of religion is a federal concern[8]; that parents' freedom to control the religious education of their children is part of the exercise of freedom of religion[9]; that this freedom should not be "abrogated or abridged without the most coercive reason[10]"; and that the teacher in a denominational school has a special role in fulfilling the school's objectives[11] (Ibid, p.17-25). Reliance was also placed on Article 26-3 of the Universal Declaration of Human Rights, which states:

> Parents have a prior right to choose the kind of education that shall be given to their children (Ibid, p.24).

In sum, the school constantly argued that "the whole raison d' etre of a religious school is rendered nugatory" if it cannot require its teachers to adhere to the tenets of the faith, and that the employer- employee relationship is very different in a religious school than in a non-religious school (Ibid). As such it cannot be regulated in the same manner. Stuart el al. did not argue that the Code has no application at all to a denominational school, but questioned "the extent of its application ... to employment decisions made on religious grounds" (Ibid, p.32). In other words, they were not disagreeing with the general purpose of the legislation but with the effect it would have on their

establishment if it were allowed to interfere with their employment practices. To conclude, the school's position on this issue can be seen in the following statement:

> If the Province can require the Catholic school to employ a Catholic that breaks Catholic marriage rules, it can require it to employ one who practises abortion. It can require a Jewish school to employ a Jewish teacher who eats pork ... indeed, any religious school to employ teachers who in the eyes of parents and students live lives of sacrilege. It is submitted that such enactments are not within the legislative competence of the province (Ibid, p.34).

Margaret Caldwell and the Director of the B.C. Code rejected the arguments based on freedom of religion. The former argued that the Code does not abridge or interfere with the school's right to practice freedom of religion providing that right is exercised within the limits of the law. It was suggested that wherever a religious establishment disagreed with a law it attempted to seek refuge behind a shield of religious exemption. Reference was made to Regina vs. Harrold (1971) in which Tysoe, J. A. stated that a party is not:

> exempt from all laws that in any way interfere with the manner in which and the means by which he sees fit to engage in the practice and propagation of his particular religion, no matter how detrimental that may be to the other members of the community, except only laws enacted by the Parliament of Canada (Caldwell's Factum, p.17-18).

The Director of the Code made mention of Robertson and Rosetanni vs. The Queen (1963), in which Mr. Justice Ritchie of the Supreme Court of Canada, stated that rights and freedoms were:

> subject to a rational, developed and civilized system of law which imposed limitations on the absolute liberty of the individual (Director's Factum, p.23).

The main argument of the Director on this issue was that freedom of religion:

> ... does not involve and cannot legitimize the use of religious dogma as an excuse for failing to conform to existing law -- law which does not stifle religious thought or expression, but merely restricts or limits the effect and application of rules or dogma ... (Ibid, p.24-25).

A final point made by the Director was that the school's hiring policy is a secular policy, not based on Canon Law. She disagreed with the school's arguments, and instead contended that provincial legislation which limited or interfered with the school's employment practices, did not infringe upon the right of freedom of religion. All three courts were willing to accept this submission, and the B.C. Supreme Court stated that it considered the school's hiring policy to be a secular policy, and as such removed from the religious domain.

Finally, on this fundamental issue of constitutionality, it is useful to refer to the recent Supreme Court of Canada judgement in A. G. Canada and Dupond vs. The City of Montreal. Speaking for the majority, Beetz, J. stated the following:

> 1. None of the freedoms refered to is so enshrined in the constitution as to be above the reach of competent legislation.
> 2. None of the freedoms is a single matter within exclusive federal or provincial competence. Each of them is an aggregate of several matters, which depending on its aspect, come within federal or provincial legislation (Cline and Finley, 1981, p.138).

If one applies these propositions to the school's claim, it is evident that firstly, the right of freedom of religion may be considered within provincial legislation, and secondly, the freedom is not above competent legislation. In the three judicial hearings of the Caldwell case, the courts decided that the Code is competent legislation:

> The Human Rights Code is in pith and substance a law respecting civil rights within the province and is valid provincial legislation notwithstanding that it governs employment policies of denominational schools (Board of Inquiry, Reasons for Decision, p.29).

They were willing to accept that the intention of the Code is to advance the government's secular goals and, in this case, such policy did not have the effect of abridging the right to freedom of religion.

To summarize the rather complex legal issues emerging from the judicial hearings:

1. The courts were willing to accept the term "religion" as having broad definition, including both active and passive connotations;
2. "Rights or privileges" possessed by denominational schools in British Columbia at Confederation, were deemed limited in scope with no statutory provision permitting dismissal, or contract non-renewal, of Catholic teachers who had broken Church laws; and
3. The right to freedom of religion was not abridged by the B.C. Human Rights Code which was considered valid and competent legislation. With the advent of the Charter of Rights and Freedoms, it is envisaged that there will be further instances of statutes being challenged for alleged violation of human rights.

The relative importance of each legal argument is shown in figure 9. Examined in a broader context, the Caldwell case has wide societal implications which are examined in the subsequent chapter.

Figure 9: The Relative Importance of the Legal Arguments in the Caldwell Case

In Margaret Caldwell's favour	In the school's favour
1. BNA Act - authorities suggest there is no statutary "right" in B.C. permitting a denominational school to refuse further employment due to Church law contravention.	1. Section 22 of the B.C Human Rights Code - if the Court accepts that all of this section's provisions were met, then the school could be exempted from the Code's principles. A problem occurs over the clause "granting a preference", and with the "identifiable group" being considered practicing Catholics, rather than Catholics in general.
2. Freedom of Religion - unlikely that a court would consider this "right" to have been violated by the B.C. Human Rights Code which, as such, is regarded as competent legislation, and is intra vires.	2. Section 8 of the B.C. Human Rights Code - interpretation of the term "bona fide" might encompass "religion" and "marital status", notwithstanding section 8(2). Also a Court might accept that "reasonable cause" existed to deny further employment.
3. Section 8 of the B.C. Human Rights Code - it is debateable whether "religion" or "marital status" can be regarded as "bona fide" qualifications, given the provision in section 8(2) of the Code. If "bona fide qualifications" can be determined by employer discretion, then this proscription becomes irrelevant.	3. Section 93(1) of the BNA Act - rights and privileges of B.C. denominational schools by law, are limited to establishment and maintenance only, however, the Court may feel that these rights should be broadly interpreted to protect the integrity of the school.
4. Section 22 of the B.C. Human Rights Code - if the Court accepts the "identifiable group" to be the students, rather than the Catholic Community, and if the provision "granting a preference" was not met, then the school cannot use this section to be exempted from the general principles of the Code.	4. Freedom of Religion - difficult argument to substantiate as the right to exercise religious belief has probably not been violated. It could be persuasive if the Court is willing to accept that the selection of teachers in denominational schools falls within this right.

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NOTES

[1] Revise Statutes of British Columbia, 1979, chapter 186.

[2] British North America Act, section 93, 30 Victoria, chapter 3.

[3] This article, "Defining Religion; of God, The Constitution and the D.A.R.", has no specific author, and appears as a comment in the University of Chicago Law Review (1965). It deals with the definition of the term "religion" by American courts, and the consideration given to include such ideologies as secular humanism within the subject area.

[4] British North America Act, section 93(1), 30 Victoria, chapter 3. For full text of this section see Appendix C.

[5] See also D. A. Schneizer, Civil Liberties in Canada, Oxford University Press, (1964), for further discussion of the constitutional status of denominational schools.

[6] See W. Tarnopolsky, Canadian Bill of Rights (2nd edition), Toronto: The Macmillan Company of Canada Ltd. (1978), for a further discussion of this theme.

[7] Constitution Act 1982, 29-30-31 Eliz.II. Proclaimed in force April 17, 1982.

[8] Saumur vs. City of Quebec and Others (1953).

[9] Chabot vs. School Commissioners of Lamorondiere and Attorney-General for Quebec (1958).

[10] Re Meaders (1871).

[11] Lemon vs. Kurtzman, 403 U.S. 602.

Chapter 6: Broader Issues in the Margaret Caldwell Case

The Caldwell case, in addition to the fundamental legal issues, raises broader issues concerning the Canadian value system, its style of government and power structure. This chapter expands on a number of these broader themes in the context of the initial hypothesis of the thesis: that the Supreme Court of Canada will decide in favour of the school when it adjudicates the Caldwell dispute. In particular, this chapter addresses three key areas: the extent to which constitutional sanctity is afforded denominational schools; the tendency in Canadian human rights jurisprudence to favour collective over individual rights; and the traditional judicial conservatism which has frequently frustrated liberal human rights legislation.

A The Extent of Constitutional Sanctity for Denominational Schools

Denominational schools claim "rights" and "privileges" as guaranteed in the British North America Act[1]. Section 93(1) of this Act specifies that provincial educational laws should not "prejudically affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union". If there is interference with these "rights", the federal government is required to intervene and, if necessary, pass remedial legislation. It is noteworthy that whilst the Constitution is silent about individual freedoms, it guarantees group rights in education. In the previous chapter, the exact "rights or privileges" possessed by denominational

schools at Confederation, were assessed with reference to British Columbia and other provinces. The focus here is on the extent to which constitutional sanctity is afforded such schools. If these "rights and privileges" are given broad interpretation by the judiciary, then individuals, as well as provincial legislators, will find it difficult to impinge upon them.

Most of the denominational schools existing in the provinces at Confederation were established by the Catholic or Protestant churches. Central to denominational education was the issue of minority language rights. The new Charter of Rights and Freedoms (1981) provides greater protection for minority language rights, than did the BNA Act. Schools have been viewed by society as important for the perpetuation of different cultures, and denominational schools have been well-supported by French Canadians, living outside Quebec, who rebelled against a monolithic culture. On occasion when there has been an attempt to interfere with constitutional guarantees afforded denominational schools, the issue of minority language rights has also been involved.

In his book Fragile Freedoms (1982), Thomas Berger cites examples of provincial government interference with denominational school rights experienced by Acadians living in New Brunswick in the 1870s, the Roman Catholics living in Manitoba in the 1890s and those living in Ontario in 1912. He notes also the courts' refusal "to give a liberal interpretation to the measures that were included in the BNA Act to protect the separate schools of Catholics outside Quebec" (p.63-64). The much-quoted dispute regarding denominational schools' "rights or

privileges" occurred over the Manitoba School Question. In Barrett vs. Winnipeg, the Supreme Court of Canada held that the Manitoba School Act (1890) "prejudicially affected the rights and privileges of Catholics with respect to denominational schools, rights and privileges that they held 'by practise' when Manitoba joined Confederation in 1870" (Ibid, p.69). The Privy Council in Britain, however, reversed this decision and interpreted the rights of Catholic schools in Manitoba to be "the right to establish and maintain such schools as they pleased, but that the province was not bound to provide funds for their support" (Ibid, p.70). This totally ignored section 22 of the Manitoba Act[2] which stated that provincial legislation should not affect rights and privileges which denominational schools enjoyed, at entry into the Union, by law or by "practise". What in fact had happened was that an Englishspeaking majority in Manitoba aimed to assimilate the French-speaking minority, and the Manitoba School Question was part of the politics of the day. The denominational schools in Manitoba were granted, albeit belatedly, constitutional protection against the provincial legislation, but not before several rounds of legal disputes.

When denominational schools have claimed "rights or privileges" concerning major issues, such as access to public funds, they have not always met with success. Similarly, their rights have been infringed upon during provincial attempts to reject bi-culturalism, as in Manitoba in the 1890's. The extent to which denominational schools are afforded constitutional sanctity varies according to the province and the time. Action aimed at prejudicially affecting denominational school rights is now accepted as directly contrary to the principles of the Constitution.

