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**THE CONSTITUTIONAL RIGHTS OF PARENTS IN
THE EDUCATION OF THEIR CHILDREN, IN
CANADA**

Thesis ad Doctoratum in Iure Canonici

totaliter edita

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To my father

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FREQUENTLY USED ABBREVIATIONS

AEQ = Assemblée des évêques du Québec

art. = article

BNA Act = *British North America Act, 1867* = *Constitution Act, 1867*

Charter = *Canadian Charter of Rights and Freedoms* (part of
Constitution Act, 1982)

D.L.R. = *Dominion Law Reports*

ESC Rights Covenant = *International Covenant on Economic, Social and
Cultural Rights* (United Nations, 1966)

S.C.R. = *Supreme Court Reports*

s. = section

ss. = sections

sub-s. = sub-section

sub-ss. = sub-sections

UDHR = *Universal Declaration of Human Rights*

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INTRODUCTION

1. "Parents have a prior right to choose the kind of education that shall be given to their children" (*Universal Declaration of Human Rights*, art. 26.3). This declaration, in what is today considered like a global *Magna Charta* or bill of rights, summarizes the rights researched in this thesis.

"The child is not the mere creature of the State." This famous phrase of a U.S. Supreme Court judge, quoted in 1995 by Justice La Forest of the Supreme Court of Canada¹, means that educational rights can not be viewed solely from the point of view of the state. Rather, until the child comes of age, its parents have real rights in its upbringing. This is a consequence of the liberty of the person (of the child), of the rights of the family, and of the principle of subsidiarity.

This thesis thus seeks to explain which rights of parents to educate their children are constitutionally protected in Canada.

To view Canadian education law from the point of view of parental constitutional rights is a novel approach: in the course of my research I have not found other juridical works written on Canadian law which look at the subject-matter at hand from this perspective.

And yet, on the one hand, international human rights agreements, solemnly signed by Canada, declare these rights; and, on the other, this perspective sheds much-needed light on the subject.

¹ *Pierce v. Society of Sisters* , 268 U.S. 535 (1925), quoted in *B. (R.) v. Children's Aid Society*, (1995) 1 S.C.R 315, para. LXXXI.

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In effect, the provisions on parental rights to educate their children found in international rights declarations cannot be disregarded by Canadian courts, nor by Canadian citizens -- and this approach to educational and family rights helps to resolve, at times with a charming simplicity, juridical issues which otherwise are unsatisfactorily and *unjustly* resolved, or not solved at all.

2. A woman and a man, this woman and this man, unite in marriage among other things to have children, to have their own children, to nurture them and to educate them. This first social unit is -- has always been -- universally acknowledged as prior to other communities such as the state. The parents have rights that correspond to duties, which the law also monitors and can oblige to perform.

Human beings need to be educated. They need to be educated in a family by parents. Otherwise human beings do not survive nor develop to their full potentiality.

Procreation and education are the two great dimensions of human motherhood and fatherhood. The right to educate offspring is original and primary, it cannot be substituted for, it is inalienable. Therefore parents truly are the first and foremost educators of their children.

Furthermore freedom of education -- democracy -- demand this right.²

The duty-right includes: the religious education of the children, their education in human, intellectual and moral values, the guiding of one's

² Cf Hervada, Javier, *La libertad de enseñanza: principio básico en una sociedad democrática*, in *Ius Canonicum*, Vol. XIX, no. 37 (1979), pp. 233-242.

offspring to full human maturity, and the freedom of parents to choose schools and programs of study.

Parents' responsibility in this field is so great that: to lead their children to reach maturity through education is one of their most privileged tasks and greatest obligations; besides being a most grave obligation, it is a mission and a calling; merely sending the children to school does not free parents from this duty.

The common good demands that this duty-right be protected by the state. Groupings of parents (or that include parents) that safeguard and supervise this duty-right are very important. Parents cooperate with other educational agents: a) the school complements the education received at home, and not the other way around; b) parent-teacher associations and the like are important elements in the collaboration between home and school; c) parents and teachers must constantly interact and collaborate.³

In sum, parents have a right "to choose according to their convictions the kind of education and the model of school which they wish for their

³ Cf Sarmiento, Augusto and Escrivá Ivars, Javier, *Enchiridion Familiae. Textos del Magisterio Pontificio y Conciliar sobre el Matrimonio y la Familia (Siglos I a XX)*, Pamplona, Spain, Rialp, 1992, Vol. VI, pp. 5332-5335. Cf also *Code of Canon Law*, Can. 796 § 2, and, in general, Cann. 793-806, as well as the commentary by Cito, Davide, *Educación católica (comentario exegético a cc. 793-821)* in Instituto Martín de Azpilcueta, Universidad de Navarra, *Comentario exegético al Código de Derecho Canónico*, Vol. III, Pamplona, Eunsa, 1996.

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children", as Pope John Paul II said in Canada, echoing the *Universal Declaration of Human Rights*, issued 50 years ago.⁴

⁴ "All men and women -- and all children -- have a right to education. Closely linked to this right to education is the right of parents, of families, to choose according to their convictions the kind of education and the model of school they wish for their children (cf *Universal Declaration of Human Rights*, art. 26). Related as well is the no less sacred right of religious freedom.

"In a society such as Canada's, people's freedom to associate and enter into certain group or institutional endeavours with the aim of fulfilling their expectations according to their own values is a fundamental democratic right. This right implies that parents have a real possibility to choose, without undue financial burden placed upon them, appropriate schools and educational systems for their children. Here in Newfoundland I note that you view education as a partnership between the Church and the Province. Fortunately, in other parts of Canada similar cooperation between Church and government exists. I realize that this varies from Province to Province.

"Society is called to provide for and support with public funding those types of schools that correspond to the deepest aspirations of its citizens. The role of the modern state is to respond to these expectations within the limits of the common good. A state thereby promotes harmony, and, in a pluralistic situation such as Canada's, this effectively fosters respect for the wide diversity of this land. To ignore this diversity and the legitimate claims of the people within various groups would be to deny a fundamental right to parents.

"Governments have the responsibility, therefore, to ensure the freedom of ecclesial Communion to have appropriate educational services with all that such a freedom implies: teacher training, buildings, research funding, adequate financing and so forth.

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3. This is not a thesis in philosophy of law. No attempt is being made to give an exhaustive and comprehensive statement of all parental rights with respect to the education of their children, nor a philosophical classification of these rights.

A classification of these rights as they are protected by the Canadian Constitution is offered -- a classification based on the pre-existing rights of parents, as declared in international human rights documents.

This then is a thesis in Canadian constitutional law, or Canadian human rights law.⁵

"In a pluralistic society it is surely a challenge to provide all citizens with satisfactory educational services. In dealing with this complex challenge one must not ignore the centrality of God in the believer's outlook on life. A totally secular school system would not be a way of meeting this challenge. We cannot leave God at the schoolhouse door." Pope John Paul II, Address to Catholic Educators, 12 September 1984, St. John's, Newfoundland, in *Insegnamenti di Giovanni Paolo II*, VII,2 (1984), Libreria Editrice Vaticana, 1984, pp. 479-480. In the cathedral the Pope met with 2,200 educators, including 100 non-Catholics.

Cf also the *Catechism of the Catholic Church*, Libreria Editrice Vaticana, 1994, nos. 2221-2230.

⁵ As is well known, students of canon law also study civil legislation dealing with subjects such as religious freedom, marriage, and education, that overlap with the religious phenomenon. In some countries this is known as ecclesiastical law of the state. This thesis is being written in partial fulfillment of the requirements for a doctorate in canon law at an ecclesiastical university, and has been supervised by a professor of Ecclesiastical Law of the State, Prof. José Tomás Martín de Agar.

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We will divide this work as follows.

The Preliminary Part entitled *Historical and Juridical Background* is an introduction into the fascinating history and *geography* of the Canadian Constitution, especially as it relates to education and human rights. Apologies are offered to those who may find the information redundant: it was felt that it was necessary for the global comprehension of the topic.

The constitutional rights of parents in the education of their children, in Canada, can be summarized thus:

I. Implicit Rights: 1. To Independent Schooling; 2. Regarding Religion in Public Schools; 3. Regarding Parental Participation in Schools;

II. Explicit Rights: 1. To Funded Denominational Schooling; 2. To Funded Minority Language Schooling.

The thesis has two main parts. Part I, *Implicit Rights*, is divided into three chapters. Part II, *Explicit Rights*, is divided into two chapters. My claim is that the Constitution implicitly protects the rights of parents to

It also owes a great deal to the fact that the author has a law degree and a master's in comparative constitutional law (McGill University).

I would like to take this opportunity to state how much I have also benefited from the lessons in Constitutional Canon Law (Prof. Valentín Gómez-Iglesias), Canonical Discipline of the *Munus docendi* (Professors Georg Gänswein and Carlos J. Errázuriz M.), Matrimonial Canon Law (Professors Joan Carreras and Héctor Franceschi), and Research Seminar (Prof. Enrique de León), and from many other courses, seminars, and conferences in which I have participated at the Pontificia Università della Santa Croce.

choose private schools or home schooling, to choose the teaching of their religion in public schools (despite the judicial denial of this right), and to participate in different ways in the schools of their sons and daughters. And that the explicit rights are those to funded denominational schooling (in certain provinces) and to funded minority language schooling (under certain circumstances).

Each part and each chapter incorporates legal arguments taken from the Constitution, international declarations of rights, provincial quasi-constitutional statutes, and judicial decisions, especially of the Supreme Court of Canada and of the Privy Council.⁶ Evaluations and proposals are found in diverse partial conclusions.

Lastly, there is a thesis *Conclusion*, and there are *Appendices* with relevant legal documentation, as well as a *Bibliography*.

Nota bene that information that is considered less important is found in citation text (be it or not a quote) and in footnotes throughout the work.

Catholic magisterium has often been at the forefront of human rights law, also, as will be seen, throughout Canadian history. This thesis owes much to the enlightening teaching of the Catholic Church on human rights in general and family educational rights in particular -- it has benefited from her social doctrine. In this context mention should be

⁶ As shall be seen, until 1947 the Privy Council in the United Kingdom was the highest court of appeal for Canadians.

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made of the teachings on parental rights in education of the founder of Opus Dei.⁷

⁷ Cf, for example, Escrivá, Josemaría, *Conversaciones con Mons. Josemaría Escrivá de Balaguer* (an English translation, published by Scepter of New York and London: *Conversations with Msgr Josemaría Escrivá*,).

PRELIMINARY PART. HISTORICAL AND JURIDICAL BACKGROUND

1. An Introduction to Canada. First Historical Period (1608-1763)

Canada's unique historical and juridical background together with its high economic and cultural development makes the study of the rights of parents in the education of their children especially interesting and enlightening.

The United Nations considers Canada the best country to live in, taking into account indicators such as per capita GDP (US \$20,500), education, health care, and human rights. Canada's motto is *a mari usque ad mare*: its ten million square kilometres make it the second-largest state in the world.

It has 30,287,000 inhabitants. Herewith the share of each of the ten provinces and three national territories. Ontario (capital: Toronto): 11,408,000, or 37%. Quebec (capital: Quebec City): 7,420,000, or 25%. British Columbia (Victoria): 3,933,000. Alberta (Edmonton): 2,847,000. Manitoba (Winnipeg): 1,145,000. Saskatchewan (Regina): 1,024,000. Nova Scotia (Halifax): 948,000. New Brunswick (Fredericton): 762,000. Newfoundland (St. John's): 564,000. Prince Edward Island (Charlottetown): 137,000. The Northwest Territories: 36,000. The territory of the Yukon: 32,000. The territory of Nunavut: 22,000.⁸ Population density is very low: 3.3 persons per square

⁸ From 1999 on, the Northwest Territories are divided in two: the eastern part is Nunavut. Major metropolitan areas in Canada are Toronto (4,410,000), Montreal (3,370,000), Vancouver (1,880,000), and Ottawa-Hull (1,040,000).

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kilometre. The birth rate is likewise very low -- with the fertility rate at 1.9, the population is below reproduction levels. But over 200,000 legal immigrants enter Canada each year. The marriage rate is low: 5.4 per 1,000 people.⁹ Abortion and suicide rates are high. Canada has no abortion law: all abortions are legal any time anywhere.¹⁰ In 1991 the principal mother tongues of Canadian residents were: English: 16.5 million; French: 6.6 million (of which more than 90 % in Quebec); Italian: 540,000; *Chinese*: 520,000; German: 490,000; Portuguese: 220,000; Ukrainian: 200,000; Polish: 200,000; etc.

Quebec is more than 80 % French-speaking, about one third of New Brunswick's population is francophone, and Franco-Ontarians constitute

For up-to-date electronic statistics, cf Statistics Canada, <http://www.statcan.ca>.

According to the 1991 census there were 12.3 million Catholics, 3.1 million United Church adherents, 2.2 million Anglicans, 660,000 Baptists, 640,000 Presbyterians, 640,000 Lutherans, 440,000 Pentecostals, 390,000 Eastern Orthodox, 320,000 Jews, 250,000 Moslems, etc. There were 3.4 million people with no religious affiliation.

⁹ Quebec has the lowest (3.3) while Ontario has one of the highest (6.1).

¹⁰ On 28 January 1988 the Supreme Court declared the abortion legislation unconstitutional in *Morgentaler v. R.*, (1988) 1 S.C.R. 30, and it has not been replaced. The unconstitutionality was based on the fact that, since the law limited abortions somewhat, it violated the constitutional rights of equality among women and of physical security of the person (woman).

To give an idea of the magnitude of the phenomenon, there were over 94,000 official abortions performed in 1990.

a small but substantial minority. All other provinces have minute francophone minorities. However, they all are multicultural, since Canada is a country of immigrants. The descendants of the first immigrants are the Amerindians, which make up 1.7 % of the population. French explorer Jacques Cartier met them in 1534, when he claimed Nouvelle France for the French crown.

In 1608 Samuel Champlain establishes the first lasting settlement in Quebec City. By the 1650s, when the colonists number about 2,000, the fur trade spurs the colonizing effort. The evangelizing zeal of Catholics gives impetus to the colonizing effort. In 1659 Rome names Blessed François de Montmorency Laval first bishop of the see of Quebec.

In 1670 the Hudson's Bay Company is formed in England. Based on explorer Henry Hudson's claim laid during his 1610 voyage to the bay that bears his name, the crown-backed Company intended to control the fur trade too. The resulting rivalry ended in 1760.

The conquest of the French by the British began in 1713 when the latter took Acadia (today's provinces of Nova Scotia and New Brunswick) and ended in 1759-1760 when Quebec City and Montreal fell. The land that the British won over was immense: French forts controlled waterways connecting the estuary of the St. Lawrence with the mouth of the Mississippi. But there were only some 65,000 French colonists.

2. Second Period: 1763-1867

The Treaty of Paris (1763) seals the conquest. Its article IV allows the king's new subjects to profess their Catholic faith to the extent permitted by the laws of Great Britain.¹¹

On the eve of the American Revolution, the British crown, by the *Quebec Act* of 1774, sets up a council to aid the British Governor rule the Colony of Quebec (which excludes the colonies bordering on the Atlantic Ocean). Catholics are allowed to sit on the council. The Act also re-establishes French civil law; English public law and criminal law are confirmed as being in force too.¹²

The independence in 1776 of thirteen British colonies has a profound impact on the Quebec Colony. The French, conquered but allowed to practice their religion, do not join the Protestant revolutionaries against the British crown. And many British American Loyalists move, after the Revolutionary War (1775-83), into the British North American colonies that have not seceded.¹³ The British Parliament passes the *Constitutional Act of 1791*, replacing the 1774 *Quebec Act*: the rights of Catholics are preserved, a parliament is created, and the division of the

11 Cf Rhéaume, Jean, *Droits et libertés de la personne et de la famille*, Montréal, Wilson & Lafleur, 1990, p. 52.

12 "Les droits reconnus par le droit civil (français) (...) sont dès lors également constitutionnellement protégés puisque l'*Acte de Québec* a une portée constitutionnelle. Quant aux droits protégés en Angleterre par le droit public, ils sont garantis par cette loi." Ibidem, p. 54.

13 The population of the Quebec colony swells to 161,000 in 1790.

colony into Lower Canada (Quebec) and Upper Canada (Ontario) is provided for.

For almost 50 years this constitutional set-up works. But the real power is in the hands of the Governor, not the parliament, and popular unrest culminates in an armed revolt in 1837.

Britain sends Lord Durham to investigate and suggest a political solution. His report leads to the union of Lower and Upper Canada into one province called United Canada (1841), and to self-government (representative government) in 1848.¹⁴

By 1851, 890,000 people lived in Lower Canada and 952,000 in Upper Canada. The former were mostly French Catholic, the latter, mostly English Protestant. They were, however, electing members to a united parliament. Durham's dream (and the French Canadians' nightmare) of fully integrating the former into an English-speaking homogenous province floundered. The expansionist desire of the Canadians, the British interest in ending its defense of inland Canada (against the United States), the indirect effects of the American Civil War (1860-65) -- this and other motives¹⁵ led to the *British North*

14 After eight years of a power struggle between the Governor and the elected representatives which ends in the latter's victory, ushering in a democratic era.

15 The 1854 Reciprocity Treaty with the United States in part replaced British with continental trade, and the colonies boomed. Economic growth was stimulated too by the Civil War. But when the U.S. government announced in 1864 that it wished to abrogate the treaty, colonial politicians started thinking that unification of British North America would provide a substitute market.

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America Act, passed by the Imperial London Parliament on March 29, 1867. It came into force on July 1, 1867, the birthdate of Canada.

3. Confederation: The *Constitution Act, 1867*

3.1. Background: The Confederation Movement

What historians have termed the movement toward confederation at the time was called a move toward union.

It was the result of a unity coalition government in the United Canada province: Reform Party leader George Brown joined Conservative John A. Macdonald (both of Canada West) and Conservative Georges-Étienne Cartier (of Canada East). The Canadian equivalent to a constituent assembly took place in stages. These three political leaders, plus Alexander Galt (also from the province of United Canada), attended in early September of 1864 a conference in Charlottetown, Prince Edward Island, in which Charles Tupper (Nova Scotia), Samuel Tilley (New Brunswick) and other politicians were discussing a union of the Atlantic colonies. The Canadian leaders persuaded the Atlantic leaders to discuss a union with them too. On October 10, 1864, the entente is concretized in Quebec City, where these and other *fathers of confederation* draft 72 resolutions, which were first approved in the respective provinces and then submitted to London.

There was also a continuing political deadlock between conservatives and reformers in the United Province of Canada; there were fears of U.S. military power: and there was a desire to annex the northwest. In effect, there were no direct links between United Canada and the west, which was under the control of the British crown (via the Hudson's Bay Company). Cf *The New Encyclopaedia Britannica*, Vol. 15, 15th ed., Chicago, 1993, p. 463.

Under the influence of Macdonald, Canada's leading politician for a quarter of a century, the constitutional resolutions propose a central government that is stronger, on paper, than that created in the United States by the 1787-89 Constitution, precisely in order to avoid a civil war like the one then raging south of the border. Macdonald, desiring to forestall U.S. moves into the British west, also obtains proposals offering the peoples of those territories the possibility of forming new provinces which could join the founding ones.

Quebec, Ontario, New Brunswick and Nova Scotia are the first provinces of the Dominion of Canada, and Macdonald leads the Conservative Party which governs in Ottawa from July 1, 1867.

3.2. *Analysis of the Constitution Act, 1867*

The *British North America Act 16* (BNA Act) was aptly retitled *Constitution Act, 1867* in 1982. In fact it was, with its amendments, Canada's constitution for 115 years, and, amended further in 1982, still is. Inter alia, it provided constitutions for the *new* provinces of Quebec and Ontario. It protected certain rights, and provided for the division of power between the central (or federal) government and the provinces.¹⁷

16 30-31 Vict., c. 3 (U.K.), which, after the constitutional amendment of 1982, is called *Constitution Act, 1867*; cf *Canada Act, 1982, Schedule I*, c. 11 (U.K.) in R.S.C., 1985, Appendix II, no. 44. In this thesis I will refer to the *Constitution Act, 1867* and to the BNA Act (1867) indistinctly.

17 See Appendix I: Preamble of the *Constitution Act, 1867*.

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This British law became the Constitution of an autonomous but not yet independent Canada: it federated the North American British colonies, maintaining the constitutional principles of the United Kingdom.¹⁸

In interpreting the BNA Act one should not forget that it is the result of a compromise between British and French. It is also the result of peculiar geographical and political circumstances. Its juridical mold is British constitutional law, whose sources go back at least to the 1215 *Magna Charta*¹⁹.

The thorniest issues debated by the *fathers of confederation* were those related to religion. The founding provinces had different mixes of religious majorities and minorities: Protestants (Anglicans,

¹⁸ Three other pre-existing colonies that could have joined the Union in 1867 postponed their accession -- by four years in the case of British Columbia, which became a province in 1871; by six years in the case of Prince Edward Island, which became a province in 1873; by 82 years in the case of Newfoundland, which decided to join, after a hotly-debated referendum campaign, in 1949. Cf *Constitution Act, 1867*, s. 146.

The dates of union of the remaining provinces are: Manitoba, 1870, and Alberta and Saskatchewan, 1905; they were carved out of pre-existing territories. Cf *ibidem* and *Manitoba Act, 1870*; *Rupert's Land and North-Western Territory Order*; *British Columbia Terms of Union*; *Prince Edward Island Terms of Union*; *Adjacent Territories Order*; *Alberta Act*; *Saskatchewan Act*; *Newfoundland Act* in R.S.C.(1985), Appendix II.

¹⁹ Cf also *Petition of Right* (1627), *Habeas Corpus Act* (1640), *Habeas Corpus Act* (1679), *Act of Settlement* (1700): cf Rhéaume, *op. cit.* p. 48, note 153.

Presbyterians, Methodists, etc.), and Catholics. In Quebec the majority was French Catholic but the powerful minority was British Protestant. In Ontario the majority was British Protestant but the restive minority was French or English-speaking (especially Irish) Catholic. In New Brunswick and Nova Scotia there were significant minorities of Catholics, most of them French-speaking. This is the *raison d'être* for s. 93 of the BNA Act which attempts to safeguard the confessional school rights of most of these minorities. And s. 133 assures the right to use both English and French in the federal and Quebec parliaments as well as in the courts established by these legislatures, as well as imposing the publication of federal and Quebec legislation in both tongues.

In a word, federalism and responsible government (the principles of subsidiarity and representation) guaranteed the respect for minority rights, while assuring the attainment of other goals envisaged, such as the defense of British colonies, westward expansion, creeping independence from the mother country, etc.

Thus the BNA Act describes in detail the structure and way of functioning of the new federal government based in Ottawa (located on the Quebec-Ontario border). It establishes the roles of the monarch's representative for the whole of Canada, the governor general, and for the provinces, the lieutenant governors (*executive power*). It establishes the role and functions of the federal Parliament, comprised of Senate and House of Commons, and of the provincial legislatures (*legislative power*). And it establishes the courts (*judicial power*).²⁰ The Act

²⁰ Cf ss. 9-15 (federal executive power), 58-68 (provincial executive power), 17-57 and 91 (federal legislative power), 69-90 and 92 (provincial legislative power), and 96-101 (judicial power).

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confirms the right of citizens to choose their representatives, and establishes the number of these representatives in Parliament, proportional to the population of each province.²¹

Sections 91 and 92 are the *core* of the BNA Act. The former establishes the powers of the federal Parliament, the latter of the provincial legislatures. Since the executive today has little power in Canada, the legislative authority distributed in these two sections is at the heart of how Canadian federalism works.

Section 91 begins with a clear attribution of the *residuary power* to the central government. "It shall be lawful for (...) the Senate²² and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces".²³ It then enumerates, "for greater Certainty", specific classes of subjects over which "the exclusive Legislative Authority of the

²¹ Cf ss. 37, 52, 70 and 80. Cf also Rhéaume, Jean, op. cit. 58-59.

²² Today, the Senate's powers are minimal. Senators are non-elected legislators named by the government in power. Efforts to eliminate the Senate have shipwrecked on the shoals of politics, despite almost universal recognition of its uselessness in democratic times: the Senate is a relic of an aristocratic past. Due to this, there are few references to the Senate in this thesis.

²³ At this point Canada was not truly federal because the central government had broad powers, similar to those the British government had possessed over the colonies. Judicial interpretation and the growth of provincial rights would make the country more truly federal.

Parliament of Canada extends".²⁴ Nevertheless, s. 91 safeguards provincial autonomy.²⁵

Section 92 fixes the exclusive powers of provincial legislatures. "In each Province the Legislature may exclusively make Laws (...) within the Classes of Subjects (...) enumerated".²⁶ More important than the (considerable) length of this list is the broadness of some of its classes of subjects. And even more important has been the fact that judicial interpretation has often tended to reward the provinces' zeal for preserving their powers. This has led to the decentralization of the Canadian federation, although there have been centralizing trends too.

24 Public debt, public property, the regulation of trade, taxation, postal service, the census and statistics, defence, the civil service, navigation, fisheries, currency, banking, weights and measures, bankruptcy, patents, copyrights, Indians, naturalization and aliens, marriage and divorce, criminal law, penitentiaries, etc.

25 It states at the end that "any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

26 Provincial taxation; provincial civil service; provincial public lands; provincial prisons, hospitals, asylums, and other similar institutions; municipal institutions; local works and undertakings; the solemnization of marriage; property and civil rights in the province; the administration of justice in the province; "generally all Matters of a merely local or private Nature in the Province", etc.

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Section 93 will be the focus of our attention in numerous pages of this thesis.²⁷ It was added to the BNA Act as part of that historical

27 "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 lie 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 Council under this Section."

compromise which made possible the union in 1867 of British and French, Catholics and Protestants. First, it adds one more class of subjects, education, to the powers of exclusive provincial jurisdiction listed in s.92. It also safeguards the rights of religious minorities to their own confessional schools. Sub-section (3) and especially sub-s. (4) have lost much of their importance, whereas the first two sub-sections are crucial -- for some, if not for all, of the provinces. We shall see *infra* how the courts have interpreted this section.

For now, suffice it to say that the BNA Act, in effecting the union of Quebec, Ontario, New Brunswick and Nova Scotia, by s. 93(1) protected denominational school rights which any class of persons had *by law* at the union; the courts have decided that in 1867 the latter two provinces *had no laws* on denominational schools, and thus had few rights under this sub-section. As for Quebec, the 1997 constitutional amendment added s. 93A: "Sub-sections (1) to (4) of section 93 do not apply to Quebec".²⁸ It means that the *entrenched constitutional* protection has been lifted (although other Quebec legislation still guarantees denominational education). Thus the provinces have different histories.²⁹ Ontario, Alberta and Saskatchewan are the provinces that in 1999 benefit from entrenched constitutional rights to fully-funded confessional schooling.

Note that *the Governor General in Council* means, today, the Prime Minister and his government.

²⁸ *Constitution Amendment, 1997 (Quebec)*.

²⁹ The *Manitoba Act*, 33 Vict., c. 3 (Canada), confirmed by the *Constitution Act, 1871*, is similar to s. 93, for example.

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3.3. *Some Constitutional Principles of Interpretation*

We will mention a couple of constitutional principles of interpretation, developed above all by the Supreme Court of Canada and (until 1947) by the Privy Council.³⁰

The BNA Act distributes legislative power between the federal Parliament (s. 91) and the provincial legislatures (ss. 92, 93) by listing *classes of subjects*, or what could be better termed classes of laws. But these lists, drawn up in 1867, are not watertight, and need continuous interpretation and updating -- in fact, in some cases the classes of laws are broad and overlapping.

In cases of conflict between federal laws and provincial laws which deal with the same subject, the courts have decided that one or the other was *ultra vires* : in many cases, because of the construction of the BNA Act itself. This is sometimes called *mutual modification*, i.e. the logical reading of the different sections or sub-sections of the Act. Thus, only the provincial legislatures can make laws for marriage ceremonies (s. 92(12)), while only the federal Parliament can enact divorce legislation (s. 91(26)). The courts have thus arrived to decisions defining *exclusive powers* of each jurisdiction.

In some instances the courts have decided that federal legislation is *paramount*: when a valid federal law collides with a valid provincial law

³⁰ Until 1947 the Judicial Committee of the Privy Council (London, U.K.) was the highest court of appeal for Canadians.

on a subject which in one *aspect* falls under federal power and in another under provincial power.³¹

3.4. *Provincial Educational Systems*

Since the organization, administration, and supervision of education are provincial responsibilities, the federal government is directly concerned only with education in the northern territories, in native schools throughout the country, for the families of members of the Canadian forces on military stations, and for other post-secondary institutions and programs.

Here we will briefly introduce some aspects of the policies and practices, which vary from province to province.

Each province has a department of education headed by a provincial cabinet minister. Most children have one year of kindergarden, an eight-grade elementary school beginning at age 6 or 7, and a four-grade secondary school beginning at age 14.

Quebec's new dispensation dates from 1997-98: public schooling with linguistic, not confessional school boards, although there are confessional schools, together with private schooling. Secondary school ends at age 16-17 after 11 years of schooling, followed by two years of pre-university education (*Collèges d'enseignement générale et professionnelle: cégeps*) for students desiring to go on to university, or three years of professional training, also in *cégeps*.

³¹ This, after analyzing whether the law in its *essence* falls under one or another jurisdiction, as opposed to doing so *incidentally*. Cf Magnet, Joseph, *Constitutional law of Canada*, Toronto, Carswell, 1985, pp. 248-352.

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Ontario's 1997 educational reform rationalized and centralized school boards, retaining a full-funded Catholic separate school system, but not giving subsidies to independent schools. Legislation regulating independent and home schooling is very flexible.

British Columbia has no constitutionally-mandated separate school system but a sophisticated, partially-subsidized private school system.

Alberta: There is a large, tax-supported separate Catholic school system. The School Foundation Program Fund, pooled from provincial grants and local property taxes, provides funds -- distributed back to the school boards -- for the school systems.

Manitoba schools are funded by government grants and local taxes.

Saskatchewan school districts have considerable local responsibility. There is a separate school system.

Nova Scotia has a nondenominational system of public education dating from the mid-1800s. It consolidated the many rural school districts into fewer and larger districts during the 1970s.

New Brunswick's public education system is administered by separate English and French sections of the Department of Education. The provincial government raises and distributes funds to school districts.

Newfoundland's educational system was recently revamped; we will study this in depth.

Prince Edward Island: The Department of Education administers public education from primary grades through senior high school by means of five regional school boards.

The territories: Missionaries provided nearly all the education available until the 1950s. Since then education has for the most part been taken over by government. The federal Department of Indian Affairs and Northern Development cooperates with the territorial department of education in providing elementary and secondary schooling.

Native peoples: For a report on the legal, constitutional and treaty aspects of Indian education, which depends directly on the federal government -- and is outside the scope of this thesis --, see: *The MacPherson Report on Tradition and Education: Towards a Vision of our Future*.³²

4. From Empire to Commonwealth to United Nations: 1867-1967

4.1. 1867-1914

Slowly but surely the Dominion of Canada grew in extension, population, wealth and sovereignty. By 1905 the west had been *conquered*, and all the provinces except Newfoundland had *joined*. But the French-English dichotomy remained, and parental rights in education were part of the bicultural debate.

Riel and the railroad. When the new Canadian government in 1869 bought out the rights over the territories from the Hudson's Bay Company, *métis* leader Louis Riel's first rebellion took place. Educated in

³² Cited in Brown and Zuker, *Education Law*, p. 15: MacPherson, James C., *The MacPherson Report*, September 1991; on p. 15 of the former, there is further bibliography.

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Montreal, Riel was Catholic and francophone; like many *métis*, the child of a Canadian father and a native mother. Riel's men seized control of the Red River colony (today's Winnipeg) and forced the federal government to postpone the transfer of the colony from the Company to the Dominion. After negotiations the small province of Manitoba was created in 1870, with equality of English and French languages and an educational system like Quebec's and Ontario's, that is, a dual Catholic and Protestant public confessional system. The implication was that the northwest was to be bicultural. That assumption was to be thwarted.³³

On the Pacific coast, Vancouver Island colony had been organized into a colony in 1849, and united to the mainland region facing it in 1866. In 1871 the Legislative Council of the colony by then called British Columbia accepted to join Canada, thus obtaining responsible government and connection to the far east.³⁴

³³ Cf the *Manitoba Act, 1870*, the *Rupert's Land and North-Western Territory Order* (admitting those lands into the union, 23 June 1870), and the *Constitution Act, 1871*. The latter said in part: "2. The Parliament of Canada may (...) establish new Provinces in (its) territories (...) and (...) make provisions for (their) constitution and administration. 3. The Parliament of Canada may (...) with the consent of the Legislature of any Province of the said Dominion, increase, diminish or otherwise alter the limits of such Province." Section 5 confirmed (made constitutional) the Act and Order mentioned in this note. Section 22, on the educational rights of Manitoba parents, will be studied in Part II. Cf also *New Encyclopaedia Britannica*, Vol. 15, pp. 463-464.

³⁴ The Dominion government daringly promised British Columbia a transcontinental railroad by 1881: it was completed four years late, nine days before the hanging of Riel. Cf the *British Columbia Terms of Union* (16 May 1871).

A promised transcontinental railway, much longer than any yet built, caused the fall of the federal Conservatives and the rise of the federal Liberals, and became the downfall of Riel in 1885. The *métis* leader was called back to Canada from exile in the United States, this time to the shores of the Saskatchewan River, where a second rebellion was suppressed by Canadian train-transported troops. Riel was convicted of treason -- Prime Minister Macdonald refused mercy.³⁵

The Conservative Party, which again controlled Parliament, lost power in 1896 because of the Manitoba Schools controversy. Liberal Party leader Wilfrid Laurier came to power on the basis of the Quebec vote. (This *pattern* has often repeated itself in Canadian federal elections: governments win with a base in Quebec, but they have to perform a balancing act with the rest of the country.) By 1911, when Laurier stepped down, the three prairie provinces had a combined population of 1,323,000, thanks to high immigration. In 1905 his government, in creating Alberta and Saskatchewan, gave rise to another fierce political battle over education rights.³⁶

³⁵ There was a fierce reaction in Quebec. Riel was by then viewed by French Canadian nationalists as a martyr. The result was the election of a clerical-nationalist government in Quebec. This produced a reaction in Protestant Ontario and in Manitoba, where the denominational school system was abolished in 1890. French Canadians thereafter fell back on the provincial rights of Quebec to maintain their rights -- a reaction with far-reaching consequences for Canada.

³⁶ Section 17 is identical in the *Alberta Act* and in the *Saskatchewan Act* : "17. Section 93 of the *Constitution Act, 1867*, shall apply to the said province, with the substitution for paragraph (1) (...) of the following paragraph: -- (1)

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Laurier's downfall was caused in part by growing Quebec nationalism, as demonstrated by French Canadian opposition to fighting in the British Empire's wars. The 1909 creation of a Department of External Affairs in Ottawa was a sign of Canadian emancipation from imperial diplomatic tutorship, and a foreshadowing of the guns of August 1914.