It is instructive, however, to consider the constitutional sanctity afforded these schools when the dispute does not involve a school district and a government, but when the conflict involves the school and one of its employees.

Disputes Between Denominational Schools and Individual Employees

When employees have a dispute with their denominational schools they may decide to seek legal redress, or alternatively the case may never reach the judiciary, being settled out of court, or considered unsuitable for adjudication by a Board of Inquiry or tribunal. Few cases have become public knowledge, but invariably when a complaint against a denominational school is lodged, it raises the question of constitutional sanctity afforded by section 93(1) of the BNA Act.

The Essex County case, referred to in the previous chapter, held that denominational schools in Ontario do have the right to dismiss teachers for religious cause. The statement of Zuber, J. A., in the Court of Appeal is relevant here:

> ...I therefore conclude that as of 1867, separate school trustees in Ontario possessed the power to dismiss teachers for denominational cause. In my view, it follows that the power of the trustees to dismiss for denominational cause is a "right or

> privilege with respect to denominational schools" possessed by separate school supporters and by virtue of s.93 of the British North America Act, 1867, nothing in the legislation of the province of Ontario can prejudicially affect this right (as cited in Bucsis, 1982, p.115).

This viewpoint was echoed in the case of Board of Education for Moose Jaw School District No. 1 et al. vs. Attorney-General of Saskatchewan and Saskatchewan Teachers Federation (1974), which held part of a Teacher Collective Bargaining Act to be ultra vires because "selection and dismissal of teachers was a right or privilege reserved to the separate school board" (Ibid, p.115-116).

A further case concerning loss of employment, is that of Tom Heidt, a Catholic school principal who was dismissed by the Prince Albert Separate School Board, due to his marriage to a divorcee. The case is slightly different from that of Margaret Caldwell in that he and his wife were seeking an annulment of her former marriage. In addition, the parents and the students of the school lodged complaints to the school board, on Mr. Heidt's behalf (Ibid, p.95). To date he has not been reinstated and the case has not reached court. A similar case is Stack vs. Roman Catholic Board for St. John's (1979), in which a Catholic school teacher was dismissed, without notice, because his wife divorced him. He based his complaint upon the Newfoundland Education Act (1927), which requires notice for dismissal on immoral grounds, and the matter has been remitted to arbitration (Tarnopolsky, 1982, p.217).

Although not set within a Catholic school, but within a Catholic organization, the case of Louis Blatt also concerns dismissal for religious reasons. In Blatt vs. Catholic Children's Aid Society of Metropolitan Toronto (1979), Louis Blatt, a Jew, was employed and dismissed on the same day when it was learnt that he had entered a common law relationship. He lodged a complaint to the Ontario Human Rights Commission alleging a breach of section 4(1) of the Ontario Human Rights Code which provides:

> Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, record of offences, marital status, family status or handicap.

In this instance his complaint was dismissed by a Board of Inquiry because his dismissal was due to his "lifestyle", rather than his marital status, as specified in section 4 (Blatt Judgement, 1979, p.6-7).

Finally, two cases involving support staff in denominational schools are noteworthy, Gore vs. Ottawa Separate School Board (1971) and Huber vs. Saskatoon Separate School Board (1980). In the Gore case, (supra), mentioned in the previous chapter, a prospective secretary was denied employment by a Catholic school because she was not a Catholic. A Board of Inquiry found that

> ...in 1867 there was no right or privilege at law of separate school boards to require as a condition of employment that a person be a Roman Catholic, (Gore Judgement, 1971, p.15).

The Board in this case ordered that Mrs. Gore receive a letter of apology from the school board, and the Ontario Human Rights Commission receive a declaration of intention to abide by the Ontario Code (Ibid). The Huber case also involved a secretary who, in this instance was employed by a Saskatoon denominational school board and who lost employment because of a common-law relationship. Her complaint involved Article 6.01 of the Collective Agreement. Although the constitutional argument was again used, the arbitration board also considered the terms of the Collective Agreement which the school had entered and

> by so doing has contracted out of the right to "discriminate ...by reason of marital status". (Bucsis, p.113).

Although Ms. Huber was ordered reinstated, the decision has been appealed and the Saskatoon Catholic School Board

> is seeking collective bargaining guarantees that non-teaching employees will respect church values (Ibid).

From these two cases it appears that in the case of support staff, denominational school boards have a more difficult time persuading courts of the necessity for all employees to support the school philosophy. Tarnopolsky states that school boards are more likely to succeed with this argument when the employees are teachers in the school, rather than support staff.

The examination of these cases demonstrate that denominational schools use the argument that the constitutional protection, afforded by section 93(1) of the BNA Act, allows them to pursue their own dismissal policies. This reflects an apparent concern, on the part of the judiciary, that if the "rights" and "privileges" are lost by the denominational schools, the quality or character of such organizations would be weakened. In Mackell (1979) it was stated that legislative enactments would be valid

> ...provided they do not prejudicially affect a denominational right or privilege ...attached to denominational teaching or the integrity of the specified schools... (as cited in Tarnopolsky, p.217, emphasis added).

Bucsis contends that

> the pivotal question in these dismissal cases is whether the integrity and nature of Catholic schools would be impaired if the school board lost the right to dismiss for denominational cause and this right must ...therefore implicitly be found to exist (p.117, emphasis added).

As teachers are considered the main component within the denominational school system, with the responsibility of providing a good example to the students, their behaviour and example may affect the character and "integrity" of the school. As evidenced in chapter 3, a Catholic

teacher's public and private life must be consistent with the school's philosophy. Denominational school boards feel that serious contravention of Church rules is detrimental to the school. There are others who disagree with what Bucsis considers the speculation that the denominational school system will fail, due to inappropriate behaviour on the part of teachers. While not everyone within a religious community may agree with its school board's action, the judiciary is normally presented with the combined and unified interests of a community. It is also called to give interpretation to section 93(1) of the BNA Act, as it relates to the school and its desire to pursue employment practices based on religious considerations. In this instance

> the cases in this area, to date, have interpreted the constitutional enactments in a broad manner. The existence of Catholic schools is protected by the BNA Act and the right of separate school boards to implement discriminatory dismissal policies has been implied within the protection afforded.... The position accepted is that only complete freedom in selection and dismissal of teachers will guarantee the fulfillment of the separate school boards' objectives and philosophies. (Ibid, p.120).

The "rights" and "privileges" of denominational schools as specified by section 93(1) of the BNA Act, discussed in chapter 5, were normally limited to such areas as maintenance and establishment of such schools, and access to public funds. Yet these cases demonstrate that given a dispute concerning employer-employee relations, the judiciary has

been willing to interpret the "rights" and "privileges" to the extent that they protect the "integrity" of denominational schools.

The desire by denominational schools to protect their "integrity" means that a teacher's private, as well as professional life, must be consistent with the school philosophy. The Toronto Globe and Mail (1980), cited a spokesperson for the Ontario English Catholic Teachers Association, who stated that "the Separate School Board here would be loath to accept someone to teach in the schools who was blatantly going against the teachers of the church". The same article also stated that "historically, Ontario's courts have upheld the right of separate school boards to fire teachers for acts which go against the teachings of the Catholic Church". As discussed earlier, Ontario's denominational schools possess wide "rights" and "privileges" compared with other provinces, but even those "rights" do not specify that a teacher can be dismissed "for acts which go against the teachings of the Catholic Church". Is there a sound legal basis for such an assumption? It is more likely that the belief is based on general public policy rather than any strict legal grounds.

In some provinces, such as Newfoundland, the "rights" and "privileges" of denominational schools are so broad as to include a morals clause to be included in teachers' contracts. This clause permits a school board to dismiss teachers for what it perceives to be immoral behaviour (Globe and Mail 1976). In this instance, the province's "denominational system was entrenched in the constitution, with the added stipulation that school boards would not be subject to Canadian human rights legislation" (Ibid). In interpreting the position of the

St. John's Catholic schools, then Education Minister Wallace House was quoted as saying that immoral conduct is "not in the spirit of the beliefs of their churches and consequently...[they]...want to tighten their control over teachers' activities" (Ibid). One commentator has noted the paradox of this position:

> It is ironic that constitutional guarantees should be used to violate fundamental rights (MacKay, 1978, p.745-746).

Mackay further comments that "the current movement to repatriate the constitution should also consider the injustices of outdated provisions" (p.746). The Constitution has since been repatriated but there is no major provision to challenge the existing rights of denominational schools, other than that which an individual may seek to make by virtue of his/her rights in the new Charter of Rights and Freedoms (1981). Only litigation over the next few decades will demonstrate whether in fact the constitutional guarantees afforded denominational schools not only remain unimpinged, but continue to allow such schools to pursue their own employment practices and policies. Later discussion will consider the fact that these employment practices and policies are perceived to be a crucial part of the autonomy of denominational schools. Such autonomy is a part of the existing pattern of traditional values in Canada. Any legislation that seeks to place an individual's claim to employment above that of denominational school "rights", would represent a reorientation of that value system.

In relation to the case of Binter vs. Regina Public School Board (1965), Strayer (1966) notes the autonomy of denominational school boards and concludes that "group rights are guaranteed at the expense of individual rights" (p.231). This broad theme also emerges from the Caldwell case and will be examined in the following section.

B Collective Versus Individual Rights

The Margaret Caldwell case demonstrates a situation in which there is a conflict of rights, "rights" as perceived by each party, and specified in the British North America Act (1867) and the Human Rights Code of British Columbia. In the judicial hearings, the courts were required to balance the collective rights of the school with the individual rights of the teacher. Assessed in a broader perspective, it is apparent that society generally, and the judiciary in particular, are, on occasions, faced with the challenge of weighing individual against collective rights.

"Rights in conflict " has been a persistent problem in society. Professor Donald Smiley (1979) notes that "political and legal philosophers have made many attempts to distinguish human rights from other human claims and to devise tests for ranking rights when these come into conflict", (p.2-3), and yet such "lists" have not proved successful. He suggests this is partly because the problem involves "the relative ranking of legitimate values" (p.3). In his work, "Towards a Theory of Human Rights" (1968), Golding states that in a conflict situation, the ideal solution is reached "through the alteration of the desires and/or

interests of the parties...[as]...conflict is mitigated through the transformation of desires and interests when they are held up for criticism against a mutually maintained system of rights" (p.526). He further posits that in the judicial process of interpreting the conflicting interests "the granting and expansion of rights have developed through a struggle for rights" (Ibid). This "struggle for rights" implies that one party must inevitably emerge a loser in the resolution of the problem. This raises philosophical questions regarding a society's propensity to favour collective rights over individual rights, as in Canada, and the "social ideal" which supports this.

Liberty and the "Social Ideal"

Golding contends that "we cannot speak of rights existing anterior to or outside of a community...rights are always 'possessed' in relation to a community" (p.529). As Aristotle stated, over two millenia ago, man is a social animal who is subject to restraints imposed upon him because he chooses to live in a community. Today, references to "collective consciousness", "collective psyche" and "collective identity" intimate that values and rights develop into a system which, according to Golding, depends "upon the social ideal that the community maintains" (p.539). Or, as Lederman (1979) states, laws are developed to "deal with the rights, duties, freedoms, and immunities of all persons who live in the country...[and]... specify what social conduct ought to be" (p.26).

The liberty of the individual is limited by the legal and moral restraints imposed by a society in order to achieve its "social ideal". In "The Just Requirements of Morality, Public Order and the General Welfare in a Democratic Society" (1979), Humphrey states "if freedom is the absence of restraint, it is obvious that in human affairs there has never been and never will be absolute or perfect freedom" (p.137). He quotes Cicero's poignant comment, "we are all the slaves of the law that we may be free" (p.138). It is, however, the extent of restraint which denotes how much freedom an individual may enjoy. Or as John Stuart Mill posited "the nature and limits of the power which can be legitimately exercised by society over the individual" (Ibid). Humphrey suggests that in order to discover the limits of power over the individual, it must be possible to "demonstrate that there exists a definable area of freedom where the individual is supreme and therefore where society cannot interfere" (p.139). Some would argue that this area includes the fundamental freedoms, such as freedom of religion, and freedom of opinion, yet there are laws in society which work to restrict the exercise of these. Humphrey further notes, "even the right to life, which is the most fundamental of all rights, is not absolute" (Ibid).

The United Nations has recognized "an autonomous area, however limited, of individual existence within which the individual is inviolable" (Ibid, p.140). This area includes the right not to be "subjected to torture or other cruel or degrading treatment" (Ibid), and yet this violation of individual rights is perpetrated by many countries, some of which are signatories of the Universal Declaration of Human Rights. Furthermore, to assume that governments act in the best interest

of all, is to ignore the existence of totalitarianism or the imposition of regimes. In situations like this "there is such a thing as the tyranny of the majority" (Ibid, p.139). John Stuart Mill concluded:

> the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of any of their number is self-protection ...the only purpose for which power can be rightfully exercised over any member of a civilized community against his will is to prevent harm to others (Ibid, p.140).

Society is governed with the intention of maintaining and perpetuating the "general welfare of a society", to use the language of the Universal Declaration of Human Rights. Defined in the broadest sense, however, the concept "general welfare" can be used to justify extensive restrictions on personal freedom. This is what Humphrey considers

> the perennial question in contemporary society of the conflict between certain individual rights and the rights of the collectivity (p.145).

He notes that an individual may find himself in conflict with smaller collectivities, than for example, the state. This is the situation in the Caldwell case. In an endeavour to discover the extent to which one set of rights should impinge on another, it is worth considering the following principle from the Declaration:

> the limitations placed on freedom in the interest of the general welfare must be just, and such as would be compatible with a democratic state (Ibid, p.146).

Humphrey states "...the general welfare is a concept of such wide-reaching scope that almost anything can be done in its name" (p.153). He also adds that the concept of a "democratic state", indicates "a society in which the rights set forth in the Declaration are recognized and respected" (Ibid). This constitutes a circular argument, since one moves from an examination of what is "just", to "what is compatible with a democratic state", and return to "the interest of the general welfare", which "must be just".

Many writers have struggled with the concepts of liberty and the "social ideal", and although there is no consensus as to their meaning, there is agreement upon the importance of "time" on the exercise of freedoms. Smiley states that "human rights...are conditioned by time, place, and circumstances" (p.3), and according to MacKay their relation to time and place suggests that "rights are never absolute" (p.740). A brief discussion of the Canadian experience will demonstrate whether this maxim holds true, and whether human rights in Canada are dependant upon "time, place and circumstance". Further information will be provided, throughout this chapter, as to what constitutes the Canadian "social ideal", especially with regard to human rights. Although most of the situations discussed here deal with the individual and the state, as a collective, there are occasions when the individual's rights are in conflict with private agencies. Friedenberg (1980) notes "private

entities" also have the ability to "mould and limit our lives" (p.132). Finally, Smiley comments that human rights situations involve "the clash of human values, the sense of the community about what is acceptable and the broadest judgements of where society is going" (as cited in MacKay, p.740).

An Historical Viewpoint of Collective versus Individual Rights in Canadian Society.

Historically, human rights legislation in Canada is a twentieth century phenomenon, for prior to the Second World War, there was no anti-discrimination legislation and an individual could only rely upon constitutional guarantees implied in the preamble to the BNA Act. As explained in chapter 2, the BNA Act made no provision for human rights except for the preamble which stated that Canada's constitution was to be similar to that of the United Kingdom which used Common Law, rather than Statute Law, to deal with basic rights. This avenue for redress proved to be unsatisfactory and, therefore, all provinces and territories in Canada enacted legislation after 1944 to protect human rights.

Despite the existence today of human rights legislation, at both federal and provincial level, there are occasions when such rights are limited, frequently in the name of "the general welfare of society". Surveillance of individuals is a fact of life. Berger notes the "appalling" fact that in 1977, the McDonald Commission reported that the Royal Canadian Mounted Police had files on more than 800,000 Canadians

(p.160). Given that Canada has a population of only 25 million, this suggests that at least 6% of the adult population are spied upon, in peacetime, allegedly for the national good. Borovoy (1979) cites a case of a drug raid in Ontario, in 1974, involving 115 people. A Royal Commission later found the intrusive aspects of the incident to be "foolish" and "unnecessary" (Ibid p.425). What was also very important, he notes, is that despite these criticisms, the Commissioner's verdict was that this behaviour, on behalf of the police, was "not unlawful" (Ibid). In what Friedenberg refers to as "Mountie-gate", R.C.M.P. wrongdoings in 1977 involved theft, burglary, arson and mail opening. Yet, according to Borovoy, when the federal government was called to answer the complaints regarding this activity, the implication was "that the government did not fully disapprove of the law breaking involved" (p.441). Such a response "tends to create an aura of legitimacy around the notion of police law-breaking" (Ibid).

There have been occasions in Canadian history when the rights and interests of the majority have been deemed paramount to that of the minority, even if the minority consists of thousands, instead of one. Berger cites examples: the expulsion of the Acadians in the 18th Century; the loss of a homeland by the Meti Indians; and "the internment in 1970 of hundreds of dissidents in Quebec during the October Crisis" (p.xvi). This suggests an historical trend in which majority rights are given primacy, ostensibly for the general good. One of the most remarkable examples of human rights infringement, by a majority over a minority, was that imposed on the Japanese-Canadian during and after World War II,

whereby they were evacuated from the west coast, their property confiscated and their expulsion from Canada planned. As Marx (1979) states:

> These events have traumatized our collective psyche. They make up the skeleton in our closet that stalks out to haunt all our discussions on civil liberties (p.456).

This particular incident, in which a minority was deprived of its basic rights, was perpetrated in the name of the general good of society. Berger takes this argument to its logical conclusion:

> The "it was all for the best" argument is founded on the notion that the state has the right to scatter the members of any minority wherever it is deemed to be for their own good. If the evacuation of the Japanese Canadians from their homes can be justified as social engineering, which of us will be the next group to be scattered, our communities destroyed, our property confiscated - all in our own best interest? (p.121)

Another example of the conflict between collective and individual rights is provided by Professor Tarnopolsky, Canada's leading human rights scholar who states:

> The best testing of the standard of civil liberties in a society is the way that society treats its dissenters and minorities. Few dissenters, and no other

> religious minorities, have put Canada to the test quite so acutely in this activity as have the Witnesses of Jehovah (as cited in Berger, p.189).

The Canadian Watch Tower Bible and Tract Society, more commonly known as the Jehovah Witnesses, were outlawed during the Second World War, ostensibly because of their pacifist views. It should be noted, however, that the Supreme Court of Canada took action against the worst excesses of the Duplessis government in Quebec, which had been perpetrated against the Jehovah Witnesses.

There have been occasions when the government has used its perogative to interfere with human rights when the country has been at war, and when there has been a crisis which threatens to develop into an insurrection. In this instance, it is perhaps understandable that a government should impinge upon individual freedoms for reasons of national security. There are legal foundations for the emergency powers of the Canadian government, as specified in section 91 of the BNA Act. What is significant, is the extent to which such powers are used. Human rights were curbed under the War Measures Act, in both World Wars, and during the 1970 October Crisis. In the Second World War, communist and fascist organizations were banned, as were Jehovah Witnesses. When the War Measures Act was enforced during the October Crisis, the human rights of hundreds of individuals were violated in what has since been considered, an extreme and unnecessary manner. Criticism of Canada's emergency powers during war time or time of crises, has centred around the excessive and unjustified infringement of rights, in order to protect the

"general welfare" of society. An example of this, according to Marx, is "the planned expulsion of Japanese-Canadians, at the end of World War II, after hostilities had ended" (p.447).

As well as curtailment of human rights during war or crisis situations, peacetime has also witnessed this behaviour on the part of the state. For example, section 98 of the Criminal Code was used in the 1920's and 1930's, to limit the political freedom of members of the Communist Party, other left-wing organizations, and trade unions. This section provides:

> Any association...whose professed purpose...is to bring about any governmental, industrial or economic change within Canada by use of force, violence or physical injury to person or property, or by threats of such injury, or which teaches, advocates, advises or defends the use of force, violence, terrorism, or physical injury to person or property...in order to accomplish such change, or for any other purposes, or which shall by any means prosecute or pursue such purpose...or shall so each, advocate, advise or defend, shall be an unlawful association (as cited in Berger, p.132-3).

F. A. Scott stated in Queen's Quarterly (1932), with regard to this section:

> for permanent restriction of the rights of association, freedom of discussion, printing and distribution of literature, and for the severity of punishment,

> [it] is unequalled in the history of Canada and probably of any British country for centuries past (Ibid, p.135).

A final example of the invasion of human rights during peacetime, can be seen in the famous case of Gordon Martin, a law graduate of the University of British Columbia, who was refused admittance to the Bar because of his affiliation with the Labour Progressive Party in the early 1950's. As Berger explains:

> The decision against Martin did not depend on his having said or done anything inimical to the welfare of Canada. To the Benchers, notwithstanding that Martin had stated that he was opposed to the use of violence, his association with the Communist party meant that he was not a person of good repute and not fit to be called to the Bar (p.156).

What is particularly important to note about the curtailment of human rights in Canada, is the observation that Canadians are generally unperturbed by the infringement. In his work Deference to Authority (1980), Friedenberg states that "the Canadian public is generally too complaisant to demand more freedom" from its government, and "if eternal vigilance be the price of liberty, Canada faces - with disturbing equanimity - the continuous threat of foreclosure" (p.131). Certainly, many acquiesce to the dictates of the government, and unless personally involved, they are prepared to concede that it is all for the general

good of society. Whether it is peacetime or wartime, examples exist to demonstrate that collective rights have superseded individual rights, and minority rights. In their study of this issue, Macdonald and Humphrey (1979) conclude:

> ...in Canada lower priority is given to personal freedom and the traditional civil and political rights than to collective rights and the egalitarian economic and social rights, which often come into conflict with individual rights and freedoms (p.xvii).

They also state that "the majority of people are apparently prepared to accept...substantial inroads on personal freedom" (Ibid). There has also been a tendency for priority to be given to the collective. In 1970 Humphrey wrote "more and more the states prefers collective to individual rights" (p.418), and nearly a decade later he, and Macdonald noted a continuation of this trend:

> increasingly there seems to be a tendency to solve the conflict in favour of the collectivity and against the individual, to favour collective at the expense of individual rights (p.xviii).

As noted earlier, this is invariably performed in the name of the general good of society. A result of the trend, to favour collective over individual rights, argue Macdonald and Humphrey, has been "the enormous

growth in the power of the state and the size and influence of its apparatus, the bureaucracy" (ibid). This situation is not restricted to Canada alone, for as they contend:

> It is a fact of the utmost significance that in the United Nation priority is now given as a matter of principle to collective and to economic and social rights over traditional civil and political rights and personal freedoms (p.xvii).