4.2. 1914-1967

If trials help men grow up, the same can be said of countries: the two world wars made Canada come of age. Before World War I the Dominion was groping towards the full international independence that it finally obtained by 1947. That year the Judicial Committee of the Privy Council, an imperial tribunal in London, ceased to have Canadian jurisdiction -- the Supreme Court of Canada became the highest court of appeal for Canadian cases. (Two other significant events were the creation of the

Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the Northwest Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances. 2. In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29 or any Act passed in amendment thereof, or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29. 3. Where the expression 'by law' is employed in paragraph 3 of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30, and where the expression 'at the Union' is employed, in the said paragraph 3, it shall be held to mean the date at which this Act comes into force."

Canadian flag in 1967, and the *repatriation* of the Constitution from the United Kingdom, in 1982.)

Canada paid a high price for supporting Britain in the Great War: more than 600,000 served, 60,000 were killed in action -- and the unity of the country was shattered. When in 1917 Prime Minister Robert L. Borden introduced compulsory military service, French Canadians opposed it strenuously, while English Canada backed it patriotically. Added to this were new education fights in Ontario and Manitoba, where the use of French in schools was being restricted. But by 1917 Art. IX of the Imperial War Cabinet (led by British Prime Minister Lloyd George) stated that in the British Empire there were self-governing nations such as Canada, and their prime ministers were members of the Imperial War Cabinet, conducting the war and planning the peace. Plus, Canada and other dominion powers were able to sign treaties separately (though as members of an Empire panel), and were accepted as members of the League of Nations.

Canada's inter-war isolationism, a course steered by the dominant Canadian politician of the 1920s, 1930s, and 1940s, Liberal leader William L. Mackenzie King, was motivated both by his desire to keep the country united -- and by economic necessity after the Great Depression set in. It would take World War II to fully bring Canada out of a prolonged economic crisis.

Economic considerations also played a part in Canada's piecemeal constitutional emancipation. The *Statute of Westminster, 1931* is the key breakaway point. The statute, coming on the heels of the Balfour Report at the 1926 Imperial Conference, ended all legislative supremacy of the British Parliament over the dominion parliaments. It made the dominions sovereign states sharing a common crown: Canada had

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become an independent state in the Commonwealth.³⁷ Canada established its own foreign service.³⁸

World War II changed Canada in many ways. The federal government began to intervene in and control many aspects of Canadian life. King launched Keynesian economics, including family allowances. He would have gone further had not the provinces balked at even greater centralization. The old French-English wound was re-opened, as in 1917, over compulsory military service.

Canada became a United Nations supporter. It fought under the U.N. flag in the Korean War (1950-53).³⁹ Being a developed middle power with no imperialistic past, Canada has continuously been involved in peacekeeping efforts: for example, in Egypt after the 1956 Suez crisis, where Canada mediated. And it has volunteered foreign aid to third

³⁷ "3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation." In 22 Geo. V, c. 4 (U.K.).

³⁸ The courts in 1937 found the *Canadian New Deal* to be for the most part unconstitutional. The BNA Act's distribution of powers was studied in an official inquiry by a distinguished royal commission. It reported in 1940 that the federal government had unlimited power to tax, but could not spend all of the revenue on many needed services, whereas the impoverished provinces which had the powers lacked the dollars. Therefore the commission recommended new federal-provincial arrangements, some of which were acted upon.

³⁹ This war also helped Canada avoid a post-World War II economic downturn. For six decades in fact Canada, with ups and downs, has had a high pace of economic development.

world countries, as well as keeping or re-establishing diplomatic relations with countries such as Cuba and China.

It is appropriate at this point to point out the international norms regarding parental rights to education that Canada has either incorporated or to whose authority it lends weight: they are mentioned in this thesis, and many provisions are found in the Appendix.

5. Trudeau, the Constitution Act of 1982, and Beyond

5.1. Introduction

5.1.1. Pierre Trudeau

Pierre Trudeau was Liberal Prime Minister almost continuously from 1968 to 1984.

His government early on established English and French as the two official languages of Canada, and also encouraged a policy of *multiculturalism*, thus defending parents' rights to educate their children in their culture. However his government took several anti-family measures. During the Trudeau years, divorce and abortion became commonplace (thus probably contributing to harm Quebec culture more than any other government since the 1759-60 Conquest).⁴⁰ Hunter adds other relevant facts.⁴¹

⁴⁰ This tendency was followed by his successors, Conservative Brian Mulroney (1984-94) and by former Trudeau minister Liberal Jean Chrétien (1994 to the present). Not only is abortion legal at any time: it is paid for by state "health" insurance. Divorce was encouraged by the *Divorce Act*, S.C. 1967-68, c. 24 (R.S.C. 1970, c. D-8) and liberalized even more by the *1985 Divorce Act*, R.S.C. (1985), 2nd Suppl., c. 3. These governments have named

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A constitutional expert, Trudeau strove for many years to update the Constitution. A 1971 attempt failed at the last minute when Quebec balked. Ten years later, the federalist (i.e. anti-separatist) forces defeated, with Trudeau's help, the Parti Québécois *indépendantistes* in a 1980 Quebec referendum: 60% to 40 %.

Trudeau took advantage of this impulse given to federalism. After arduous negotiations with the provinces, on 2 December 1981 he obtained their almost unanimous consent to the *Canada Act 1982* (U.K.) c. 11, which was a statute of the British Parliament which amended and

Supreme Court judges who favour these policies: cf Rhéaume, op. cit. passim and Hunter, Ian, *Three Faces of the Law. A Christian Perspective*, Mississauga, Ont., Work Research Foundation, 1996. Among other cases, Hunter at pp. 70-72 discusses the Supreme Court's overturning of an injunction granted by the Quebec Court of Appeal to the father of an unborn child whose mother wanted to abort: *Daigle v. Tremblay* (1989) 2 S.C.R. 530 and *Tremblay v. Daigle* (1989) R.J.Q. 1980. The Supreme Court seems to show disregard and disrespect for Quebec in that decision.

41 Since 28 January 1988 Canada has no law -- no legal limits -- on abortion, despite the fact that only one Canadian in ten favours abortion on demand, writes legal scholar Ian Hunter. Trudeau shrewdly promoted a package of criminal law reforms, including abortion, in a 1969 omnibus bill. Trudeau later admitted that this bill contained so many diverse issues it would make the passage of liberalized abortion easier: Canada should have debated such matters. Cf Hunter, Ian, *The Canadian Abortion Quagmire: The Way in and a Way out* in *Canadian Family Law Quarterly* 6.

repatriated the Canadian Constitution. The *Canada Act* came into force on 17 April 1982, when Queen Elizabeth II proclaimed it, in Ottawa.⁴²

5.1.2. The Canadian Legal System

We have seen how Canada's Constitution establishes the basic framework for the country's system of law and justice. It defines the nature of the federal and provincial governments, how these governments are elected, and the powers they have. The Constitution also sets out the basic rights and liberties of each person. The Constitution establishes a federal system of government: the authority to make laws is divided between the Parliament of Canada, based in Ottawa, and the provincial legislatures (with names such as *Legislative Assembly*, *Assemblée Nationale*, etc.). The provincial governments have the authority to make laws (*pass statutes*) on subjects such as education, and other matters of a local or private nature. The provinces may also create local or municipal governmental structures that in turn issue by-laws on parking regulations, building standards, zoning, etc.

⁴² Quebec did not and has not yet undersigned the *Canada Act*, although it came close to doing so when Conservative Prime Minister Brian Mulroney almost obtained another constitutional reform in the late 1980s, whereby Quebec would have been constitutionally considered "une société distincte". However the Constitution as amended applies to Quebec. Trudeau did obtain the approval of the other nine provinces on 2 December 1981 after the Supreme Court had ruled, earlier that year, that the federal government did not need unanimous consent from the provinces in order to petition the British Parliament to amend the BNA Act. Cf *Reference re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)* (1981) 1 S.C.R. 753. The British Parliament passed the legislation on 25 March 1982.

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The federal government deals with matters such as trade and commerce, defence, and criminal law. The federal cabinet consists of the prime minister and the other ministers. All are answerable to the federal Parliament. The provincial governments have similar arrangements.

Within constitutional limits, laws can be made or amended by means of statutes enacted by Parliament or a provincial or territorial legislature for its respective jurisdiction. Statute law automatically replaces any conflicting unwritten common-law precedents dealing with the same subject. Although any legislator may propose a new law (*bill*), most bills are put forward by the party in power. All legislators then study and debate the bill, which becomes a statute if and when approved by the legislative majority. The legislature may authorize public officials or government bodies to create regulations, that must reflect the intention of the statute law it details.

Civil law in nine of the provinces is based on common law, which in turn is based on *precedent*. Whenever a judge or tribunal makes a decision that is legally enforced, it becomes a precedent: a rule that guides other judges or tribunals when they consider similar cases. Civil law in *Quebec*, however, is codified.

Each province is responsible for its own courts, which deal with both federal and provincial (or territorial) laws. There are also federal courts. Provinces divide their court systems into two or three levels. *First*, there are Provincial Courts (which deal with most criminal offences), Small Claims Courts, and sometimes Youth and Family Courts. Their judges are appointed by provincial governments. *Second*, there are District or County Courts, which handle some criminal cases, appeals, and private disputes involving large sums of money. Their judges are named by

Ottawa. (Most provinces merge these courts with their Superior Courts.) *Third*, there are Superior Courts, whose judges are also federally appointed. They deal with the most serious cases, and a division of these courts -- or a separate Court of Appeal -- hears appeals from all lower tribunals. The Supreme Court of Canada hears appeals from the Superior Courts and Courts of Appeal. Parliament in Ottawa has also established the Federal Court -- dealing with claims made against the government, patents, copyrights, and maritime law -- and the Tax Court.

In addition to the courts proper, there are not a few *boards* and *tribunals*, which handle administrative rules and regulations (e.g. broadcasting, labour relations) and human rights issues.⁴³

5.2. Quasi-Constitutional Human Rights Statutes

In 1960 Prime Minister Diefenbaker passed a statute that sought to declare and protect rights -- but it was a simple law, not part of the Constitution. Similarly, the provinces have enacted their own bills of rights, which likewise are statutes passed by the legislatures.

Several factors seem to have contributed to the enactment of these laws, whose provisions having to do with this thesis are excerpted or cited in Appendix II. First, many go back to pre-Charter days, when there was no bill of rights in our Constitution. Also, since around 1960 there has been a greater consciousness of the importance of safeguarding human rights.

⁴³ Cf External Affairs and International Trade Canada, Facts Canada No. 10: *The Legal System.*, s/d.

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As seen elsewhere in this thesis, before 1982 the Supreme Court would on occasion seek to safeguard rights by declaring laws unconstitutional. But the unconstitutionality was based on the fact that either the federal government or a province had overstepped its jurisdiction in not respecting the division of legislative powers established in the BNA Act, especially in sections 91, 92 and 93. This had the significant disadvantages that laws which clearly infringed human rights could at times not be declared unconstitutional, because the division of powers was respected. Another problem was the impossibility of having recourse to the principle of interpretation of the division of powers when the violation came from a simple citizen.⁴⁴

“En l’absence de lois provinciales prohibant spécifiquement ce genre de discrimination non fondée, les citoyens ont longtemps dû s’appuyer sur les règles du droit commun (common law) pour faire reconnaître et protéger leurs droits et libertés par les tribunaux. Leurs recours en dommages-intérêts fondés sur la responsabilité civile de la personne physique ou morale ayant porté atteinte à l’un ou l’autre de leurs droits fondamentaux, ainsi que l’illustrent l’affaire *Christie* et plusieurs arrêts moins importants, ont toutefois connu peu de succès.”⁴⁵

The desire to remedy this situation was one of the main factors that led some provinces to first pass anti-discrimination laws in the areas of

44 Cf *Christie v. The York Corporation*, (1940) S.C.R. 139, where the Supreme Court rejected a claim based on racial discrimination, declaring that a merchant could invoke freedom of commerce in refusing to serve a beer to a black man.

45 Rhéaume, op. cit., p. 64, where he cites seven other cases.

employment and housing, and then provincial bills of rights, while often creating para-governmental human rights commissions, human rights administrative tribunals, as well as the office of ombudsmen. These provincial bills of rights, then, seek to address relations among citizens especially, more than relations between citizens and the state. *The Supreme Court has recognized that they have quasi-constitutional value.*⁴⁶

5.3. *The Canada Act, 1982*

The *Canada Act, 1982* says in part:

“Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom (...) be it therefore enacted by the Queen (...) 1. The *Constitution Act, 1982* (...) is hereby enacted for and shall have the force of law in Canada (...) 2. No Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1982* comes into force shall extend to Canada as part of its law. 3. (...) The French version of this Act (...) has the same authority in Canada as the English version thereof.”

The Department of Justice published on 1 October 1989 a *Consolidation of the Constitution Acts, 1867 to 1982*.⁴⁷ The introductory paragraphs explain, inter alia, that this consolidation contains the text of

⁴⁶ Cf *ibidem*, pp. 64-65, where seven decisions are cited, and the following article: Morin, Jacques-Yvan, *La constitutionnalisation progressive de la Charte des droits et libertés de la personne*, (1987) 21 *Revue juridique Thémis* 25-69.

⁴⁷ Available from Canadian Government Publishing Centre, Supply and Services Canada, Ottawa, Canada K1A 0S9.

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the *Constitution Act, 1867* (formerly the BNA Act, 1867), together with amendments made to it since its enactment, and the text of the *Constitution Act, 1982*, as amended by the *Constitution Amendment Proclamation 1983*. The *Constitution Act, 1982* contains the *Canadian Charter of Rights and Freedoms* and other new provisions, including the procedure for amending the Constitution. It also repeals certain constitutional enactments and provides for the renaming of others. The new names are used in the consolidation. The *Constitution Act, 1982* was enacted as Schedule B to the *Canada Act, 1982* (U.K.). It is set out in the consolidation as a separate part after the BNA Act. The law embodied in the *Constitution Act, 1867* (the BNA Act) has been altered many times by direct and indirect amendments, by the Parliaments of the United Kingdom and of Canada and by the legislatures of the provinces in cases where provisions of that Act were expressly subject to such changes. The consolidation thus reflects as accurately as possible all those amendments, that is, the substance of the law. It also makes footnote references to spent provisions, i.e. those that after the passage of time or a change of circumstances are no longer or are probably no longer in force.⁴⁸

The patriation of the Constitution and the adoption of a Charter of rights was seen by some as a political triumph for Trudeau, who had long sought to entrench a bill of rights in the Canadian Constitution, as most modern constitutions do.

In 1990 Rhéaume explained that

⁴⁸ E.g., s. 119 of the BNA Act is spent: it stated that New Brunswick would receive certain payments from Canada until 1877.

“pour des raisons politiques plutôt que juridiques, le parti québécois au pouvoir à cette époque a néanmoins recouru à l’exception prévue à l’article 33 de la Charte canadienne, pour empêcher l’application des articles 2 et 7 à 15 de celle-ci à l’ensemble des lois québécoises (...). Cette situation unique au Canada a pris fin en 1987 (...) (Un) régime particulier (...) a prévalu au Québec pendant cette période de cinq ans, de même que l’entrée en vigueur de l’important article 15 retardée pour trois ans partout au Canada (...) En dépit de ces réserves, et en moins de dix ans, la *Charte canadienne des droits et libertés* a été invoquée dans plus de mille causes - surtout en droit criminel et pénal - et inspiré des centaines d’études juridiques. (...) La Charte canadienne se présente donc non seulement sous la forme d’un monument historique mais également sous celle d’un outil efficace et moderne, destiné à la reconnaissance et à la protection des droits et libertés fondamentaux.”⁴⁹

Black offered this analysis:

“The Constitution Act, 1982 (...) established a formula for amending the Canadian Constitution which simultaneously ended our dependency on the Parliament of the United Kingdom and ensured that the major terms of the Constitution cannot be unilaterally changed by any single level of government. It also recognized the aboriginal and treaty rights of Native people (...). The most dramatic change, however, was the incorporation into the Constitution of the Canadian Charter (...) The impact of the Charter has been more significant than had been predicted by many. In part, the caution of many observers was based on the fact that the Canadian Bill of Rights, enacted in 1960, had been interpreted

⁴⁹ *Droits et libertés de la personne et de la famille*, pp. 7-8.

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so narrowly by the courts. (...) The Charter is a part of the Constitution whereas the Canadian Bill of Rights is, at most, a quasi-constitutional document. Differences in wording between the documents (...) and one suspects that changes in the composition of the judiciary have played a role. Perhaps in hindsight, however, the Canadian Bill of Rights provided experience that was a necessary intermediate step in the *change from a legal system steeped in the traditions of parliamentary supremacy to one incorporating entrenched constitutional rights.*"

He added that the narrow and literalistic methods of interpretation that characterized pre-1982 jurisprudence are no longer useful. But, "while the Charter greatly expands the scope of judicial review, such review has always been a part of Canadian law, for our federal system has never incorporated parliamentary supremacy in its pure form."

And he pointed out that portions of the Charter have been derived from international documents; yet, for different reasons, it does not include, for instance, many of the rights to which Canada is committed by the International Covenant on Economic, Social and Cultural Rights. It would, however, be "unwise to assume that the exclusion of a right from the Charter signifies that it is of lesser importance than those that are included," or, worse, that it does not exist.⁵⁰

Before analyzing the Charter itself, it is important to note that s. 52(1) of the *Constitution Act, 1982* declares that "the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the

⁵⁰ Black, W. W., *The Charter of Rights and Freedoms -- An Introduction*, quoted in Magnet, op. cit., vol. 2, pp. 859-861. Emphasis added.

inconsistency, of no force or effect." The section goes on to say that the Constitution includes, among other things, both *Constitution Acts, 1867* and *1982*, plus 28 other amendments mentioned in an annex or schedule.

The Constitution in the broad sense: Canada logically shares not a few of the characteristics of British constitutional law, not the least of which is that the Canadian constitution is not all written down in one document. If that is still the case today, it was much more so at the foundation.

The *Constitution Act, 1867*, which is generally understood as the foundational constitutional document of the federal state called Canada, was only a part of the whole constitution. In effect, some aspects of the constitutional organization of the new federal state were ruled by constitutional conventions, such as *responsible government*, *confidentiality of cabinet proceedings*, etc.⁵¹ Furthermore, each province had its own constitution, partly unwritten too.

The Supreme Court recently declared that

"the Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution, including the

⁵¹ Cf Marshall, G. *Constitutional Conventions*, Oxford University Press, 1984, pp. 7-18, quoted in Magnet, Joseph, *Constitutional Law of Canada*, Vol. I, Toronto, Carswell, 1985, pp. 38-43.

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principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform our overall appreciation of the constitutional rights (...)”⁵²

The Charter of Rights is of paramount importance for this thesis: see therefore Appendix III. Here I will only mention the following.

Part I of the *Canadian Charter of Rights and Freedoms*, has this brief preamble: “Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law”.

Section 2’s fundamental freedoms are: “(a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association.” This provision is key for our subject.

Section 7 says: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”⁵³ Under the right to liberty

⁵² *Reference re Secession of Quebec*, S.C., August 20, 1998, p.3.

⁵³ The word “everyone” includes unborn children according to logic, common sense, medical science, justice, common-law and civil-law judicial decisions and doctrine, and the drafting process of the Charter -- but recent jurisprudence has changed its meaning, although the latter is hotly contested in many circles. Cf Christian, *Section 7 of the Charter of Rights and Freedoms: Constraints on State Action*, in (1984), 22 *Alberta Law Review* 222; Rhéaume, *op. cit.*, pp. 81-149.

falls the right to educate one's children as one sees fit; it is therefore of paramount importance for this thesis.

Section 23, entitled *Minority Language Educational Rights*, is copied in full in Appendix III.

Of the remaining sections, mention should be made of:

"26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada."

"27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

"29. 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."

This is a reference to s. 93 of the BNA Act and its counterparts, and is also key for us.

5.4. Quebec: "*Je me souviens*" (1967-1999)

In the 1960s Quebec underwent a *révolution tranquille* which involved the modernization and secularization of its society.⁵⁴

⁵⁴ Some aspects of this complex development which concern us here are: a) a higher value placed on democracy, freedom and some human rights; b) the reform of the educational system; c) the abandonment of the practice of the faith by many Quebecers and of many private religious schools, as well as the

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In 1970 the terrorist *Front de libération du Québec* was disbanded with the help of emergency legislation; that same year, the non-violent Parti Québécois obtained 24 % of the provincial vote. Two elections later it came to power: on 15 November 1976. In May 1980 a Quebec referendum on sovereignty-association, a watered-down version of independence, obtained 40 % support.

In 1981 Quebec did not go along with the other nine provinces and the federal government on constitutional reform. Quebec refused to officially endorse the 1982 Constitution. Since then, neither separatist Parti Québécois governments (such as René Lévesque's then was, or Lucien Bouchard's now is) nor federalist-leaning Liberal governments have endorsed the *Canada Act, 1982*.⁵⁵

Nevertheless, *the 1982 Constitution has been applying to Quebec*, except for those aspects thereof overridden by Quebec's *Assemblée nationale* in use of the notwithstanding clause (Charter s.33). Quebec has in law and in fact submitted to the new 1982 Constitution, to the point that Bouchard's *indépendentiste* government obtained from the

ensuing moral crisis leading to family breakups, high youth suicide rates, low marriage and birth rates, etc.; d) nationalism.

⁵⁵ The *Meech Lake Accord* came close to resolving the issue, while Liberal Robert Bourassa was premier of Quebec and Conservative Brian Mulroney was prime minister. It was a constitutional agreement concluded by all ten provinces and Ottawa in 1987, designed to amend the Constitution by declaring Quebec a *distinct society* within Canada. According to the new amending procedure there was a three-year deadline for all provinces to ratify the Accord. Newfoundland's and Manitoba's last-minute refusals to ratify it by June 23, 1990 created a new reason for discord within the federation.

federal government a 1997 amendment to the Constitution according to the new amending procedures: the new s. 93A which eliminated the guarantee of confessional schools.

In 1995 another referendum on independence was held in Quebec. The results were 50.5 % against and 49,5 % in favor. In 1998 the federal government asked the Supreme Court to rule on whether there was in the Canadian Constitution a right to secession. On 20 August the Court ruled thus:⁵⁶

“The Court in this Reference is required to consider whether Quebec has a right to unilateral secession. Arguments in support of the existence of such a right were primarily based on the principle of democracy. Democracy, however, means more than simple majority rule. Constitutional jurisprudence shows that democracy exists in the larger context of other constitutional values. Since Confederation, the people of the provinces and territories have created close ties of interdependence (economic, social, political and cultural) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province "under the Constitution" could not be achieved unilaterally, that is, without principled negotiation with other

⁵⁶ *Reference re Secession of Quebec*, S.C., 20 August 1998, pp. 3-4. I have taken the liberty of quoting this judgment at length because it neatly summarizes and updates the constitutional framework and the Quebec question.

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participants in Confederation within the existing constitutional framework.

“Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. A clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.

“Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted: the continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions

predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government and Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities.

“The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole. A political majority at either level that does not act in accordance with the underlying constitutional principles puts at risk the legitimacy of its exercise of its rights, and the ultimate acceptance of the result by the international community. (...) It will be for the political actors to determine what constitutes "a clear majority on a clear question" in the circumstances under which a future referendum vote may be taken.”⁵⁷

⁵⁷ Will there be a third referendum on independence in Quebec? In the November 1998 provincial election, the Parti Québécois won with less than 45 % of the vote. Deputy Premier Bernard Landry surmised that the government would wait at least until 2001 before calling another referendum.

PART I. IMPLICIT RIGHTS

INTRODUCTION TO THE IMPLICIT CONSTITUTIONAL RIGHTS OF PARENTS TO EDUCATE THEIR CHILDREN, IN CANADA

1. "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."⁵⁸ Are there *implicit* constitutional rights of parents in the education of their children, in Canada?

Section 2(a) of the Charter guarantees freedom of conscience and religion; 2(b) guarantees freedom of thought, belief, opinion and expression; and 2(d) protects freedom of association. This section, thus, *implicitly* safeguards the right of parents to educate their children according to their own faith and according to basic ethical values. A child's freedom of religion includes the right to be educated in the religion, philosophy, belief, etc. of his parents while he grows and matures. The right to teach is a part of freedom of opinion and expression. And the right to create educational institutions is an aspect of freedom of association.

Section 7 of the Charter says that "everyone has the right to liberty" and "the right not to be deprived thereof except in accordance with the principles of fundamental justice". Some jurisprudence of the Supreme Court of Canada holds that the right to educate one's children according to one's beliefs also falls under the right to liberty.⁵⁹

⁵⁸ *Constitution Act, 1982*, s. 52(1).

⁵⁹ Other constitutional provisions worthy of mention here are the following.

The preamble of the *Constitution Act, 1867* states that the provinces have expressed their desire to be federally united "with a Constitution similar in Principle to that of the United Kingdom". The preamble of the Charter declares that "Canada is founded upon principles that recognize the supremacy of God and the rule of law".

Section 1 of the Charter says that it "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

Section 15 is entitled *Equality Rights*: "(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination (...) (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups (...)."

While some base themselves on this provision to curtail parental rights in education, in fact it enhances them. Thus, equality requires that wealthy families not enjoy rights that less wealthy families do not. In short, this provision in my view could be used to eliminate financial discrimination, whether it be called reverse effect discrimination, double taxation, or whatever.

Section 24(1) says that "anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances".

Section 26 declares that "the guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada", including "rights or freedoms that pertain to the aboriginal peoples of Canada" (s. 25). Also, "this Charter shall be

Quebec stands out as having *quasi-constitutional* norms that set out clearly these rights: a) the right of parents to choose for their children schools other than those established by the public authorities; b) the right of parents to ensure the religious education of their children in conformity with their own convictions.⁶⁰

The *Saskatchewan Human Rights Code*, art. 13, declares a right to education. And the human rights acts of Ontario, Manitoba, Prince Edward Island, the Yukon and the Northwest Territories explicitly base themselves, in their preambles, on the UDHR.⁶¹

2. Among the *supra-constitutional* norms that Canada should comply with, then, since they belong to solemn declarations ratified by Canada, two stand out: UDHR art. 26.3, and the *International Covenant on Economic, Social and Cultural Rights* art. 13, paragraphs 3 and 4. These, especially the latter, can be broken down into four rights:

a) the right of parents to choose for their children schools other than those established by the public authorities;

interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians" (s. 27).

⁶⁰ Cf *Charte des droits et libertés de la personne*, articles 41 and 42. See also the preambles to the *Loi sur le Ministère de l'Éducation* and to the *Loi sur le Conseil de l'instruction publique*.

⁶¹ In the case of Manitoba, also on other international solemn undertakings; in the case of the Yukon, the fact "that Canada is a party to the United Nations" UDHR and other international undertakings.

b) the right of individuals and bodies to establish educational institutions;

c) the right of individuals and bodies to direct educational institutions;

d) the right of parents to ensure the religious education of their children in conformity with their own convictions.

Canada's Constitution respects all four rights in theory. But d) is not respected absolutely, for example, in public schools; nor is a) respected absolutely, for example when private schools receive no funding from the province.

3. Even though the Constitution of Canada does not explicitly declare basic parental rights to education (like the international human rights documents and Quebec's *Charte des droits et libertés de la personne*), they are contained therein implicitly. There are five reasons why it can be said that they are implicitly contained in the Constitution.

First, because judicial interpretation of freedom of conscience and religion, freedom of thought, belief, opinion and expression (s. 2(a) and (b) of the Charter) and of the right to liberty (s. 7 thereof) includes therein basic parental rights to educate their children.

Second, because many other provisions of the Canadian Constitution, as well as some judicial interpretation thereof, support this conclusion. See Charter s. 2(d) on freedom of association, s. 23 on citizens' rights to educate their children in the official language of choice, s. 26 which safeguards other rights and freedoms not explicitly guaranteed in the Charter, s. 27 on respect for the multicultural heritage of Canadians, s. 29 on parents' rights to educate their children in denominational schools, and the preamble which states that Canada is founded upon

principles that recognize the supremacy of God and the rule of law.⁶² See the *Constitution Act, 1867*'s s. 93 on denominational school rights, and s. 17 of the *Alberta Act* and of the *Saskatchewan Act*.⁶³

Third, because international agreements solemnly signed by Canada explicitly guarantee these rights. See Appendix V, and this Part.

Fourth, because Quebec explicitly protects these rights in quasi-constitutional statutes, and other quasi-constitutional texts support them. See Appendix II, and this Part.

Fifth, because in a Constitution similar in principle to that of the United Kingdom⁶⁴ human rights protected in common law can only be abrogated explicitly by Parliament.⁶⁵

One of the aims of this thesis is to back up with research the above assertions, which are not necessarily shared by all Canadian legal scholars.

This Part is divided into three chapters.

Chapter 1 deals with the rights of parents regarding independent schooling. (Canada has undertaken to respect the liberty of parents to choose for their children schools other than those established by the public authorities, as well as to not interfere with the liberty of

⁶² Cf Appendix III.

⁶³ Cf Part II, Ch. 1.

⁶⁴ Cf Preamble of the *Constitution Act, 1867* in Appendix I.

⁶⁵ Cf Preliminary Part, 5.

individuals and bodies to establish and direct educational institutions: see ESC Rights Covenant).

Chapter 2 deals with the rights of parents regarding religion in public schools. ("Parents have a prior right to choose the kind of education that shall be given to their children": UDHR, art. 26.3. Canada has undertaken to ensure the religious and moral education of children in conformity with their parents' convictions: see ESC Rights Covenant).

Chapter 3 deals with aspects of parental participation in public schooling. (See previous two paragraphs.)

CHAPTER 1. RIGHTS OF PARENTS REGARDING INDEPENDENT SCHOOLING

1.1. The Right in International Agreements and in Quebec. The Principle of Subsidiarity

Among several international texts subscribed by Canada that refer to the right of parents to independent (or private) schooling, can be found the following quotes:

a) "It is essential to respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities (...)"⁶⁶

b) "3. The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions. 4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions (...)." ⁶⁷

⁶⁶ *Convention Against Discrimination in Education*, art. 15.1.b, in Appendix V.

⁶⁷ ESC Rights Covenant, art. 13.3 and .4, in Appendix V.

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c) "No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions (...)." ⁶⁸

Despite the fact that Saskatchewan and the Northwest Territories refer to education in their quasi-constitutional statutes (see Appendix II), the only clear texts on this right are those of Quebec. ⁶⁹

⁶⁸ *Convention on the Rights of the Child*, art. 29.2, in Appendix V.

⁶⁹ In a 29 August 1963 letter to the Quebec premier, Quebec City Cardinal Maurice Roy, in his and in the other Québécois bishops' name, stakes out a position on parental rights which compares with wording found in the UDHR and in the ESC Rights Covenant, and which was introduced into the *Loi sur le Ministère de l'Éducation*, the *Loi sur le Conseil supérieur de l'éducation*, 1964, and into Quebec's *Charte des droits et libertés de la personne*, 1975. "Parmi les suggestions que nous formulons en annexe à cette lettre, nous croyons particulièrement importante celle qui vise la proclamation de certains droits fondamentaux dans le domaine de l'éducation. (...) Comme l'éducation est un domaine où sont engagés les droits fondamentaux de la personne, nous croyons qu'il serait particulièrement nécessaire que le projet de loi contienne une déclaration explicite des libertés et des droits de base en matière d'éducation: droit pour tout enfant de bénéficier d'un système d'éducation qui favorise le plein épanouissement de sa personnalité; droit pour les parents de choisir les institutions qui, selon leur conviction, assurent le mieux le respect des droits de leurs enfants; droits pour les personnes et les groupes de créer des institutions d'enseignement autonomes et, les exigences du bien commun étant sauves, de bénéficier des moyens administratifs et financiers nécessaires à la poursuite de leurs fins." The letter adds: "Une telle déclaration serait comme l'âme du système d'éducation et des structures qu'on veut établir. De plus, tous les citoyens retrouveraient dans cette proclamation des droits des

The first paragraph of the preamble of the *Loi sur le Conseil supérieur de l'Éducation*, 1964 recalls UDHR art. 26.1 and 2. (Preamble: "Attendu que tout enfant a le droit de bénéficier d'un système d'éducation qui favorise le plein épanouissement de sa personnalité." For UDHR art. 26, see V.) The second paragraph reflects UDHR art. 26.3, and UNESCO's 1960 *Convention Against Discrimination in Education* art. 5.1.a and b.⁷⁰ The third paragraph foreshadows aspects of the 1966 ESC Rights Covenant's art. 13.⁷¹

The 1975 *Charte des droits et libertés de la personne*⁷², declares:

personnes et des groupes en matière d'éducation, l'expression d'un principe qu'ils considèrent tous comme sacré: la liberté de conscience." Comité catholique, Conseil supérieur de l'éducation, Gouvernement du Québec, *La juridiction et les responsabilités du Comité catholique*, Québec, Québec, 1987, pp. 17-18.

The wording is reproduced in the proposed amendments that Cardinal Roy attached to his letter, and in the preambles to the statutes on the Ministry of Education (*Loi sur le ministère de l'Éducation*) and on the *Conseil supérieur de l'Éducation*, 1964, still in force.

⁷⁰ Preamble: "Attendu que les parents ont le droit de choisir les institutions qui, selon leur conviction, assurent le mieux le respect des droits de leurs enfants". For the Convention, see Appendix V.

⁷¹ Preamble: "Attendu que les personnes et les groupes ont le droit de créer des institutions d'enseignement autonomes et, les exigences du bien commun étant sauves, de bénéficier des moyens administratifs et financiers nécessaires à la poursuite de leurs fins".

⁷² L.R.Q., c. C-12.

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“Art. 41. Les parents ou les personnes qui en tiennent lieu ont le droit d’exiger que, dans les établissements d’enseignement publics, leurs enfants reçoivent un enseignement religieux ou moral conforme à leurs convictions, dans le cadre des programmes prévues par la loi. Art. 42. Les parents ou les personnes qui en tiennent lieu ont le droit de choisir pour leurs enfants des établissements d’enseignement privés, pourvu que ces établissements se conforment aux normes prescrites ou approuvées en vertu de la loi.”

It is necessary in this area to understand well the *principle of subsidiarity*. “The principle of subsidiarity is not well understood because the modern world is state-obsessed. When people say, ‘Something should be done about this’ they mean ‘The state should do something’.”⁷³

“Subsidiarity is a complete reversal of the conventional way of thinking about society. For example, the authority in education rests with the family. Subsidiarity in education is not to take an enterprise which naturally belongs to the state and letting parents share in that responsibility. That is not subsidiarity -- that is a top-down type of allocation which continues to assume that the locus of authority is the state. The locus of authority are the parents, in this case.

⁷³ Interview with Richard John Neuhaus, 28 February 1997 at the “Politics and Ethics” conference organized by the Pontifical Atheneum of the Holy Cross in Rome. The Canadian-born Neuhaus, president of the New York-based Institute on Religion and Public Life, is author of books such as *The Naked Public Square*.

"The dynamics and the legitimate authority of society percolates up from the bottom. The family, voluntary associations, the church, the neighbourhood are institutions that are smaller than the state but not lower than the state, in terms of their spheres of sovereignty. The state is to serve these institutions and to be subordinate to them. That is the radicality of the idea of subsidiarity: it is much more than simply a re-distribution of state functions to other institutions."⁷⁴

1.2. Independent Schools in Canada

1.2.1. Introduction

After a brief description of provincial legislation and situations, we will explain the constitutional rights of parents in this area.