A noteworthy example is Quebec's Bill 101, considered by many as an endeavour to ensure that French becomes the dominant language of the province, irrespective of individual rights. This translates into parents being forced to enroll their children in French-speaking schools, and restricting their freedom of choice. There needs to be a limit to the extent to which collective rights should supersede individual rights:

> The challenge of the eighties is perhaps to discover the limit, or better, to discover how collective rights can be extended in the interest of the general welfare and greater social justice without at the same time destroying individual freedoms (ibid, p.xix).

In order that individual rights, or minority rights are favoured over collective rights in appropriate instances, there has to be a sacrifice on the part of the collective, and in some instances, a change in the value system. Human rights legislation which, in part,

seeks to protect individual and minority rights, presents a new set of values which need political support to become effective. Once in power, human rights advocates may suspend promotion of new values, for political expediency. Trudeau, for example, considered a human rights advocate before taking office as Prime Minister, has been quoted as saying that

> in a serious conflict between the requirements of the state and the rights of the individual, the rights of the state come first (Friedenberg, p.57-58).

Unfortunately, as proved by earlier examples in this section, the term "serious conflict" has been interpreted broadly to include the religious, ethnic or political background of individuals, whose threat to state security, was not convincingly proven. Despite the invalidity of such action towards individuals, it can be difficult to seek redress:

> Canadians who believe that they have certain guaranteed basic rights and attempt to assert them against the government are quickly disabused of this notion (Ibid, p.61).

This may appear to be an extreme viewpoint, but the experience of the October Crisis, 1970, and the treatment of such groups as Jehovah Witnesses, Communists and trade unionists, in Canada, suggests it is a valid conclusion. A controversial individual whose "rights" were also forfeited for the common good was Louis Riel. Canadians have debated ad

infinitum the circumstances leading to his demise, but his comments at his trial are pertinent to this discussion of individual and collective rights:

> ...there were two societies who treated together. One was small, but in its smallness had its rights. The other was great, but in its greatness had no greater rights than the rights of the small, because the right is the same for everyone (as cited in Berger, p.56).

Contemporary Canadian society has a spectrum of problems to contend with, from the rights of native Indians to the question of disarmament. Since racism no longer occupies the collective consciousness, ethnic groups such as Chinese-and Japanese-Canadians can now exercise their rights with less restriction or harassment. It is easy with hindsight to apportion blame for decisions taken in wartime or periods of crisis, and the debate over such action is endless. What is noteworthy is that in order to correct a situation in which collective rights tend to be favoured over individual rights, there needs to be regard for change in society at large, and smaller collectives, will have to accommodate this change. As Smiley notes:

> ...changes almost always impose costs on the community, both financially and in the partial or total overriding of other rights (p.15).

One way that "changes" can be implemented is as a result of judicial decisions which favour the "partial or total overriding of other rights". The role of the judiciary in the success of new legislation, such as human rights statutes, is considered in the following section.

C Judicial Conservatism and Liberal Human Rights Legislation

The Caldwell case highlights the disparity between liberal human rights legislation and the judicial conservatism, prevalent today. In two out of the three hearings of the dispute, the courts were unwilling to interpret the relevant sections of the Human Rights Code of British Columbia in a manner such as to reduce the traditional and constitutionally protected rights of denominational schools, in favour of an individual right, as claimed through legislation of only one decade's standing. Parts of the human rights legislation can be viewed as a challenge to some of the traditional notions of "rights", especially in the area of private employment. In this respect, liberal human rights legislation is frustrated by judicial conservatism, and the full extent of the Code cannot be enjoyed.

The terms "liberal" and "conservative" are labels used to describe two extremes of a legal spectrum and are meaningless without definition. The Oxford English Dictionary interprets the word "conservative" as "characterized by a tendency to preserve, or keep in fact or unchanged", such things as a social order. The word is also suffused with connotations of opposition to change, caution, and the adherence to traditional methods or views. Conversely, the term "liberal" is defined

as "open to the reception of new ideas and proposals of reform", and has connotations of open-mindedness in opinion or judgement, and favourable to the change of traditional opinions or established institutions. It is with these two definitions in mind that this theme is to be analysed.

There are those who would consider that all judiciary is conservative in nature and consequently for the purpose of this section, one must ask, "conservative, relative to what?". In this instance, the expression "judicial conservatism" refers to the way in which the courts have chosen to narrowly and/or restrictively interpret legislation during the last few decades, and therefore have missed the opportunity to advance human rights. Excluding a brief period, between 1940 to 1960, the Canadian judiciary has assumed a conservative posture, upholding the traditional values of society. This point will be amplified with reference to: the role of the courts in Canada; the concept of parliamentary supremacy; the power structure in Canada; and further discussion of the "social ideal". Finally, the section concludes with a brief examination of the new Canadian Charter of Rights and Freedoms (1981) to try and foresee whether it will affect the judiciary in the area of human rights.

Judicial Interpretation of Human Rights Legislation

The Canadian judiciary has, on occasion, indicated its willingness to take a liberal stand on human rights, particularly in the 1940's and 1950's. As noted in chapter 5, the courts were willing to protect human rights during this time, and even though no Bill of Rights existed, managed to provide concrete legal remedies for abuses of human rights.

The judiciary failed to maintain this liberal attitude, once an actual Bill of Rights was passed in 1960. Leary (1979) explains the change:

> This reticence may be in part due to second thoughts after the euphoria over implied rights between 1940 and 1960, and in part to a relative absence of repressive provincial legislation to which the "implied bill of rights" might be applied. (p.55).

According to Hunter 1976), the passage of legislation like The Ontario Racial Discrimination Act (1944) suggested that "thenceforth the judiciary could not simply subordinate human rights to commerce, contract or property" (p.13). Despite some efforts by the courts to favour human rights in the 1940's and 1950's, it was still not sufficient. As Tarnopolsky (1979) states, decisions like Noble and Wolf vs. Alley (1951), in which the Supreme Court of Canada chose not to use the opportunity to be a protector of human rights, meant that the provincial legislators

> With no aid from the judiciary, had to move into the field and start to enact anti-discrimination legislation, the administration and application of which has largely been taken out of the courts (p.295).

The Canadian Bill of Rights provided a more concrete legal format, however the judicial decisions under it have been disappointing. Friedenberg states that this is because Canadian courts have "so often

chosen to interpret the bill restrictively" (p.89). (Such a restrictive interpretation has been called the "frozen concepts" doctrine)[4]. Leavy contends that

> ...although the quasi-constitutional Canadian Bill of Rights recognizes the existence of many fundamental rights, its practical effect is weakened by the hesitancy of the judiciary to give it full effect. This weakness is not contained in the Bill itself, but is a consequence of the judicial tradition surrounding its application (p.58).

The Supreme Court's retreat from what Cline and Finley (1981) call "the strong defence of basic freedoms which was one of its most distinguished achievements" (p.137), is particularly evidenced in Attorney General (Canada) and Dupond vs. the City of Montreal (1978). As noted in the previous chapter, Mr. Justice Beetz's majority decision in this case implied that there were no fundamental rights "above the reach of competent legislation" (Ibid, p.138). Berger states that the Dupond decision was a rejection of "the idea that fundamental freedoms might constitute independent constitutional values" (p.184). The Dupond case is also insightful because it produced what can be described as one of the narrowest definitions of freedom of speech:

> Demonstrations are not a form of speech but of collective action. They are of the nature of a display of force rather than of that of an appeal to

> reason; their inarticulateness prevents them from becoming part of language and from reaching the level of discourse (Ibid, p.186).

Such narrowness of definition by the court is also evidenced in MacNeil vs. Nova Scotia Board of Censors (1978). Regarding this case, in which the question of censorship was at issue, Friedenberg states "it was difficult to imagine that the Supreme Court of Canada would break with tradition and with the mood of the country to support absolute freedom of expression" (p.97). The connection between the judicial "tradition" and "the mood of the country" is a crucial part of this theme and will be discussed later in the chapter.

The reason why the judiciary did not interpret the Bill of Rights broadly is, according to Leavy, because it found itself in an "uncomfortable" situation since "the courts are not used to impugning federal legislation outside the technical context of 'nonconstitutionality'. They do not like to tell Parliament that its laws are inoperative..." (p.56). He explains that in such cases as Lavell and Bedard, the judgement of the Supreme Court "gives the impression of judges reluctant to believe that Parliament has given them the power to assess and impugn its own statutes" (Ibid). Similarly the Hogan case, which concerned the right to counsel, demonstrates "judicial reluctance to use the Bill of Rights as a means of changing traditional rules and practices of the criminal law and its application" (Ibid, p.57).
Bruner (1979) states, with reference to the Ontario judiciary, that the courts reluctance "to usurp the power of the legislature" in the area of

anti-discrimination, is due to their perception of the role of the judiciary in Canada (p.242). This is well evidenced in the comments of Mr. Justice Schroeder of the Ontario Supreme Court in Re Noble and Wolf (1948):

> We are not...authorized to establish everything which we may think for the public good, and prohibit everything which we think otherwise... For a court to invent new heads of public policy and found therein nullification of established rights or obligations - in a sense embarking upon a course of judicial legislation - is a mode of procedure not to be encouraged or approved... (Ibid, p.245).

These case comments demonstrate the view that the judiciary's reluctance to depart from its traditional position, is due partly to the increase in provincial human rights legislation, and most importantly, due to what it perceives to be its traditional and limited role. It is necessary therefore, to consider if the label of "judicial conservatism" is infact a result of its role in Canadian society.

The Role of the Judiciary in Canada

The role of the Canadian judiciary, explains Lederman, is "to take the legal principles found in constitutions and ordinary statutes... and individualize them so as to give authoritative decisions at the particular level of everyday affairs..." (p.34). Although the courts

only examine "a very small number of critical cases", their decisions are used by the country as the correct interpretation of law (Ibid, p.35). He further adds:

> ...while important discretions rest with the judges, the priority of ordinary statutes remain. Parliament can amend one of its statutes if it does not like the interpretation given to it by the courts (Ibid).

Historically, Canadian courts do not have the right to strike down laws as non-constitutional and their role is not as broad or as powerful as their American counterpart. Important social policy changes in Canada take place at government level, not in the courts. The power or influence of the Canadian judiciary lies in its ability to give both broad or narrow interpretations to law and this affects its application in society. Another area of jurisdiction, notes Friedenberg. is that of deciding which of "several possible conflicting statutes is paramount in a particular case" (p.6). This role of the courts was evidenced in the Caldwell case. Friedenberg continues that in deciding paramountcy, the judiciary may occasionally "sustain the Bill of Rights - though it seldom has" (Ibid).

Mackay contends that "Canadian courts play a much more limited role in protecting human rights" than do the American judiciary (p.744). He justifies this by stating that "Parliament has always been considered the champion of liberty in Canada and judicial review of its actions have

been narrowly limited" (Ibid). Essentially, the role of the judiciary in Canada is limited in what it can accomplish in this area. He further adds that for Canadian courts "to become active in upholding human rights", there would be a need to "'politicize' the judiciary and this has been traditionally considered undesirable" (Ibid).

Some would advocate a more active role for the Canadian judiciary. In America, for example, the Supreme Court was involved in promoting civil rights and desegregation in the 1960's. The case of Queen vs. Drybones (1970) suggested that Canadian courts might be assuming a more active role, and to many, the selection of Bora Laskin as Chief Justice of the Canadian Supreme Court, provided further hope (Ibid). According to MacKay, however, "a restrictive interpretation of the Bill of Rights in the Attorney General of Canada vs. Lavell (1973) indicated a retreat to the traditional deference to the will of Parliament" (p.744-745). He quotes Professor Schmeiser who concluded that "social change was actually hindered by the influence of a conservative judiciary" (Ibid, p.745).