It is hard to generalize about independent or private education in Canada as a whole. Laws and contexts vary widely from province to province.

Canada has only 5 % of its primary and secondary students in independent education. This is quite low when compared with countries like Australia (28.5 %), Belgium (61.5 %), France (18 %), Ireland (85 %), the Netherlands (71 %), the United Kingdom (33 %), and the United States (10.5 %).⁷⁵

Within Canada, private enrolments in 1993-94 (as a proportion of total enrolments) were: Quebec 9 %, British Columbia 8 %, Manitoba 5.5 %, Alberta 3.5 %, Ontario 3.5 %, Saskatchewan 1.5 %. Private

⁷⁴ Ibidem.

⁷⁵ OIDEI, *Rapport, 1995*, pp. 125-127.

enrolments in Newfoundland, New Brunswick, Nova Scotia and Prince Edward Island were too small for percentages to be meaningful.⁷⁶

There is no common understanding of what the independent or private school is in Canada, and no logical policy in most provinces to determine the dividing line between fully supported, partially supported, and unsupported schools. The first four provinces mentioned in the previous paragraph all provide partial funding to independent schools that meet certain criteria.

1.2.2. British Columbia

British Columbia has the most sophisticated and one of the most open set of funding criteria -- and enrolment in its independent schools grows steadily. It is one of two provinces that treats all religious denominations equally. Most of its private schools are religiously oriented.

It has five categories of independent schools.⁷⁷

The first category receives about *half* of the public school level of funding: in order to qualify institutions "must report to the department (of education); not teach racial superiority, religious intolerance, or violent social change; employ only certified teachers; follow the provincial curriculum; and not spend more per student than the local school district. The second category receives about 35 per cent of public

⁷⁶ Holmes, Mark, *The Reformation of Canada's Schools*, p. 32. Cf *ibidem*, pp. 31-40, for some of what follows in these pages.

⁷⁷ Cf *Independent School Act*, R.S.B.C. 1996, c. 216.

school funding, but does not have to restrict costs to the level of public schools. The third receives only 10 per cent of public school funding and does not have to employ certified teachers or follow provincial program requirements. The final two categories receive *no funding*."⁷⁸

1.2.3. Quebec

Quebec has a long tradition of private schooling.

Just before the educational reform of the 1960s, one fifth of its secondary school students were enrolled in independent institutions. Even though the proportion dipped to 5 % in 1971, it had risen again to over 15 % by 1991. However, primary school enrolment levels have been hovering around the 3 % figure for decades.⁷⁹

In 1968 the *Loi de l'enseignement privé* was enacted by Quebec's National Assembly, after much study and debate.

"Le Rapport Parent n'a pas rejeté le secteur privé; bien au contraire, il a souhaité sa présence et a proposé que le législateur reconnaisse le droit 'de créer des institutions d'enseignement autonomes' et 'de bénéficier des moyens administratifs et financiers nécessaires à la poursuite de leurs fins', ce qui fut effectivement fait. La Commission Parent n'a cependant pas considéré ce droit comme inconditionnel et absolu. D'une part (...) c'est dans la mesure où les exigences du bien

⁷⁸ Ibidem, pp. 31-32. Emphasis added.

⁷⁹ Cf Simard, Myriam, *L'enseignement privé: trente ans de débats*, Montréal, Thémis, 1993, pp. 29-31; this work describes in a comprehensive way the debates and legislation on private schools in Quebec from 1960 to the early 1990s.

commun seront réalisées que le secteur privé aura droit à la bienveillance et à l'aide de l'État. D'autre part, elle recommande 'à l'État d'exercer, au nom de la société, une certaine surveillance et une autorité sur tout établissement privé, *qu'il soit subventionné ou non*'. (...)

"Enfin, elle ne considère comme valable la contribution de l'enseignement privé (...) que si 'elle se situe dans le cadre d'un système scolaire cohérent, structuré, organique'; cette contribution 'doit obéir aux règles de la planification du développement scolaire et aux exigences de la coordination de l'enseignement, dont est responsable le ministre de l'Éducation pour le secteur public et le secteur privé'."⁸⁰

In a word, even though the right to establish and run independent schools was recognized, an *interventionist* Quebec government has not only conditioned private education, but, in the late seventies and early eighties, *did not allow new private schools to be founded, by decree establishing a moratorium* on issuing permits for their foundation.⁸¹

⁸⁰ Garant, *Droit scolaire*, pp. 267-268. For background on the Parent Commission, see Chapter 2.

⁸¹ The 1977 moratorium provoked a public opinion mobilization, and more than half a million signatures in favour of private schools were presented to the National Assembly in November of that year. "La pétition formule, *sur la base du respect des droits inaliénables des parents*, deux réclamations: 1°) le maintien et le respect de la loi 56 à tous les niveaux; 2°) l'absence de restriction concernant le développement normal du secteur privé d'enseignement." Simard, *op. cit.*, p. 153. The *loi 56* is the one passed in 1968, which the government was not respecting; emphasis added.

The *moratorium* lasted from 1977 to 1983, under the government of the Parti Québécois, and it was lifted as a result of a court decision, *Mont-Bénilde Inc. v. Morin*.⁸² In *Mont-Bénilde*, the Court of Appeal interpreted in a restrictive way the power of the education minister to grant permits to private schools:

“Le pouvoir du ministre lorsque vient le temps de disposer d’une demande de permis (...) est un *pouvoir de compétence liée* qui l’oblige à délivrer tel permis dès que le requérant s’est conformé aux exigences administratives.”⁸³

The court based itself not only on its interpretation of the *Loi d’enseignement privé*, but also on the preamble of the *Loi sur le ministère de l’Éducation*, which was considered the foundation of all legislation on education in Quebec. This preamble includes the right of parents to choose the type of education they desire for their children.⁸⁴

⁸² (1983), C.A. 443.

In 1983 the moratorium was described in these terms by then opposition Liberal politician Claude Ryan: “une mesure arbitraire, injuste et asphyxiante (...) Elle m’apparaît tout à fait contraire à l’esprit du préambule de la loi du ministère de l’Éducation (...) Il y a longtemps qu’on demande la levée de ce moratoire. Au cours des sept dernières années, à peine une couple d’exceptions ont-elles été faites à cette règle d’airain que le gouvernement a fait peser injustement sur l’enseignement privé.” Quoted in Simard, op. cit., p. 163.

⁸³ At pp. 448-449. Emphasis added.

⁸⁴ The Quebec government did not appeal. Immediately after the decision was rendered, “le Service juridique du ministère (de l’Éducation) considère qu’il

Like British Columbia, Quebec has established different categories of private schools, generously subsidizing some of them. The 1968 law gave 80 % funding to those (secondary) schools declared by the Ministry of Education to be of public interest. But the government also arbitrarily decided not to support primary schools at all. In 1981 the funding rationale was changed, and the amount reduced; by the early 1990s a few primary schools were being allowed some funding.

More importantly, in 1992 the Liberal government passed a new private education law. It respected the essentials of the previous law: categories of independent schools with possibilities of more or less financial support. Its elaborate funding protocol is not unlike that of British Columbia. Even though parents' groups and other pro-private education associations had pressured the government to include a preamble in this statute, the preamble was not added. The education minister explained that

“les droits des parents au libre choix de l'école étant déjà garantis dans les (préambules des) lois constitutives du ministère et du Conseil supérieur de l'éducation, il n'est donc 'd'aucune utilité juridique' de répéter ce préambule”.⁸⁵

faut accepter le jugement de la Cour d'appel: 'Du strict point de vue légal, ce jugement de la Cour d'appel nous semble bien-fondé. *Les arguments que nous pourrions soulever éventuellement en appel à la Cour suprême ne nous semblent pas de poids* et ne sont pas, à notre avis, de nature à modifier la position des tribunaux à ce sujet.'" Simard, op. cit., p. 165; emphasis added.

⁸⁵ Simard, op. cit., p. 220.

There were also 35 *écoles ethniques* in 1992 (26 Jewish, 5 Greek, 3 Armenian, and one Moslem): private schools, with a total of almost 10,000 students, that were *funded more generously, under different criteria*.⁸⁶

1.2.4. Manitoba and Alberta

Manitoba provides partial funding to independent schools, and is the only other province to fund schools of all religions on an equal basis, i.e., it does not *favour* Catholics as Ontario, Saskatchewan and Alberta do.

Alberta is the fourth province that aids private schools that meet certain conditions.⁸⁷ As we know, Alberta also has a Catholic separate school system.

1.2.5. Saskatchewan, and the Maritime Provinces

Saskatchewan, Ontario, Newfoundland, and the three Maritime provinces of *New Brunswick, Nova Scotia, and Prince Edward Island* do not fund independent schooling. However, Saskatchewan does provide support for private schools for children with special needs and for a few high schools that have historically received partial funding. The three Maritime provinces do not have a strong independent school tradition. This is partly because, in practice, the English-language public schools have generally been Protestant (but they are becoming rapidly secularized), and their cities of Moncton and Saint John (N.B.),

⁸⁶ Cf *ibidem*, pp. 214-216.

⁸⁷ Cf *Department of Education Act*, R.S.A. 1980, c. D-17, s. 10 and its corresponding regulations.

Charlottetown (P.E.I.) and Halifax (N.S.), all with significant English-speaking populations, have had province-funded Catholic schools, administered by their public school boards.

Holmes summarizes all this by saying that

“no province funds schools in accordance with parents’ spiritual or secular values without discrimination; only British Columbia and Manitoba treat all denominations and religions equally. So discussion of independent schools has little national meaning; their definition depends on the province. (...) Manitoba, Alberta, and British Columbia provide partial funding to independent schools based on open criteria; in each case, the rate of enrolment continues to grow steadily.”⁸⁸

David Brown adds that those provinces which have enacted legislation or regulations specifically governing independent schools -- British Columbia, Alberta, and Quebec being the most notable examples -- generally establish the schools’ minimum standards and reporting requirements; the amount of funding usually represents a percentage of the per pupil student grant provided to public schools in the province.⁸⁹

1.2.6. Ontario Independent Schools: Historical Background

In 1985 Bernard Shapiro presented to Premier Peterson a report that Premier Davis had requested: *The Report of the Commission on Private*

⁸⁸ Op. cit., pp. 37, 40.

⁸⁹ *An Educator's Guide to Independent Schools*, Aurora, Ontario, Canada Law Book, 1999, pp. 7-8.

*Schools in Ontario*⁹⁰, the conclusions of a commission of inquiry into non-province-run schools for the purpose of considering whether Ontario should grant some funding to these institutions. In order to make useful recommendations the report summarized the *history* of these schools.⁹¹

a) *Schools of necessity* (first half of the 19th century): parents are forced to send their children to schools which receive no government funding, while the common school system is slowly set up.

b) *Schools of privilege* (second half of the 19th century): élite boarding schools are founded, most of them by religious groups such as high Anglicans, low-church Anglicans, non-conformist denominations and Catholic groups.

c) *Schools of innovation* (first half of the 20th century): entrepreneurs begin to replace religious founders. The new schools tend to be non-sectarian, are not necessarily for boarders, and cater to urban professional and commercial families. Many of these schools initiate pedagogical reforms and promote experimental programs of study. The sixties brought a change, because by the 1950s "the general public seemed (...) indifferent" to the independent school, which was "associated with the aristocratic societies of Europe and (was) rarely thought of as being a significant feature of Canadian life."⁹²

⁹⁰ Toronto, Ministry of Education, 1985.

⁹¹ Cf *A History of Private Schools in Ontario* by Robert Stamp, Appendix G to *ibidem*. The history has been simplified.

⁹² *Ibidem*, p. 200.

d) *Schools of protest or diversity* (since the 1960s): From 134 in 1948 to 242 in 1970, to 335 in 1978, to 550 in the mid-80s, to 560 in the mid-90s (despite the fact that most private Catholic schools moved to the public sector with the passage of *Bill 30* in 1985). Parents seek alternatives to the public and separate systems, where in many cases the quality of education leaves much to be desired, there is a lack of morals, discipline and even physical security. Many parents seek the human, intellectual and spiritual formation of their children, look for alternative structures and programs of study. Christian-Reformed, Jewish and other denominations reflect the diversity of Ontario; there is also a secular philosophic pluralism. Proponents of public education had long hoped to accommodate such diversity within the state-supported school systems. But an increasing minority of parents has chosen the private sector. These schools can no longer be classified exclusively as schools of necessity, privilege, or protest: they are *schools of diversity*.⁹³

1.2.7. Ontario's Independent Schools Legislation

Ontario has *not* passed specific legislation regarding independent schools: only a few sections of the *Education Act* deal with independent schools, which it calls private schools. As far as rights are concerned, this leaves parents with great leeway in founding these schools, and allows these institutions great latitude in their operations and programs of study.

This "flexibility, however, comes with a high price tag. Alone among the major Canadian provinces, Ontario does not provide any public

⁹³ Cf *ibidem*, p. 205.

funding to independent schools. (...) An effort by Jewish and Christian parents in 1996 to persuade the Supreme Court of Canada that Ontario was constitutionally obliged to fund independent schools was not successful."⁹⁴ (Brown refers to the *Adler* case.) "Moreover (...) Ontario has not passed any regulations specifically dealing with independent schools. From the perspective of those who wish to establish and operate independent schools, Ontario's legal framework possesses a refreshing simplicity."⁹⁵

The Shapiro Report proposed a hybrid *associated* school, whereby independent institutions could agree with local school boards to operate together. Associated schools would preserve some autonomy; they would report to the board in exchange for state funding. Nothing has come of this proposal.

The *Education Act*, s.1(1) says:

"'Private school' means an institution at which instruction is provided at any time between the hours of 9 a.m. and 4 p.m. for five or more pupils who are of or over compulsory school age in any of the subjects of the elementary or secondary school courses of study and that is not a school" as defined by the Act.

Section 21(1) requires every child 6 to 15 years old to attend a (public or separate) "school" on every school day. A parent is guilty of an offence if his or her 6- to 15-year-old misses school due to the

⁹⁴ Brown, David M., *An Educator's Guide to Independent Schools*, Aurora, Ontario, Canada Law Book, 1999, p. 8.

⁹⁵ *Ibidem* p. 12.

parent's fault. However, "a child is excused from attendance at school if, (a) the child is receiving satisfactory instruction at home or elsewhere" (s. 21(2)(a)). On this simple provision the recognition of *the right to private schools and home schooling* is based.

Section 16 establishes the requirements for private schools: Sub-sections (1)-(4): Private schools must submit annually to the Ministry of Education a *notice of intention to operate*, in such form as required. Sub-s.(5): The principal must *inform* the Ministry regarding enrolment, staff, courses of study and other data when required. Sub-s. (6): The Minister may direct a supervisory officer to *inspect* the schools. Sub-s. (7): *Diploma-granting secondary schools* may be *inspected* in respect of the standard of instruction in the subjects leading to the diploma. Sub-s.(8): The schools may opt to participate in *province-wide tests*. Sub-s.(9): Anybody who makes a false statement in a notice of intention to operate these schools or an information return under s. 16 is guilty of an *offence* (there are other offences stipulated in the section).

1.3. The Right to Independent Schooling in the *Constitution Acts*

Even though there is no explicit provision in the *Constitution Acts* recognizing a right of parents to set up, run, or choose to send their offspring to independent or private schools, that right can be supported by the Constitution, by international rights declarations, by quasi-constitutional texts, by case-law, and by practice.

"La Charte constitutionnelle ne traite pas expressément de ce droit;" nevertheless, explains Garant, "il serait facile de le faire reconnaître

jurisprudentiellement en se fondant soit sur l'article 2, soit sur l'article 7."⁹⁶

David Brown proves how this is happening. He first recalls how s. 93 of the *Constitution Act, 1867* gives to each province the authority to

⁹⁶ *Droit scolaire*, p. 269. He is referring to the Charter's sections 2(a) (freedom of conscience and religion), (b) (freedom of thought, belief, opinion and expression), and 7 (right to liberty).

"C'est en 1964 que notre droit (québécois) reconnaît expressément pour la première fois le droit à l'enseignement privé. Dans le préambule des deux lois créant le ministère de l'Éducation et le Conseil supérieur, le législateur reconnaît aux parents le droit de choisir l'école de leur choix, aux personnes de créer des institutions et de bénéficier des moyens administratifs et financiers nécessaires à l'entretien de ces institutions.

"En 1975, la Charte des droits et libertés du Québec consacre à son article 42 le droit pour 'les parents (...) de choisir pour leurs enfants des établissements d'enseignement privés'."

These private schools have a right to exist which "se fonde sur les libertés d'expression et de rassemblement reconnues par nos traditions politiques et (...) juridiques."

Independent schools "doivent avoir la liberté et les moyens de continuer leur oeuvre bénéfique. Le Québec ne peut se permettre de voir disparaître ces institutions plus que méritantes. Ce principe de la liberté a maintes fois été proclamé par les représentants du gouvernement et il a été inscrit dans nos lois, notamment dans le préambule de la *Loi du ministère de l'Éducation*."

These quotes in *ibidem*, pp. 268, 270, 271. The last two are quotes from the *Journal des Débats de l'Assemblée nationale*, 1977 and 1968 respectively.

make laws regarding education. Although most provincial education laws also allow parents to choose to send their children to independent schools, subsidized or not by the province, Brown repeats that the *Constitution Act, 1867* does not specifically refer to independent or private schools nor to a right of parents to send their children to schools outside the public school system.

But the *Constitution Act, 1867* and especially the 1982 Charter did lay the foundation “to fashion a constitutional claim by parents to a right to send their children to independent schools”. The Charter makes no reference to independent schooling -- it only refers directly to education in ss. 23 and 29--, but a series of post-Charter Supreme Court cases “has moved the law a long way towards recognizing a constitutional right of parents to send their children to independent schools”.⁹⁷

1.4. The Right to Independent Schools in Post-1982 Supreme Court Cases⁹⁸

1.4.1. Right to Teach Children According to Parents' Convictions

R. v. Jones (1986): Pastor Jones ran a school in the basement of his Baptist church in the province of Alberta. The *Alberta School Act* in fact allowed children to be excused from attending a public school, *if* a government inspector certified that the pupil was under efficient instruction elsewhere -- for example, in a private school approved by the *Department of Education Act*. However, Jones refused to apply for approval of, or even to request that officials inspect, his Western Baptist

⁹⁷ Brown, *An Educator's Guide to Independent Schools*, p. 4.

⁹⁸ Cf *ibidem*, pp. 4-7.

Academy, on religious grounds (i.e. he should not ask the state to allow him to do what God allowed him to do).⁹⁹

The Albertan educational authorities proved that they could be just as stubborn: they refused to send inspectors unless they first received a formal request from the pastor, and they finally charged him with truancy. Jones was acquitted at trial, but convicted at the Alberta Court of Appeal, and defeated again at the Supreme Court.

Nevertheless, even in dismissing Jones' appeal the Supreme Court "made it quite clear that a province is obliged to make room in its system of education for those who wish to educate their children at home or in independent schools, especially if the parents are motivated by religious convictions."¹⁰⁰

"How far the province could go in imposing conditions on the way the (pastor) provides instruction, if he had applied for registration of his academy as a private school or for certification of the efficiency of his instructions, I need not enter into. Certainly a reasonable accommodation would have to be made in dealing with this issue to ensure that provincial interests in the quality of education were met in a way that did not unduly encroach on the religious convictions of the (pastor). In determining whether pupils are under 'efficient instruction', it would be necessary to delicately and sensitively weigh the competing interests so as to respect, as much as possible, the religious convictions of the

⁹⁹ He, however, had no objection to the actual inspecting of the academy. What he objected to was to make the first move. This case is in (1986), 31 D.L.R. (4th) 569; (1986) 2 S.C.R. 284.

¹⁰⁰ Brown, *op. cit.*, p. 5.

(pastor) as guaranteed by the Charter. *Those who administer the province's educational requirements may not do so in a manner that unreasonably infringes on the right of parents to teach their children in accordance with their religious convictions. The interference must be demonstrably justified.*"¹⁰¹

The Court concluded that an *efficient instruction* certification was indeed a justifiable requirement, as was the need to *apply* to the authorities for that certification. Both requirements were regarded as minimal or peripheral intrusions on religious rights.¹⁰²

1.4.2. This Right Is an Integral Element of Freedom of Religion

In *B. (R.) v. Children's Aid Society of Metropolitan Toronto* (1995), the Supreme Court went one step further in the recognition of the right of parents to educate their children according to their religious beliefs as an integral element of the guarantee of freedom of religion contained in s. 2(a) of the Charter.

"The right of parents to rear their children according to their religious beliefs, including that of choosing medical and other treatments, is an equally fundamental aspect of freedom of religion."¹⁰³

"The parents of Sheena are constitutionally entitled to manifest their beliefs and practise their religion, as is their daughter. That

¹⁰¹ Justice La Forest, (1986) 2 S.C.R. 298. Emphasis added.

¹⁰² *Ibidem*, p. 299.

¹⁰³ Justice La Forest, speaking for the majority, (1995) 1 S.C.R. 315 at p. 382.

constitutional freedom includes the right to educate and rear their child in the tenets of their faith. In effect, until the child reaches an age where she can make an independent decision regarding her own religious beliefs, her parents may decide on her religion for her and raise her in accordance with that religion.”¹⁰⁴

1.4.3. Right to Send Children to Religious Schools

*Adler v. Ontario*¹⁰⁵ (1996) deals with the right of parents to receive state financial support for independent schooling, and not with the right of parents to *send* their children to independent educational institutions. Nevertheless, several of the judges took the opportunity to affirm that such a constitutional right does exist.

“There is no disputing the fact that the appellants enjoy a fundamental constitutional right to send their children to the religious school of their choice. This Court has recently reiterated that parents have the right to educate their children in the religion of their choice.”

Judge Sopinka quotes La Forest’s statement transcribed a few paragraphs above.¹⁰⁶

¹⁰⁴ Justices Iacobucci and Major in *ibidem*, pp. 434-435.

¹⁰⁵ *Infra*, Chapter 2.

¹⁰⁶ (1996) 3 S.C.R. 699-700, where Sopinka adds that the appellants cannot complain “that the Ontario *Education Act* prevents them from exercising this aspect of their freedom of religion since it allows for the provision of education within a religious school or at home.”

"If the *Education Act* (...) required all *children* to go to either *secular* or Roman Catholic *schools*, it would *impinge on the religious freedom of those whose beliefs require* non-Roman Catholic religious education. The *Education Act* does not do this. Section 21 excuses children from school attendance if they are receiving satisfactory instruction elsewhere. *Parents* whose beliefs do not permit them to educate their children in the secular or Roman Catholic school systems *are free to educate their children in other schools or at home*. The requirement of mandatory education therefore does not conflict with the *constitutional right of parents to educate their children as their religion dictates*."¹⁰⁷

Brown concludes by saying that this recognition by the Supreme Court of a constitutional right of parents to secure an education for their children outside the government-established school systems conforms with several international human rights conventions, as we have seen.¹⁰⁸

1.5. Rights of Parents Regarding Home Schooling

Introduction

Much of what has been studied regarding the constitutional rights of parents to have their children instructed in independent schools applies to home schooling, including, in particular, ss. 2 and 7 of the Charter, *R. v. Jones*, and *B. (R.) v. Children's Aid Society*.¹⁰⁹

¹⁰⁷ McLachlin, *ibidem*, p. 711. Emphasis added.

¹⁰⁸ *Op. cit.*, p. 7.

¹⁰⁹ (1986) 2 S.C.R. 284; and (1995) 1 S.C.R. 315 .

La Forest and three other judges who joined him in the latter case (a) defined "liberty" to include parental rights, (b) adopted an important U.S. judicial precedent which preserves parental freedom, and (c) affirmed parental choice as a part of one's religious freedom.¹¹⁰

1.5.1. Limits of Parents' Rights: Right to Life of the Child. B. (R.) v. Children's Aid Society (1995)

B. (R.) v. Children's Aid Society dealt with the infant daughter of two Jehovah Witnesses who for religious reasons rejected blood transfusions that doctors and the Ontario Children's Aid Society saw as necessary for the life of the girl. Accordingly, a judge made baby Sheena a ward of the state long enough (three weeks) for her to receive that medical treatment. The parents took the province to court, but lost, also at the Supreme Court.

This case provides home educating (and private school) parents with a strong argument that the s. 7 right of liberty includes the right to choose independent education. Any infringement of this right must be in accord with principles of fundamental justice and must recognize that the province has a *compelling interest* in intervening in order to maintain the quality of education.

"The right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of *the liberty interest of a parent.*"

¹¹⁰ I am following in this part Miller, Dallas K., *The Supreme Court of Canada, the Charter and Parental Rights*, an undated two-page brief. Mr. Miller is counsel for the Home School Legal Defence Association of Canada, #2-3295 Dunmore Road SE, Medicine Hat, Alberta.

"The *common law* has long recognized that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well being."¹¹¹

For the court, the *parental interest* in bringing up, nurturing and caring for a child, *including* medical care and *moral upbringing*, is an individual interest of *fundamental importance* to society. La Forest, L'Heureux-Dubé, Gonthier and McLachlin held that

*"our society is far from having repudiated the privileged role parents exercise in the upbringing of their children. This role translates into a protected sphere of parental decision making which is coated in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill equipped to make such decisions itself. Moreover, individuals have a deep personal interest as parents in fostering the growth of their children."*¹¹²

"We must accept that parents can, at times, make decisions contrary to their children's wishes -- and rights -- as long as they do not exceed *the threshold dictated by public policy, in its broad conception*. For instance, it would be difficult to deny that a parent can dictate to his or her child the place where he or she will live, or *which school he or she will attend*."¹¹³

¹¹¹ (1995) 1 S.C.R. 315, paragraph LXXXIII.

¹¹² Ibidem, official case summary.

¹¹³ (1995) 1 S.C.R. 315, paragraph LXXXVI. In paragraph LXXXV La Forest says:

1.5.2. *Pierce v. Society of Sisters (1925: U.S.)*

In *B. (R.) v. Children's Aid Society* the Supreme Court also endorsed and adopted the rationale of two key United States cases dealing with parental liberty, and on which many American citizens have relied to

"While acknowledging that parents bear responsibilities towards their children, it seems to me that they must enjoy correlative rights to exercise them. The contrary view would not recognize the fundamental importance of choice and personal autonomy in our society. As already stated, the common law has always, in the absence of demonstrated neglect or unsuitability, presumed that parents should make all significant choices affecting their children, and has afforded them a general liberty to do as they choose. This liberty interest is not a parental right tantamount to a right of property in children. (Fortunately, we have distanced ourselves from the ancient juridical conception of children as chattels of their parents.) The state is now actively involved in a number of areas traditionally conceived of as properly belonging to the private sphere. Nonetheless, our society is far from having repudiated the privileged role parents exercise in the upbringing of their children. This role translates into a protected sphere of parental decision-making which is rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself. Moreover, individuals have a deep personal interest as parents in fostering the growth of their own children. This is not to say that the state cannot intervene when it considers it necessary to safeguard the child's autonomy or health. But such intervention must be justified. In other words, parental decision-making must receive the protection of the Charter in order for state interference to be properly monitored by the courts, and be permitted only when it conforms to the values underlying the Charter."

The emphasis in the main text, throughout these quotes, is mine.

support their right to educate their children at home (as well as in independent schools). Miller states that with this judgment the Canadian Supreme Court has made this interpretation of liberty its own. It is once again simpler to let La Forest speak.

“The American experience can give us valuable guidance as to the proper meaning and limits of liberty. The United States Supreme Court has given a liberal interpretation to the concept of liberty, as it relates to family matters. It has elevated both *the notion of the integrity of the family unit and that of parental rights to the status of constitutional values* through its interpretation of the Fifth and Fourteenth Amendments. *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), are the two landmark cases most often cited. In the former, the Supreme Court invalidated a statute that purported to limit the teaching of foreign languages. Its decision was grounded, in part at least, on a finding that the statute interfered with *the right of the parents to control the education of their children*. In *Pierce v. Society of Sisters*, the Supreme Court declared unconstitutional a statute that required that children attend public schools. McReynolds J. stated, at pp. 534-35:

‘Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. *The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who*

*nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."*¹¹⁴

1.5.3. Freedom of Religion: S. 2(a)

La Forest, in *B. (R.) v. Children's Aid Society*, confirmed and built on the principle he laid down in 1986 in *R. v. Jones*, namely that the s. 2(a) freedom of religion encompasses the right of parents to educate their children according to their religious beliefs.

Chief Justice Lamer, in *B. (R.) v. Children's Aid Society*, disagreed with La Forest's analysis of a s. 7 liberty that included broad parental rights, but was open to hearing arguments on parental rights under s. 2(a) in future cases.

1.6. Other Forms of Choice

1.6.1. The Voucher System

As we will have occasion to see in Part II, the *fathers of confederation* gave a 19th century solution to the issue of denominational schools, of parental rights to choose their children's type of education. In this last section, I will briefly touch on more modern solutions to what is frequently seen as a conundrum, i.e. how to satisfy parental rights within the modern financially-complex state.

The voucher system could be a 21st century solution to some of the problems caused by using 19th century educational structures. It could go some way in resolving some of the complex and costly situations created by ss. 93 (*Constitution Act, 1867*) and 23 (Charter). One simple

¹¹⁴ Ibidem, paragraph LXXXI. Emphasis added.

but innovative solution, I think, to cut Canada's educational *Gordian knot* is partial funding: vouchers, or something equivalent.

A *voucher* is a document exchangeable for goods or services as token of payment made or promised. The voucher system, simply put, means that the state grants each family a voucher for each school-age child, which pays totally or partially for his or her education. The parents go with the voucher to the school of their choice. There is thus full competition, and the rights of parents in education are fully respected too.

Some way of school option based on vouchers or similar aid exists in at least five U.S states: Wisconsin, Ohio, Minnesota, Iowa and Arizona. In June 1998 the Wisconsin Supreme Court ruled, in *Jackson v. Benson*¹¹⁵, that the city of Milwaukee, Wisconsin, was allowed to use public funds so that families could send their children to independent schools, be they denominational or not. The Court held that the voucher program did not violate the First Amendment (separation of Church and state: non-establishment of religion), because it had a secular goal. The Milwaukee Parental Choice Program, which began in 1990, under a 1989 law, foresees that families which benefit from it receive a voucher of

¹¹⁵ __N.W. 2d__, No. 97-0270, 1998 Wisc. LEXIS 70 (Wis. 1998); cf 18 *Religious Freedom Reporter* 242 (1998). The U.S. Supreme Court applies a three-prong (*Lemon*) test to determine whether legislation to support independent schools is constitutional: the program must serve a secular purpose; its primary effect must neither advance nor inhibit religion; and it must not foster excessive entanglement between government and religion: cf McCoy, James, *New York Poker*, in *The Catholic World Report*, Nov. 1996, pp. 27-31; cf *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

\$3,000 US per year per child, to pay for education in the school of choice, public or private. The income of the family must be under a certain level.

A 1995 amendment added denominational schools to the program. It also changed the method of payment from a direct disbursement from the state treasury to the school, to a disbursement to the parent of the student, and the amount was decreased. The amended program also prohibited private schools from requiring a student attending the school "to participate in any religious activity if the pupil's parent or guardian submits (...) a written request that the pupil be exempt from such activities".¹¹⁶ Public school teachers' unions and other groups challenged the constitutionality of the program. They won at circuit court and on appeal at the court of appeals, but lost at the Wisconsin Supreme Court, which concluded that the amended program was constitutional and ordered the circuit court to dissolve an injunction it had placed on the program. Now the case will likely be decided by the U.S. Supreme Court.

A Cleveland, Ohio, program was also challenged in court.¹¹⁷ Private foundations too give out vouchers and scholarships to needy children.

In Canada, of course, the voucher system would not have to face the constitutional roadblocks that it faces south of the border, because our Constitution is based on the principle of cooperation, not separation, of Church and state.

¹¹⁶ Ibidem.

¹¹⁷ Cf *Aceprensa* news service, Madrid, 95/98, 24 June 1998, and 181/97, 24 Dec. 1997; *The Economist*, London, 29 Nov. 1997.

In 1997 the *Comité catholique* of Quebec's *Conseil supérieur de l'Éducation* published a research study in which it mentioned the voucher system (*écoles financées par des bons d'étude*) as one of several specific ways of giving parents greater choice in schooling.¹¹⁸

1.6.2. Partially Funded Independent Schools

British Columbia, Alberta, Manitoba and Quebec partially fund independent schools, providing a per-pupil grant according to a formula reflecting parental ability to pay, program, and similarity of school program to provincial curricula. Eligible schools, which normally spend the same or less than comparable fully-funded schools, often receive between 50 % and 80 % of the fully-funded rate.¹¹⁹

1.6.3. U.S. Private and Public Sectors

Given that the quality of education in the United States is below international standards, and that almost half the \$ 6,500 US spent per pupil in education goes to pay non-educational, mostly administrative, services, families there are increasingly unhappy about public schools -- but often cannot afford independent schools.

These circumstances are blurring the line between the public and private sectors.

¹¹⁸ *L'École publique commune dans quelques systèmes scolaires*, pp. 174-176.

¹¹⁹ Cf Holmes, *op. cit.*, p. 278.

Charter schools are allowed, entrusting the management and direction of state-run schools to private firms. In 1998 there were over 1,100 charter schools in the U.S.

Also, firms that specialize in re-floating or turning around state-run schools are proliferating. These companies manage public schools.¹²⁰

¹²⁰ Edison Project manages 51 schools, Nobel Learning Communities manages 138 schools, and Sylvan Learning Systems manages 46. Cf *Aceprensa* 31/99, 24 Feb. 1999; and *Aceprensa* 176/94.

CHAPTER 2. RIGHTS OF PARENTS REGARDING RELIGION IN PUBLIC (NON-DENOMINATIONAL) SCHOOLS

2.1. The Right in International Rights Declarations and in Quebec

a) Seven months before the UDHR appeared, the Organization of American States had issued (2 May 1948) a similar document (Canada was to join the OAS in the 1980s), the *American Declaration of Human Rights and Obligations*.

"Article 12. 4. Parents or guardians have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions."¹²¹

b) Art. 26.3 of the UDHR guarantees parents their prior right to choose the kind of education that shall be given to their children (Appendix V).

c) The document sometimes known as the European Human Rights Convention has been cited on occasion in Canadian courts:¹²² of interest are its article 9, and article 2 of its additional protocol (see Appendix V).

¹²¹ The first three paragraphs of art. 12 are on freedom of conscience and religion. Cf Hervada, Javier and Zumaquero, José Manuel (eds.), *Textos Internacionales de Derechos Humanos*, Pamplona, 1978, pp.107-108.

¹²² Cf as an example *Quebec Association of Protestant School Boards v. Attorney General of Quebec (No. 2)*, (1982), 140 D.L.R. (3d) 33 (Que. S.C.); cf also Magnet, op. cit. pp. 863-866.

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d) It is essential to ensure the religious and moral education of children in conformity with their parents' convictions: *Covention Against Discrimination in Education*, art. 5.1.b. (Appendix V).

e) Canada has undertaken to ensure the religious and moral education of children in conformity with the parents' own convictions: ESC Rights Covenant, art. 13.3, also in Appendix V.

"The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions." (Art. 18.4 of the *International Covenant on Civil and Political Rights*.)

"Art . 5. (...) 2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle. (...) "4. In the case of a child who is not under the care either of his parents or of legal guardians, due account shall be taken of their expressed wishes or of any other proof of their wishes in the matter of religion or belief (...)" (*Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*.¹²³)

¹²³ OIDEL, *Freedom of Education. International Instruments*, Geneva. This document has the official English version of most of these declarations.

f) Canada shall respect the right of the child to freedom of thought, conscience and religion, as well as the rights and duties of the parents to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. (See art. 14 of the *Convention on the Rights of the Child*, Appendix V.)

“Les parents (...) ont le droit d'exiger que, dans les établissements d'enseignement publics, leurs enfants reçoivent un enseignement religieux ou moral conforme à leurs convictions, dans le cadre des programmes prévus par la loi.” (Quebec's *Charte des droits*, art. 42, in Appendix II.)

2.2. Some Juridical and Historical Background

We will refer in this section and the next mostly to Ontario. Important Charter cases have been decided there which is making its impact felt in the rest of Canada, not excluding Quebec. We will commence, however, with a case which, if correctly interpreted, sheds light on the rights of parents to the religious education of their children in public schools.

2.2.1. The Right of Parents in Denominational Schools as Public Schools

Fully-funded denominational schools can be considered from the angle of the rights of parents to choose a confessional school (see Part II), or from the point of view of parents who do not have any other option but to send their children to a confessional school which is in fact a public school because it is completely financed by the province.

Chabot v. Les commissaires d'écoles de Lamorandière:¹²⁴ In the 1950s, Jehovah Witness parents took a Quebec school board to court when their children were expelled from school for refusing to participate in compulsory Catholic devotions. Because there was no other school in the district, the Quebec Court of Appeal decided that the children had a right to attend the Catholic denominational school. The child could not be obliged to attend the religious exercises mandated by the board. Freedom of religion and conscience was seen as a matter of natural law, not positive law. The court said the parents, not the child, had "sacred rights" to choose in this respect. And, citing an 1878 precedent, it stated that

"the authority of the father to guide and govern the education of his child is a very sacred thing, bestowed by the Almighty, and to be sustained to the uttermost by human law. It is not to be abrogated or abridged, without the most coercive reason."

2.2.2. A Historical Precedent: The Mackay Report in Ontario

This 1969 report commissioned by provincial government dealt with religious education in the Ontario *public* system. Although most parents wanted religious instruction retained in public schools, the Mackay Report recommended that it be dropped.

In 1944 systematic Protestant Christian religion courses had been strengthened and made mandatory during regular school hours in public schools. Before issuing his final report Chairman Mackay had affirmed

¹²⁴ (1957), Que. Q.B. 707 (C.A.). Cf MacKay, A. W., *Education Law in Canada*, pp. 65-66, and Scott, Frank R., *Case and Comment* in (1958), 36 *Can. Bar Rev.* 248.

the rights of parents to determine the kind of religious education their children should receive. But the anti-religious views of other educational experts won out. The report proposed that prayers be retained at opening exercises only; that the Bible be read in literature or history classes only; that there should be no religious *indoctrination*; that *character building* pervade every regular and extra-curricular activity; that secondary school history departments offer courses in world religions in grades 11 and 12. The main stumbling-blocks for the commissioners seemed to be the pluralistic nature of the student population and the prevailing winds of secularism and relativism. Suggestions had been made to the committee that could have much better respected the rights of parents to the religious education of their children. Msgr. Joseph Finn, a Catholic spokesman, after consulting with the Catholic bishops of Ontario, in 1966 had proposed to the committee that optional credit courses be set up in the public schools, which each denomination involved would supervise. Catholics, however, upheld their traditional opposition to any common syncretistic course in religion.¹²⁵ This view was again made known after the report was made public, this time in the form of a joint letter from the Ontario bishops to

¹²⁵ From the mid-1940s to the mid-1960s a *modus vivendi* had been worked out regarding Catholic students who attended public schools. Often public school boards with a majority of Catholic students (e.g. in northern Ontario) obtained permission from the government to not teach Protestant religion courses. And most dioceses tried to arrange religious instruction for Catholic public secondary school pupils (many children, however, failed to attend them). If school principals cooperated, Catholic religion classes were arranged for Catholics in the public schools themselves. In 1965, for example, some five thousand Catholic children were taught their religion in public schools.

Education Minister William Davis. The letter stated that: religious doctrine should not be forced on the unwilling; basic religious content should be retained in public schools; morality could hardly be taught in the absence of theological and philosophical foundations; courses on world religions would be deleterious, *inter alia* because history teachers were not prepared to teach them. The most sensible solution was, the bishops said, to offer optional denominational courses in religion, taught by adequately trained teachers.

The Catholic bishops also expressed concern with regard to their own flock: the Mackay Report did not allow public schools where Catholic students predominated to be able to teach the Catholic religion.¹²⁶

2.3. The Recent Judicial Transformation of Public Schools into Neutral Schools

2.3.1. Exemption From School Prayers Is Not Freedom Because of Peer Pressure

In *Zylberberg v. Sudbury Board of Education*¹²⁷ (1988), three pairs of parents (Jewish, Moslem and agnostic) of primary school children sought a declaration that a regulation violated the Charter, because it allowed the schools of the board to open with the National Anthem, the Lord's Prayer and, in some schools, readings from the Bible. The Divisional Court held by a majority that the regulation did not infringe the freedom of religion and conscience guaranteed by s. 2(a) of the Charter.

¹²⁶ The letter was dated 16 July 1969. Cf *The Canadian Register*, Toronto, 15 Nov. 1965.

¹²⁷ (1988) 65 O.R. (2d) 641.

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But a 4-1 majority of the Ontario Court of Appeal overturned that decision, declaring the regulation unconstitutional. In essence, the Court of Appeal held that:

a) Christian prayers and readings imposed Christian observances on non-Christian pupils -- *even though students could be exempted from those religious exercises*;

b) the exemption was not sufficient protection of the freedom of religion and conscience (Charter s. 2(a)) and of equality (Charter s. 15(1)) because children felt *peer pressure* to conform -- this pressure offended their freedom of religion.¹²⁸

The judges who disagreed (Lacourcière in the Court of Appeal, Anderson and O'Leary in the lower court) pointed out, inter alia, that the possibility of opting out was sufficient protection of freedom of religion, and that s. 2(a) does not forbid any and all government aid to or advancement of religion. Governments are not prevented from giving choices to parents to exercise their rights. The concept of freedom of religion "cannot be so broad as to prohibit government Acts which compel the making of a religious choice. If 'freedom' were so broadly conceived, it would demand a stance of state neutrality that is not

¹²⁸ "The right to be excused from class, or to be exempted from participating, does not overcome the infringement of the Charter freedom of conscience and religion by the mandated religious exercises. On the contrary, the exemption provision imposes a penalty on pupils from religious minorities who utilize it by stigmatizing them as non-conformists and setting them apart from their fellow students who are members of the dominant religion." Ibidem, p. 656.

justified and probably not possible to achieve".¹²⁹ Common experience shows that opting out of religious exercises does not impose on religious minorities a compulsion to conform to the practices of the majority. Also the regulation did not oblige school boards to use Christian prayers and readings.¹³⁰

"Finally," Lacourcière added, "s. 27 of the Charter may be of some assistance. (...) Religion is one of the dominant aspects of (...) culture which the Charter is intended to preserve and enhance. (...) The removal of all religion from the school environment seems more consistent with the encouragement of a homogeneous society than with the preservation or enhancement of a 'multicultural' one."¹³¹

Could the regulation have been justified under s. 1 of the Charter?, the Court of Appeal asked. No, it answered, because freedom of religion was being infringed unreasonably in this case.¹³²

¹²⁹ Ibidem, p. 679.

¹³⁰ Ibidem. One of the lower court judges, Anderson, stated that the parents (Jewish, Moslem and agnostic) made an argument which offended logic and common sense: that "a right to refuse is a compulsion to accept. Choice is of the essence of freedom and the decision as to what choice is appropriate is often difficult. The difficulty is part of the price of freedom." Ibidem, p. 648.

¹³¹ Ibidem, p. 676. For the sake of convenience, we copy again s. 27: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

¹³² Section 1 allows for reasonable limits to rights as demonstrably justified in a democracy. The court summarized the *Oakes* test developed by the Supreme Court, in which it "laid down the procedure which must be followed in

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2.3.2. Exemption From Religion Class Is Not Freedom Because of Psychological Pressure

Elgin County (1990): in this case¹³³, the Ontario Court of Appeal rendered a unanimous decision whose official court summary follows.

“The appellants, the Canadian Civil Liberties Association and parents of children enrolled in or previously enrolled in schools of the respondent board of education, brought an application for judicial review to challenge the constitutionality of s. 28 (of an Ontario regulation), and the curriculum of religious studies of the board. Section 28(4) of the regulation requires two periods of religious studies in public schools each week. Pursuant to s. 28(6), instruction shall be given by the teacher, and issues of a controversial or sectarian nature shall be avoided.

deciding whether legislation infringing Charter rights can be justified under s. 1. First, it must be determined whether the legislative objective is sufficiently important to warrant overriding the Charter right or freedom. If it is, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This, in turn, requires the application of the three components of (...) the ‘proportionality test’, which requires a balancing of the objective of the legislation with its effects. The first question to be asked is whether the legislation is rationally connected to the objective. The second is whether the means chosen impair the Charter right or freedom as little as possible. The third is whether there is proportionality between the objective and the effects of the measures in limiting Charter rights.” The court held that “there are less intrusive ways of imparting educational and moral values” than religious exercises, and thus the objective sought by the regulation is not proportional to the right violation it causes. *Ibidem*, pp. 662-663.

¹³³ *Canadian Civil Liberties v. Ontario (Education Minister)* (1990) 71 O.R. (2d) 341.

Section 28(7) permits a board to allow clergy or lay people to give religious instruction in lieu of teachers. Parents can apply to have their children exempted from religious education pursuant to s. 28(10). A teacher may also claim exemption from teaching religious education. Section 50 of the *Education Act*, R.S.O. 1980, c. 129, provides that, subject to the regulations, each pupil shall receive religious instruction only as his or her parent or guardian desires or, where the pupil is an adult, as he or she desires, while s. 10(1), para. 18, permits (...) regulations respecting religious education.

“At the time the application commenced, religious instruction was provided only by members of a country Bible association, and the instruction was largely from a fundamentalist Christian perspective. In 1986-87, there were curriculum changes to add references to other faiths. The board resolved, after this litigation commenced, that in 1987-88, class-room teachers rather than lay volunteers would provide elementary religious education. The population of the county is overwhelmingly Christian and largely Protestant. The appellant parents all objected to the sectarian nature of the religious instruction, although two families chose not to exempt their children from religious instruction, because they feared that the child would be ostracized or subject to stigma. The application for judicial review was dismissed at trial.

“On appeal, **held**, the appeal should be granted. Section 28(4) of the regulation and the curriculum of the respondent board violate s.2(a) of the *Canadian Charter of Rights and Freedoms*, and the board is enjoined from continuing to offer the curriculum in its schools.

“The purpose of s. 28(4) of Reg. 262 is to permit the indoctrination of school children in Ontario in the Christian faith. The purpose is not

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altered by the exemption provisions in s. 28, because they impose a penalty on pupils from religious minorities who utilize the exemption by stigmatizing them as non-conformists and setting them apart. State-authorized religious indoctrination violates s. 2(a) of the Charter because it amounts to the imposition of majoritarian religious beliefs on minorities. It creates a direct burden on religious minorities and non-believers who do not adhere to majoritarian beliefs. The expert evidence of a psychologist, as it accords with the evidence of the individual appellants, shows that children whose religion is different from that being taught in class will feel pressure to conform and experience stress and discomfort if they remain in the class-room. Even if there is an exemption, there is great pressure on the child to remain in the class-room. Thus, the effect of the regulation was to provide for the use of curricula and materials which constituted the basis for indoctrination contrary to s. 2(a).

“The religious education curriculum offered by the board is governmental conduct subject to Charter scrutiny. If it violates s. 2(a), the remedy would be under s. 24(1) of the Charter, not s. 52(1) of the *Constitution Act, 1982*.

“Section 2(a) prohibits religious indoctrination, but it does not prohibit education about religion. The board concedes the unconstitutionality of the pre-1986 curriculum, which was directed towards Christian indoctrination. The 1986-87 curriculum, despite efforts to broaden the curriculum to teach about religion, continued to be taught exclusively from the Christian point of view, and the purpose continued to be indoctrination. Even the 1988-89 curriculum, described in new evidence before the Court of Appeal, which indicates further efforts of a substantial nature in the direction of teaching about religion, violates s.

2(a), because the curriculum contains sufficient indoctrinating material to preclude the court from regarding it as trivial or inconsequential.

“In view of the conclusions on s. 2(a), it is unnecessary to deal with s. 15(1) of the Charter. The curriculum does not constitute a limit prescribed by law, and, therefore, s. 1 has no application to it. As the true purpose of the regulation is to indoctrinate children in the Christian faith, the infringement cannot be justified under s. 1. Even if s. 1 were applicable, the indoctrination of children into the Christian faith is not rationally connected to the objective of inculcating proper moral standards in elementary school children. In addition, the measures fail to impair the appellants’ rights as little as possible.”

2.3.3. No Right to Funding of Non-Catholic Confessional Schooling

In *Adler v. Ontario* (1996) the Supreme Court, besides declaring Ontario’s Catholic separate schools constitutional, also stated that the province was under no constitutional obligation, due to equality, to fund private denominational schools (McLachlin and L’Heureux-Dubé dissenting on this point).

When this case was decided in 1994 by the Ontario Court of Appeal, Chief Justice Dubin, speaking for the court, held that neither the parents’ freedom of religion, nor their right to equal treatment under the law, were infringed by Ontario’s *Education Act* by reason of the failure of the government to fund private religious schools.¹³⁴

¹³⁴ Cf a summary of this decision in *Bal v. Ontario* (1994) 21 O.R. (3d) 681 at pp. 695-698.

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This has been taken by some judges and authorities to mean that school boards and the province of Ontario itself cannot allow the teaching of specific religions in public schools during school hours, even though perhaps a majority of parents in the area desire that instruction.

Justice Sopinka considers the secular nature of the public school system mandated by s. 2(a) of the Charter as held by several courts in Canada.¹³⁵

2.3.4. No Right to Funded Alternative Minority Religious Schools

Bal v. Ontario (1994,1997). It is unfortunate that this case did not reach the Supreme Court. It died at the level of the Ontario Court of Appeal, which on 26 June 1997 decided to dismiss an appeal from the decision of a trial judge. Since the Court of Appeal's judgment, by McKinley, Osborne and Austin, is brief and clear, it can be reproduced almost in full.

"This is an appeal from the decision of Winkler J., in which he held that ss. 28 and 29 of Regulation 262 (passed pursuant to the provisions of the Ontario *Education Act*, R.S.O. 1990, c. E.2) and Policy/Program Memorandum No. 112 do not violate the rights of a number of parent members of minority religious groups in Ontario under ss. 2(a) and (b) and s. 15 of the Charter of Rights and Freedoms.

"The regulation and policy memorandum, in essence, require that programmes in religion taught in schools under the jurisdiction of public boards of education in Ontario 'must not be indoctrinational' and 'must not give primacy to any particular religious faith'. Those parents

¹³⁵ Cf *Adler v. Ontario* (1997), 140 D.L.R. 385 at 448.

claiming that their Charter rights have been violated include members of Sikh, Hindu, Muslim, Mennonite and Christian Reform communities. Prior to the issuing of the policy memorandum, there had been in existence, under a number of public boards of education in Ontario, publicly funded alternative minority religious schools. The implementation of the new policy would mean that children in those schools, as in all other public schools in the province, would now receive a secular education during school hours.

"The positions taken by the appellants are varied but, distilled, they come down to four. *First*, they contend that if they are not permitted to teach their own religion in their own schools, but must rely on teaching in their homes and in their churches or temples only, the survival of their cultures and religions will be in jeopardy; *second*, that many parents who are members of minority religious groups cannot afford to send their children to privately funded religious schools and, therefore, are deprived of their right of freedom of religion on economic grounds; *third*, that if their children are required to attend public secular schools, it will have a significant detrimental influence on their spiritual and moral development, because of both teaching and peer pressure; *fourth*, that there is no discriminatory admission policy in their alternative schools, so that children of other faiths are free to attend."

Winkler "expressed the view that the trilogy of Ontario cases" -- *Zylberberg, Elgin County, Adler* -- "are dispositive of the issues in this case. We agree. Although the trial judge did not have the benefit of the decision of the Supreme Court of Canada in *Adler v. Ontario*, (1996) 3 S.C.R. 609, which was released after he released his reasons in this case, it affirms the decision of this court in *Adler*."

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“It is not necessary to comment further on the reasons of Winkler J.: they speak for themselves, and we agree with them. We would emphasize, however, that while we sympathize with the concerns of the appellants about the positive and negative influences of the educational experience on their children, their plight is no different from that of the majority of Canadians who cannot afford, or do not wish, to send their children to privately funded religious schools. (...) No freedoms have been violated. The problem for these parents, and for many others, is that the province has decided not to fund religious schools.”¹³⁶

Let us therefore look at the judgment that met with the above approval. It is a case that touches on more than one relevant issue for this thesis.

Before: what is Policy Memorandum 112? As a result of the 30 January 1990 *Elgin County* decision the Ontario government was forced to change its policy. The Ministry of Education issued Policy/Program Memorandum No. 112 on 6 December 1990 on “Education About Religion in the Public Elementary and Secondary Schools” directed to boards of education and school principals, stating the new judicially-imposed requirements. The Memorandum is divided into six parts.¹³⁷

Part I (*Background*) explains that the Court of Appeal made it illegal to teach a single religious tradition, and to have clergy or persons designated by clergy provide religious instruction in public schools, as

¹³⁶ *Bal v. Ontario (Attorney General)*, (1997) O. J. No. 2597.

¹³⁷ Cf *Bal v. Ontario* (1994) 21 O.R. (3d) 681, pp. 692-694.

well as to “indoctrinate” as opposed to “educate” about religion.¹³⁸ Part II establishes the *policy*.¹³⁹ Part III explains that the *purpose* of these programs is to “enable individuals to understand, appreciate, and respect various types of religious beliefs, attitudes, and behaviour (...) *not* to instil the beliefs of any particular religion. It is the prerogative of individual pupils and their families to decide which religious beliefs they should hold.” Part IV (*Content*) says that a particular program cannot be expected to include every world religion, but “as a minimum, programs in any grade should include a balanced consideration of world religions

¹³⁸ To assist in distinguishing between *religious indoctrination* and *education about religion*, the Memorandum quotes *Elgin County*, which in turn approvingly quotes American Association of School Administrators, *Religion in the Public Schools*, 1986, which in turn quotes the Public Education Religion Studies Center of Wright State University, as follows (I summarize): The school may sponsor the study but not the practice of religion. It may expose students to all religious views but not impose any particular view. It educates about all religions, but does not seek to convert to any one religion. It may instruct but not indoctrinate. Its approach is academic, not devotional. It studies what all people believe but should not teach a student what to believe. Cf *Elgin County* at p. 367.

¹³⁹ 1. Boards of education may provide programs in education about religion in Grades 1 to 8 during the school day for up to 60 minutes a week. 2. They may provide optional credit courses in World Religions in Grades 11 and 12 as per an official curriculum guideline which meets the court’s requirements. 3. Schools and programs must not be indoctrinational nor give primacy to any particular religious faith. 4. Boards may continue to provide space before or after the instructional program of the school day for indoctrinational religious education, but always making space available on an equitable basis to all religious groups, as per the Charter’s equality provisions.

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that have continuing significance for the world's people." Part V adds that the Ministry will develop *resource* documents to assist boards in developing these programs. And Part VI (*Context*) -- emphasized by Judge Winkler -- says:

"This permanent policy and the forthcoming amendments to Regulation 262 are to be understood within the context of the long-established vision of the public elementary and secondary schools as places where people of diverse backgrounds can learn and grow together. The public schools are open and accessible to all on an equal basis and founded upon the positive societal values which, in general, Canadians hold and regard as essential to the well-being of our society. These values transcend cultures and faiths, reinforce democratic rights and responsibilities, and are founded on a fundamental belief in the worth of all persons."

It is this policy and the revised regulations which implement it, that which two Sikh families, two Hindu families, two Christian Reformed families, two Moslem families, and two other sets of parents¹⁴⁰ sought to declare unconstitutional in *Bal v. Ontario*. They claimed that

¹⁴⁰ Mennonites described as "devout Christians who believe it is essential for their children to be educated in a religious school in which the entire curriculum is taught from the perspective of the faith, (...) that they cannot fulfil their religious obligations as parents by simply teaching their children about their religious faith in their home (...), that it is vital for their children's religious growth (...) that the children be educated by teachers who share their religious principles and values in a school environment which encourages their particular faith tradition." *Bal v. Ontario* (1994), pp. 701-702.

“the preclusion of the establishment, funding, or continuation of alternative religious schools as part of a public school board is discriminatory and denies the applicants the freedom of conscience and religion and freedom of expression as members of minority faith communities and as such violates ss. 2(a), (b) and 15 of the *Charter*.”¹⁴¹

In fact, certain of these families were already involved in pre-existing schools which with the approval of the school boards were teaching religion as described -- the so-called alternative or opt-in schools (which, it should be emphasized, allowed students to attend exempting them from religion class if their parents so desired), which had strong local support. However, the judge, instead of defending parents' Charter rights, held that what he called the *Zylbelberg-Elgin County-Adler* “trilogy” obliged him to declare that these alternative schools could no longer function as public schools where religious instruction was given, and that neither the memorandum nor the contested regulation sections infringed the Charter.

“It is not the policy memorandum and regulations which impose obligations, penalties, restrictive conditions on the applicants, and not on others. Instead, it is the applicants' choice of education for their children. The public school system is secular, it does not present the opportunity for education in any particular denomination or faith. The objective is to provide non-denominational education. Should parents decide that their children have a religious education they must assume

¹⁴¹ Ibidem, p. 685.

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the cost. This does not mean that there is adverse effect discrimination. The government prohibition is just, fair and constitutional."¹⁴²

The parents in this case argued, inter alia, that secularism is akin to a majority religion that is being imposed on believing parents against their rights. Their lawyer suggested that secularism means minority religious groups

"do not have the opportunity to put their religious views forward as part of their education. This they ought to have a right to do through alternative religious schools. Secularism, he argued, is not neutral when applied to minorities because it undermines their values (...) Secularism is coercive (...) because it rules out the existence of alternative religious schools."

But the judge found that "secularism is not coercive, it is neutral. The logic is lacking to support (the solicitor) Jervis' contention that the secularization is a form of coercion".¹⁴³

¹⁴² Ibidem, p. 714, where *adverse effect discrimination* is described as arising where obligations, penalties or restrictive conditions are imposed on some persons based on some special characteristic. The Ontario Court of Appeal held that in *Adler* there was no adverse effect discrimination, but, as has already been pointed out, two of the nine Supreme Court judges -- McLachlin and L'Heureux-Dubé -- disagreed.

¹⁴³ Ibidem, pp. 704-705, where it also says that "Mr. Jervis (...) argued that since members of minority religious groups must pay for private religious education for their children, there is a state-imposed burden on their religious practices. The situation facing minority religious groups is analogous to the situation found to be unconstitutional in *Zylberberg* and *Elgin County*." In other

2.4. Evaluation of State Neutrality in Education: “Neutral” Schools Are Not Neutral

Canada does not have a juridical tradition of Church-state separation as the United States has, although some Canadian lawyers, jurists, and judges¹⁴⁴, seem to be attempting to import it. On the contrary, the Canadian Constitution, as has been seen, applies the *principle of cooperation* between Church and civil community, for the good of the person.¹⁴⁵

Regarding the so-called neutrality of the state, Martín de Agar asks whether

“this neutrality is really at the service of the effective freedom of all, or whether it has not been transformed into a tool precisely to neutralize

words, the pro-religion parents here wanted similar protection to what the anti-religion parents had obtained there. But they failed to obtain it.

¹⁴⁴ E.g. *Zylberberg, Elgin County, Bal.*

¹⁴⁵ The state’s neutrality or secularity is not indifference of the state vis-à-vis religions, but rather a guarantee of the state in order to safeguard freedom of religion, in a situation of confessional and cultural pluralism. This is the interpretation of the Italian Constitution given by Italy’s *Corte costituzionale* in a case regarding the teaching of Catholic religion in state-run schools. Cf Gianni, Andrea, *L’insegnamento della religione nel diritto ecclesiastico italiano*, Padova, CEDAM, 1997, p. 175. The Constitutional Court, in that case, considered that the value of religious culture and the historical heritage of Catholicism constituted elements of *laicità* (neutrality, secularity), which is not indifferent, hostile or alien to the religious phenomenon, but at the service thereof: cf *ibidem*, p. 176.

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the manifestations of freedom, in favour of a *uniformism* which is aseptic only in appearance. It is taken for granted that a neutral education is possible, one that objectively transmits theoretical and practical knowledge (even of sexuality), under condition, however, that any allusion of a religious character be scrupulously avoided. And it is presumed, at the same time, that the state can guarantee such an education. Both these assertions are, in truth, very arguable."¹⁴⁶

The same professor teaches that the educational rights of parents are often sacrificed to the neutrality of the state. Neutrality or secularity of the state should mean just that -- not neutrality of *education*. The fact that the state is secular does not mean that education should be secular too. Otherwise the state would be spreading a philosophy, that of secularism.¹⁴⁷

"In fact, when one attempts to subordinate religious freedom to any other principle, secularity (*laicità*) tends to become secularism (*laicismo*), neutrality becomes agnosticism, separation becomes hostility. The *secular-confessional* State seeks to impose those worldviews, and in a way it tries to transform juridical principles that safeguard rights, that are limits, into social values, and pretends to characterize social life with traits that are and must remain

¹⁴⁶ Martín de Agar, José T., *Problemas jurídicos de la libertad de conciencia*, in *Scripta Theologica*, 27 (1995/2) 519, p. 543.

¹⁴⁷ Class notes, Corso di Diritto Ecclesiastico dello Stato, Pontifical University of the Holy Cross, Rome, 1998.

characteristics of the state. (...) This happens, for example, when it is said that public schools must be secular because the state is secular."¹⁴⁸

In *Adler v. Ontario*, Justice McLachlin said that the government of Ontario encouraged a neutral public system of education because this was a way of promoting a more tolerant society where young people would learn understanding towards each other's different background.¹⁴⁹ The issue in this case was the non-funding of non-Catholic independent schools. With all due respect, I think that although the aim is praiseworthy (and Christian), the measure is unjust and unfair, and the reasoning faulty. The reasoning is based on the false assumption that persons who teach truths they hold to be true are somehow by that very fact promoting intolerance, whereas the *aseptic* public school teacher, who (in theory) should be absolutely relativistic, but cannot be and is not in practice, promotes tolerance. Experienced educator Mark Holmes explains persuasively that religious education is *not* divisive.¹⁵⁰

He who affirms that the school should be cleansed of all religious and ideological notions and become value-free or neutral is not value-free or

¹⁴⁸ Martín de Agar, J. T., *Libertà religiosa, uguglianza e laicità*, in *Ius Ecclesiae*, 7 (1995), p. 208.

¹⁴⁹ Cf paragraph 217. But she added in paragraph 218 that "legislators can seldom demonstrate that the measures they propose for the betterment of society will inevitably have that effect. What is required is that the measure not be arbitrary, unfair or based on irrational considerations."

¹⁵⁰ *The Reformation of Canada's Schools*, p. 235.

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neutral. Rather, he is expressing the views of the ideology that could be called *liberal pedagogy* or *doctrinal positivism*.¹⁵¹

At the root of mistaken conclusions such as McLachlin's may be the lack of distinction between *secularization* (or *secularism*) and *de-clericalization* (or *secularity*). In effect, Modernity has brought the latter in its wake. While the Middle Ages were Christian and *clerical*, the modern West has become de-clericalized but not necessarily non-religious or non-Christian. What has been taking place is the affirmation of the autonomy of secular affairs vis-à-vis religious affairs: each one of these spheres has its own laws and values, and thus a legitimate autonomy. An autonomy that is relative, not absolute, because otherwise "per oblivionem Dei ipsa creatura obscuratur" (once God is forgotten the creature is obscured as well).¹⁵²

¹⁵¹ Cf Hengsbach, Franz, *Unterrichtsfreiheit und das Recht auf Erziehung (Libertad de enseñanza y derecho a la educación in Persona y Derecho 6* (1979), pp. 57-107, p.88. Education is never a neutral task. It is always guided by an idea of man and of society, by a way of understanding what is ultimately important in life. This is so obvious that it is almost embarrassing to have to say it. It is something that every mother, every father, and every teacher knows. Those who feel it best are children, even though they might not know it or understand it clearly: cf *ibidem*, p. 98.

¹⁵² Vatican Council II, Pastoral Const. *Gaudium et Spes*, no. 36. Cf also Fazio Fernández, Mariano, *Francisco de Vitoria. Cristianismo y Modernidad*, Buenos Aires, Ediciones Ciudad Argentina, 1998, pp. 9-11.

CHAPTER 3. PARENTAL PARTICIPATION IN PUBLIC SCHOOLING

Introduction

This chapter explores the constitutional rights of parents to participate and collaborate in general in public or state-run schools. It is taken for granted that they already participate and collaborate in independent schools. Some aspects of what will here be said are of course applicable to parental participation in denominational and minority language schools, which are also state-run, but which will be studied in Part II.

3.1. Is This a Constitutional Right?

The liberty of parents to choose for their children schools other than those established by the public authorities is the *first right* safeguarded by ESC Rights Covenant art. 13.3. The 1867 Constitution's s. 93 and equivalents, coupled with the Charter's s. 29, do not address this particular right, but rather art. 13.3's *second right*: "and to ensure the religious and moral education of their children in conformity with their own convictions". Article 13.3's first right, made more explicit and, as it were, broadened in its fourth paragraph ("No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions...") has been dealt with.

Now the second right will be analyzed. In effect, parents should be able to control the *content*, at least, of the (religious, moral and cultural) education their children receive in province-funded public schools. Quebec's *Charte des droits et libertés de la personne* echoes article 13.3's second right:

"41. Les parents ou les personnes qui en tiennent lieu ont le droit d'exiger que, dans les établissements d'enseignement publics, leurs

enfants reçoivent un enseignement religieux ou moral conforme à leurs convictions, dans le cadre des programmes prévus par la loi.”

Does the Charter -- especially in ss. 2(a) (freedom of conscience and religion), (b) (freedom of thought, belief, opinion and expression), and 7 (right to liberty) -- include this right?

3.2. Does the Constitution Protect School Boards?

It is important firstly to deal with the legal nature of *boards of education* or *school boards*: since their members (trustees) are elected locally, they have been and in many places can still be privileged means for parents to have a say in the province-funded education of their children. The provinces indirectly control schools through these intermediate entities which, following the principle of subsidiarity, in theory facilitate input from the community.

This is not the place to trace the history of boards of education in Canada, nor even to explain how they differ from province to province, among other things because throughout this thesis we discover their pervasive presence.¹⁵³

¹⁵³ Educator Mark Holmes thinks they have become antiquated. “The original idea of the local school district no longer has currency in contemporary Canada. The real question is whether school boards are needed at all, or whether their few remaining tasks (planning new schools, providing a range of program options, arranging transport) would be better carried out by a single public agency reporting to the province. If school districts have little or no financial autonomy and do not represent a distinct community, what should be their responsibilities, if any? (...) New Brunswick has taken the lead in abolishing them, but the changes may well lead *to more centralization of educational*

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This is the place to attempt to define their constitutional relevance. The *Constitution Act, 1867* indirectly refers to school boards in s. 93(2), in entrenching the pre-Confederation “powers, privileges and duties at the union by law conferred and imposed” in Ontario and in Quebec on separate schools and *school trustees* of Catholics and Protestants.¹⁵⁴

What is then the *constitutional standing* of the school board? Is this intermediate body, of such immense historical importance in the development of education in Canada, bereft of *constitutional rights*? In a country where the great majority of schools are administered by school boards, can the latter be reformed, interfered with or dissolved by provincial fiat, or would the courts be able to intervene, declaring some provincial legislation unconstitutional?

In Quebec, the school board (*commission scolaire*) is a “corporation publique territorialement décentralisée”.¹⁵⁵ Garant, an administrative

policy rather than less.” The Reformation of Canada’s Schools, pp. 29-30. Emphasis added.

¹⁵⁴ The old Term 17 of the Terms of Union of Newfoundland also indirectly made reference to school boards when it mentioned “any right or privilege with respect to denominational schools, common (amalgamated) schools (...)”. And in a similar way, the provisions that are equivalent to s. 93 in the different provinces also may be taken to imply certain rights and powers of school boards: see Chapter 2.

¹⁵⁵ “Cependant, contrairement aux corporations municipales, qui, tout en étant décentralisées territorialement, possèdent une vocation générale, les commissions scolaires sont conçues uniquement pour l’organisation et la régie des services d’enseignement: *on retrouve donc un aspect de décentralisation*

law specialist, explains that the *commission scolaire*, being a *corporation publique*, has juridical personality, and is not a *personne morale de droit privé*.¹⁵⁶ "Les commissions scolaires, créées dans un but d'intérêt public, n'ont que les droits, pouvoirs et obligations qui leur sont reconnus par la loi."¹⁵⁷

Judge Winkler (Ontario Court, General Division), in *Bal v. Ontario*, seems to approve the following statement: "Boards of education have no rights; they are creatures of statute and all their powers are those derived from the provincial government. The only powers inherent in the boards of education are those conferred upon them by the government."¹⁵⁸

These words echo MacKay's, who, basing his comments on the Nova Scotia reality, writes that "school boards are creatures of statute, and as such have only the powers granted by statute or regulation".¹⁵⁹

par service ou fonctionnelle." Garant, Patrice, *Droit scolaire*, p. 158. Emphasis added.

¹⁵⁶ Ibidem, pp. 163-164: "La jurisprudence et la doctrine ont traditionnellement reconnu que les corporations publiques sont soumises aux règles de droit public dans l'exercice de leurs pouvoirs législatifs, administratifs et quasi judiciaires, alors qu'elles demeurent, sauf dispositions contraires, soumises au droit civil dans leurs rapports civils avec les individus."

¹⁵⁷ Ibidem, p. 164.

¹⁵⁸ *Bal v. Ontario (Attorney General)*, (1994) 21 O.R. (3d) 681 at 703.

¹⁵⁹ *Education Law in Canada*, 1984, p. 26.