The role of the courts in Canada is a factor contributing to "the relatively low priority given to human rights...until quite recently", according to Macdonald and Humphrey (p.xv). They contrast this with the American system whereby "the courts have the last word, even though congress may have spoken" (Ibid). They continue:

> When the courts set aside legislation which offends acceptable human rights standards it is likely to be on the ground that the legislature exceeded its powers. This has meant that there have been fewer remedies available in Canada for the protection of human rights and that Canadian lawyers have perceived

> the law and their own role as defenders of human rights in ways that differ radically from corresponding attitudes in the United States. These attitudes are important not only because of the preponderant role that lawyers play in the life of the nation... but also because of their role as formers of public opinion (Ibid).

Legislative enactments exist to limit the role of the courts, and ensure parliamentary authority. For example, the Federal Court Act prevents the courts from subpoenaing information which crown ministers consider "injurious" and which, states Friedenberg "declares the decision of the minister to be beyond the power of any court to review" (p.90). The War Measures Act is a further example of parliamentary authority because it serves to suspend human rights when implemented. As historian Kenneth McNaught revealed, in times of crisis the courts "reassert the authority of the established institutions to preserve 'order' in society" (as cited in MacKay, p.741-742).

Having considered the role of the judiciary in Canada, and its inability and unwillingness to assume a more liberal posture with regard to human rights, it is important to examine the context within which it operates. Evidence exists to suggest the limited role of the courts is due in part to a system of government in Canada, which is based upon the traditional English concept of parliamentary supremacy.

Parliamentary Supremacy in Canada

The concept of parliamentary supremacy has its origins in British history whereby the king was the transgressor of basic freedoms, and Parliament was perceived to be the protector of them. As parliament has the authority to "regulate the exercise of most fundamental liberties", it assumes a powerful position in today's society (Leavy, p.55). This is particularly evident in the application of statutes, hence:

> What the Bill of Rights means in practise depends on the manner in which both the executive and judiciary interpret its provisions (Ibid).

The question of judicial conservatism with regard to human rights legislation needs to include the role of government in this area. "Parliament", not the judiciary, states Friedenberg, "is the ultimate source of legal authority in the land. There are certain structural limits to parliamentary authority; but there are no substantive limits" (p.81). Whilst the Canadian constitution is used mainly to establish the limits of government jurisdiction, particularly between federal and provincial legislatures, the American constitution is specific about the protection afforded citizens, by any level of government. The First Amendment states "Congress shall make no law...." regarding basic freedom, whilst there is no Canadian guarantee of such freedoms from Parliamentary intrusion. The Canadian Bill of Rights is not entrenched, as is the American counterpart:

> Where the Canadian Bill of Rights reserves to Parliament the final decision as to whether a protected right shall be abrogated in a particular instance, the American is designed from the outset to place these rights beyond the reach of Congress (Ibid, p.86).

Hence a Canadian can be vulnerable because of, and not inspite of, the government, since the courts cannot uphold his rights in the face of parliamentary supremacy.

Peace, Order and Good Government

> Canadian society is ideologically committed to "peace, order and good government" as higher values than life, liberty and the pursuit of happiness... (Ibid, p.89-90).

The British North America Act attempts to provide for Canadians "peace, order and good government". This theme dominates the executive and judicial traditions. It is not intended that courts should act in a vacuum, but within the workings of society, and the constraints of the constitution. Their decisions are normally governed by what they consider is the public opinion and "mood" of an issue. Other values exist in Canadian society, apart from "peace" and "order" of which the judiciary are aware.

A dominant value in Canadian society is conservatism. John Porter elucidates this point further when he states that both English and French Canadians "are more alike in their conservatism, traditionalism, religiosity, authoritiarism and elitist values", than either group is prepared to admit (as cited in Smiley, p.11). Even in the early days of the settlement of Canada, the Founding Fathers were associated with economic and ecclesiastical institutions, rather than acting as individual pioneers.

It is the general public's desire to maintain its traditional value system which allows governments to suspend human rights when it considers it expedient. Smiley argues that the "overwhelming popular support" for the actions of the federal and Quebec governments during the 1970 crisis, mentioned earlier, results from the mythological belief of Canada as a "peaceable kingdom" (p.11-12). A similar example can be evidenced by the general acquiescence of the public to the treatment of "dissidents" during the 1920s and 1930s. Smiley further adds that "there are dangers for human rights in this society, which regards its policemen perhaps more benignly than any other modern society" (p.12).

As Canadian society regards conservatism as an important part of its value system, it is arguable that aspects of existing human rights legislation are more liberal than society is yet ready to accept. Some feel that the government should lead public opinion, rather than follow it. A prime example is penal law, and more specifically the death penalty, where the policy contained in legislation does not necessarily reflect the public's opinion. In human rights cases, however, the gov-

ernment has in fact reflected public values. The government and the judiciary seek to comply with the expectations of the citizenry, within the limits of the law:

> The government must be perceived by most of the people most of the time as doing what a government is supposed to do, for better or for worse. This, after all, is what the legislators who drafted the Canadian Bill of Rights meant to convey by referring to the rights enumerated therein as rights that "have existed and continue to exist" in Canada (Friedenberg, p.98).

Although there are few "guaranteed" rights as such, a pattern of expectations exist in Canada which includes "peace", "order" and maintenance of the status quo. It can also be characterized as conservative, counter-revolutionary and traditionalist. These are the values held in esteem among most Canadians. Hence:

> It would be presumptous,...to think of Canadian society as having been deprived of liberty by an archaic governmental structure and a weak Constitution....Canadians do not lack entrenched civil liberties because their form of government makes it difficult to provide them; they accept a governmental structure under which liberty cannot be guaranteed because they are highly ambivalent about personal freedom and because they genuinely believe that government is designed to be an instrument for advancing the general welfare, and is not, in principle, anything to fear" (Ibid, p.98-99).

Whilst some countries value liberty as paramount in a scale of values, Canadians, according to Friedenberg, "assign it a high rank, formally; but they do not...grant it precedence" (p.160). Stability, economic prosperity and traditionalism would probably be higher on the scale of values. In order to maintain a value system aimed at maintaining "peace, order and good government" there has to be "deep acquiescence" on the part of Canadians, with the idea that the ultimate authority rests with Parliament. According to MacKay there can only be success in the field of human rights when Canadians are prepared to change their order of priorities with regard to "traditional concepts of order" (p.779). At present Canadian society may not be prepared to make such changes to its value system. Some would argue that the judiciary's work helps to perpetuate this system. This point is evidenced by MacKay's comment that "when a human right conflicts with a traditional property right, the bias of the courts is clear" (Ibid, p.754).

As the "social ideal" in Canada is characterized by conservatism, there is not the public support to demand more changes, particularly in the field of human rights. Only when the majority are willing to accept the full extent of human rights codes will they be broadly implemented. In the meantime, the development of human rights can be seen as a process, in which incrementally, progress will be made in the field. For example Bruner notes, with regard to Ontario, that legislation eliminating discrimination because of sexual orientation will not be included in the province's code "until unmistakable signs of

public support confirm the arrival of the right political moment" (p.253). This can be a frustrating situation for, as Humphrey states, the most worrying issue regarding "human rights in this country is the general apathy of Canadians" (p.421).

As well as "peace, order and good government" having an impact on the progress of human rights in Canada, it is necessary to examine also, the power structure.

The Power Structure in Canada

If, as Plato suggests, "justice is the interest of the stronger" it is important to consider the impact of Canada's power structure on the enforcement and protection of human rights. This theme was examined by Burke who stated "...liberty when men act in bodies is power" (as cited in Smiley, p.4).

The power structure of Canada can be analysed in terms of corporatism, pluralism and Marxism. It is not within the scope of this chapter to examine all theories in depth, but consideration will be given briefly to pluralism and corporatism. For some the main feature of the Canadian power structure is corporatism. MacKay cites McLeod and Rea in Business and Government in Canada (1976) on this theme:

> Our political system's organization of power is not merely elitist, but corporatist. Elites interact and attempt to accommodate each other. The various elites often appear to clash, or pretend to clash, but usually maintain a realistic willingness to

> balance or harmonize their divergent interests and to preserve the interests of the community through collaboration with the state (p.742).

The concept of pluralism, states Smiley, "suggests the possibility of relatively autonomous elites having decisive power in the particular issue - areas of their respective concerns" (p.7). Both corporatism and pluralism imply the existence of relatively autonomous groups which some would call elites, bargaining between themselves and with the government. The danger can be that such "elites" are afforded exemption from public policy matters. Smiley continues on this issue

> The general thrust...is to circumscribe the autonomy of associations which have hitherto been regarded as private and to require them to conform to the standards set by and enforced by the public authorities (p.21).

(If the Caldwell case is finally decided in favour of the teacher, as a result of legal interpretation by the Supreme Court of Canada, this is essentially what would be required of the Catholic school board.)

Another viewpoint is that the cabinet is at the apex of the Canadian power structure. Governments, like private institutions, are responsible at times for violating human rights. As MacDermott (1977), explains in The Credibility Gap in Human Rights, governments must be pressured to mend their ways because they have "the power to end the violations if they are spurred or shamed into doing so" (p.270). Many

authors concur that the power system in Canada is made up of elites and corporate bodies, inextricably linked with the power of the executive, especially cabinet power. If a judiciary perceives its role limited by constitutional arrangements and interprets the law narrowly, it may be less likely that government and private institutions will enhance the progress in human rights. At the same time, the "social ideal" of conservatism in Canada, may be used as a barometer to justify the low priority given to human rights in the scale of values. Given these premises, individuals may well feel unable to realise their expectations regarding personal liberties.

The Charter of Rights and Freedoms (1981)

There has been a long-standing call for an entrenched Bill of Rights, which would increase the power of the judiciary.[4] The desire for this entrenchment of rights is now being realized in the new Charter of Rights and Freedoms (1981).[5] The impact of this Charter on the human rights movement, and on the power of the judiciary, will be made evident during the next few decades of litigation. It is unlikely that the Caldwell case will be affected by it, when adjudicated by the Supreme Court of Canada, for the Charter purports to apply to government and crown agencies rather than private institutions. Furthermore, the Charter will not come into full effect until 1984, and within it section 29 specifies that "Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools".

The Charter is, nevertheless, accompanied by a euphoria of expectation, reminiscent of that which greeted the advent of the Canadian Bill of Rights. The fact that a new Charter was required, bears testimony to the failure of the Bill of Rights to fulfill previous expectations. The Charter is particularly concerned with equality rights, as well as those pertaining to minority language education rights and aboriginal rights. There is not a complete guarantee of "rights", however, due to the non obstante clause which, Berger explains "allows Parliament and the legislatures to override the Charter provisions relating to fundamental freedoms and legal rights (p.101). Hence the possibility exists that governments will be able to "declare that a statute shall operate notwithstanding the Charter provisions..." (Ibid). The Charter also states, in section I, that rights and freedoms are guaranteed, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The persistent question of what constitutes a "democratic society" is likely to be repeated, and the courts may be asked to decide whether limits on these rights and freedoms are "demonstrably justified".

At the same time, the War Measures Act is still in existence and could be invoked in an emergency situation. As mentioned earlier, this Act is able to suspend human rights completely. Berger believes the difference between the Charter and past human rights legislation is that

> The Charter...requires the courts to determine for themselves whether or not a particular statute is demonstrably justifiable, and not simply to accede to the judgement of the politicians...(p.124).