In the same vein, Brown and Zuker think that the power of school boards is *delegated* to them by the province and that they have no inherent power of their own, and they cite jurisprudence backing this up. Among other cases, they mention *R. v. Greenbaum*, in which the Supreme Court quoted Stanley Makuch, *Canadian Municipal and Planning Law*: his explanation of municipal government powers can help to understand, in certain aspects, those of school boards.¹⁶⁰

There are other clear judicial pronouncements:

“There is no constitutionally protected right to effective representation through municipal institutions or local school boards. Under our constitutional arrangements the federal and provincial governments and their constituent electoral systems are constitutionally protected, but not municipalities or school boards (which) are creatures of the provincial government. *Subject to the constitutional limits of s. 93* (...) these institutions have no constitutional status or independent autonomy and

¹⁶⁰ “The courts, as a result of this inferior position (of municipalities), have traditionally interpreted narrowly statutes respecting grants of powers to municipalities. (...) A municipality may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation.” Makuch, Toronto, Carswell, 1983, p. 115; *R. v. Greenbaum* (1993), 100 D.L.R. (4th) 183 (S.C.C.); cf Brown and Zuker, *Education Law*, pp. 16-20.

the province has absolute and unfettered legal power to do with them as it wills."¹⁶¹

"The province remains free to exercise its plenary power with regard to education in whatever way it sees fit, subject to the restrictions relating to separate schools imposed by s. 93(1)",

and to the restrictions -- we should add -- regarding minority language education imposed by s. 23 of the Charter.¹⁶²

At times, nevertheless, the concept of *board rights* does crop up. Some jurisprudence seems to recognize rights of school boards. How to explain this? The explanation might be that those judgments deal with denominational school rights or minority language education rights -- which are constitutionally protected. One might also see in them the almost unconscious defense of the rights of parents. Whatever the case may be, here are some of those decisions; several others are discussed elsewhere in this thesis:

a) *Jacobi v. Newell No. 4 (County)*: an Alberta separate school district was not protected by the Constitution because the district did not in fact operate a school, but rather purchased services from a neighbouring public board. The court said that for *constitutional protection* to apply,

¹⁶¹ Justice Campbell in *O.P.S.B.A. v. Ontario (Attorney General)*, (1997), 151 D.L.R. (4th) 346 at 361 (Ontario General Division), quoted in Brown and Zuker, *op. cit.*, pp. 2-3. Emphasis added.

¹⁶² Justice Iacobucci in *Adler v. Ontario*, (1997), 140 D.L.R. 385 at 407 (Supreme Court).

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the district would have to provide its students with confessional education.¹⁶³

b) *Reference Re Education Act (Quebec)*: allowed the province to restructure school boards along linguistic lines.¹⁶⁴ The restructuring was permitted by the Supreme Court, as long as confessional boards were maintained in Montreal and Quebec City, and Catholics or Protestants who were in a minority within the linguistic boards could establish dissentient boards. In reviewing this and similar cases, one author concludes that even though Catholics and Protestants were entitled to confessional boards in the two cities mentioned above, and to dissentient boards elsewhere, when they were in a minority, the government still decided how the system was to be funded, what curriculum was to be taught, and to a large extent who taught and under what conditions: "in the final analysis, it does not appear that the Constitution affords the type and level of protection *which school boards were seeking*".¹⁶⁵

c) *O.E.C.T.A. v. Dufferin-Peel* "deals with a specific aspect of *the right of separate school boards* to safeguard the denominational character of

¹⁶³ (1994) 112 D.L.R. (4th) 229 (Alberta Queen's Bench): cf Brown and Zuker, op. cit., pp. 4-5.

¹⁶⁴ This was before the 1997 constitutional amendment which eliminated the s. 93 safeguards for Quebec.

¹⁶⁵ William J. Smith, quoted in Brown and Zuker, op. cit., p. 8; emphasis added. The case is in (1993), 105 D.L.R. (4th) 266 (S.C.C.).

their schools by controlling the terms and conditions of employment of staff".¹⁶⁶

3.3. Special Education

Special education is generally understood to mean those programs and services offered by schools to students who due to physical, mental and/or psychological disabilities have special needs: the mentally and physically handicapped, victims of war and abuse, etc. What, if any, constitutional rights do parents have regarding the special education of their children?

The Supreme Court in *Adler* seems to have decided that parents do not have an absolute constitutional right to state-funded special education.¹⁶⁷ However, if parents send their children to province-funded schools, it would seem that they do have this right: "These services (...) are designed to ensure that children with special needs have full access to the *public* school system."

"If the appellants have no basis for claiming a right to public funding for the education provided in private schools, they have no claim for additional 'educational services' *available only within the public school*

¹⁶⁶ Brown and Zuker, op. cit., p. 10: *O.E.C.T.A. (Branch Affiliates) v. Dufferin-Peel Roman Catholic Separate School Board* (1995), 83 O.A.C. 367.

¹⁶⁷ Seven judges held that Ontario was not obliged to fund special education services *for children who do not attend public schools*. McLachlin and L'Heureux-Dubé dissented: they thought that Ontario was obliged to do so. Cf *Adler v. Ontario* (1996) 3 S.C.R. 609.

system. There is no reason to distinguish *funding for this aspect* from other aspects of funding for educational purposes."¹⁶⁸

If the child is in a province-funded school, and she is switched to another school which can provide the special services, do the parents have the right to oppose that change and oblige the local school board to pay for special education services near the student's residence? This was the issue in *Picard*.¹⁶⁹ It was resolved in the negative: parents do not have an absolute right to choose a funded school where their child will receive special education.

Similarly, when Saskatchewan closed a school for the deaf and asked a student to attend a regular school with a special education program, the court found that the province's policy was not discriminatory nor a denial of the child's right to education.¹⁷⁰

¹⁶⁸ Ibidem, official case summary. The first quote is per Lamer, La Forest, Gonthier, Cory and Iacobucci; the second per Sopinka and Major. All seven agreed on the outcome, but with slightly different reasons. The emphasis is mine.

¹⁶⁹ *Picard c. Conseil des commissaires de la Commission scolaire de Prince-Daveluy*, (1991) R.J.Q. 167. Cf Garant, op. cit., p. 215. Cf *Picard c. Commission scolaire de Prince-Daveluy*, (1992) R.J.Q. 2369 (C. A.).

¹⁷⁰ *Trofimenkoff v Saskatchewan (Minister of Education)* (1991) 6 W.W.R. 97 (Sask. Court of Appeal), commented in Brown and Zuker, op. cit., p. 228.

In Ontario, if a board does not provide a disabled pupil with special education, it must enter into an agreement with another board to do so, as per the *Lanark, Leeds and Grenville* case.¹⁷¹

Brown and Zuker comment that “there is nothing inherently discriminatory about integration, segregation or institutionalization” in these cases. They say that human rights tribunals are not in the best position to determine which course of action is best for a pupil.¹⁷²

Do the parents have the constitutional right to demand that their special child be taught with regular, not special, pupils (i.e. be integrated into a regular classroom)? In the *Eaton* case, the Supreme Court answered no, the Charter does not give rise to a legal presumption of that right.¹⁷³ In this specific situation s. 15 equality rights are not breached.¹⁷⁴

¹⁷¹ *Lanark, Leeds and Grenville (Roman Catholic Separate School Board) v. Ontario (Human Rights Commission)*, (1987) 60 O.R. (2d) 441 (Divisional Court), affirmed by the Court of Appeal, (1989) 67 O.R. (2d) 479 (C.A.). Cf Brown and Zuker, op. cit., p. 225, who add that when appropriate the child may be asked to attend a provincially-operated school for the blind or deaf, etc.; and that if a child must leave the province for medical reasons with the approval of the Ontario Health Insurance Plan, the province subsidizes his education.

¹⁷² Op. cit., p. 230.

¹⁷³ *Eaton v. Brant County Board of Education* (1996), 142 D.L.R. (4th) 385 (S.C.C.). Cf Brown and Zuker, op. cit., pp. 228, 230-235.

¹⁷⁴ However, some pupils must be treated differently in order to be treated equally. “The treatment of a person differently from others may or may not

The parents of Emily Eaton fought all the way to the Supreme Court. They wanted their disabled daughter to be taught in a regular classroom (i.e. integration). The court concluded that while there is no *legal presumption* in favour of integration, integrated settings normally should be favoured and reasonable efforts be made to accommodate special students in integrated settings. As a result of this decision, boards can segregate pupils even against the wishes of their parents; but if challenged by the parents, they must be able to prove that the placement meets the “best interests of the child” test. For older children and those who are able to communicate their wishes and needs, their views play an important role in determining these “best interests”. The decision must be made from a subjective, child-centred perspective. The court found, in sum, that s. 15 of the Charter (equality rights) had not been violated.

3.4. Language of Instruction

Parents have a right to choose the language of instruction of their children. Yet this right is not absolute, as for example in the case of immigrants. We have seen that the rights of parents to choose the type of education of their children can be limited by the state for the common good.

This right, furthermore, should be carefully distinguished, in my view, from the right to receive *state-funded* education in a particular language. One thing is to declare illegal or unconstitutional the option of sending one’s children to any (independent or state-run) linguistic

amount to discrimination,” according to the Saskatchewan Court of Appeal, quoted in Brown and Zuker, *ibidem*.

school of choice, and another altogether is to declare the legality of such an option, but without providing government funding.

Needless to say, the issue of language of instruction has been a controversial and important topic in the history of Canada, and also, specifically, of Quebec in the last third of the twentieth century. It will only be dealt with in this thesis in order to point out certain elements of the constitutional protection afforded to parents in this regard. A comprehensive treatment of this issue could easily amount to a thesis on its own.¹⁷⁵ Because the Constitution protects state-funded minority language schooling, the logical place for this topic is the next Part.

¹⁷⁵ For a study of s. 23, its application in each province, and judicial interpretation thereof, until 1995, cf Foucher, Pierre, *Les droits scolaires des minorités linguistiques*, in Beaudoin and Mendes, *The Canadian Charter of Rights and Freedoms*, Toronto, Carswell, 3d edition, 1996, Chapter 16. For a review of its application and interpretation, as well as its historical background, in Canada and especially in Quebec, including this province's restriction and even denial of the right to English-language schooling, cf *Chapitre 3: Les aspects linguistiques du droit de l'éducation*, in Garant, Patrice, *Droit scolaire*, Cowansville, Québec, Yvon Blais, 1992.

CONCLUSION: THESE CONSTITUTIONAL RIGHTS DECLARE PRE-EXISTING HUMAN RIGHTS

1. The educational rights of parents found in the Canadian Constitution respond to pre-existent human rights.

This becomes clearer when studying international declarations of rights, some of which have already been seen, and several of whose relevant provisions are found in Appendix V.

a) At the time of writing, 10 December 1998, the *Universal Declaration of Human Rights* (UDHR) turned fifty, and was being hailed worldwide.

Half a century ago Canada joined 47 other countries in signing the Declaration. Canadian jurist John Humphrey played a leading role in drafting the text.¹⁷⁶ Canada has been a strong supporter throughout the years, despite initial hesitations.¹⁷⁷ The UDHR is one of the most

¹⁷⁶ Prof. Humphrey taught at McGill University in Montreal. In 1977 I was privileged to attend a course of his on human rights at McGill's faculty of law.

¹⁷⁷ Even though, in 1948, Humphrey was enthusiastic and an Ottawa parliamentary committee gave the UDHR a ringing endorsement, Liberal Prime Minister Louis St. Laurent, his cabinet, and the Department of External Affairs were skeptical. St. Laurent, for example, did not like the Declaration's right to education "because it might cost the state too much". The U.K. and the U.S. encouraged the St. Laurent government to endorse the UDHR.

valuable and significant documents in the history of law.¹⁷⁸ The golden anniversary provided the international community with an occasion to reflect not only on how the UDHR could defend people's rights, but also on how the Declaration itself could be adequately protected.¹⁷⁹ In effect, despite the Declaration, states often pick and choose rights, international organizations act above the law, highly developed societies make a mockery of the UDHR's art. 28 (regarding a just world order where all persons can enjoy the rights declared), and many ultimately undermine the document by placing in doubt the universality (i.e. the existence) of certain fundamental principles. They place in doubt "cette *conception commune* à laquelle se réfère le Préambule de la Déclaration".¹⁸⁰

Article 26, especially paragraph 3, is the basis of this thesis.

¹⁷⁸ Cf Pope John Paul II, *Message on occasion of the fiftieth anniversary of the Universal Declaration of Human Rights*, 30 Nov. 1998, in *L'Osservatore Romano*, 11 Dec. 1998 (original in French): "En proclamant un certain nombre de droits fondamentaux qui appartiennent à tous les membres de la famille humaine, la Déclaration a contribué de manière décisive au développement du droit international, elle a interpellé les législations nationales et permis à des millions d'hommes et de femmes de vivre plus dignement."

¹⁷⁹ U.N. Secretary General Kofi Annan, Address to the Human Rights Commission, Geneva, 23 March 1998.

¹⁸⁰ Today's challenge is to encourage that common base, "lui permettre de devenir de plus en plus la référence ultime où la liberté humaine et la solidarité entre les personnes et les cultures se rencontrent et se fécondent mutuellement". John Paul II, *op. cit.*

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b) The United Nations desired to make explicit the adaptation of the rights of the human person to the child in 1959: see principle 7 of the Declaration on the Rights of the Child.

c) One year later UNESCO, considering that discriminations in education constituted a violation of the rights mentioned in the UDHR, adopted a convention, an excerpt of which is found in Appendix V. Notice that it makes reference to minority language rights.

d) With the aim of giving greater legal force to the international protection of human rights (to the UDHR), the United Nations adopted two twin conventions, and a protocol to facilitate ratification by member States. The ratification of these documents has the same force as the signing of an international treaty. Many of the phrases in the *Canadian Charter of Rights and Freedoms* have in fact been drafted to conform to Canada's international obligations under the *International Covenant on Civil and Political Rights*; as can be seen by looking at Appendix V, not a few of the articles of the Covenant are very similar in wording and intent to sections of the Charter.¹⁸¹

e) The *San José of Costa Rica Convention* applies to Canada, as a member of the OAS. Among other things it establishes the Inter-American Human Rights Commission and Court, and procedures for both:

¹⁸¹ Cf Magnet, op. cit. 866, who in turn refers to the discussion of this to be found in the Report of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada.

140 Part I. Implicit Rights

“Art. 12. 4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.”¹⁸²

f) On 11 December 1991, Canada ratified a U.N. *Convention on the Rights of the Child*. Quite a few relevant provisions are in the appendix.¹⁸³

Canada ratified the Convention with only two reservations, which were not reservations regarding parental rights. However Alberta refused to endorse the Convention.¹⁸⁴ Concerned citizens

¹⁸² *The American Convention on Human Rights*, 22 November 1969. Hervada, Javier and Zumaquero, José Manuel, (eds.), *Textos Internacionales de Derechos Humanos*, Pamplona, 1978, no. 1598; and OIDEL, *Freedom of Education. International Instruments*, Geneva.

¹⁸³ Some of these phrases, and other provisions of this convention, could conceivably be construed so as to deny rights of parents in the education of their children declared in international documents prior to this one. For this reason throughout the 18 months between its signing by Conservative Prime Minister Brian Mulroney and its ratification by his government, numerous Canadian organizations lobbied Ottawa to include a reservation safeguarding parental rights (and ultimately children’s rights vis-à-vis a *big-brotherliness* of the state or any other organization) similar to the reservation included by the Holy See when it ratified the Convention.

The Vatican’s reservations were: “That it interprets the Articles of the Convention in a way that safeguards the primary and inalienable rights of the parents, in particular insofar as these rights concern education (Articles 13 and 28), religion (Article 14), association with others (Article 15) and privacy (Article 16)”.

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“received from the Government officials a comprehensive defence of the Government’s position that no reservations are required regarding parental authority. This defence has included some useful arguments that pro-family leaders will now be able to use in Court cases and other situations where parental authority may appear to be undermined in cases where this document is quoted as an authority.”¹⁸⁵

To what extent are documents like the above the law of the land in Canada? In principle, to the extent that their provisions have been adopted by the Constitution, enacted in statutes, or form part of the common law. (Strictly European documents have not been officially endorsed by Canada, because of the nature of these documents, but they can be referred to by judges and courts. The documents vary from the more theoretical ones like the 1959 *Declaration on the Rights of the Child*, to the more concrete ones, like the 1966 Conventions cum Protocol.)

2. Education shall be directed to the full development of the human personality and to the sense of its dignity, as well as to the strengthening of respect for human rights and fundamental freedoms. It shall enable all persons to participate effectively in a free society, and

¹⁸⁴ A case can be made for the constitutional principle that the Canadian federal government cannot ratify international treaties that affect provincial areas of competence without the consent of those provinces. Cf *Attorney General of Canada v. Attorney General of Ontario et al.* (Labour Conventions case) (1937) 1 D.L.R. 673.

¹⁸⁵ Focus on the Family member Jim Slater, quoted in Miller, Dallas K., *Canadian Home Schoolers and the United Nations Convention on the Rights of the Child. Action Paper*, s.d., p. 32.

promote understanding, tolerance and friendship.¹⁸⁶ It must pay regard to the formation of the whole person, so that all may promote the good of society. Children and youth are to be cared for in such a way that their physical, moral and intellectual talents develop harmoniously, they become responsible persons and learn to use their freedom correctly, and take an active part in social life.¹⁸⁷ Etymologically education involves human upbringing, an education, that is, an assisting in drawing out the form of our humanity from what is present in an imperfect way to what is present in its full being: it makes one more fully human.¹⁸⁸

The family is a sovereign society, although conditioned in some ways. The rights of the family are closely linked to not a few of the rights of the person: for example, the right of parents to the education of their children. But the rights of the family are not simply the sum total of the rights of the person. The family is much more than the sum of its members. It is a community of parents and children, and at times grandparents and/or other family members. For this reason its status as a subject gives rise to and calls for certain proper and specific rights. The institution of the family exists in the social and legal order of the greater societies, which include the nation, the state and the

¹⁸⁶ Cf UDHR art., 26.2, Covenant on ESC Rights art. 13.1, and other international documents excerpted in this Part and in Appendix V.

¹⁸⁷ Cf *Code of Canon Law Annotated*, Montreal, Wilson & Lafleur, 1993, c. 795. I refer to this particular formulation of this canon of the Church's code as a source of intellectual inspiration, not as a source of Canadian law.

¹⁸⁸ Cf Campbell, Gerard, *Some First Principles of Catholic Education*, 1995 *The Canadian Fellowship of Catholic Scholars*, Toronto, pp. 133-152, at p. 134.

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international communities. These greater societies are conditioned by the existence of the family. In regard to the state, considered as a political community juridically ordered towards the common good, the family is connected by reason of the principle of subsidiarity. The family is a social reality which does not have readily available all the means necessary to carry out its proper ends, also as regards education. But whenever the family is self-sufficient, it should be left on its own. Excessive

state intrusiveness, *big-brotherliness*, is detrimental. It openly violates the rights of the family.¹⁸⁹

¹⁸⁹ Cf Viladrich, Pedro Juan, *La famiglia 'sovrana'* in *Ius Exxlesiae* , 7 (1995), pp. 539-550, and Appendix VII. These comments are being made by me based on Catholic social teaching, which in turn reflects basic human rights law -- they are not being made as part of a description and analysis of the Canadian legal system: that is why they are found in this concluding section.

PART II. EXPLICIT RIGHTS

INTRODUCTION TO THE EXPLICIT CONSTITUTIONAL RIGHTS OF PARENTS TO EDUCATE THEIR CHILDREN, IN CANADA

1. We have seen in Part I the parental rights in education *implicitly* acknowledged in Canada's Constitution.

Now, in Part II, we will touch on s. 93 (and equivalent provisions) and s. 23 of the Constitution,¹⁹⁰ i.e. the parental rights in education *explicitly* guaranteed, in Canada's Constitution. *These explicit rights include two levels: the bare right, and the right to funding.* Unfortunately, these two levels are not always distinguished either in theory or in practice. Thus, we find anomalous situations: e.g. Catholic Ontario families have their rights respected, while families of other religions or in other provinces often do not.

One thing is the *bare* right and another the right *to funding*. In general, where the right to funding is *explicitly* guaranteed, so is the *bare* right. But because of judicial interpretation and constitutional amendments, complex situations have evolved. This thesis argues that regardless of whether or not there is an explicit provision in the Canadian Constitution guaranteeing the right of parents to send their children to denominational schools *with at least some funding*, that right *implicitly* exists. This is my interpretation. This thesis must faithfully report what the research has uncovered, as it unfolds in the pages that follow. There is no doubt that all Canadian families have the *bare implicit* right to send their children to independent denominational schools, to create them, to manage them: see Part I.

¹⁹⁰ *Constitution Act, 1867* and *Constitution Act, 1982*, respectively.

2. As far as parents' rights regarding the education of their children is concerned, nothing is more important than the transmission of philosophical, religious and moral values. One way to safeguard these rights for some families -- unfortunately, not all -- has evolved in Canada.

Canada was built on the foundation of the French and the English. Parents' rights to educate their children in their own language and culture, even though they be in a minority, is guaranteed by the Canadian Constitution.

3. There are many ways of respecting parental rights regarding the education of their offspring in schools of their choice. The state can fund confessional schools partially or totally. "Parents have a prior right to choose the kind of education that shall be given to their children", the liberty "to ensure the religious and moral education of their children in conformity with their own convictions".¹⁹¹

It should be borne in mind that because the original Canadian Constitution goes back to 1867, the mechanisms whereby these rights were protected are nineteenth-century measures.¹⁹² At that time the rights we are considering were not explicitly thought of as rights of *parents*. Rather, the Constitution talks of rights of *classes of persons*. In fact, only in the twentieth century have there been, in our country or

¹⁹¹ UDHR, art. 26.3; *International Covenant on Civil and Political Rights*, art. 18.4.

¹⁹² Also, for centuries Christian religious leaders, parents, and Catholic consecrated persons often generously promoted education when the state did not have the human or material resources to do so.

internationally, declarations of rights applicable in Canada where the rights being studied were clearly described as being rights of parents.

4. Section 93 of the *Constitution Act, 1867* safeguards the right of Catholic students in Ontario to *fully-funded* Catholic separate schools. Even though the section applies to British Columbia, New Brunswick, Prince Edward Island and Nova Scotia, this right of partial or full funding has been denied by Privy Council jurisprudence, especially when it denied its application to s. 22 of the *Manitoba Act, 1870*. Section 93 does not apply to Quebec after a 1997 constitutional amendment. Section 17 of the acts by which Alberta and Saskatchewan were created as provinces declares that these provinces' students have a right to fully-funded Catholic (or in some cases Protestant) separate schools. Newfoundland students today have the right "to religious observances (...) in a school where requested by parents" (*Constitutional Amendment, 1998*).

The Charter adds the guarantee 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" (s. 29).

Section 23 of the Charter constitutes a code of rights of parents *who are Canadian citizens* to have their children instructed in French or English (the official languages of the country according to s. 16) *by the state* (i.e. *fully-funded*), where numbers warrant.¹⁹³ *Quebec has not yet accepted a key provision of this code.*¹⁹⁴

¹⁹³ Section 23(3): "The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in

5. This Part thus studies, in Chapter 1, the explicit constitutional rights guaranteed by: s. 93, BNA Act, 1867 as amended by s. 93A (Quebec, 1997); s. 22 (Manitoba, 1870); s.17 (Alberta and Saskatchewan, 1905); and Term 17 (Newfoundland, 1998).

Chapter 2 looks at the explicit constitutional rights guaranteed by s. 23, Charter, 1982.

the language of the English or French linguistic minority population of a province (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and (b) includes, where the number of children so warrants, the right to have them receive the instruction in minority language educational facilities provided out of public funds".

¹⁹⁴ *Constitution Act, 1982*, s. 59: "Paragraph 23(1)(a) shall come into force in respect of Quebec (...) only where authorized by the legislative assembly or government of Quebec".

Section 23(1)(a): "Citizens of Canada (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside (...) have the right to have their children receive primary and secondary school instruction in that language in that province".

CHAPTER 1. RIGHTS TO FUNDED DENOMINATIONAL SCHOOLS

Introduction

Section 93 reads:

"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:"¹⁹⁵

¹⁹⁵ The last two sub-sections are these. "(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 lie 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

The introductory part establishes the exclusive provincial power regarding education. Such great power on such a key subject was limited by four conditions.

1. The *first condition* is the archstone. It constitutionalizes confessional school rights that Catholics and Protestants had at the time of the union. It does not mention specifically the content of those rights, rather it refers to pre-existing legislation in each of the provinces. Since only Ontario and Quebec had pre-existing legislation on confessional schools at the union, we will study that legislation in some detail.

In 1997 s. 93A was added to the Constitution: "93A. Les paragraphes (1) à (4) de l'article 93 ne s'appliquent pas au Québec."

Though s. 93 technically still applies to New Brunswick and Nova Scotia (they are founding provinces), and to British Columbia and Prince Edward Island, the courts have decided that because these provinces had no pre-existing statutes on confessional schools, few rights were and are protected explicitly by this section. Manitoba's s. 22 being very similar to s. 93, it received the same treatment.

Saskatchewan and Alberta, however, had provisions in their terms of union which, emulating s. 93, have not been judicially modified by the Privy Council.

Newfoundland's term of union number 17 established a constitutionally-entrenched confessional system which made room for

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 Council under this Section."

several religious denominations (not just Catholics and “Protestants”), but it was abolished in 1998. This province’s educational-constitutional evolution has been unique.

2. The *second condition* of s. 93 only applied to Quebec.

3. The *third and fourth conditions* are of little direct *practical* importance today: they provide remedial political measures which have never been used.¹⁹⁶

4. The plan of Chapter 1 is the following:

1.1. explicit parental constitutional rights to *fully province-funded* denominational schools: Ontario; Alberta and Saskatchewan;

1.2. explicit parental constitutional rights to denominational schools *modified by the courts*: New Brunswick, Manitoba, Nova Scotia, British Columbia, Prince Edward Island;

1.3. explicit parental constitutional rights to denominational schools *modified by constitutional amendments*: Quebec and Newfoundland;

1.4. analysis of court cases regarding explicit parental constitutional rights to denominational schools (those not studied elsewhere);

1.5. final evaluation and conclusions.

¹⁹⁶ Cf Proulx, Daniel, *La “Modification constitutionnelle de 1997” relative aux structures scolaires au Québec: une mesure opportune et juridiquement solide*, in 58 *Revue du Barreau*, printemps 1998, pp. 47-48. See the discussion below on the Manitoba schools question.

Nota bene that Canadian provinces are not juridical watertight compartments, for the simple reason that they all belong to Canada, and thus judicial precedents from one jurisdiction may apply in another jurisdiction *even though the latter's constitutional protection may have changed*. Thus, for example, pre-1997 Quebec cases may be used as judicial precedents in the other eight Canadian provinces where s. 93 has not been modified by amendment, and especially in Ontario, Alberta and Saskatchewan, where s. 93 has not been modified neither by amendment nor by the courts.

1.1. Explicit Parental Rights to Fully Funded Denominational Schools: Ontario, Alberta, Saskatchewan

1.1.1. Ontario

1.1.1.1. Before 1867

Ontario's¹⁹⁷ educational system reflects the constitutional compromises of 1867 between Protestants and Catholics (BNA Act, s. 93), and that of 1982 between anglophones and francophones (Charter, s. 23). The history of Ontario is intertwined with the evolution of these two compromises: parental rights in education has been an important component of its social and political history. Parents and their representatives have consistently claimed their rights regarding religion, language, etc. Franco-Ontarians and Catholics have been in the forefront of this struggle. The latter, perhaps due to their Church's defense of "the natural right of parents to control the kind of education

¹⁹⁷ With over ten million inhabitants, one third of all Canadians live in wealthy and influential Ontario, whose capital, Toronto, is the country's largest city (over four million people) and its financial and media hub.

to be given their children"¹⁹⁸, to their being a large minority, and to the fact that Protestants in Quebec enjoyed full denominational school rights. But members of the Church of Scotland, of England, Jews, Moslems, the Christian Reformed, ethnic minorities, independent school supporters, non-religious parents and others have also pressed for their rights.

A *Constitutional Act* of the British Parliament in 1791 established the provinces of Upper Canada (Ontario), and of Lower Canada (Quebec); in 1841 they were united within the colony of Canada and a common legislature was created, as well as municipal governments and the educational systems, soon thereafter. By 1848 the legislature had obtained that measure of autonomy known as *responsible government*: ministers became *responsible* to the electorate.

Queen Victoria's Canadian subjects sought schools for their children along denominational lines. •The *Day Act* (1841) extended the principle of dissenting schools, that was already applied in Canada East (Quebec), into Canada West (Ontario): where numbers allowed it, parents could set up schools according to their own religion. The act allowed not only Catholics but also different Protestant denominations to set up, in Canada West, schools that received provincial grants.

The following acts applied only to today's province of Ontario: •The *Hincks Act* (1843) closed the door to different Protestant denominations setting up their own schools: *separate schools* (i.e. schools that

¹⁹⁸ Catholic Education Council brief to the Hope Commission, 28 Dec. 1945, quoted in Walker, Franklin A., *Catholic Education and Politics in Ontario*, Vol. III, Toronto, Catholic Education Foundation of Ontario, 1986, p. 27.

separated from a *common school* district) might be either *Protestant* or Catholic. This Act is the foundation of all subsequent laws governing separate schools.¹⁹⁹ •By an 1847 act the final decision to establish or not a separate school was transferred to the municipal council. Previously, ten or more *freeholders or householders* (propertied residents) could found and run such a school on their own. •The *Common School Act* (1850) raised the number of petitioners needed for *separation* to 12 resident heads of families, but the local municipal authority was obliged to create the separate school whenever the petition was duly made.

In response to Toronto City Council's refusal to allow a second Catholic school, •an 1851 act (which applied to the whole United Province of Canada) permitted separate schools to be established in each ward of a city or town. •An 1853 act exempted separate school supporters from paying common-school property taxes.²⁰⁰ The tensions between francophone Catholics (concentrated in Canada East) and anglophone Protestants (the majority in Canada West) would eventually (in 1867) lead to the break-up of the United Province. •The *Taché Act* (1855) reflected this ongoing struggle. Catholic members of the legislature managed to introduce and pass this law whereby the delaying tactics of municipal councils in setting up separate schools were overcome: Canada West trustees were now allowed to deal directly with

¹⁹⁹ Cf Stamp, Robert M., *The historical background to separate schools in Ontario*, Toronto, Queen's Printer for Ontario, 1985, p. 2.

²⁰⁰ Cf *ibidem*, pp. 3-4.

the Chief Superintendent of Education for Upper Canada. This statute left a legacy of bitterness among militant Protestants.²⁰¹

•The 1863 *Scott Act* forms the basis of today's separate schools, since the BNA Act made permanent all the advantages granted to separate school supporters in this statute. The *Scott Act*, while applying only to Canada West, was passed on the strength of Canada East votes. Separate schools operating under the provisions of the *Scott Act* could, like their common school counterparts, offer instruction to the end of what today would be considered Grade 10, since there was at the time no sharp division between elementary and secondary education.²⁰²

1.1.1.2. 1867-1928

A cornerstone of the Constitution, s. 93 has greatly influenced the evolution of education in Ontario. In effect,

“separate school provisions existing *by law* in Ontario at the time of Confederation were given a constitutional guarantee. There was little controversy over section 93 at the various Confederation conferences or in the legislature of the United Province of Canada; most participants regarded it as a necessary aspect of the Confederation bargain; Quebec's Protestant minority and Ontario's Roman Catholic minority were guaranteed certain school rights. Subsequent disputes were not so much over whether separate schools should lose any right or privilege,

²⁰¹ Cf *ibidem*, p. 4.

²⁰² Cf *ibidem*, p. 5. Its official title is *An Act to Restore to Roman Catholics in Upper Canada Certain Rights in Respect to Separate Schools* (26 Victoria, Chap. 5).

but whether they should be allowed to *extend* their operations with public support along with the rest of the formal school system.”²⁰³

By virtue of s. 93, the Ontario legislature could “exclusively make Laws in relation to Education”, but “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”. Thus, had there been, in 1867 Ontario, separate Jewish, Moslem, or Baptist schools, today they would have the same status as Catholic schools now possess.²⁰⁴

•The 1871 *School Act* brought fully into the province-supported system what today are called secondary schools: all local taxpayers,

²⁰³ Stamp, *op. cit.*, p. 6. “Both Ontario and Quebec entered into Confederation on the condition that the educational rights of the religious minorities in those provinces were protected. This was one of the cornerstones of Confederation -- a condition precedent for the formation of Canada in 1867. Indeed, Sir Charles Tupper, a father of Confederation, speaking in the House of Commons in 1896, described the Confederation bargain in precisely that way, noting that without the education guarantees contained in section 93 of the British North America Act ‘the provinces would have been unable to obtain any confederation whatever’. (...) A unanimous Supreme Court of Canada has reaffirmed this historic bargain.” Quote from Ontario Attorney General Ian Scott’s statement to the Ontario Legislative Assembly, Re: Decision of Supreme Court of Canada Regarding the Constitutionality of Bill 30, L-1345-1, June 25, 1987.

²⁰⁴ The term separate was opposed to common: in 1871; however, the *School Act* changed the terminology, and common schools were from then on called public schools.

whether Catholic (separate-school supporters) or non-Catholic (public-school supporters) were forced to pay for secondary education. This act neglected to say where primary schooling ended and secondary education began. This was to cause much confusion and litigation. For the time being, elementary schools were deemed to include roughly the first two years of secondary instruction (Ontario's grades 9 and 10 today).²⁰⁵

•Between 1879 and 1913 ten Ontario acts: a) allowed the training of Catholic teachers; b) gave separate schools and boards their own inspectors; c) permitted *tenants* to direct their taxes to separate schools; d) allowed *corporations* to direct part of their local property taxes to separate schools; e) re-affirmed the principle that all taxpayers were presumed to support *public* schools unless they gave notice in writing of their wish to support separate schools; f) conferred the rights to establish *partial* (grades 9 and 10) or even *full* secondary schools (grades 9-12)²⁰⁶; g) allowed ten or more Catholic heads of families the right to set up a separate school board in rural areas, *even though there might not yet be a public school board from which to "separate"*²⁰⁷; h)

²⁰⁵ Cf Stamp, *op. cit.*, p. 7.

²⁰⁶ The terminology is mine. Few full secondary schools were created. Partial secondary schools were regarded by the government as the continuation of primary schools and therefore received less funding than their public counterparts.

²⁰⁷ This was of special importance in Northern Ontario, where the French Canadian population was on the rise.

obliged nuns and brothers to attend approved teacher-training institutions in order to obtain provincial certification.²⁰⁸

1.1.1.3. 1928-1950

Howard Ferguson, Conservative premier (1923-1930), attempted to keep Catholic electoral support, after the 1928 *Tiny* decision was handed down by London's Privy Council (see this chapter, 1.4.3.4.), by providing more funds for poorer separate schools.

In 1932 Martin Quinn formed the Catholic Taxpayer's Association (CTA), whose aim was to obtain a permanent legislated settlement. But Conservative George Henry, who succeeded Ferguson, did nothing on this issue -- and lost the 1934 election.²⁰⁹ New Liberal Premier Mitchell Hepburn tried but failed to give the CTA some of what it asked.²¹⁰ He then decided to aid separate school supporters by the less contentious means of provincial *equalization grants*, which channelled more money to poorer districts.²¹¹ A Conservative Premier, George Drew, took office in 1943. During those years the Catholic laity, Religious women and men, clergy and bishops tried to organize themselves to lobby and/or

²⁰⁸ Cf Stamp, *op. cit.*, pp. 7-12.

²⁰⁹ Cf *ibidem*, pp. 28-29.

²¹⁰ Amid acrimonious debate Hepburn's party passed the *Tax Assessment Act* (1936) whereby corporations were required to pay a specific amount of their property taxes to separate school boards. This law proved so unpopular and complicated that Hepburn himself obtained its repeal, in 1937.