The judiciary may, therefore, assume a more active and liberal role in the human rights process, by virtue of its interpretation of the new legislation. Clearly, the role of the judiciary must change if the Charter is to be successful. Conversely, the courts may judge that the public does not yet require broad interpretations of human rights which modulate traditional values, and as with the Bill of Rights, may choose to adopt a conservative posture. Robert Stanfield states in Rumours of War "civil liberties in Canada...will continue to depend basically on the importance Canadians attach to them and upon our willingness to defend them even in times of stress" (as cited in Berger, p.217).

Contemporary Canadian society has made progress in the field of human rights legislation, especially since the Second World War. Although its "social ideal" is not as liberal or supportive of change in traditional views, as some might prefer, its successes in the field of human rights are greater than those of other states. Compared with other countries, Canada also has political stability and abundant economic resources to ensure its prosperity. It also has the competence to maintain and increase the momentum in the human rights movement by striving to constantly update, refine and enforce legislation. As the notion of "rights" implicit in new human rights statutes become acceptable to the public at large, the principles of human rights will be cemented into the Canadian value system.

Implicit in the Supreme Court of Canada's ruling on the Caldwell case, will be what constitutes society's value system, and whether collective rights will supersede individual rights. The question

of individual freedom in society is relative to the established institutions. Past cases demonstrate that denominational school group rights are protected when the judiciary is prepared to broadly interpret the constitutional sanctity afforded such schools, in order to protect the "integrity" of the institution.

In the balancing of rights the judiciary is called upon to consider sensitively the "rights" of both parties, those of the school and those of the teacher. The Court may deem it preferable to give primacy to the collective rather than the individual, but in what circumstances should an individual's right be given primacy? Some might say when the case of discrimination is blatant, causing a public outrage, rather than what may appear to some as "marginal", as in the Caldwell case. The context in which the parties operate, is most relevant here. Although the media has promoted the case as a "cause celebre" after each judicial hearing, there has not been any great public support for Margaret Caldwell, and the judiciary may duly take note. To many, her dispute is tied up with the rights of a private organization and human rights legislation at present contains certain exemptions for such organizations. Furthermore, she chose to obtain her own legal counsel and did not seek the support of the British Columbia Civil Liberties Association, or any other group with political influence. Hence if "power" is an underlying factor, Margaret Caldwell possesses a paucity, especially compared with the established, traditional authority of the Catholic Church, which constitutes a "relatively autonomous elite".

The Court's decision will take into account the value system of Canada, the traditional, conservative values of the past. These are now being challenged by the new notions contained in human rights legislation. Much is expected of the new Charter of Rights and Freedoms which provides greater protection for individual rights. If there should be a decision from the Court, in favour of Margaret Caldwell, it could herald a new era in human rights legislation for individual rights. Alternatively, the judiciary may hand down an interpretation of the relevant sections of the B.C. Code, which is perceived to be a compromise between traditional values and new goals of society. It is unlikely, however, that this case will enjoy the potential benefits of being adjudicated under the Charter because the new legislation does not come into full effect until 1984, and, notwithstanding the provision for denominational school rights, it is doubtful that it will be applied retroactively.

This thesis states that the final decision will, in light of the aforementioned reasons, be in favour of the school. The dominant value of conservatism starts at a lower level than the courts and permeates most Canadian institutions. Progress has, nevertheless, been made in some areas of human rights, and the vast majority of the general public is now prepared to accept that discrimination on the grounds of ethnic background is wrong. Public opinion is not always polarized into two extremes on all issues, but there may not be overwhelming support for the implementation of new values contained in human rights legislation. In twenty years time there may be no such thing as a Margaret Caldwell case because by that time, the new legislation may have been given broad interpretation by the judiciary, and the public may be ready to accept

the idea of individual rights superseding collective rights. Presently however, the courts will interpret that the general public has not yet grasped such notions implicit in the human rights code and now enshrined in the Charter.

When the Supreme Court of Canada adjudicates the Margaret Caldwell case, it will probably look beyond the Human Rights Code of British Columbia and The British North America Act, and consider the ramifications of its decision. It is the possible implications of the Court's judgement, for all parties involved, which are discussed in the final chapter.

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    (a) "Teachers Fight Morals Clause in Newfoundland Pacts", Oct. 30, 1976.

    (b) "B.C. court upsets firing of B.C. teacher over marriage", Sept. 5, 1980.

25. The Vancouver Sun, Editorial column, 1979.

NOTES

[1] British North America Act, section 93(1), 30 Victoria, Chapter 3.

[2] Manitoba Act, 1870, section 22.

[3] Human Rights Code of Ontario, Statutes of Ontario, 1981, chapter 53.

[4] For a further discussion of the "Frozen Concepts theory of interpretation", see E. Z. Friedenberg "Deference to Authority" and W. S. Tarnopolsky "Discrimination and the Law".

[5] Constitution Act 1982, 29-30-31 Eliz.II. Proclaimed in force April 17, 1982.

Chapter 7: Conclusion: Implications of the Margaret Caldwell Case

The potential consequences of the final decision in the Caldwell case will impact on Canadian human rights, the Catholic Church and Her denominational schools, independent schools in general, and their teachers. This thesis concludes with a discussion of the anticipated implications for these parties.

A Implications for Human Rights

The decision of the Supreme Court of Canada on the Caldwell case will have implications for the B.C. Human Rights Code specifically, and Canadian human rights legislation in general. The provinces seek judicial interpretation from the Court as to the definitive meaning of parts of the human rights statutes. This legal clarification is vital for the success of the Human Rights Branch, for part of its mandate is to disseminate information and properly advise employers and other interested parties within the province. In this context, there is debate over the success of commissions to carry out their mandate of promoting and enforcing human rights. The opposing views of human rights commissions demonstrate that while some feel they have been invested with too much "power", others feel they have insufficient.

It is significant, and not incidental, that the commissions have received criticism for their over-zealous approach to human rights enforcement. The difficulty of fulfilling its role is summed up by Fairweather in his study of The Canadian Human Rights Commission (1979):

> It has proved a challenging test of skill and evenhandedness to steer a course in partisan issues between reckless intervention on the one hand, and inhibition on the other. This balance must be maintained, not only in the face of pressure to conform to the traditionally discreet posture of officialdom, but also in the face of the impatience and the expectations aroused by national and international emphasis on human rights issues (p.317).

Adequate staffing, necessary to promote aims of human rights legislation, has been one weak area which some writers feel has contributed to the overall ineffectiveness of some human rights commissions. Professor William Black (1980) has noted the understaffing of human rights agencies as one of the problems limiting agency effectiveness. With respect to "overly zealous" enforcement efforts, he argues that in fact "the velvet glove has been much more in evidence than the iron hand" (p.1). Whenever possible, the commissions have attempted to use education and conciliation as methods of reaching a settlement, rather than enforce punitive sanctions. (There is a certain irony in the Caldwell case, in that attempts to use "education" to change attitudes obviously failed.) Tarnopolsky (1979) maintains that "enforcement techniques ... will have to be applied vigorously if the human rights statutes are not to deteriorate to pious but ineffectual declarations" (p.305). On the same theme, MacKay (1978) contends that there must be a shift in focus "from the definition of rights to the provision of real remedies" (p.739).

Human rights legislation must have wide public support in order to be effective and responsibility lies with commissions to educate society. Politically, human rights advocacy may not win a government support, compared with other issues, and once in power, low priority and insufficient funding may restrict a commission's effectiveness. The low priority afforded human rights agencies may be a result of a government's interpretation of the general public's commitment to, or interest in, human rights enforcement. In order to change public opinion, human rights commissions need to maintain a higher profile, as well as receive a greater financial commitment from government. According to MacKay, "fines should be raised to the point that discrimination becomes unprofitable" (p.756). He further adds that "the major criticism of human rights commissions is that they do not have enough power" (p.753). Certainly, more "power" will only be afforded them when it is politically viable.

Conversely, human rights commissions have also been critized for having too much "power". Hunter (1976) contends that:

> ... human rights commissions, created to administer the legislation, have been uncritically vested with excessive statutory discretion, open to abuse and, regrettably but demonstrably, abused (p.27-28).

Critics, such as Elizabeth Lennon, consider that there is "a general paternalistic attitude that the commission knows what is best for you" (as cited in MacKay, p.755). This is particularly evident when a commission fails to act on behalf of a client because it disagrees with

the content or severity of discrimination. As noted in chapter 2, some commissions do not act independently and permission is required to pursue cases, by the Minister of Labour, "who may refuse to prosecute for political reasons ... at its worst a commission could be used for channeling a dispute away from the public eye" (MacKay, p.755). The credibility of human rights commissions can be eroded or destroyed if they are given too much or too little "power" or discretion. Citing the B.C. case of Borho vs. Atco Lumber Co. (1976), Hunter notes how a ridiculous application of legislation can affect commission credibility, fueling the arguments of critics.

As evidenced by the above case, the Human Rights Branch of British Columbia has not been immune from criticism. One of the causes of critism may in fact result from the Code itself containing features which may appear ambiguous. The Caldwell case demonstrates this well. Of particular concern is the "reasonable cause" language, apparent in section 8, which has the effect of allowing greater flexibility for judicial input, and more variability. The Code's open-endedness can serve as an advantage in that it can accommodate society's attitudinal change without waiting for legislative amendment, and as a disadvantage in the fact that the flexibility leads to ambiguity concerning grounds of discrimination not legally covered. Hunter notes the employment and accommodation sections of the B.C. Code as being "dangerously open-ended", with the Commission acting as "arbiter of what qualities may reasonably be sought in the hiring process" (p.15). In many respects the ambiguity and "open-endedness" is demonstrated in how one interprets sections 8 and 22 of the B.C. Code. If they were unambiguous, it is

unlikely there would be such a protracted dispute in the Caldwell case. Section 8 appears to definitely forbid discrimination, but section (or is it Catch?) 22 allows it. The matter now rests with the Court to decide on the correct interpretation of these sections for this and future disputes.

If the legislators did not intend section 22 to be used, indirectly, to deny a person further employment, or to discriminate between categories of people within a religious group, then it should perhaps be amended, especially as that is the way it could be used in the Caldwell case. If the decision should favour Margaret Caldwell, the Catholic Church and/or the Federation of Independent School Association (FISA), may pressure the provincial government to change the legislation and accommodate the Church and Her schools. The question is, would it be politically wise? The answer depends on public opinion and what it accepts as the value system. It may appear as a struggle between reinforcement of old values and a refusal to accept a modified or new value system. Accommodation of the Church and Her denominational schools, with the attendant parental support, may be regarded as a sensitive government issue. The B.C. Appeal Court hearing of the Caldwell case demonstrates this. Whilst the Director of the B.C. Code argued that St.Thomas Aquinas School was not exempted from the principles of the legislation, by virtue of section 22, the Attorney-General for B.C. argued the contrary. In this instance, two agencies of the same government supported opposite sides in the dispute, hence a united front was not presented. This apparently weakened Margaret Caldwell's position, and strengthened the school's.

In the event that the Court's decision should favour the school, human rights advocates might also seek legislative amendment. There has not, of late, been a request to amend section 22, but in its Recommendations for Change to the Human Rights Code of British Columbia (1981), the commission has specifically recommended changes regarding the "reasonable cause" language now present in sections 3, 8 and 9. If the proposals are adopted, this clause would be expanded to sections 4 and 5, and give the Commission the power "to issue guidelines, binding upon Boards of Inquiry, specifically describing the conduct that constitutes discrimination prohibited by the Code" (p.20). Moreover, the Commission seeks a general recommendation that the Code be given primary status in order that it "supercede other legislation where there is a conflict between the Code and other legislation" (Ibid, p.19). Such a conflict existed in the Caldwell case, between the Code, and section 93(1) of the BNA Act and the constitutional provision for freedom of religion. Although these recommendations have not yet been implemented, they may serve to clarify the law for concerned parties. Certainly, clarification and/or amendment of sections 8 and 22 of the Code, might de-fuse another Caldwell case before three provincial and one federal hearings are invoked.