²¹¹ From 1938 to 1941 the funds allotted to separate schooling rose from 10 to 20 per cent of the provincial share of total educational costs.

pressure the government to obtain their goal of full funding for separate schools. In 1943 the English Catholic Education Association of Ontario (ECEAO) was founded, emulating the Association canadienne-française d'éducation d'Ontario.²¹² The Ontario bishops decided to have a priest as head of ECEAO, and Rev. Vincent Priester was named.²¹³ He worked closely with Toronto Archbishop James C. McGuigan, the education spokesman for the province's bishops.²¹⁴

In 1945 Premier Drew appointed a Royal Commission on Education asking its chairman, Ontario Supreme Court Judge John A. Hope, and 19 other commissioners "to inquire into and report upon the provincial educational system". Drew desired advice on how best to modernize Ontario education and, *inter alia*, resolve the separate-school-funding controversy, postponing difficult political decisions. Five acrimonious years produced a divided document: a majority report, and the four Catholic commissioners' dissent. The most controversial proposal of the majority was that the grade structure of Ontario's schools be reorganized. Instead of elementary grades 1-8 (ages 6-13) and secondary grades 9-13 (ages 14-18), it suggested primary grades 1-6,

²¹² Under lay leadership since 1910, ACFEAO had successfully defended French-Canadian linguistic, cultural and religious rights.

²¹³ Some laymen would have preferred a lay Catholic as ECEAO head: the right to establish separate schools was vested in taxpayers, not the clergy; it was much easier for a lay spokesman to function in Protestant Ontario; and lay leaders were quite capable of mobilizing grass-roots support. Cf *ibidem*, p. 9.

²¹⁴ Priester thought his function should be to voice the wishes of the bishops and even to be controlled by the bishops -- without giving the appearance of being a purely Church organization. Cf *ibidem*, p. 4.

intermediate grades 7-10, and senior grades 11-13.²¹⁵ The anti-separate school commissioners' hope was that the government, in acting on the recommendations, would cut back funding to grades 1-6. This resulted in a religious and political controversy which led the government to shelve the report, thus blocking the adoption of most of its proposals.²¹⁶

1.1.1.4. 1950-1984

Throughout the 1950s Catholic lobbying was done to a large extent via the *quiet diplomacy* of Rev. Priester, ECEAO executive director and secretary. He helped improve somewhat the situation of separate schools.²¹⁷ In the 1960s, Catholic bishops and laity -- especially the Ontario Separate School Trustees' Association (OSSTA)-- made major gains for their cause (the extension of full provincial funding to the end of grade 13).

In 1962 the Ontario bishops presented Conservative Premier John Robarts with a brief calling for "the same advantages, the same rights, and the same opportunity to grow as is enjoyed by our secular

²¹⁵ The Hope Commission had been influenced by anti-Catholic and anti-French opinion, including "a lengthy, thoroughly-researched, well-written and venomous" Protestant brief submitted to the commission in December 1945. Cf *ibidem*, p. 23.

²¹⁶ Cf *ibidem*, pp. 17-72, and Stamp, Robert M., *The historical background to separate schools in Ontario*, p. 31.

²¹⁷ The policy of quiet diplomacy was advocated by some prominent lay Catholics, and initiated by the hierarchy. Cf Walker, Franklin, *Catholic Education and Politics in Ontario*, Vol. III, p. 85.

counterparts".²¹⁸ The government's response was to greatly increase in 1964 provincial subsidies, *but only up to grade 10*.

The government also established two new provincial committees of inquiry. The *Committee on Aims and Objectives of Education in the Schools of Ontario* (co-chaired by Emmett Hall and Lloyd Dennis) began its work in 1965. In 1966 the *Committee on Religious Education in the Province of Ontario*, chaired by J. Keiller Mackay, began its inquiry, which ended in 1969.

The 1968 Hall-Dennis Report, *Living and Learning*, was signed by all its members, including the Catholic commissioners.²¹⁹ Even though the report did not explicitly suggest that funding be extended to grades 11-13 of separate secondary schools, it was more or less implied in its call for continuous education.²²⁰

²¹⁸ Quoted in Stamp, Robert M., *The historical background to separate schools in Ontario*, p. 31.

²¹⁹ It recommended a modernization of education in Ontario: the system of grades was to be replaced by a continuous system; students should not be failed; formal grammar was to be avoided; the development of the child was more important than information, etc. Cf Walker, Franklin, op. cit. pp. 217-218.

The Mackay Report is studied elsewhere in this thesis.

²²⁰ "The Separate School people of Ontario will find that we have made a significant contribution towards attainment of the goal they are seeking. The programme we have recommended can only be implemented in a school system that is integrated and continuous." Letter of Co-Chairman Emmett Hall

Davis says No. Education in Ontario reflected the changes of the late sixties.²²¹ In 1971 the former education minister and new Conservative Premier William Davis agonized over separate school funding. On August 31, he finally decided not to alienate Protestant support and announced that full funding would not be extended to cover the last three grades of separate schooling. The *Tiny* case had established the principle that separate funding went until grade 10. The Hope Report had not eroded that principle -- constitutionally could not. The 1962 bishops' brief had led to equality -- greater funding for the separate system, approaching the level of the public system²²² -- but the line seemed to be even more firmly drawn at grade 10. By the mid-sixties, the issue had thus clearly crystallized: Were Catholic secondary schools to be funded up to and including grade 13? The pressure constantly mounted on the Ontario government.²²³ Some Catholics wanted to join with independent schools

to Rev. Carl J. Matthews SJ, 8 July 1968, quoted in Walker, Franklin, op. cit. p. 220.

²²¹ The Second Vatican Council and changing public opinion contributed to many of those changes. The OSSTA, made up mostly of lay Catholics and run by them, took over where the ECEAO (headed by a priest) and the bishops had left off.

²²² Premier John Robarts' foundation plan.

²²³ For example, a Toronto high school Dads' Club in 1965 formed an action committee to act politically against "the injustices". Toronto Archbishop Philip Pocock welcomed the participation of the parents, but he and the other Ontario bishops wanted to guide any campaign. In Rome for the final session of the Second Vatican Council, the Ontario bishops met, in November of 1965. They decided to try to coordinate the parents of secondary school students. Wrote

to lobby the government for subsidies for secondary private schools. ²²⁴ Those Catholics who continued to advocate provincial grants for private high schools were not on the same wavelength as the bishops. In late 1967, a Catholic High School Boards' Association study congress adopted a *Provincial Education Program* to persuade the public to support extension of funding. The major newspapers attacked it, but its literature spread rapidly. In early 1968 OSSTA agreed to formally support the *Program*. As the elected representatives of Catholic taxpayers, the trustees were the most important part of the full-funding coalition. In May of 1969 they presented a brief to the government entitled *Equal Opportunity for Continuous Education in Separate Schools of Ontario*. This was followed up with a publicity and lobbying campaign. The Catholic Parent-Teachers' Association and the teachers' association actively participated. Students joined in,²²⁵ in the spirit of the times.²²⁶

Pocock: "We are aware of the rather feverish activity, especially among the laity, with regard to education at the secondary school level and have taken the preliminary steps to coordinate and channel this activity." Letter to Rev. Carl Matthews SJ, 21 November 1965, quoted in Walker, Franklin, op. cit. p. 290.

²²⁴ But a key participant in the education debate, Rev. Carl Matthews SJ, opposed that strategy, and he convinced others. Cf Walker, Franklin, *ibidem* p. 292.

²²⁵ In May, 1968, Catholic students from 60 secondary schools met in the city of St. Catharines to kick off what would become the Ontario Catholic Students' Federation.

²²⁶ The students demonstrated, wrote (echoing Martin Luther King's *I have a dream* speech), and held rallies, such as the one on 25 October 1970, where

By 1970 the opposition Liberal Party and New Democratic Party had changed their stance and given their support to separate school full funding. But Davis' prime consideration in rejecting full funding was, he said, "the value of a single, universally accessible, publicly-supported secondary school system".²²⁷ The separate school trustees criticized Davis' "backward-looking" statement, and so did the Ontario bishops, pointing to seven other Canadian provinces where there was greater financial support for Catholic high schools. Thanks among other things to immigration, the Catholic student population had greatly grown in the twentieth century, and during the seventies it was about one-third of the total number of pupils. Even though there was no government funding for the last three grades, many private Catholic secondary schools managed to survive and grow. Though some closed, new ones were established. In 1968 around 33,000 students were enrolled in Catholic secondary schools; their number had more than doubled 15 years later.²²⁸ These schools benefited from a general disenchantment with standards and discipline in the public system, and also from the sacrifice of parents, students, and Catholics in general, who supported them with fund drives, the payment of higher fees, etc. Davis opted to increase the aid to separate schools in non-controversial ways.²²⁹ In

more than 20,000 youth and other separate school supporters met in Toronto's Maple Leafs Gardens.

²²⁷ Statement by the Honourable William Davis, 31 August 1971. Quoted in Walker, Franklin, *op. cit.* p. 354.

²²⁸ 70,500 in 1983. Cf *The Catholic Register*, Toronto, 28 January 1984.

²²⁹ Through special "weighting" concessions Davis from year to year increased grants for grades 9 and 10 (which were still not considered to be

1982 OSSTA confidentially petitioned the government, pointing out, among other things, how Catholics were subject to double taxation for secondary schools. On 30 April 1984 the education committee of the Ontario bishops presented a statement to Davis backing the Catholic trustees: they asked for full funding of secondary separate schools, and for state help to private schools of all faiths.²³⁰

Davis says Yes. On 12 June 1984, three months before John Paul II's scheduled visit to Ontario, Davis announced to the legislature that the Catholic separate school boards would be permitted to establish a full range of elementary and secondary education and, as part of the public system, to be funded accordingly. This would begin to be implemented in September of 1985.²³¹ Davis also announced that he would appoint a

secondary schooling by the government). And in 1981 he allowed separate schools to conduct province-funded special education classes for handicapped students, just like the public schools.

²³⁰ "Children must be educated somewhere at public expense and since it is visibly not possible to adapt public schools to satisfy the legitimate philosophical and religious views of a respectable segment of the population, it seems unfair that those who work to provide acceptable education for their children in alternate ways should be deprived of reasonable support from public funds. Instead now, they are doubly taxed." Ontario Conference of Catholic Bishops, Statement of the Education Committee. Quoted in Walker, Franklin, *op. cit.*, p. 375.

²³¹ The *Education Act* would be amended accordingly. To protect the jobs of public school teachers, separate school boards were expected to hire transferred non-Catholic teachers for ten years. And they were expected to accept non-Catholic students.

commission to study help for private schools.²³² The Pope visited Canada in September.²³³ Davis announced his resignation as premier late in 1984. All governments since -- Liberal, New Democratic, and Conservative -- have continued the full funding policy.

1.1.1.5. 1984-1997

Bill 30. Liberal David Peterson formed a new centre-left government in June 1985, ending four decades of Conservative Party rule. Davis' decision 12 months before had created controversy in the province. Perhaps because of the ongoing debate, Peterson, though confident of the constitutionality of the reform, asked the Ontario Court of Appeal to rule on Bill 30, the full-funding legislation (*An Act to amend the Education Act*) his government introduced in the Legislature in July 1985. It was declared constitutional both by the Ontario Court of Appeal and the Supreme Court (see below).

²³² Cf *Elementary and Secondary School Funding in Ontario*. A statement to the Legislature by William G. Davis, Premier, Toronto, quoted in *ibidem*, pp. 375-376. The legislature stood up to give the premier a standing ovation.

²³³ On September 15, at Toronto's Downsview airport, 600,000 people attended a papal Mass. In a seven-language homily the Pope, when speaking in Spanish, asked parents to ensure that their children received Catholic education. Cf *Insegnamenti di Giovanni Paolo II*, VII,2 (1984), Libreria Editrice Vaticana, 1988, p. 557. That morning, he had told native people, who comprised most of the 100,000 who greeted him at the Huronia Canadian Martyrs' Shrine near Midland, Ontario, that Christianity helps to preserve and enrich their culture, and that Christ animates the very centre of all cultures. Cf *ibidem*, pp. 544-549.

The Pope and the Ontario bishops. In 1988 John Paul II commended the bishops of Ontario for their

“successful efforts to promote measures that uphold the Church's right to fulfill her educational mission, and that *support parents* in the free exercise of their right to educate their children in accordance with their religion. Public support for the Separate School system in Canada is a great blessing not only for Catholics; all of your national life is enriched by the intellectual and moral formation these schools provide for their students.(...) Even though the financial viability of Catholic schools has been guaranteed, the task remains of ensuring their *Catholic character*.”²³⁴

²³⁴ The Pope asked the bishops to ensure that true Christian formation be given in Catholic schools, through clear and faithful catechesis, and by integrating all the subjects taught in the light of the Gospel. Above all, “pour que la formation porte ses fruits dans la vie des jeunes (...) leurs parents et leurs maîtres doivent être imprégnés d'esprit *chrétien* dans leur *façon de penser et leur façon d'agir*. Comme ‘éducateurs’, au sens plein du terme, les enseignants catholiques ont la responsabilité particulière de se laisser guider dans leurs activités par une conception chrétienne de la personne humaine en accord avec le magistère ecclésiastique.” He encouraged the bishops “to find even better and more effective ways to *recruit and train* lay teachers for the Separate School system, so that the goals of Catholic education may be fully realized.” *Address to the bishops of Ontario on occasion of their ad limina Apostolorum visit to Rome*, 26 April 1988, in *Insegnamenti di Giovanni Paolo II*, XI,1 (1988), Libreria Editrice Vaticana, 1989, pp. 1040-1042. The Pope also stated: “A privileged place for the formation of young people, second in importance only to their families, is the *school* they attend. Accordingly, the Second Vatican Council said that all schools should provide an education that is in accord with the moral and religious principles of *families*, that respects the

Summing up Ontario's educational legislation as far as explicit and implicit constitutional rights of parents are concerned, David Brown describes the *Education Act (1980, 1990)* thus:

"Whereas a few sections of the Act still echo the original principle of significant parental control over education (e.g. five heads of Roman Catholic families can meet to establish a separate school zone), and in a greatly diluted sense elected trustees account to parents for the education provided in public schools, our present education system is, at its core, one controlled directly by the Minister of Education and Training and his officials. Sections 8 and 11 of the Act provide the Minister with

right of the young to have their consciences formed on the basis of *sound morality*, and that respects their right to *know and love God* more perfectly. The Council also reaffirmed the Church's right to establish her own schools, a right which is of the greatest importance for preserving freedom of conscience, for protecting parents' rights, and for advancing culture." (p. 1040) "'More than ever before, a Catholic school's job is infinitely more difficult, more complex, since this is a time when Christianity demands to be clothed in fresh garments, when all manner of changes have been introduced in the Church and in secular life, and, particularly, when a pluralistic mentality dominates and the Christian Gospel is increasingly pushed to the sidelines.' (...) The Catholic school's task 'is fundamentally a synthesis of faith and life: the first is reached by integrating all the different aspects of human knowledge, through the subjects taught, in the light of the Gospel; the second by growing in the virtues characteristic of the Christian'" (pp. 1040-1041). Emphasis in the original.

virtually total control over every aspect of education, including prescribing the courses of study."²³⁵

Moreover, few sections of the act grant parents *direct* control over their children's education: some influence over their placement in special education programs (s. 8(3)); the possibility to enrol them in French immersion programs (s. 8(1)25); an ability to leave the system by sending them to private schools or educate them at home (s. 21(2)(a)). Section 51(1), which in theory allows parents to request religious instruction for their children, applies of course in separate schools but no longer in public schools, as per court cases (see Part I) and regulations of the Ministry of Education in the wake of those decisions.

The Ontario *Education Act* defines *school* as an educational institution under the jurisdiction of a district board of education. There are four types of board: anglophone public, francophone public, anglophone separate, and francophone separate.²³⁶ Since an independent (private) school or a home school are not included in the definition, the overwhelming number of obligations imposed by the act are on public and separate schools and boards.

²³⁵ Brown, David, *Parental Choice in Education: Right or Privilege?*, a paper delivered 26 November 1996 at the Responsible Choice in Education Conference (sponsored by the Centre for Renewal and Public Policy).

²³⁶ In addition, there is one historical anomaly: Burkvale Protestant Separate School, established in 1883, in the town of Penetanguishine in Simcoe County. Cf Patterson, Renton, *Not Carved in Stone*, Harrow, Ontario, Friends of Public Education in Ontario, 1992, p. 36.

1.1.2. Alberta and Saskatchewan

Like Ontario, separate schools are constitutionally entrenched. When in 1905 they were carved out of the Northwest Territories, these two provinces went through religious-political turmoil similar to Manitoba's (see below).

The controversy over the confessional school issue pitted *French nationalist* Catholics (such as Quebec crusader Henri Bourassa and some francophone bishops) against more *moderate* English-speaking Catholics (such as Toronto Archbishop John Walsh). Pope Pius X's Secretary of State Raphaël Merry del Val, and Donato Sbaretti, Vatican apostolic delegate in Ottawa from 1902 to 1910, helped smooth over the controversies in a Canada led by Prime Minister Wilfrid Laurier, a Liberal and a Catholic who was constantly looking over his shoulder, trying to accommodate all sides as best he could.

After much wrangling, both the *Alberta Act* and the *Saskatchewan Act* contain identical sections 17:

"17. Section 93 of The British North America Act, 1867, shall apply to the said province, with the substitution for paragraph (1) of the said section 93, of the following paragraph:

'(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the North-west Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.'

(2) In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29 or any Act passed in amendment thereof, or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

(3) Where the expression 'by law' is employed in paragraph 3 of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30, and where the expression 'at the Union' is employed, in the said paragraph 3, it shall be held to mean the date at which this Act comes into force."²³⁷

The effect of these identical-twin sections is that the legislatures of these two provinces cannot deprive a Protestant or Catholic minority of any right or privilege with respect to separate schools which it possessed under the *Ordinances of the Northwest Territories, 1901*.²³⁸ The immediate cause of these two sections is the *Manitoba schools question*. The short-, medium- and long-term result of these two sections has been to protect the rights of many parents in the education of their children, as far as province-funded denominational schools are concerned.

In Appendix IV excerpts from the preamble and from some sections of the *School Act* of the province of Alberta are reproduced. They show

²³⁷ *Alberta Act, 4-5 Edw. VII, c. 3, 1905 (Canada). Saskatchewan Act, 4-5 Edw. VII, c. 42, 1905 (Canada).*

²³⁸ Cf D. Schmeiser, quoted in Magnet, *op. cit.*, p. 787.

that separate schools, Catholic or Protestant, enjoy the same constitutional protection that s. 93 gives to Ontario Catholic parents.

It can be concluded that the s. 17-based separate school rights of Alberta and Saskatchewan residents are very similar to the s. 93-based separate school rights of Ontario residents.

1.2. Explicit Parental Constitutional Rights to Denominational Schools Modified by the Courts: New Brunswick, Manitoba, Nova Scotia, British Columbia, Prince Edward Island

Introduction

In this section we deal with those provinces where the explicit parental constitutional rights to province-funded denominational schools have been judicially re-interpreted, i.e. the right to funding has been abrogated by (non-Canadian) judges.

Section 93 protects the right or rights in existence at the time of the union: 1867 for the four original provinces (Ontario, Quebec, New Brunswick and Nova Scotia), and later dates for the two provinces that do not have *special* provisions in their respective terms of union on denominational school rights: British Columbia and Prince Edward Island.

The four last-mentioned provinces (N.B., N.S., B.C., P.E.I.) had *no denominational school legislation when they joined Canada*. Therefore, s. 93 applies to them in the sense that the exceptions or safeguards of the sub-sections *do not fully apply to them*: the courts early on stated that there were no “classes of persons” which had “*by law* in the province at the union” any “right or privilege with respect to denominational schools” (sub-s. (1)).

New Brunswick and Nova Scotia, unlike Quebec and Ontario, had no laws on confessional education in 1867. Nor did British Columbia have denominational school legislation in 1871, or Prince Edward Island in 1873.

1.2.1. *New Brunswick*

Already in 1874 the Privy Council based itself on the non-existence of denominational school legislation in New Brunswick to decide -- in the first landmark case on this issue -- that the rights of s. 93(1) did not apply in that province -- and, by extension, to Nova Scotia, British Columbia and Prince Edward Island.

The case was *Maher v. Town of Portland*: the Privy Council disregarded the reality that many schools in New Brunswick were and had been before 1867 denominational *de facto*. It held that they were not denominational *de iure*.²³⁹

1.2.2. *Manitoba*

Introduction

Two Manitoba cases have gone down in Canadian history. They are more significant than *Maher*: they are *Barrett* and *Brophy*.

²³⁹ *Wheeler's Confederation Law of Canada*, 1896, p. 362.

However, all this does not mean that these provinces cannot fund, partially or totally, separate schools. In fact, British Columbia does so, and we will study jurisprudence on the matter. See *Caldwell v. Stuart*, *infra*.

Section 22 of the *Manitoba Act, 1870* (of constitutional level because by it the new province was created) guaranteed denominational school rights by repeating key provisions of s. 93:

“22. In and for the Province, the *said* 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 *or practice* in the Province at the Union:

(2) An appeal shall lie to the Governor General in Council from any Act or decision *of the Legislature of the Province*, or 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.”

The words in italics are those changed or added by the legislator. Sub-section (2) of s. 93, which referred to Quebec, was logically dropped. The first part of sub-s. (3) of s. 93 was also eliminated.²⁴⁰ But the gist of sub-s. (3), and all of sub-s. (4) of s. 93, were reproduced in s. 22, as sub-ss. (2) and (3) respectively.

All of this is relevant because many Franco-Manitoban parents felt secure with these apparently strengthened guarantees, in the sense that their new province could evolve as the original ones seemed to be

²⁴⁰ “Where in any Province a System of Separate or Dissident Schools exists by Law at the Union or is thereafter established by the Legislature of the Province.”

evolving, that is, with Catholic and Protestant schools constitutionally safeguarded. Judges would decide otherwise.

In 1890 the by then dominant Protestant anglophone majority moved towards the secularization and anglicization of the province, by eliminating some Christian holidays and above all by passing a *Public Schools Act* whereby all schools had to be state-run and non-confessional, even though the teaching of religion was tolerated.

1.2.2.1. The Privy Council's Emptying of the Constitutional Right to Funding: Barrett (1892)

Mr. Barrett, a taxpayer who, like other separate school supporters, was being doubly taxed (to help maintain the new state-run schools) moved to quash a by-law of the City of Winnipeg providing for the collection of public school taxes, contending that the 1890 *Public School Act* was unconstitutional.

The Supreme Court *unanimously agreed*, and held that the Act violated s. 22 by prejudicially affecting rights and privileges with respect to province-funded denominational schools which Catholic parents had "by practice" in the province in 1870.

The Privy Council *reversed this judgment*, however, holding that no such rights and privileges were prejudicially affected, and that the only right or privilege possessed by Catholics, by law or practice, was that of *establishing and maintaining Catholic schools*.²⁴¹

²⁴¹ Cf *Barrett v. City of Winnipeg* (1891), 19 S.C.R. 374, and Schmeiser's comment quoted in Magnet, *op. cit.*, p. 785-786.

This reversal is difficult to justify, to say the least. It completely disregards the word "practice".²⁴² "Il s'agit d'une décision fort néfaste pour l'unité nationale puisqu'elle constituait la modification judiciaire la plus malheureuse de la Constitution faite par le Conseil privé."²⁴³

1.2.2.2. Reaction to the Emptying of the Constitutional Right to Funding: Brophy (Privy Council, 1895), and Affari vos (Pope Leo XIII, 1897)

Again some Christian parents appealed -- this time to the Governor General, under s. 22(2). When their right to thus ask for help from the federal executive in Ottawa was put in doubt, a second case reached the Privy Council in London.

This time the Privy Council let its other shoe drop. In *Brophy v. Attorney General of Manitoba*²⁴⁴, it decided that these parents did have the right to claim aid according to s. 22 (2), i.e. the right of s. 93 (3). Among the reasons given was that between 1870 and 1890 the separate school supporters had acquired the right to control and manage those institutions, and to receive their fair share of provincial tax money.

The upshot was that the federal Conservative Party, in power for most of Confederation, fell, when it proposed remedial legislation which would have re-established separate schools in Manitoba. Parliament was

²⁴² Cf. Schmeiser, David, *Civil Liberties in Canada*, Oxford, 1964, pp. 158-169.

²⁴³ Garant, op. cit., p. 49, who agrees with Bale, Gordon, *Law Politics and the Manitoba School Question: Supreme Court and Privy Council*, (1985) 63 *Canadian Bar Review* 461.

²⁴⁴ (1895) A.C. 202.

dissolved before voting on the bill. New Liberal Prime Minister Laurier reached an agreement with Manitoba Premier Thomas Greenway. The Laurier-Greenway accord established that *there would be no federal "remedial law for the due execution of the provisions of" s. 22* -- on the other hand, instruction in French and in religion were given more leeway.

Delegations and counter-delegations went to Rome, in a dispute among Canadian Catholics. Laurier backers presented Pope Leo XIII a petition signed by the prime minister and 43 other parliamentarians. Mieczeslaus Cardinal Ledochowsky, head of the Congregation of Propaganda Fide and a veteran of the *Kulturkampf* battles against Bismarck, did not understand the moderation of the Canadian Liberal prime minister. Leo XIII sent an apostolic delegate, 32-year-old Msgr. Raphaël Merry del Val, to Canada, to study the issues first-hand.²⁴⁵

After his return, Leo XIII sent the Encyclical *Affari vos*, dated 8 December 1897, to the Canadian bishops. In it he commends Canadian Catholics and in particular their pastors for their defense of Catholic and parental rights in education, specifically in Manitoba, where the law of 1890 had violated those rights.

The Pope says that education -- if moral formation, which is necessarily based on religious values, is not taken care of -- has deleterious effects on youth, the future of the Church and of Canada. The bishops, the Pope repeats, have done well to defend these sacred

²⁴⁵ Cf Hennesey, James, *La Chiesa in America Settentrionale*, in Guerriero, Elio and Zambarbieri, Annibale, eds., *La Chiesa e la Società Industriale (1878-1922): Storia della Chiesa*, vol. XXII/1, pp. 461-496, at 493-494.

rights.²⁴⁶ It belongs to parents, recalls the Pope who wrote so much on social doctrine, to decide by whom their children should be taught and

²⁴⁶ "The Apostolic See, furthermore, has never ceased to work, in conjunction with your zeal and with that of your predecessors, for the education of youth, on whom are based the highest hopes of Christian and civil societies. Thus, for the education of youth in virtue and in letters, many schools have been built, promoted by and under the care of the Church (...) For this reason it is with the greatest concern (...) that we have turned our thoughts to those events that have recently taken place as regards the Catholic education of Manitoba youth. (...) We are speaking about what was decided seven years ago by the legislators of the Province of Manitoba regarding the education of children. The legislators, in the act of union with the Canadian federation, had established that Catholic children had the right to be instructed and educated in public schools according to the dictates of their own consciences: this right has now been abolished by a contrary law." Leo XIII goes on to explain that it is wrong that, in order to have access to learning, children should have to be taught in places where the faith is neglected by ignorance or positively combatted, or where its doctrine is ridiculed and its fundamental principles are rejected. In some countries the Church has been forced to accept that, but she has tried to take all the measures necessary to avoid dangers. "At the same time, that type of truly bad instruction should be avoided at all costs, which accepts without any discrimination and considers on the same level all religious beliefs, as if, in that which regards God or divine things, it were of no import to know what is correct or not, to follow what is true or what is false." Leo explains that non-Catholics would agree that moral values need to be based on religious truth: justice and reason require that the school furnish science and moral wisdom. Therefore, books used by Catholic teachers should be approved by the bishops, and teachers should be free to teach according to the Catholic faith. *Acta Sanctae Sedis* 30 (1897-98), pp. 356-362. The English translation is mine, since during the course of this

who should be their "praeceptores vivendi": this is a *parental right*. Thus, when Catholic parents ask -- and they have the right to -- that the training of the teacher be in accordance with the religion of their children, they are making use of this right. There is no greater injustice for parents than to place them in the alternative of either having their children grow up rude and ignorant, or of putting them in a clear situation of danger regarding supreme things.²⁴⁷

The Pope also addresses the internal Church problems.²⁴⁸

research I have not been able to find one. For an Italian translation, cf *Enchiridion delle Encicliche 3: Leone XIII (1878-1903)*, Bologna, EDB, 1997, nos. 1354-1366.

²⁴⁷ "Videre autem de suis quemque liberis, apud quos instituantur, quos habeant vivendi praeceptores, magnopere pertinet ad patriam potestatem. Quocirca cum catholici volunt, quod et velle et contendere officium est, ut ad liberorum suorum religionem institutio doctoris accommodetur, iure faciunt. Nec sane iniquius agi cum iis queat, quam si alterutrum malle compellantur, aut rudes et indoctos, quos procrearint, adolescere, aut in aperto rerum maximarum discrimine versari." *Acta Sanctae Sedis* 30 (1897-98), p. 359. For an Italian translation, cf *Enchiridion delle Encicliche 3: Leone XIII (1878-1903)*, Bologna, EDB, 1997, nos. 1354-1366.

²⁴⁸ Leo XIII recommends a pacifying of spirits among Canadians Catholics; he bemoans the divisions among Catholics at that crucial time, when charity among Catholic politicians and journalists and filial obed

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Much of what was said a century ago remains unresolved in Manitoba, where parents do not have the protection of sub-s. 22(1), emasculated by *Barrett*, nor of sub-ss. (2) and (3), which, after the Conservative defeat in 1896, have never been used (either for the sake of Manitoban parents or of parents of any other province). At the same time, thanks to *gentlemen's agreements*, there has been Catholic religious instruction in some Manitoba schools throughout the years.

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1.3. Explicit Parental Constitutional Rights to Denominational Schools Modified by Constitutional Amendments: Quebec and Newfoundland

1.3.1. Quebec

Introduction

Reflecting the democratization, secularisation, and *pluralization* of its society in the last four decades of this century, a new chapter is being written in the homes and schools of Quebec at the dawn of the 21st century.

Until recently Quebec was in some ways a mirror image of Ontario. With its roots in s. 93 of the BNA Act, Quebec's system of education, like Ontario's, was based on a majority-minority denominational schools set-up. Nevertheless, it evolved differently.

A 1997 constitutional amendment opened the door to a reform of the relevant Quebec legislation. Linguistic school boards replaced confessional school boards, after the 130-year-old constitutional guarantee of s. 93 had been eliminated.²⁴⁹

Nota bene, nevertheless, that in 1975 the *quasi-constitutional Charte des droits et libertés de la personne* was passed.

The *Séminaire de Québec* was founded by Blessed François Laval, first bishop of Quebec, in 1668. Including primary, secondary and *tertiary* schooling, it was one of the first North American institutions of higher learning, and in 1852 became the Catholic *Université Laval*. Before the

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arrival of the British in 1760, many Catholic diocesan priests and Religious (Jesuits, Sulpicians, Ursulines) opened schools. Parents were directly involved, and there were lay teachers, including notaries and itinerant educators. Boys who were headed towards the priesthood, medicine and law, and girls, were favoured as far as formal education was concerned.

From the 1760s to the 1860s efforts by British rulers to anglicize and secularize education floundered, due to the stubborn resistance of French Canadian parents and religious leaders. This led, as we have seen, to the development of minority religion education rights, in the provinces of Ontario and Quebec.

The BNA Act solidified the entente between French Catholics and English Protestants, as far as education of their children was concerned. Quebec was the first province of the new state to establish a ministry of public instruction: it lasted from 1867 to 1876. Important education legislation was enacted in 1869 and 1876; in this last year the post of minister was downgraded to that of superintendent of public instruction, to be advised by the *Conseil de l'instruction publique*, which in turn was composed of two committees. In the Catholic Committee, all bishops who were heads of Quebec dioceses were ex-officio members, plus an equal number of Catholic parents. The Protestant committee had similar representation of religious leaders and of parents.

1.3.1.1. Educational Reform

In 1961 Jean Lesage's new Liberal government named a commission to study the system of education and propose reforms.

The *Commission royale d'enquête sur l'enseignement*, better known as Commission Parent (because of its president, Msgr. Parent, not

because it necessarily reflected opinions of parents) issued its report in five volumes, from 1963 to 1966. Already in 1964 the government passed legislation which profoundly changed the educational landscape: a law on the Ministry of Education (also known as Bill 60), and a law on the *Conseil supérieur de l'éducation*. They were two of ten statutes on educational reform enacted by the Lesage government (1960-1966).

The new ministry of education centralized almost everything, from teacher training to religious instruction. It created a new Catholic Committee and a new Protestant Committee, within the *Conseil supérieur de l'éducation*. Both these committees were placed under the full control of the government. The *Comité catholique* was charged with supervising the confessionality of "Catholic" schools. It was asked to draw up regulations that would apply to Catholic schools without having the power to see to it that they were applied.

Without entering in depth into the educational reform of the 1960s, it is appropriate to touch on certain aspects thereof, beginning with the Parent Report itself. The Parent Commission set three global objectives to modernize education in Quebec: 1) equality of opportunities, 2) accessibility to tertiary education for all, and 3) preparation of students for life and work by means of a comprehensive (*polyvalente*) and continuing formation. It suggested centralizing the planning, financing and management of education in the Quebec government, especially through the ministry of education and the *conseil supérieur*, as an advisory body to the minister. It encouraged the downsizing of the private sector. It favored substituting the state for the Church in the role

that the latter had been largely playing. The rights of parents got lost in the shuffle. Priority was given to the public sector -- not to them.²⁵⁰

1.3.1.2. Le Comité catholique

The new dispensation had immediate effects on Catholic education. Before 1964, all programs, textbooks, and teacher training schools fell under the direct and exclusive authority of the Catholic Committee, comprised by an equal number of Quebec bishops and of lay Catholics named by the government. Catholic educators studied at Catholic teacher training schools (*écoles normales*).

By 1982 school board trustee and educational critic Michel Pallascio was decrying:

“On a substitué aux écoles normales catholiques, l’Université d’État neutre pour former les maîtres. (Le) Comité catholique a reçu mandat de faire des règlements s’appliquant aux écoles catholiques sous l’aspect moral et religieux sans cependant lui accorder l’autorité nécessaire pour voir à l’application de ses règlements dans les écoles catholiques. Les structures ‘de sommet’ (...) n’ont pas empêché la dégradation des écoles catholiques, qui se poursuit depuis plus de quinze ans. Cette dégradation est due surtout à la négligence à peu près totale du ministère vis-à-vis de la formation des maîtres en fonction de la mission d’éducation chrétienne des écoles catholiques. C’est un fait évident, que

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déplorent les parents de foi catholique et l'ensemble de la population catholique, toujours majoritaire au Québec."²⁵¹

To what extent were (and, even after the 1997 constitutional amendment and the 1998 educational reform, are) parental rights in the education of their children respected by the Catholic Committee? In June 1987 the Quebec government published a 29-page document entitled *La juridiction et les responsabilités du Comité catholique*²⁵², with the aim of clarifying the powers of this Committee.

"Peut-on assurer cette gestion (de la confessionnalité) par un ministère et un gouvernement qui sont neutres (...)? Comment garantir les droits des catholiques alors que les évêques perdent leur droit de regard, de supervision et de décision à l'égard des institutions publiques confessionnelles?"²⁵³

The document's reply to its rhetorical question is that in 1964 the Quebec government created a new *Comité catholique*: an arms-length body, ten of whose 15 members are named by the government itself, and five by the Quebec bishops.

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This body has great powers: it manages the *confessionalité* of recognized Catholic public schools in the province. The 15 members (only one of whom, in 1997, was a bishop²⁵⁴) decide what part of, and how, the Catholic faith should be taught, who should teach it, etc. It does not even have the last word, either: this belongs to the government.

Little wonder that Catholic schools in Quebec have been sometimes considered Catholic in name only.²⁵⁵

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Despite their lack of representativeness, the Quebec government considers the Comité members --*who are not elected like school board trustees* and who are often necessarily far-removed from local circumstances -- to be representatives of Catholics (and thus of Catholic parents).

“Pour l’État et le monde scolaire, le Comité catholique se trouve légitimement constitué et autorisé comme représentant des citoyens qui désirent pour leurs enfants une école confessionnelle de foi catholique ou du moins une éducation religieuse catholique. Ainsi, aux yeux du pouvoir civil, le Comité catholique est le représentant officiel de la population catholique en ce qui concerne l’éducation chrétienne scolaire. (Il) constitue ainsi le canal normal et officiel par où s’expriment les attentes et les revendications de la population catholique. Cette fonction d’interlocuteur officiel de la population devient, dans le contexte actuel de diversité d’opinion parmi les catholiques, (...) plus nécessaire (...) et plus difficile.”²⁵⁶

As if realizing the audacity of this statement, the document attempts to justify it by indirectly quoting Maurice Cardinal Roy, Archbishop of

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A Catholic school cannot be called Catholic simply because it gives instruction in Catholicism. Many secular institutions do a much better job at that. (Some) religion teachers and pastoral animators (...) complained of a lack of a forceful religious presence in the school and that the school is Catholic in name only.”

²⁵⁶ Comité catholique, Conseil supérieur de l’éducation, Gouvernement du Québec, *La juridiction et les responsabilités du Comité catholique*, Sainte-Foy, Québec, 1987, p. 11.

Québec City during the 1960s and president of the *Assemblée des Évêques du Québec* (the AEQ is not a bishops' conference).²⁵⁷ Sensing that that is not enough, the document offers a second non-official quote.²⁵⁸

²⁵⁷ "Extrait du procès-verbal de la 9e réunion du Comité catholique, 15 juillet 1965. (...) Le cardinal Maurice Roy (...) reçoit le Comité catholique à un dîner non officiel (...) Le cardinal se déclare très heureux d'avoir l'occasion de rencontrer le Comité catholique et profite de ce premier contact pour exposer aux membres le rôle que le Comité catholique est appelé à jouer auprès du ministre de l'éducation. L'Assemblée des Évêques du Québec, dit le cardinal, a accepté qu'un groupe de personnes représentant l'Église, les parents et les éducateurs exercent certains pouvoirs qui, en principe, reviennent de droit à l'Église. L'exercice d'une partie du magistère de l'Église par cette modalité moderne que représente le Comité catholique du Conseil supérieur de l'éducation, modalité acceptée par l'Église de concert avec l'État et instituée par une loi de l'État, est certainement une preuve que l'Église sait évoluer (...) Le rôle du Comité catholique est grand puisqu'il doit se prononcer sur l'aspect religieux catholique et moral dans les affaires de l'éducation. Son Éminence dit toute la confiance que l'Assemblée des Évêques met dans le Comité catholique et souhaite que des contacts fréquents s'établissent entre le Comité et les représentants de l'Église (...) Le Comité remercie le cardinal de l'avoir invité à cette première rencontre avec l'Église et, conscient de son rôle délicat et de sa grande responsabilité, il l'assure de son effort constant et éclairé dans l'exercice des pouvoirs que lui confère la loi." Ibidem, p. 25.

²⁵⁸ "À la 18e réunion du Comité catholique tenue les 17-18 mars 1966 à Montréal, le cardinal Maurice Roy recontra les membres du Comité catholique. Le procès-verbal rapporte ainsi ses propos: 'Le cardinal rappelle le double mandat (...) venant de l'État et donné par la Loi du Conseil supérieur de l'éducation et (...) venant de l'Église qui délègue au Comité des pouvoirs et des

The document thus affirms that an agreement was reached in 1964 between the government and the Quebec episcopate, whereby the bishops consented to the fact that the law conferred on the *Comité* legal jurisdiction in overseeing the religious dimension of education.

“Certes, l’entente entre le gouvernement et l’épiscopat n’est pas un concordat. Mais elle est claire et bien établie par un échange de correspondance.”²⁵⁹

responsabilités qui sont ceux et celles de l’Église, plus particulièrement de la hiérarchie. (...) Si, par son mandat reçu de l’État, le Comité catholique a la responsabilité des déterminations et des orientations religieuses dans les institutions d’enseignement catholiques, le Comité, de ce fait, se voit donc confier par l’Église (...) la charge de déterminer en son nom ce qui est vraiment la responsabilité de l’Église.” Ibidem, p. 12.

²⁵⁹ Ibidem, p. 12, where the following can also be read: “En exerçant son rôle dans le champ de préoccupation des ministères de l’Éducation et de l’Enseignement supérieur et de la Science ou dans le champ de préoccupation de l’Église, le Comité catholique, cependant, n’est pas situé légalement en lien de dépendance juridictionnelle ni de ces ministères ni de l’épiscopat. Le Comité catholique n’est pas un comité ministériel ni un organisme épiscopal. Toutefois, l’exercice de son autonomie légale de juridiction ne peut soustraire le Comité catholique au cadre de fonctionnement qui découle du pouvoir ministériel dans la gestion du système scolaire. De même l’exercice de son mandat civil et de sa juridiction légale déjà agréée par les évêques et l’exercice de son autonomie propre ne peuvent soustraire le Comité catholique au cadre de fonctionnement qui découle du respect dû à l’autorité des évêques dans le domaine ecclésial. C’est ainsi que le Comité catholique exerce sa responsabilité d’Église dans le ‘respect religieux’, dont parle le concile Vatican II dans la constitution dogmatique sur l’Église (no 25), à l’égard des avis de l’épiscopat.”

The document thus considers the exchange of letters as constituting a sort of Church-state agreement. In fact it adds two letters signed by Cardinal Roy as Annexes A and B. (But it does not include any letters from Premier Jean Lesage to the cardinal.)

Annex A contains a letter from Roy to Lesage dated 29 August 1963.²⁶⁰ “Le droit à la confessionnalité se place (...) dans la logique du droit à la liberté de conscience; il permet à ceux qui professent une foi religieuse d’avoir des écoles conformes à leurs convictions intérieures et à leur idéal de vie. Loin de vouloir imposer aux autres leurs propres conceptions (...) nos catholiques estiment nécessaire que, par des structures pluralistes et souples, le Gouvernement assure à chacun une juste liberté. (...) Obéissant à leur conscience, ils demandent pour eux-mêmes des écoles confessionnelles et ils apprécient le fait que le Gouvernement, dans son projet de loi, ait voulu assurer le maintien d’écoles qui répondent aux aspirations de la population catholique. (...)”

“Une école qui peut satisfaire pleinement les catholiques n’est pas simplement une école où l’on donne, à côté des matières profanes, un enseignement proprement religieux ou encore où l’on consacre des moments à la prière et au culte. (Le) christianisme (...) embrasse l’ensemble de la vie humaine et donne une inspiration et un éclairage particuliers à toute l’activité de l’homme. Le levain qu’est la doctrine du Christ doit être mis dans la pâte: pour un étudiant, la pâte ce sont aussi

²⁶⁰ Proposed amendments to Bill 60 (which became the 1964 *Loi sur le Conseil supérieur de l’éducation*) were attached to that letter. Many of those amendments, proposed by the cardinal in the name of the AEQ, were incorporated into the final version of the statute (including an important preamble).

les matières profanes qu'il étudie, c'est le milieu (...la vie de l'école, son ordonnance, sa philosophie de l'éducation, ses conceptions pédagogiques...). Une telle conception implique certaines exigences pour ce qui est des programmes, de la qualité du matériel didactique, des qualifications des éducateurs eux-mêmes."

The cardinal explains: "Si nous proposons les amendements joints à cette lettre, c'est afin que (la confessionnalité) soit parfaitement respectée dans les nouvelles structures d'éducation élaborées par le Bill 60. Ces amendements ont pour but de sauvegarder la confessionnalité dans les organismes de consultation, de décision et d'exécution que le Bill doit mettre sur pied."²⁶¹ He then adds some concrete proposals.²⁶²

Annex B is a three-paragraph Roy-Lesage letter in which the cardinal says that the Quebec bishops are in agreement with the amended version of Bill 60.²⁶³

²⁶¹ Ibidem, p. 18. The words between parentheses are paraphrases.

²⁶² Among the proposed amendments were that: a) an assistant minister for Catholic education be named, agreeable to the Comité catholique; b) this assistant minister be in charge of managing, guiding and pedagogically organizing Catholic schools; c) the Comité catholique have the powers to officially recognize Catholic educational institutions, to decide regarding qualified personnel in those schools from the religious and moral points of view, and to approve from the religious and moral viewpoints programs, textbooks and teaching material. Cf ibidem, pp. 20-22.

²⁶³ Cf ibidem, p. 23; the letter says that the Quebec bishops "ont pris connaissance des modifications que vous vous proposez de faire au bill 60 à la suite de la lettre que je vous ai adressée en leur nom le 29 août 1963 (...) Ils

1.3.1.3. Catholic Pastoral Services in Schools²⁶⁴

In the 1960s formal agreements on education were established between Church and state, and they were re-affirmed in the mid-seventies in order to assure Catholic education for Quebec's Catholic youth.

- In 1974 the Catholic Committee published a series of five books entitled *Religion in Today's School*, which sought to define how religion was to be taught and pastoral services provided. These works were the basis for programs for the following quarter of a century.

- During the period of reform of the system of education which started in 1978, the Catholic Committee issued regulations on Catholic Religious Instruction and on Catholic Moral Instruction. The regulations also gave parents the possibility of requesting exemption from religion class for their children, and teachers the possibility of opting out of teaching religion.

- The Quebec government in 1979 issued a policy statement and plan of action on *The Schools of Quebec*, which re-affirmed the teaching of religion in province-funded educational institutions. New religious education programs were created, and *pastoral animation* became a

estiment que la nouvelle rédaction des articles qu'ils vous avaient signalés correspond en substance aux suggestions qu'ils vous ont soumises. (...) Ils se sont contentés d'indiquer ce qui leur paraît indispensable pour qu'un ensemble d'écoles catholiques existe au sein des nouvelles structures de l'enseignement."

²⁶⁴ Based on an information guide prepared by the new English Montreal School Board, *Confessional Services in Schools*, September 1998, pp. 14-15: Brief History of Catholic Pastoral Animation.

complementary service with specific objectives and activities. "Parishes took on a partnership role with the schools regarding sacramental preparation. While the school continued to provide the theological and doctrinal content, the parishes assumed the responsibility for the immediate preparation of the celebration of the sacraments. As a result, lay pastoral animators became the link between the parish, the home and the school."

• "In 1984, educational reform provided parents with the option of choosing between Catholic Religious and Moral Instruction (and) Moral Education." • "In 1989, the Education Act recognized and guaranteed Pastoral Animation as a complementary service offered to all students registered as Catholic." • "In 1990, at the elementary level, the Diocese, the parishes, the school boards and the schools established a partnership promoting Pastoral Animation. Protocols were signed between the School Boards and the Archdiocese of Montreal. These protocols were based on norms outlined in the *Guide for Organizing Pastoral Animation Services for Preschool and Elementary Pupils Attending Elementary Public Schools of the Diocese of Montreal*. Presently (i.e. 1998), Pastoral Animation Services are offered in all elementary and secondary schools within the Diocese of Montreal."²⁶⁵

²⁶⁵ Ibidem. Cf also Assemblée des évêques du Québec, *L'enseignement religieux catholique: Orientations pastorales*, Montreal, 1 May 1984; and *L'animation pastorale dans les écoles primaires publiques: Orientations pastorales*, Montreal, 1 December 1987.

1.3.1.4. Levels of Confessionality

An Italian observer has described the Quebec denominational schools system as one with different levels of confessionality. We could in fact, with Cardia, tie up the loose ends thus:

“La competenza sui programmi, sui metodi di insegnamento e sul personale insegnante è dal 1964 (...) affidata alle autorità civili, mentre è rimasta ai *Comitati*, cattolico e protestante, una sorte di giurisdizione sull'insegnamento religioso. Compito essenziale di questi *Comitati* 'è di riconoscere ufficialmente come cattolico o protestanti le scuole pubbliche che ne facciano richiesta, riconoscimento cui consegue l'assoggettamento delle scuole stesse a particolari regolamenti tendenti a conferire loro vero carattere confessionale'. Per le scuole laiche -- cioè non riconosciute come cattoliche e come protestanti -- c'è la possibilità per i due *Comitati* di imporre 'l'obbligo di impartire un insegnamento genericamente religioso o morale'. Dimodoché, è stato osservato, 'si viene ad avere nel Québec un complicato intrecciarsi di scuole con diversi livelli di confessionalità'.”²⁶⁶

1.3.1.5. 1997-1998

By the 1990s a large consensus had developed in Quebec to the effect that s. 93's limitations of the National Assembly's exclusive power to legislate in education should be abolished, because they were seen to hamper the reforming of the system, a reform which included as a priority re-distributing schools within *linguistic* school boards.

²⁶⁶ Cardia, C., *Stato e confessioni religiose*, Bologna, Il Mulino, 1988, pp. 32-33.

The constitutional protections of s. 93 (1) to (4) were eliminated, by the approval, on 15 April 1997 by the National Assembly of Quebec, and then by the federal Parliament of the *Constitution Amendment, 1997 (Modification constitutionnelle de 1997)*, which came into force on 19 December 1997.²⁶⁷

The elimination of s. 93 for Quebec means that in that province the constitutional rights of parents to fully-funded denominational education of their children are not *explicitly* protected -- but they are *implicitly*. Sections 2 and 7 of the Charter apply, as do provisions of the *Charte des droits et libertés de la personne* and the preamble of the *Loi sur le ministère de l'Éducation*. In addition, there is important jurisprudence mentioned in this thesis (e.g. *B. (R.) v. Children's Aid Society*²⁶⁸).

Starting in September 1998, linguistic school boards managed all schools, many of which continued to be confessional, as per legislation

²⁶⁷ "La *Loi constitutionnelle de 1867* est modifiée par l'insertion, après l'article 93, de ce qui suit: '93A. Les paragraphes (1) à (4) de l'article 93 ne s'appliquent pas au Québec.'" Registration SI/97-141, 22 December 1997.

Cf Proulx, Daniel, *La "Modification constitutionnelle de 1997" relative aux structures scolaires au Québec* in *Revue du Barreau*, Tome 58, printemps 1998, pp. 41-94.

²⁶⁸ (1995) 1 S.C.R. 315, at 382. It confirms the constitutional right of parents to educate their children according to their beliefs, based on the Charter, s. 2 (a). Cf Garant, Patrice, *La survie de la confessionnalité scolaire*, Faculty of Law, Université Laval, Sainte-Foy, Québec, s/d, p. 6.

adopted in the wake of the 1997 constitutional amendment.²⁶⁹ Catholic or Protestant province-funded schools can now be recognized as such upon application of the school board to the Catholic or Protestant Committees of the Ministry of Education, *after due consultation with the parents of the students*. In the same way, the board may apply for the withdrawal of such recognition.²⁷⁰ A Catholic school is one that has been recognized as such by the Catholic Committee; a Protestant school, by the Protestant Committee.²⁷¹

Article 457 of the new act establishes that the education minister shall define, by regulation, after consultation with the Catholic and Protestant Committees, the ways and means of consulting the parents of students attending a school with regard to applications for recognition or

²⁶⁹ *Loi sur l'instruction publique*, updated February 1998, effective 1 July 1998: cf following note.

²⁷⁰ Cf *Loi sur l'instruction publique*, art. 218, as quoted in the English Montreal School Board's Information Guide, *Confessional Services in Schools*, September 1998, p. 9.

²⁷¹ In practice, when the change-over from confessional to linguistic boards took place, many schools remained denominational schools, at least for the time being. Thus, on 1 July 1998, in the cities of Montreal and Quebec, the schools that were housed in buildings belonging to Catholic school boards were recognized as Catholic, and those that were housed in buildings belonging to Protestant boards were recognized as Protestant. Outside the boundaries of those cities, since the school boards were not necessarily confessional ones, a school transferred to a building bearing a Catholic or Protestant status retained that status.

withdrawal of recognition of the confessional status of the institution.²⁷² The Catholic Committee's Regulation, art. 4, states that a public school recognized as Catholic shall integrate the beliefs and values of the Catholic religion into its educational project while maintaining respect for freedom of conscience and religion. Its art. 23 states that the staff, the parents and the pupils of such a school shall be respectful of both the public character and the Catholic character of the school.²⁷³

Article 3 of the Regulation of the Protestant Committee says that Protestant schools must teach the curricula and use the textbooks and teaching materials approved for moral and religious education by the Committee, and teach only local curricula of Protestant Moral and Religious Education approved by the Protestant Committee. Its art. 5 adds that teachers shall respect the philosophy and confessional character of the school, and in the performance of his duties a teacher shall respect the pupil's personal religious or ideological point of view.²⁷⁴

Catholic students are entitled to pastoral services and guidance (art. 6.1). Every school board shall ensure that Catholic or Protestant Moral and Religious Instruction and Catholic or Protestant pastoral services are provided (art. 227).

²⁷² Cf *Confessional Services in Schools*, p. 9.

²⁷³ Cf *ibidem*.

²⁷⁴ Cf *ibidem*, p. 12. At the previous page the *Protestant Educational Values* is quoted as saying: "In Protestant education, the family is seen as the primary educator and the place where responsibility lies for the religious orientation of the child".

Every school board shall appoint one or two full-time professionals, who meet the qualification requirements established by the Catholic and Protestant Committees, as persons responsible for *confessionality*. The appointments must be approved by the bishop of the Catholic diocese in which the head office of the school board is situated, or by a committee formed by the Protestant Churches within the territory of the board.²⁷⁵ The persons appointed shall consult and inform, on a regular basis, *the parents of students and the religious authorities* having jurisdiction within the territory of the board (arts. 261-263).

Every student has a right to choose, every year, between Catholic or Protestant Moral and Religious Instruction or (non-religious) Moral Instruction, or Moral and Religious Instruction of a non-Christian faith where such instruction is given at a school. *In elementary school and in the first two years of secondary school, the parents choose on behalf of their children* (art. 5).

Every school board shall ensure that only the textbooks and instructional material approved by the Catholic or Protestant Committees are used for the teaching of Catholic or Protestant Moral and Religious Instruction (art. 230). Every teacher has the right to refuse to give Moral and Religious Instruction of a religious affiliation on the grounds of freedom of conscience (arts. 20-21). In order to be able

²⁷⁵ To obtain Catholic Church approval, the director general of the school board requests, in writing, the consent of the bishop, providing, with the profile of the recommended candidate, any relevant information allowing the prelate to better evaluate the situation. The candidate should be available for an interview with the bishop or his delegate. The bishop sends his written approval or refusal to the director general.

to teach Religious and Moral Instruction a teacher shall be of the faith that he is teaching and meet other professional requirements established by the Committees.²⁷⁶

Another important element in Quebec's educational-constitutional jigsaw puzzle is the provincial government's use of art. 33 of the Charter, the *notwithstanding clause*.²⁷⁷ Because Quebec government legal advisers felt that under the Charter the rights of parents to religious education could not be protected, they counselled the government, in 1988 and again in 1994, to withdraw from Charter application several legal provisions dealing with school confessionality.²⁷⁸

²⁷⁶ The above norms are taken from the 1998 *Loi sur l'instruction publique*, an English version of which, together with explanations and bibliography, is found in the guide *Confessional Services in Schools*.

²⁷⁷ "33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." Cf Appendix III for the full text: the *notwithstanding clause* goes on to explain that the law or provision overrides the Charter sections mentioned; that a notwithstanding declaration automatically must cease its effect five years after it comes into force; and that the declaration may be re-enacted by the legislative body for subsequent five-year periods.

Quebec makes use of this clause regarding confessional schools and regarding minority English schools.

²⁷⁸ Articles 726 and 727 of the *Loi sur l'instruction publique*, arts. 31 and 32 of the *Loi sur le Conseil supérieur de l'éducation*, arts. 17 and 18 of the *Loi sur*

“La clause dérogatoire (notwithstanding clause), bien que parfaitement légale et légitime, exerce de moins en moins d’attrait (...). La clause est perçue comme la volonté de se soustraire aux valeurs de la Charte, et celle de limiter le contrôle judiciaire, instrument de la primauté du droit.”²⁷⁹

Conclusion

There is much confusion in Quebec today about parental rights in education. The teaching of religion in province-funded schools is seen as a right or privilege of Churches²⁸⁰, rather than as a right of parents who exercise their options of sending their children to confessional schools or not, or who ask for their sons and daughters to be exempted from religion class.

Some people are preying on this confusion to restrict these rights.

This is obviously not the place to make concrete proposals for educational reform in Quebec.

It is the place to clearly state once again that parents have rights that should be constitutionally protected.

le Ministère de l'Éducation, and arts. 175 and 176 of the Loi sur l'éducation publique.

²⁷⁹ Garant, Patrice, *La survie de la confessionnalité scolaire*, Faculté de Droit, Université Laval, Sainte-Foy, Québec, s/d, p. 3.

²⁸⁰ Obviously, Churches have the right to educate, because they are associations, and associations have this right; and, in the case of the Catholic Church, because of “its divine mission of helping all to arrive at the fullness of Christian life” (*Code of Canon Law*, Can. 794 § 1).

Quebec uses the notwithstanding clause of the Charter to continue funding confessional schools, in the absence of the s. 93 guarantees. This is perhaps necessary, but odious. It clearly manifests the confusion alluded to, and the need to clarify this issue, which is one of the aims of this thesis.

Patrice Garant, in a study written right before the 1997 constitutional amendment, lobbied for the maintenance of s. 93, or for an amendment ensuring the teaching of religion in public schools, or for other constitutional safeguards that would protect confessionality in Quebec. He was not listened to. He also defended, as a last resort, the use of the notwithstanding clause. Without it, he feared

“la laïcization complète des écoles publiques par un législateur qui pourrait de bonne foi croire que c’est là un impératif de la Charte ou pour tout autre raison. (...) La lecture de certains développements sous la plume des juges de la Cour suprême nous porte à croire que l’école publique laïque est celle qu’ils semblent privilégier.”²⁸¹

As is clear in this thesis, I do not think that the Canadian Constitution authorizes judges to violate what I call the implicit constitutional rights of parents. In that sense I am perhaps not as legalistic as Garant is. Nor as pessimistic. He refers to the possibility that the provinces subsidize the education of all children, regardless of their religion.

“Pourrait-on argumenter que ce financement public (...) est destiné à favoriser l’exercice du droit d’éduquer ses enfants dans la religion de son

²⁸¹ *La survie de la confessionnalité scolaire*, Faculté de Droit, Université Laval, Sainte-Foy, Québec, s/d, pp. 7-8.

choix? Mais puisque la société doit viser à assurer à tous l'égalité quant à la jouissance des libertés fondamentales, cela impliquerait que l'État finance également toutes les écoles confessionnelles ou tous les enseignements religieux. C'est à cette seule condition que seraient respectés l'art. 2(a) et l'art. 15."²⁸²

Perhaps the solution is precisely along those lines: not establishing denominational schools for all religions, which is well-nigh impossible, but rather looking into modern solutions such as the voucher system, the partial funding of independent schooling, etc.

Yet Garant fears infringing the rights of atheist, agnostic, or non-believing parents, who are taxpayers.²⁸³ But that objection can be easily answered. All parents pay taxes, all have rights to choose the education of their children according to their convictions. Therefore, as long as non-believing parents are not obliged to send their children to confessional schools, and are also subsidized in their choice of schooling, there is no problem.²⁸⁴

²⁸² Ibidem, p. 7.

²⁸³ "Il n'est pas évident que les opposants à tout enseignement religieux financé par l'État ne réussiraient pas à démontrer qu'ils supportent, comme payeurs de taxes, une charge financière pour faire dispenser des enseignements religieux que réprouve leur conscience. Il en résulterait que la laïcité de l'enseignement public ou de l'enseignement financé par l'État s'impose à cause de l'art. 2(a)." Ibidem.

²⁸⁴ It is clear that those whose ideology leads them to oppose the rights of believing parents are not *more equal*, to use an Orwellian phrase, than others,

It is further suggested that the Churches sign accords with the provincial authorities regarding *quality control* of confessionality (see this chapter, 1.5.4.). Catholic bishops could perhaps in that way better fulfill their responsibility of ensuring that schools that are imbued with a Christian spirit provide education.²⁸⁵

1.3.2. Newfoundland

1.3.2.1. 1949-April, 1997

The last British colony to join Canada (in 1949), Newfoundland's *Terms of Union* contained a provision establishing an educational system which allowed several denominations to run state-funded schools.²⁸⁶

who also have a conscience, and who often in Canadian history have been forced to support with their taxes *neutral* education which is not neutral.

²⁸⁵ Cf *Code of Canon Law*, Can. 802 § 1.

²⁸⁶ "17. (1) In lieu of section ninety-three of the *Constitution Act, 1867*, the following Term shall apply in respect of the Province of Newfoundland:

In and for the Province of Newfoundland the Legislature shall have exclusive authority to make laws in relation to education, but the Legislature will not have the authority to make laws prejudicially affecting any right or privilege with respect to denominational schools, common (amalgamated) schools, or denominational colleges, that any class or classes of persons have by law in Newfoundland at the date of Union, and out of public funds of the Province of Newfoundland, provided for education,

(a) all such schools shall receive their share of such funds in accordance with scales determined on a non-discriminatory basis from time to time by the Legislature for all schools then being conducted under authority of the Legislature; and

This system had been in existence for about a century and a half. By the time it was revised, 21 April 1997, the Catholic Church (37 % of the population), the Pentecostal Church (7 % of the population), the Church of Seventh Day Adventists (0,1 % of the population), the Church of England, the Presbyterian Church, the United Church of Canada, and the Salvation Army²⁸⁷ were the denominations that had a constitutional right to fully provincially-funded schools.

The *Constitutional Amendment Act, 1997* was passed by the federal Parliament, after the Newfoundland legislature asked for the change. The process of amendment began with the establishment in 1990 of a royal commission of inquiry on education, led by Len Williams. In 1992 it published the report *Our Children, Our Future*. In September of 1995,

(b) all such colleges shall receive their share of any grant from time to time voted for all colleges then being conducted under authority of the Legislature, such grant being distributed on a non-discriminatory basis.

(2) For the purposes of paragraph one of this Term, the Pentecostal Assemblies of Newfoundland have in Newfoundland all the same rights and privileges with respect to denominational schools and denominational colleges as any other class or classes of persons had by law in Newfoundland at the date of Union (...).” The Terms of Union of Newfoundland with Canada were confirmed by the *Newfoundland Act, 12-13 Geo. VI, c. 22 (U.K.)*, which was amended by the *Constitution Amendment, 1987 (Newfoundland Act)*, and again by the *Constitution Amendment, 1998 (Newfoundland Act)*; the Terms of Union comprise an Annex of the *Newfoundland Act*.

²⁸⁷ These last four represent about 50 % of the population; in 1969 they joined forces in “one integrated school system”, as Term 17(1)(a) of the 1997 amendment put it.

55% of voters in a referendum on the subject voted in favor of the amendment.²⁸⁸ Thus, although the members of the three parties represented in the legislature favoured it²⁸⁹, 45 % of the voters, and several religious leaders, including St. John's Catholic Archbishop James H. MacDonald, who decried the loss of constitutionally protected rights, opposed the constitutional change.²⁹⁰

Term 17 as amended in 1997 read: "17. (1) In lieu of section ninety-three of the *Constitution Act, 1867*, the following shall apply in respect of the Province of Newfoundland:

"In and for the Province of Newfoundland, the Legislature shall have exclusive authority to make laws in relation to education but

"(a) except as provided in paragraphs (b) and (c), schools established, maintained and operated with public funds shall be

²⁸⁸ Only 52 % of registered voters participated.

²⁸⁹ In May, 1996 the Legislature unanimously adopted a resolution asking the federal Parliament to act without delay in approving the constitutional amendment.

²⁹⁰ In fact, critics of denominational schools applauded the constitutional amendment. See, for example, Proulx, Daniel, *La Modification constitutionnelle de 1997 relative aux structures scolaires au Québec*, in *Revue du Barreau*, Tome 58, printemps 1998, p. 46, note 7. And defenders of constitutionally entrenched minority rights, inside and outside of Newfoundland, argued against the change: see below.

Note also that Abp. MacDonald was president of the Catholic Education Council of Newfoundland and Labrador.

denominational schools, and any class of persons having rights under this Term as it read on January 1, 1995 shall continue to have the right to provide for religious education, activities and observances for the children of that class in those schools, and the group of classes that formed one *integrated* school system by agreement in 1969 may exercise the same rights under this Term as a single class of persons;

“(b) subject to provincial legislation that is uniformly applicable to all schools specifying conditions for the establishment or continued operation of schools,

“(i) any class of persons referred to in paragraph (a) shall have the right to have a publicly funded denominational school established, maintained and operated especially for that class, and (ii) the Legislature may approve the establishment, maintenance and operation of a publicly funded school, whether denominational or non-denominational;

“(c) where a school is established, maintained and operated pursuant to subparagraph (b)(i), the class of persons referred to in that subparagraph shall continue to have the right to provide for religious education, activities and observances and to *direct* the teaching of aspects of curriculum affecting religious beliefs, student admission policy and the assignment and dismissal of teachers in that school;

“(d) all schools referred to in paragraphs (a) and (b) shall receive their share of public funds in accordance with scales determined on a non-discriminatory basis from time to time by the Legislature; and

“(e) if the classes of persons having rights under this Term so desire, they shall have the right to elect in total not less than two thirds of the members of a school board, and any class so desiring shall have the

right to elect the portion of that total that is proportionate to the population of that class in the area under the board's jurisdiction."²⁹¹

Constitutionalists differed as to the soundness of the protection offered by the new wording. Some said that the rights of religious minorities to their schools continued to be sufficiently protected. After a thorough study, the majority of the 14-member Senate Committee on Legal and Constitutional Affairs wrote (with a minority dissenting): "Dans l'ensemble, la modification proposée garantira suffisamment les droits des minorités protégées. Certes, elles seront touchées par la modification, mais celle-ci ne les opprimera pas. Les écoles continueront d'être confessionnelles, et chacune des minorités protégées continuera d'avoir le droit d'assurer l'enseignement religieux, l'exercice d'activités religieuses et la pratique de la religion à l'école. Par ailleurs, le droit aux écoles uniconfessionnelles, en plus d'être inscrit dans la Constitution, sera élargi. En fait, les droits des minorités protégées après la modification seront plus vastes que ceux dont jouissent les minorités religieuses dans d'autres provinces."²⁹²

Others thought it unacceptable that sub-s. (b) subordinated the constitutional right to confessionality to the provincial legislature. They asserted that it went against the Canadian constitutional tradition of absolutely safeguarding certain denominational school rights (such as in

²⁹¹ Emphasis added.

²⁹² Senate of Canada, Standing Senate Committee on Legal and Constitutional Affairs, *Amendment of the Constitution of Canada, Term 17 of the Terms of Union of Newfoundland with Canada*, 17 July 1996, Majority Report, Conclusion, p. 16.

s. 93 of the *Constitution Act, 1867*). Some of these critics, and the Senate report's dissenting opinion signed by the Conservative senators, asked for an amendment of that sub-s. (b). They proposed that instead of beginning with the words "subject to provincial legislation that is uniformly applicable", it start with the phrase "where numbers warrant" or "where the number of children so warrants".²⁹³ This would have had the advantage of establishing an objective standard and thus placing in the hands of judges, not of politicians, the ultimate decision on establishing or continuing denominational schools. Yet the Newfoundland government rejected this wording; it thought that it would be unwise to apply judicial interpretation of the "where numbers warrant" criterion, regarding s. 23 of the Charter on minority language educational rights, to denominational schools.²⁹⁴

Newfoundland Education Minister Roger Grimes assured the senate committee:

"La formule 'sous réserve du droit provincial d'application générale' n'a pas pour effet de menacer ces droits (confessionnels). Pour la

²⁹³ Cf Charter, s. 23.

²⁹⁴ Cf *Reference Re Education Act of Ontario and Minority Language Education Rights*, (1984) 10 D.L.R. (4th) 491.

"Dorénavant, à Terre-Neuve, la protection des droits confessionnels sera assujettie aux lois provinciales d'application générale, se qui est sans précédent dans notre système. (...) Nous remarquons qu'en utilisant le critère 'là où le nombre le justifie', cela signifiera que les tribunaux demeureront les gardiens ultimes des droits des classes de personnes que la clause 17 cherche à conférer." Senate Report, p. 50; cf also pp. 9-11.

première fois, la disposition constitutionnelle elle-même, c'est-à-dire la clause 17, précise la nature des droits qu'elle protège. Toute Assemblée législative qui, aujourd'hui, dans 15 ans, dans 20 ans ou dans 100 ans, chercherait à adopter des lois rendant pratiquement impossible l'exercice des droits énoncés, verrait ces lois annulées par n'importe quel tribunal."²⁹⁵

1.3.2.2. The 1998 Amendment

Not a century later but less than *one year* later, on 8 January 1998, a new amendment was passed:

"Whereas section 43 of the *Constitution Act, 1982* provides that an amendment to the Constitution of Canada may be made (...) where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies;

²⁹⁵ Senate Report, p. 10.

Another objection made by some constitutional experts and critics was that the phrase "to direct the teaching of aspects of curriculum affecting religious beliefs" in Term 17(1)(c) should have been complemented by the verb "to determine and direct..." It was pointed out that Supreme Court jurisprudence had denied Quebec confessional school boards the right to determine aspects of curriculum while retaining the right to direct or manage them: Cf *Greater Montreal Protestant School Board v. Quebec (Attorney General)*, (1989) 1 S.C.R. 377. "L'alinéa 17(1)(c) de la résolution se lit ainsi: '...d'y régir les activités académiques touchant aux...'. Cela aura effectivement pour effet d'abroger un droit constitutionnel actuel de la population de Terre-Neuve." Senate Report's dissenting opinion, p. 50.

"And whereas the Senate (...) on December 18, 1997 (...); and (...) the House of Commons (...) on December 9, 1997; and (...) the House of Assembly of the Province of Newfoundland (...) on September 5, 1997 authoriz(ed) an amendment to the Constitution of Canada":

"1. Term 17 of the *Terms of Union of Newfoundland* with Canada set out in the Schedule to the *Newfoundland Act* is repealed and the following substituted therefor:

"17. (1) In lieu of section ninety-three of the *Constitution Act, 1867*, this Term shall apply in respect of the Province of Newfoundland.

"(2) In and for the Province of Newfoundland, the Legislature shall have exclusive authority to make laws in relation to education, but shall provide for *courses in religion that are not specific* to a religious denomination.

"(3) *Religious observances shall be permitted* in a school *where requested by parents*.