The provincial legislative body would, in the event of amending the B.C. Code, be faced with determining the political wisdom of such a decision, notwithstanding the advancement of its social policy in the field of human rights. Educational choice is regarded by some as a civil liberty, and such choice can extend to the appropriateness of the teacher. This belief may form the basis of an argument presented by the

independent school lobby in the event of an amendment proposal. Additionally, amendment may favour the individual rights of teachers or employees operating within the private sector. Marks (1981) states that "as long as emerging rights are not so unrealistic or trivial as to be treated with mockery, their recognition does serve the advancement of the cause of human rights without endangering the rights of earlier generations" (p.451). In this work "Emerging Human Rights: A New Generation for the 1980's?" (1981), he cites Professor Georges Abi-Saab on this theme:

> In reality, law does not come out of a social nothingness, nor does it come into being in a "big bang". In most cases, it is a progressive ... growth over a large grey zone separating emerging social values from the well established legal rules; a zone which is very difficult (and sometimes even impossible) to divide ... between the two (p.437).

Any legislative amendment in B.C., may appear as such a "grey zone", as it seeks to accommodate the different values of the public. Ultimately, political persuasion and/or public opinion may be the deciding factor. What results is a "system of rights", states Golding (1968), the content of which is "not necessarily the 'enjoyed' rights, but rather the 'gained' rights - [which] depend upon the social ideal that the community maintains" (p.539). What is most evident is that despite the work of human rights commissions and their advocates, rights are fragile once removed from a legal framework and exposed to society. Contingent on the

final decision of the Caldwell case will be the effectiveness of the B.C. Human Rights Branch in securing individual employment rights, as well as the progress being made generally in Canada in the implementation of new social policy, as epitomized in human rights legislation.

B Implications for the Catholic Church and Denominational Schools

Disputes similar to the Caldwell case suggest that the courts may not be the most appropriate arena in which to settle conflicts of a religious nature. Are we asking an impossible task of the courts to judge moral issues and demanding too much of the legal system? Although courts often have to deal with moral issues, an ecclesiastical tribunal might have been a more suitable forum for the Caldwell case. Alternatively, some feel that it may be difficult for such a panel to be impartial, therefore a courtroom might function as neutral territory. The issue of morality was analyzed so finely that the case was pivotal on a moral qualification rather than on professional competency. Was that the intention of the legislators? Clearly, legislative amendment to the Code might aim to remove a situation in which the judiciary is called to decide such moral issues.

The final result of the Caldwell case has serious implications for both the Catholic Church and denominational schools. An alternative to legislative amendment of human rights statutes, would be reform from within the Catholic Church. From the Church's viewpoint, religious reform may, however, be the most improbable solution to the dilemma. The Catholic Church could require a reappraisal of Her doctrinal demands on

the members in light of an ever-evolving world, but this, from an organization whose doctrine pre-dates that of human rights legislation by 1900 years is perhaps unlikely. The Right Reverend Monsignor Stewart notes:

> Any suggestion that the teaching of Christ on marriage is outmoded, or that the Church may be about to deviate from it, is contradicated by the strongest statements of the present Pope, John Paul II (Vancouver Sun, Jul., 1979).

The Caldwell dispute centered around a moral issue resulting from her marriage to a divorced Methodist in a civil ceremony. Some might question whether morality can be imposed by law and whether it is possible to legislate "goodness" or "fairplay". Yet much of the judiciary's time, as evidenced in chapters 4 and 5, was given over to considering what makes a Catholic "Catholic", and what is the difference between categories of Catholics. Implicit in that argument was an underlying theme of what is a "good" or "bad" Catholic. Theologians and Canon lawyers disagree on moral standards in Catholicism, and to some extent, the provincial judiciary was perhaps ultra vires in its attempt to deal with the question of morality, yet was forced by circumstances to consider it. If Margaret Caldwell is considered by some to be a "second class" or "bad" Catholic, or is in "bad standing" in the Catholic community, then perhaps she should be penalized within the Church, by being refused Holy Communion, and be judged by an ecclesiastical tribunal, rather than be penalized via the courts, in the form of loss of further employment within a Catholic school.

Margaret Caldwell's "error" or moral "crime" was that of her marriage to a divorced person. As the Church states that marriage is indissoluble, and Mr. Caldwell's former marriage was never annulled or invalidated, she is therefore considered by some a bigamist. As noted in chapter 4, evidence was presented which demonstrated that, according to Canon Law 2356, the Catholic party in these circumstances is guilty of bigamy and infamy, and warrants excommunication from the Church if public scandal is caused by the "marriage" (Appeal Book, Vol. 1, p.75), however, excommunication is rarely advocated today. Debate exists in the Caldwell case as to whether there was enough public scandal attached to her marriage, to warrant the severity of the school's action. In other words, were the students and parents of the school "scandalized" in the classical theological sense of the word? If not then some would argue that "moral justice" needs to be done in the Caldwell case. Such Catholics tend perhaps to stress the spirit of Christianity rather than the letter of the Canon Law.

Another controversy centres around the flexibility of Catholic dogma. Some argue that Roman Catholicism has varied to some degree, according to time and place. Hence, Roman Catholicism three hundred years ago, or as exists today in South America, may appear somewhat different from how it is presently perceived in Canada. Moreover, it is argued that there is sufficient flexibility of Canon Law to permit input from a senior level within the Catholic hierarchy, for dispensation from the application of law, when deemed appropriate. In the Caldwell case, there was a conflict between individual liberty and group values, within

Catholicism, and the gravity and nature of her action apparently made such dispensation inappropriate and/or impossible. Hence, the Church remained intransigent on this issue of marriage to a divorced person.

Catholics are themselves divided over the question of marriage outside the boundaries of Church Law. Reverend James Roberts notes statistics of "10,000 annulments ... granted each year in the United States by Catholic diocesan marriage tribunals", leading him to speculate whether "the church isn't in effect in the business of granting divorces without admitting it" (Vancouver Sun, Aug., 1979). In his work "Catholic Divorce and Remarriage" (1979), he states that some clergymen within the Catholic Church have departed from the traditional understanding of marriage, in response to the awareness of over "10 million divorced Catholics in the U.S.A. and Canada" (p.1). He quotes William O'Shea in the Jesuit magazine Theology Digest:

> one can make a case for understanding Christ's insistence on the indissolubility of marriage as an ideal to be seriously pursued rather than as a law to be literally enforced (p.2).

The movement away from strict interpretation of the scriptures is further evidenced in the comments of Rev. Alexander Schmemann, dean of St.Vladimir's Theological Seminar in New York: "... marriage is indissoluble, yet it is being dissolved all the time ... Yes, the Church acknowledges the divorce, but she does not divorce!" (Ibid, p.3). Whilst the "ideal" is still sought, there is concern today for Catholics who,

according to Father Roberts "live moral and spiritually productive lives although married outside the canonical requirements of Church Law" (p.8). Father Bruce Vawter suggests that the Church needs to "address the needs and challenges of the existing age with its interpretation of the mind of Christ" (Ibid, p.4). Such a change might necessitate a departure from the traditional interpretation of marriage. John T. Catoir writes in his article, Catholics and Broken Marriage (1979) that "jurisprudence is still developing even within the Roman Rota. This evolution will increase the grounds on which marriages may be declared invalid ... though the Church will continue to uphold its tradition on indissolubility" (p.61). As Canon Law undergoes revision, the position of Catholics married to divorcés may be affected, but as in the past, a great deal depends on the incumbent Pope.

The present Pope, John Paul II, has established a charismatic presence on the world stage, and, along with many within the Catholic Church, he has championed human rights. As head of the Catholic Church, he establishes the criteria which percolates down to all levels within the Church and which are adhered to by members of the Catholic hierarchy. Whilst Pope John Paul II has taken a progressive view on human rights, his position on certain issues, such as abortion, have not demonstrated a departure from traditional Church values. As noted earlier by Monsignor Stewart, the Pope's statement on marriage suggests that marriage laws will continue to be interpreted in a traditional manner. The desire to be cognisant of the challenges of the present, yet preserve traditional values, is possibly the path most papal heads skillfully try to steer. The Second Vatican Council (1962-1965) attempted to modernize "Catholic

thought", according to Donohue (1982), and yet caused controversy and schism within the Church (Edmonton Journal, 1982). Anne Roche sums up the criticism caused by attempted change"... gutted Masses with their antic priests, manufactured excitement and cafeteria casualness at Holy Communion" (Ibid, p.16). When reform leads to such condemnation it is not surprising that the Church attempts to charter a steady course between traditionalism and change. Hence, even in the area of human rights statutes, the Church may feel that it still has to adhere to dogma, as interpreted by the Pope. Despite its frequent support of many areas of human rights, the Church is unable and/or unwilling to depart from Her views on marriage laws, even in the face of the secular goals of the state. Any attempt by the state to intrude into religious affairs, over which it has no jurisdiction, can promote conflict. In order to limit state interference in the religious domain, the Church is likely to resist what it considers unfair or invalid government intrusion, as evidenced by the reaction to the Caldwell case. When the B.C. Supreme Court handed down a decision in Margaret Caldwell's favour, the most Reverend James F. Carney, Archbishop of the Vancouver Archdiocese, was reported as saying that the "decision could kill B.C.'s Catholic schools". He further added that the "intrusion into hiring procedures inevitably would subvert the Catholicity of the schools" (B.C. Catholic, August, 1980).

The Catholic school boards in British Columbia and the provincial government have on occasions conflicted on religious and secular issues. As stated in chapter 2, the Maillardville Incident (1951) resulted in the deliberate closure of three Catholic schools and the

subsequent registration of 800 students in the B.C. public school system, as a tax protest (Boucher, 1977). According to Downey (1979), the then premier W.A.C. Bennett, "saw in the Maillardville affair something of a political time bomb-- a potential for problems more serious than his government had yet faced in the non-public school issue. So he determined to diffuse the issue, in 1957, by amending the Municipal Act" (p.20). Approximately 65% of the Independent schools belonging to FISA are Catholic, and thereby exert a powerful influence on a successful interest group: as is evidenced by its documented contribution to the 1977 Independent School Support Act. One ponders the duality of the present situation, whereby, the present premier Bennett may be forced to listen to the ticking of the same device, as his father did, if Stuart et al. are unsuccessful in Ottawa and have to comply with an order to reinstate Margaret Caldwell. Clearly an order of this kind, although conceivably remote and perhaps politically unwise, would be viewed as a major challenge to denominational school autonomy.

The most famous problem between Church and State relations occurred over criticism of Laurier's handling of the Manitoba School Question. In this instance, Pope Leo XIII sent Monsignor Merry del Val to investigate the matter and as a result, the Pope issued an encyclical, Affari vos, 1897, which stated that when pursuing justice "the rules of moderation, of meekness, and of brotherly charity were not to be lost sight of" (as cited in Berger, p.75). In the event that Margaret Caldwell was ordered reinstated, it would be interesting to speculate on the present Pope's reaction if Vatican help was sought. Given the recent Vatican announcements, the school board and its community might not so

easily be rebuked, for Pope John Paul II reinforced the importance of the teacher in "Lay Catholics in Schools - Witnesses to Faith". This document explained:

> ... the role of lay Catholic educators has become crucial to the church in recent years because of the decline in vocations to the religious life and asked that Catholic educators use their life experience to guide their students (Vancouver Sun, Oct., 1982).

It is arguable that the situation today is somewhat different because Catholic schools in B.C., unlike in 1897 and 1951, are in possession of public funding, and as such there is more accountability on their part. The media focused attention on the fact that a school, perceived to be engaged in discriminatory practices, was in receipt of such public funding. The Liberal Party, the British Columbia Teachers' Federation and the former N.D.P. Education Minister all called for an appeal to the Board of Inquiry ruling on the Caldwell case (B.C. Province, Jul., 1979). The Vancouver Sun's editorial captured the mood of these critics:

> what has happened is that a religious organization supported by public money has been permitted to engage legally in an unfair labour practise that would be illegal if practised by almost any other employer.... what is really offensive about the discrimination against Mrs. Caldwell is that it was perpetrated by an organization that is now receiving

> a large public subsidy under the Independent School Support Act, which was forced through the legislature ... with almost indecent haste.... The government has simply got to get rid of this iniquitous double standard - not by cutting off aid to the Catholic schools as has been suggested, but by making the aid conditional on the schools' acceptance of the employment and human rights laws that apply to everyone else (1979).

The reason why public funding for independent schools did not become a burning issue in the Caldwell case is probably two-fold: firstly, the Social Credit government's commitment to the Independent School Support Act; and secondly, the limited scope of the legislation to permit infringement upon independent school autonomy. The Social Credit government was receptive to the lobbying of FISA during the preparation of Bill 33 and is aware of the potential political support of FISA parents. The legislation, successfully passed by this government placed few demands on independent schools. Wilson and Lazerson (1982) interpret the Independent School Support Act as "less stringent" than its equivalent in other Western provinces, such as Alberta:

> Although eligible schools must have been in operation for at least five years, teachers do not need provincial teaching certificates, and there are virtually no admissions or curriculum restrictions, except for vague requirements that schools not promote racial or ethnic superiority, religious intolerance or persecution, or "social change through violent action" (p.16).

Unless there is substantial amendment to the Independent School Support Act, it is unlikely that a provincial government could infringe upon independent school autonomy by making financial support conditional on compliance with other legislation, such as human rights statutes. Furthermore, such a "condition" could be perceived as an intrusion into the affairs of these schools, a threat to their presently-enjoyed autonomy and displacement of the Church by the State.

C Implications for Independent Schools in General

Independent schools in B.C., both denominational and non-denominational, await the outcome of the Caldwell case to see if there is to be an intrusion into their autonomy. It is only through such disputes that their "independence" is called into question. If Margaret Caldwell should receive a decision in her favour, independent schools would effectively be directed as to whom they should hire or re-hire.

To date, the majority of independent schools have attempted to work within government guidelines, providing acceptable curricula, and also endeavouring to ensure that teachers are both professionally and philosophically competent to teach within the private school system. Other than this, the independent schools have continued to experience the autonomy they enjoyed before funding was made available. Yet how "independent" should independent schools be? The outcome of the Caldwell case will provide a ruling which dictates whether schools can hire on religious grounds and later refuse further employment due to perceived contravention of church law. As the choice of teacher is an integral

part of independent school philosophy, the outcome is crucial to independent schools in general. If the government was to attempt to restrict independent school autonomy, it would have to face the inevitable political consequences. For example, an order to reinstate Margaret Caldwell, as necessitated by the interpretation of the Code by the Supreme Court of Canada, could provoke extreme reaction. As the Maillardville Incident demonstrates, independent schools are not loath to use their most potent political weapon of completely closing down their schools. A repeat of this action would release thousands of students onto a logistically unprepared public school system. A government may well consider the economics of a situation whereby independent schools have major autonomy, at a cost to the taxpayer of a maximum of 30%, as opposed to greater infringement on their autonomy with the expense of 100% operating costs! Alternatively, an opportunist government may welcome the independent school students into its public system, as a means to counteract declining enrollment and teacher unemployment.

It is said that with money comes control and some independent schools may well fear, as Richard Wagner (1979) suggests, that government aid to private schools may be "a Trojan horse". Extensive control over independent schools, in an endeavour to restrict their autonomy may, however, require financial commitment above that which a government is prepared to bear. Also, some perceive the infringement upon independent school autonomy as an incremental process. Wilson and Lazerson note a trend away from autonomy for independent schools in certain Atlantic provinces and an erosion of their "power" as provincial government efforts to "improve educational services ... seriously challenged the

denominational basis of schooling" (p.13). Hence the desire to make public funding available to independent schools, conditional on their adherence to human rights legislation, may appear to be the beginning of a process to gradually erode the autonomy of such schools. In addition, denominational schools in particular may perceive such conditions as a classic case of "State before Church".

Rarely, will government involve itself in the affairs of independent schools. Human rights statutes contain exemption categories for private institutions and most independent schools could be so categorized. In addition to using reinstatement, or financial support, as methods of obtaining independent school adherence to human rights statutes, an alternative might be the use of Collective Agreements. Rather than an independent school being directed as to whom they can or cannot hire as a result of judicial proceedings, a mutual contract might be utilized so that its employment practices can reflect the state's social goals, as specified in human rights legislation, without jeopardising the school's philosophy. As such, criticism could not be levelled at independent schools being beyond or above the law of the land, if such law is not only considered "just" but recognized within their contractual arrangements.

Regardless of whether the school finally wins or loses the Caldwell dispute, there are serious policy implications for independent schools in general which extend beyond contractual arrangements, these being: who should one hire; how should employees be selected; what criteria should be used in employee evaluation; and on what basis should a decision be made to deny further employment? It is not prudent to

question the validity of religious beliefs, and certainly, the actions of denominational schools can be performed out of the highest of Christian motives. The policymakers themselves, within denominational and non-denominational schools, nevertheless, may feel the need to reassess their employment policy in light of provincial law. In an endeavour to develop employment policies which are in line with provincial statutes, an independent school may need to change the focus or direction of philosophical goals. Realistically, there may be insufficient Catholic, Jewish or Mormons who are both professionally qualified teachers and who faithfully adhere to religious teachings. Will a Jewish or Mormon teacher who is not a strict adherent of the faith, seriously weaken a school's credibility? The schools may have to consider alternative methods of compensating for the infallibility of lay educators. In the last analysis, it may be wiser to emphasize tolerance rather than adherence to a particular religious rule.

The Caldwell case demonstrates very clearly that one needs to understand the organizational structure and philosophy of independent schools, especially in light of the ever-increasing support for non-public education. Independent schools have a twin obligation: to pursue individual philosophy and yet operate within the letter of the secular law. Only by transcending the world of alternative and independent schools is one aware of the difficulty of achieving this dual obligation. To date this area has not been heavily researched. Daniel Duke (1979) makes a special plea for more research on alternative schools, and the same principle holds true for the range of schools incorporated under the independent school rubric. Further, research into this area would

provide data which might otherwise be lost. Lazerson (1977) notes that "too little is known about the internal dynamics" of Catholic school systems (p.314). Some of these institutions may be cautious about allowing researchers to investigate areas of employment policy and practices, yet without such research one may fail to appreciate their philosophical objectives, as well as miss the opportunity to learn from diverse forms of education.

D Implications for Teachers in Independent Schools

Finally, one should consider the implications of the Caldwell case not just for independent schools, but for the individual teachers who function within them. For Margaret Caldwell personally, a decision in her favour would possibly mean an award of financial damages, both the financial compensation which she sought originally when her case came before the Board of Inquiry in 1979, and possibly those which have accumulated over the last five years, as a measure of the damage done to her career. Her counsel might also ask that the original order of reinstatement, be upheld.

If Margaret Caldwell should lose her case, there will be ramifications not just for herself but for all those individuals who choose to work in the non-public section, for their personal rights may be relegated vis-a-vis those of the institution. Society may be saturated with the subject of human rights, but some of these hard-won rights may be forgone by independent school teachers once they enter the school gates. The provincial human rights commission may not be able to

assist such teachers realize the rights which their public school counterparts take for granted. The implications are not just confined within the gates of the independent school; as evidenced in chapter 6, they have wider societal impact. The resolution of conflict in this instance may in fact determine that when teachers decide to work in an independent school, they must abide by the rules of the institution, as they would be obligated to do as members of a private club. As conflict in society is inevitable, to some extent, "the quest for the most reasonable balance", may in fact benefit the independent school rather than the individual teacher (Borovoy, 1973, p.106).

Discrimination can be regarded as the use of irrelevant criteria on which to base a decision. Independent schools may consider that behaviour, regarding philosophical matters, is relevant to job performance and therefore, such required behaviour is not a question of unnecessary discrimination. The major concern at this juncture, is that every time an independent school uses such criteria on which to base a decision, and is considered to have acted legally, precedents become established norms and form a set pattern of future expectations in behaviour. The Caldwell dispute is a precedent-setting case, which will be seen as a direct indicator as to what is, and is not, acceptable behaviour on the part of the teacher, as well as of the school. It is crucial because cases of this nature decide the extent of autonomy for independent schools. It raises the questions: to what extent should autonomy be allowed; and how far can an independent school go in attempting to regulate teachers' behaviour in their private lives?

Blatant and persistent disregard of independent school ideals, or public denigration, could be seen as unacceptable behaviour by independent school teachers. Personal behaviour may be regarded by students as being indicative of teacher attitude to school philosophy. It is not unreasonable that independent schools should expect teachers to exemplify, to the best of their ability, the ideals of the institution. The difficulty arises in defining the boundary between what can be realistically expected of teachers, in today's society, and that which serves to impinge too greatly upon their private lives.

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Appendix A

Letter of Margaret Caldwell

August 4, 1982

Dear Jane:

I have read the chapter that deals with a profile of myself, and find it to be a fair and accurate description of my background, and the events leading up to the case.

Yours truly

Margaret Caldwell

Appendix B

Section 8 of the Human Rights
Code of British Columbia

Section 8 of the Human Rights Code of British Columbia

Discrimination in respect of employment

8. (1) Every person has the right of equality of opportunity based on bona fide qualifications in respect of his occupation or employment, or in respect of an intended occupation, employment, advancement or promotion; and, without limiting the generality of the foregoing,

(a) no employer shall refuse to employ, or to continue to employ, or to advance or promote that person, or discriminate against that person in respect of employment or a condition of employment; and

(b) no employment agency shall refuse to refer him for employment,

unless reasonable cause exists for the refusal or discrimination.

(2) For the purposes of subsection (1),

(a) the race, religion, colour, age, marital status, ancestry, place of origin or political belief of any person or class of persons shall not constitute reasonable cause;

(b) a provision respecting Canadian citizenship in an Act constitutes reasonable cause;

(c) the sex of a person shall not constitute reasonable cause unless it relates to the maintenance of public decency;

(d) a conviction for a criminal or summary conviction charge shall not constitute reasonable cause unless the charge relates to the occupation or employment, or to the intended occupation, employment, advancement or promotion of a person.

(3) Nothing in this section relating to age prohibits the operation of any term of a bona fide retirement, superannuation or pension plan, or the terms or conditions of a bona fide group or employee insurance plan, or of a bona fide scheme based on seniority.

Appendix C

Section 93 of the British North America Act (1867)

Section 93 of the British North America Act (1867)

93. In and for each province, the legislature may exclusively make laws in relation to education, subject and according to the following provisions:-

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the union;

(2) All the powers, privileges, and duties at the union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec;

(3) Where in any province a system of separate or dissentient schools exists by law at the union, or is thereafter established by the legislature of the province, an appeal shall be to the Governor-General in Council from any Act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education;

(4) In case any such provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor-General in Canada under this section.

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