"2. This Amendment may be cited as the *Constitution Amendment, 1998 (Newfoundland Act)*."²⁹⁶

Why this turnaround? The explanation is that there had been a political reaction to a judicial challenge to the 1997 Term 17.

In effect, the province's legislation reflecting the 1997 Term 17 had been contested in court by Catholic and Pentecostal parents and religious leaders on the basis that it *violated* said term.

²⁹⁶ *Canada Gazette* Part II, Vol. 132, Extra, Ottawa, 14 January 1998. Emphasis added.

On 8 July 1997 Judge Barry of the trial division of the Newfoundland Supreme Court issued an interlocutory order restraining certain steps being taken under the legislation, pending trial.²⁹⁷

The provincial government responded by convoking a referendum on the amendment that we have just reproduced. On 2 September 73 % voted in favour of the proposed amendment, although the turnout was low.²⁹⁸ On 5 September the House of Assembly unanimously authorized the amendment.

In *Hogan v. Newfoundland (A. G.)*, Judge Orsborn of the trial division of the Newfoundland Supreme Court dismissed an application for an order restraining the Governor General of Canada from proclaiming the amendment, on grounds that Term 17 was not part of the Constitution and that government had utilized improper amendment procedures. The application had been presented by 14 Catholics, many of them parents, and by the Catholic bishops of St. John's, of Grand Falls, and of St. George's, as well as by the diocesan Administrator of Labrador City-Schefferville.²⁹⁹

²⁹⁷ Cf *Hogan v. Newfoundland (School Boards for Ten Districts)*, (1997), 149 D.L.R. (4th) 468 (Nfld. T.D.).

²⁹⁸ Out of 385,000 eligible voters, 206,000 voted: thus only 39 % of the total eligible voted in favour. Cf *Hogan v. Newfoundland (Attorney General)*, 4 Admin. L. R. (3d) 59, at 66.

²⁹⁹ Cf previous note.

1.4. Analysis of Court Cases on Explicit Parental Constitutional Rights to Denominational Schools

Introduction

In New Brunswick, Manitoba, Nova Scotia, Prince Edward Island and British Columbia the judiciary has, in a word, “emptied” s. 93. But what the courts have taken away the courts could bring back. Just as *Reference Re Bill 30* revisited and overturned *Tiny* (see below 1.4.3.4.), it is conceivable that another judicial decision could re-open and revise *Maher* and *Barrett*, both unjustly decided.

Judicial interpretation has the last word. It is an important word. That is why we will now review other cases that have not yet been commented. It shall be seen that the courts have also protected rights of parents regarding the education of their children, perhaps *unconsciously* on occasion (meaning, that they intended perhaps to safeguard other rights, such as minorities’ rights or freedom of conscience), but certainly efficaciously.

1.4.1. Defining Which Rights Are Protected

1.4.1.1. 1917: Catholic, Not French, Rights Are Protected

The 1917 *MacKell* case³⁰⁰ raised the question of the validity of a circular of instructions issued by the Ontario Department of Education in 1913 restricting the use of French in separate schools. Even though the main issue was language, the decision also refers in passing to the rights of parents regarding province-funded denominational schools. In

³⁰⁰ *Ottawa Roman Catholic Separate School Trustees v. MacKell* (1917) A.C. 62; 32 D.L.R.1 (P.C.).

MacKell the Privy Council confirmed the rights of Catholic parents of whatever language to have their children educated in their faith.

“The second paragraph of the circular is important (...): The provision for religious instruction and exercises in public schools shall not apply to separate schools, and separate school boards may substitute the Canadian Catholic readers for the Ontario public school readers. These modifications bring the instructions into agreement with the provisions as to regulations affecting religious instruction in the Common Schools Act and the Separate Schools Act.” The *Common Schools Act*, s. 129 provided “that no persons shall require any pupil to read or study in or from any religious book or join in any exercise of devotion or religion objected to by his or her parents or guardian.” Both French-speaking and “English-speaking parents whose children are being educated in the Roman Catholic separate schools in Ottawa” have these rights to denominational education.³⁰¹

In other words, “the Privy Council held that s. 93(1) protected only the religious rights and not the linguistic rights of French-speaking separate school supporters.”³⁰²

1.4.1.2. 1984: Catholic and French Rights Are Protected

An Ontario government 23 March 1983 White Paper in relation to boards of education proposed amending the *Education Act*, providing for

³⁰¹ (1917) A.C. 66 ff. MacKell was an English-speaking Catholic parent.

³⁰² *Reference re Education Act of Ontario and Minority Language Education Rights*, (1984), 47 O.R. (2d) 1; 10 D.L.R. (4th) 491 (C.A.); Magnet, *Constitutional Law of Canada*, p. 831.

the election of minority language trustees (francophones, for the most part) to separate school boards to exercise certain exclusive responsibilities as minority language sections of those boards. The Ontario Court of Appeal declared the proposal to be constitutional, in so far as it guaranteed minority language rights without prejudice to s. 93 denominational school rights. It saw no reason why separate school boards should not be allowed to have minority language trustees:

“The Charter (...) grants supporters of denominational schools a right in addition to those granted them in 1867 by s. 93. They are now entitled, by virtue of s. 23, to have their children receive denominational education” in either English or French. If “s. 23 were treated as inapplicable to denominational schools, an anomalous and, indeed, patently unacceptable result would follow. French-speaking members of the Roman Catholic community would then be required to forgo their denominational education rights protected by s. 93 in order to avail themselves of the new minority language educational rights conferred on them by s. 23 of the Charter.(...) Section 23 and s. 93 are compatible.”³⁰³

The court also said that the province’s power to regulate was “limited by the constitutional stipulation in s.93(1) that it must not ‘prejudicially

³⁰³ *Reference re Education Act of Ontario and Minority Language Education Rights*, (1984), 47 O.R. (2d) 1; Magnet, op. cit. p. 853. The court also quoted the *Tiny* decision’s classic exposition of the regulatory power of a province to change the educational system: “The Provincial Legislature is supreme in matters of education, except as far as s. 93 of the British North America Act restricts its authority.” Provinces preserve “the power to mould the educational system in the interests of the public at large”. Magnet, op. cit., p. 830.

affect' the rights and privileges of Roman Catholics with respect to denominational schools. These rights and privileges include the large measure of autonomy in the control and management of their schools which Roman Catholics enjoyed at Confederation. But they involve more than the administrative structure, which, in itself, is intended only to be the means of preserving and fostering the religious and other values of denominational education. These values were eloquently expressed by Anglin C.J.C. in the *Tiny* case (...): 'The idea that the denominational school is to be differentiated from the common schools purely by the character of its religious exercise or religious studies is erroneous. Common and separate schools are based on fundamentally different conceptions of education. Udenominational 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.' Recently, Zuber J.A., speaking for this Court in *Re Essex County Roman Catholic Separate School Board and Porter et al.* (1978), 89 D.L.R. (3d) 445, succinctly described these values when he said at p. 447: (...) 'within the denominational school religious instruction, influence and example form an important part of the educational process'."³⁰⁴

1.4.1.3. No Rights for Jewish Parents in Public Schools

Board of Education for Borough of North York v. Ministry of Education (1978) is a *pre-Charter* case.³⁰⁵ North York, part of Metropolitan

³⁰⁴ Ibidem pp. 830-831.

³⁰⁵ 19 O.R. (2d) 547, 6 M.P.L.R. 249 (H.C.J.). Cf Brown, David, *ibidem* p. 8.

Toronto, has many Jewish residents. In 1976 the Associated Hebrew Schools of Toronto and the North York Public School Board agreed to experiment with integrating the junior high school grades: the students in the integrated schools would all be obliged to receive Hebrew religion lessons. The court ruled in favour of the Ministry of Education, which strongly resisted the project. The court based its judgment on the fact that the *Education Act* did not allow mandatory religious education in any schools under the auspices of a public school board.

1.4.2. Catholic Parents' Educational Rights Not Extended to Parents of Other Beliefs: Adler v. Ontario

In the 1990s Susie Adler and four other Ontario parents of children attending Jewish schools sought a judicial declaration that the non-funding of Jewish schools in Ontario was unconstitutional. Leo Elgersma and three other parents of children attending independent Christian schools, and the non-profit Ontario Alliance of Christian School Societies (OACSS), sought, inter alia, a declaration from the courts that the non-funding of independent Christian schools infringed their Charter rights. In other words, that the Ontario government's policy of fully funding public secular schools and separate Catholic schools while not partially nor totally subsidizing other denominational schools violated s. 2(a) (freedom of conscience and religion) and equality rights of s. 15 of the Charter -- violations which are not justifiable in a free and democratic society (s.1)³⁰⁶.

³⁰⁶ *Adler v. Ontario*, (1996) 3 S.C.R. 609. In Ontario in 1996 full-time Jewish day schools had ten thousand students, and Christian Reformed Church inspired (OACSS) schools numbered 73.

The Ontario trial judge found that even though those religious and equality rights were infringed, the *Education Act* was justified under s. 1.³⁰⁷

The Ontario Court of Appeal, on its part, found that s. 2(a) of the Charter did not provide a *positive entitlement* to state support for the exercise of one's religion and that any violation was justified under s.1.³⁰⁸

Chief Justice Lamer wrote the five-judge majority opinion of the Supreme Court. Sopinka, joined by Cory, wrote an opinion which agreed in the outcome but differed in the reasons. McLachlin dissented in part and L'Heureux-Dubé in full. Because it is highly relevant and quite recent -- post-1982 -- we will see this case in some detail.

Lamer explained that s. 93 of the BNA Act, being the product of a historical compromise crucial to Confederation, also forms a *comprehensive code* regarding denominational school rights. This code cannot be enlarged by appealing to s.2(a) of the Charter. This code does not guarantee pre-existing natural rights: it simply enshrines in the Constitution certain privileges. Therefore, since the Jewish and Christian Reformed parents cannot bring themselves within the terms of s. 93's guarantees, they have no claim to public funding for their schools. Ontario's choice to fund Catholic separate schools but not other religious schools does not therefore contravene the equality provisions of s. 15(1): a) because s. 29 explicitly exempts from Charter challenges all

³⁰⁷ Anderson J. (1992), 9 O.R. (3d) 676.

³⁰⁸ (1994), 19 O.R. (3d) 1.

rights and privileges guaranteed under s. 93; and b) because the provinces have a plenary power in relation to education. Ontario's plenary power to legislate with regard to public schools which are open to all members of society without distinction is constitutionally entrenched, indirectly, by s. 93. The province remains free to exercise its plenary power with regard to education in whatever way it sees fit, subject to s. 93(1). Ontario could foreseeably fund Jewish, Christian Reformed, and other independent schools. However, legislation in respect of education could then be subject to Charter scrutiny: whenever the government decides to go beyond the confines of the s. 93 *code*, i.e. of the special mandate to fund Catholic separate schools and public schools.

Sopinka denied the existence of a s. 93 *comprehensive code*. He explained that nothing restricts extending funding to Jewish, Christian Reformed and other schools. Certain provisions of pre-Confederation statutes gave separate schools the same rights as those enjoyed by public schools: the rights of these public schools are merely the *benchmarks* for ascertaining the rights of separate schools. Only the rights and privileges of separate schools are given constitutional protection. Legislation under the plenary power relating to funding for secular schools is not insulated from Charter attack. The exercise of that power in relation to matters specifically authorized by s. 93(3), however, is immune. The latter sub-section specifically authorizes distinctions to be made that would otherwise contravene the Charter. On another point: even if the non-funding of private religious schools imposes an economic disadvantage in relation to the parents who send their children to secular public schools, the *Education Act*, by *allowing* private religious schools and home schooling, clearly does not compel parents to act in any way that infringes their freedom of religion. The cost of

sending their children to private religious schools is a natural cost of the parents' religion.³⁰⁹

For McLachlin, s. 15 on equality was infringed because of the unequal funding vis-à-vis subsidized secular schools. Although the public school system is neutral on its face, she said, the funding system results in adverse effect discrimination in that it has the effect of denying a benefit to those whose religions do not permit their adherents to send their children to public secular schools. This discrimination is caused by the *Education Act*, not by the parents' religion. The state cannot "blame" the person discriminated against for having chosen the status which leads to the denial of benefit. But the encouragement of a more tolerant harmonious multicultural society is a policy objective sufficiently pressing and substantial, provided its effect is duly proportionate, to justify infringing equality rights. The public school system is the best way to realize a more fully tolerant society. The law promotes this objective. The denial of funding to religious schools is rationally connected with that goal. Perhaps a less intrusive measure, such as partial funding for private schools, might achieve the same objective with less infringement of equality. "I conclude that while the denial of funding for independent religious schools infringes the equality guarantee of the Charter, the infringement is justified under s. 1."³¹⁰

Finally, L'Heureux-Dubé stated that partial funding would be required in order not to discriminate against insular religious communities such

³⁰⁹ Cf summary of opinions in (1996) 3 S.C.R. 609 ff.

³¹⁰ Ibidem, no. 225.

as Jews and Christian Reformed, whose very survival is at stake if their private schooling is not subsidized.³¹¹

1.4.3. Final Analysis of Denominational School Rights

Section 93 is by now quite familiar to the reader. He has witnessed its birth, and has seen it being claimed, infringed, interpreted. By way of summing up and attempting to categorize some of the *explicit rights of parents to province-funded denominational schools*, a "framework" of s. 93 is here offered, following Garant.³¹²

1. The scope of s. 93 and of equivalent constitutional provisions; 2. Condition: right in existence by law at union; 3. Subjects or holders of the right; 4. Object of the right; 5. Condition: infringement of the right.

1.4.3.1. The Scope of S. 93 and Equivalent Constitutional Provisions: An Exception to a Rule

It is well to recall that s. 93 and equivalent constitutional provisions recognize that the exclusive provincial power in relation to education is the rule, and that the right we are dealing with is an exception to that rule: "The power conferred is not absolute (...) The sub-sections (...) indicate the limitations imposed on, and the exceptions from, (the provinces') power of exclusive legislation."³¹³

As an exception to a rule, this right has at times been given a strict interpretation, although it might be fair to say that the interpretation

³¹¹ Cf *ibidem*, nos. 56-113.

³¹² *Op. cit.*, chapitre 2.

³¹³ *Brophy v. Attorney-General of Manitoba*, (1895) A.C. 221-222.

has been broader in Ottawa than in London. And broader, too, after 1947 and especially after 1982, than before those two key dates (at least for the provinces of Ontario, Alberta and Saskatchewan).

1.4.3.2. Condition: Right in Existence by Law at the Union

The first condition that we find in s. 93 and equivalent is that the right to province-funded denominational schools has to be based on a pre-existing legal right before the province became a part of Canada. The Canadian Constitution never defines the right: it fixes or freezes pre-union laws.

At the time the New Brunswick troubles were brewing, Manitoba was admitted into Canada. Despite the precautions taken by the drafters of the *Manitoba Act, 1870*, the addition of the words “or practice” did not help. As has been explained, when this province joined, s. 22 of its terms of union was almost identical to s. 93, except that its sub-s. (1) read: “Nothing in any such law shall prejudicially affect any right (...) which any class of persons have by law *or practice* in the Province.” Manitoba had in practice a denominational school system. Between 1870 and 1890 legislation continued this system. In 1890, the Protestant majority abolished the system. Although the Supreme Court declared the act unconstitutional, saying that the Act prejudicially affected rights held *by practice* in Manitoba in 1870,³¹⁴ the Privy Council reversed this judgment.³¹⁵

³¹⁴ Cf *Barrett v. City of Winnipeg* (1891), 19 S.C.R. 374.

³¹⁵ Cf *City of Winnipeg v. Barrett*, (1892) A.C. 445.

1.4.3.3. Subjects (Holders) of the Right

“Any class of persons”, that is, Roman Catholics or Protestants, united by a common faith. Roman Catholics have been easy to identify by the courts: they are Christians who recognize the authority of the Pope.³¹⁶ The term Protestant has caused judicial headaches.³¹⁷

Throughout this thesis, I often conclude that the rights of Catholic parents, or Protestant parents, or Jewish parents, or any other parents, are involved. The word “parents”, however, does not appear in many judicial decisions -- and certainly not in s. 93 and equivalent provisions, which talk about “classes of persons”, and which the courts and authors usually identify with religious minorities or even religious majorities. It is implicit, nevertheless, in most situations.

1.4.3.4. Object of the Right: Primary *and Secondary* Schooling (Tiny Decision Overturned by Reference Re Bill 30 Decision)

Section 93 talks about “rights or privileges”. Not a few judges and commentators consider that to be able to send one’s children to province-funded denominational schools is a privilege, i.e. an advantage granted to a *privileged* group. Nevertheless, the word “right” (without unduly forcing its meaning) seems preferable. It is not tainted with the brush of legal positivism -- something (perhaps unconsciously) present, and prevalent, among many authors and judges. It is clear that s. 93 and equivalent provisions protect fundamental rights: so fundamental

³¹⁶ Cf *Pander v. Town of Melville*, (1922) 3 W.W.R. 53, where Catholics of the Ruthenian rite were correctly considered to belong to the Catholic Church because their bishop was named by the Pope.

³¹⁷ Cf Garant, op. cit., pp. 50-51.

that they have been explicitly and expressly declared in the most solemn international declarations signed by Canada (see Appendix V). One cannot on the one hand affirm that s. 93 does not protect any fundamental right, and on the other, assert that, for example, minority language educational rights are based on fundamental rights.³¹⁸ One cannot have it both ways. The *raison d'être* of human rights declarations is precisely to avoid a cafeteria-style choice of rights. Were one to ask the parents themselves, many would say that the freedom to choose a subsidized denominational school is more fundamental than the freedom to choose a subsidized French or English school.

The *object* of the s. 93 right is, then, the choice of sending one's children to funded confessional schools, and of earmarking one's taxes to a confessional school board or system.

The courts have carefully distinguished confessional or denominational school rights from linguistic school rights (which went unprotected constitutionally until the 1982 Charter).

Garant offers two descriptions or definitions of a confessional school:

³¹⁸ Cf Proulx, Daniel, *op. cit.*, pp. 50-52: in note 20 this author speaks of "droits fondés sur des principes", and of rights "(qui) commandent une interprétation large et libérale en raison de leur caractère réparateur des injustices passées", among which he includes s. 23 of the Charter but not s. 93.

"A denominational school must *ex vi termini* mean a school established by, and exclusively belonging to, a particular denomination."³¹⁹

"L'école confessionnelle, entendue juridiquement, serait celle qui, de par la loi, est établie par et pour des personnes d'une même religion, qui fonctionne sous leur contrôle exclusif, qui est supportée financièrement par des taxes qui leur sont imposées comme membres d'une même religion, où l'enseignement est conforme aux préceptes de cette religion et donné par des maîtres choisis par eux, et où l'admission n'est réservée de droit qu'aux enfants de cette confession."³²⁰

Despite what is said in the above definitions, the Catholic Church teaches that Catholic schools are in principle open to all students, Catholic and non-Catholic alike, so long as the admission of non-Catholic pupils is compatible with the maintenance of the Catholic identity of the school.³²¹

³¹⁹ Quote from *Maher v. Town of Portland* in *op. cit.*, p. 58.

³²⁰ G. Houle, *Le cadre juridique de l'administration scolaire au Québec*, 1966, annexed to the Rapport Parent, quoted in Garant, *op. cit.*, p. 58.

³²¹ Thus, can. 803 of the *Code of Canon Law*, in defining a *Catholic school*, does not require that its students or their parents be Catholic:

"§ 1. A Catholic school is understood to be one which is under the control of the competent ecclesiastical authority or of a public ecclesiastical juridical person, or one which in a written document is acknowledged as Catholic by the ecclesiastical authority.

The constitutional guarantees apply to primary *and secondary* schooling: In the *Tiny* (but greatly important) case³²², the Privy Council in England, then Canada's highest appeal court, in 1928 rejected a plea from the trustees of the Tiny Township, Ontario, separate school board. They had claimed the following rights: a) to run their own secondary schools; b) to be exempt from municipal taxation for the support of public secondary schools; c) to receive Ontario grants for their secondary schools. The Privy Council held that s.93 (1) and (2) did not necessarily give them these rights.

"It may be that the (...) laws will hamper the freedom of the Roman Catholics in their denominational schools. They may conceivably be (...)

"§ 2. Formation and education in a Catholic school must be based on the principles of Catholic doctrine, and the teachers must be outstanding in true doctrine and uprightness of life.

"§ 3. No school, even if it is in fact Catholic, may bear the title 'Catholic school' except by the consent of the competent ecclesiastical authority."

³²² *Roman Catholic Separate School Trustees for Tiny v. R.*, (1928) A.C. 363; (1928) 3 D.L.R. 753; Magnet, op. cit., pp. 793-802. "This appeal is among the most important that have come (...) from Canada in recent years. It relates to the interpretation of the Constitution of Canada in regard to separate schools of a large part of her Roman Catholic population, and to the character of the rights conferred on them by the legislative settlement made at the time of Confederation under the British North America Act. (...) It is (...) a question of far-reaching importance to Canada as a whole, and it has given rise to great differences of opinion among the judges of the Canadian Courts. The tribunals of Ontario (...) decided unanimously against the appellants' claim. But (...) the Supreme Court (was) evenly divided."

subjected to injustice (...) But they are still left with separate schools, which are none the less actual because the liberty of giving secondary and higher education in them may be abridged by regulation.”³²³ In other words, the province could by legislation or regulation decide to fund the denominational primary schools only, and not the secondary ones. “It is indeed true that power to regulate merely does not imply a power to abolish. But the controversy (...) on the present occasion is a long way from abolition.”³²⁴

The defeat dashed the hopes of many Ontario Catholic parents that their rights would be recognized as constitutional, as far as secondary schools were concerned.³²⁵ Nevertheless, almost six decades later the *Tiny* rationale was overruled in the *Reference Re Bill 30*.³²⁶

(In the 1941 *Ford Motor* case, a Privy Council decision had restricted but not eliminated the possibilities of corporations to direct their property taxes to separate schooling.³²⁷ This meant that most

³²³ Viscount Haldane in *ibidem*, quoted in Magnet, *op. cit.*, p. 802.

³²⁴ *Ibidem*.

³²⁵ Cf Stamp, *op. cit.*, p. 12.

³²⁶ *Reference Re Bill 30, An Act to Amend the Education Act (Ontario)*, (1987) 1 S.C.R. 1148.

³²⁷ *Windsor Board of Education v. Ford Motor Co.*, (1941) A.C. 453, (1941) 3 All E.R. 241, (1941) 3 D.L.R. 721. Cf Magnet, Joseph E., *Constitutional Law of Canada*, Vol. 1, Toronto, Carswell, 1985, 2nd ed., pp. 815-817: “The onus to prove affirmatively that the portion of corporate assessments directed to the separate schools does not exceed the maximum allowable portion is not an

corporation taxes continued to go to public schools, which normally enjoyed a much larger residential tax base and received all taxes from public utilities. Many Catholic schools survived because of low teachers' salaries, the gratuitous work or low salaries of Religious teachers, and the financial contributions from parishes.³²⁸⁾

In *Reference Re Bill 30* the Ontario Court of Appeal decided 3-2 in February 1986 that Bill 30 (full funding for separate schools) was constitutional. On 25 June 1987 the Supreme Court unanimously upheld that decision.³²⁹ In upholding the extension of funding, the Court

onus that arises from the Constitution. It arises from a court interpretation of (...) a legislative limitation imposed by the Ontario legislature. The effect of this limitation is to diminish significantly the corporation's power to apportion its assessment to the separate schools. In practice, and as a result of legislative obstacles to fairly apportioning corporate taxes by population, the lion's share of corporate taxes are directed to the public school system, and not to the separate schools." (At p. 816.) Magnet must have written -- and not revised -- this before 12 June 1984, when the Ontario government decided to fully fund separate schools.

³²⁸ Cf Walker, Franklin A., *Catholic Education and Politics in Ontario*, Vol. III, Toronto, Catholic Education Foundation of Ontario, 1986, p. 1-2.

³²⁹ *Reference re Bill 30, An Act to Amend the Education Act (Ontario)*, (1987) 1 S.C.R. 1148. In *Reference re The Adoption Act*, (1938) S.C.R. 398, a 1938 unanimous Supreme Court decision, there had been the following obiter dicta: at p. 402: "By s. 93 (subject to provisions having for their purpose the protection of religious minorities) education is committed exclusively to the responsibility of the" provincial legislatures. The Court recalls that s. 93 embodies one of the cardinal terms of the Confederation arrangement. The term education is "employed in this section in its most comprehensive sense."

decided that subsidizing Catholic education in Ontario is immune from review under the Charter: the equality rights in s. 15 cannot be used to strike down the rights contained in s. 93. Section 29 of the Charter states specifically that s. 93 rights are not abrogated or derogated by the Charter.³³⁰ Judge Bertha Wilson, in writing the majority reasons for four of the seven judges, repeated that s. 93 represents a fundamental part of the Confederation compromise, and added that even without s. 29, s. 93 would override other arguments.³³¹

Wilson, Chief Justice Dickson, McIntyre and La Forest thus overturned the *Tiny* rationale, a creature, as we know, of the 1928 Privy Council. The 1987 Supreme Court decided that pre-Confederation legislation did not authorize the province of Ontario to deny full funding to the separate school system, because the power to regulate could not run counter to

³³⁰ Cf Brown and Zuker, *Education Law*, p. 4.

³³¹ Cf Black-Branch, Jonathan, *Making Sense of the Canadian Charter of Rights and Freedoms. A handbook for administrators and teachers*, Toronto, Canadian Education Association, 1995, p.29, where he comments the following scenario: "A group of Muslim parents applies to the government for funding to open a religious school. Are they entitled to public funding? The answer is no. They are not "entitled" to receive public funds to open a school of a religious nature. They may, however, request those funds. Asking permission for funding is different from being "entitled" to it." He asks rhetorically, Is it likely that the government will agree? "It depends on the government of the day and those involved in funding decisions."

the main provisions of the legislation being regulated -- legislation which in this area had been given constitutional protection.³³²

“Le pouvoir de réglementation ne devait pas être interprété de manière à rendre aléatoire ou lettre morte les droits accordés aux écoles séparées dans les lois préconfédératives (...) Cette limitation donnée par la Cour au pouvoir de réglementer a conduit la juge Wilson à décider que, tant sur le plan du niveau d’enseignement protégé (i.e. secondary) que sur celui du financement public des écoles séparées (i.e. full funding), la décision du Conseil privé était mal fondée. L’avis du Conseil privé était erroné en ce que l’interprétation qu’il donnait de l’étendue des pouvoirs du Conseil de l’instruction publique (of Ontario) dénaturait l’essence même de la Loi de 1863.”³³³

1.4.3.5. Condition: Infringement of the Right to Denominational Schools

Another essential condition for s. 93 protection is that the right to denominational schools be infringed by the province. The courts have differed in defining what this infringement means.

Limiting the review to recent cases, in 1984 the Supreme Court held that Quebec’s *Loi sur la fiscalité municipale* was not unconstitutional when it obliged a school board to hold a referendum within its jurisdiction in order to be able to increase the school tax, but that it did

³³² Even though the decision was unanimous as to the result, three judges did not agree with Wilson as to the reasons, and “ont refusé de remettre en question l’arrêt *Tiny*”: Garant, *Droit scolaire*, 1992, p. 80.

³³³ Ibidem, p. 82.

violate the s. 93(1) right in allowing Catholics and non-Catholics alike to vote on the tax increase.³³⁴

“Dans le *Renvoi sur la Loi sur l’instruction publique* de 1990, il est question de l’attribution du pouvoir d’établir des règles pour assurer la confessionnalité aux Comités catholique et protestant du Conseil supérieur de l’éducation par la législation contemporaine; la Cour d’appel, à l’unanimité, décide que ‘l’attribution d’un tel pouvoir ne porte aucun préjudice aux droits constitutionnels garantis’.”³³⁵

A restriction is not necessarily an infringement, according to the Saskatchewan Court of Appeal. It validated a provincial law that established a system of contract negotiations for all the teachers of the province. The court judged that, even though the statute deprived separate schools of some aspects of their jurisdiction, it did not invade the right to choose and place teachers, nor damage the nature and quality of education: the statute did not therefore erode the power of control of the separate school boards.³³⁶

In *Essex County (Roman Catholic Separate School Board) v. Porter*, two teachers had been fired because they had married before civil, not

³³⁴ *Attorney General (Quebec) v. Greater Hull School Board*, (1984) 2 S.C.R.575.

³³⁵ Garant, op. cit., p. 87. The decision is in (1990) R.J.Q. 2498. See the section on the Comité catholique above.

³³⁶ *Moose Jaw Board of Education v. Attorney General of Saskatchewan*, (1975) 57 D.L.R. (3d) 315, summarized ibidem, pp. 87-88. Garant there mentions a similar Quebec case.

Church, authorities. The Ontario Court of Appeal decided that the separate school board had the right to dismiss them for 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.(...) Nothing in the legislation of the Province of Ontario can prejudicially affect this right. It seems apparent that to subject the right to dismiss for denominational reasons to a review by a Board of Reference would prejudicially affect the right.”³³⁷

In British Columbia a Catholic teacher, Margaret Caldwell, was fired from a Catholic school because she married a divorced man. The Supreme Court held that the B.C. *Human Rights Code* as it then stood, which forbade discrimination based on religion, did not apply. The court made this distinction: Caldwell had not been dismissed for disobeying a tenet of her faith, but rather because a Catholic teacher in a Catholic school sets an example, and conducting herself according to her faith constituted a real professional requirement for the job. A second rationale for lack of discrimination, said the court, was that the school was owned and run by a non-profit organization, and the *Human Rights*

³³⁷ (1978), 89 D.L.R. (3d) 445 (C.A. Ont.), at 447 and at 445. Six years later, in *Essex County (Roman Catholic Separate School Board) v. Tremblay-Webster*, (1984), 45 O.R. (2d) 83 (C.A.), the same court allowed another teacher who had married outside the Church to obtain grievance of her dismissal for just cause. Cf Brown and Zuker, *Education Law*, Toronto, Carswell, 1998, p. 9.

Code allowed these institutions to hire those it saw fit, in order to better serve the people the institution existed for.

The respondent had attacked the *Human Rights Code*, alleging that it was unconstitutional. The court held that the *Human Rights Code* did not infringe s. 93(1): it said that if interpreted in a broad manner, the *Code* did not violate freedom of religion nor the right to denominational schools. For good measure, the court added that “the rights of denominational schools in British Columbia were very limited at the time of Confederation. It has been said that they were limited to the right to exist.” And those are the bare-bone rights that are constitutionally protected to this day there.

The school where Mrs. Caldwell taught was owned and operated by a society called The Catholic Public Schools of Vancouver Archdiocese.

“It is subject to control by its own local school board and it receives public funds for the carrying out of its programs. Under the provisions of the School Support (Independent) Act, R.S.B.C. 1979, c.378, the school is entitled to receive financial support from public funds based upon a formula which is related to the number of students and the average operating cost of the school.”³³⁸

³³⁸ *Caldwell v. Stuart*, (1984) 2 S.C.R. 603. Judgment quoted in *Magnet*, op. cit., p. 832, 836. Judge McIntyre also stated: “This difference (between Catholic and non-Catholic schools) does not consist in the mere addition of religious training to the academic curriculum. The religious or doctrinal aspect of the school lies at its very heart and colours all its activities and programs. The role of the teacher in this respect is fundamental to the whole effort of the school, as much in its spiritual nature as in its academic. It is my opinion that, objectively viewed, having in mind the special nature and objectives of the

Thus, despite the fact that a province may not have a fully-funded separate schools structure, s. 93(1) still may apply to it (unless constitutionally amended). It is important to realize that the “emptying” of s. 93 by Privy Council jurisprudence has still “left some rights” for separate school parents in the five “empty” provinces.³³⁹ This leads us to our final evaluation.

1.5. Evaluation of Explicit Parental Constitutional Rights to Denominational Schools

1.5.1. The Law

Most relevant constitutional provisions: Constitution Act, 1867, ss. 93, 93A; Manitoba Act, 1870, s. 22; Alberta Act, 1905, s. 17; Saskatchewan Act, 1905, s. 17; Charter, ss. 2, 7, 15, 25, 26, 27, 29.

Most relevant cases: Reference Re Bill 30, Adler v. Ontario.

Most relevant provisions of international rights declarations: UDHR, art. 26.3; ICCPR, art. 18; ESC Rights Covenant art. 13; 25 Nov. 1981 U.N. Declaration, art. 5; Conv. agaisnt Discr. in Educ., art. 5; ACHR, art. 12.4. (See Appendix V.)

It is necessary to distinguish among (a) a constitutional right to denominational schools, (b) a constitutional right to partially-funded

school, the requirement of religious conformance including the acceptance and observance of the Church’s rules regarding marriage is reasonably necessary to assure the achievement of the objects of the school.” Ibidem, p. 835.

³³⁹ British Columbia, Manitoba, New Brunswick, Prince Edward Island and Nova Scotia.

denominational schools, and finally, (c) a constitutional right to fully-funded denominational schools.

In Canada, all parents have (a), because all have the right to send their children to, establish, direct, manage, etc., religious schools. (But between 1977 and 1983 the Quebec government impeded the free exercise of this right by imposing a moratorium on the creation of new independent schools.)

Catholic parents have (c) in Ontario, Alberta and Saskatchewan.

1.5.2. Evaluation

All parents in all provinces should have at least (b), in my opinion.³⁴⁰ In this way, Canada's constitutional rights would come into line with its international obligations: to respect the right of parents to choose the education of their children. Otherwise, there is discrimination between those parents who can and those who cannot afford to send their children to independent schools. The provinces should ensure the provision of genuine choice of school by developing, implementing and monitoring funding formulas for partially-funded independent schools.

The above should be a minimum. Provinces such as Ontario, Alberta and Saskatchewan which wish to, or must, because of previous constitutional settlements, fully fund separate schools (whether Catholic or Protestant), could continue to do so. It would be advisable that other provinces too, such as Manitoba and the Maritime provinces, have separate schools, as does British Columbia. Section 93 and equivalent documents can be made to revive for these provinces by politicians and

³⁴⁰ Holmes and David Brown are also of this view.

judges -- parents there could seek judicial declarations of their rights to that effect.

Some authors think that separate schools discriminate against non-Catholics. Aside from the fact that some fully-funded denominational schools are, or were until recently, Protestant, it does not seem that the recognition of a right to some people should be taken away because others are denied it. An evil for a few, some, many or all is of no consolation to anyone. If the rights of *some* are respected, justice requires to *extend* those rights to *all*, not to take away the rights of some in the interests of a misconceived equality. It is not more just that none be respected in their rights. It is more just that as many as possible -- equality requires that *all* -- be respected in their rights.

Despite the fact that this is clear throughout this thesis, I wish to emphasize that I am pretending to defend the rights of all parents, also of Protestants, and of members of other religions, and of non-believing parents -- not just those of Catholic parents.

On more than one occasion Canadians who speak languages other than English or French have complained of discrimination because they are not allowed to send their children to fully provincially funded schools in their mother tongue. It does not seem unreasonable nor unjust that their claim be denied (unless they are native Canadians), because this country has two founding peoples, etc.

The underlying philosophy of a family -- the basic values it seeks to transmit -- is more fundamental than language. I think that it should be recognized more fully than linguistic choice in schooling.

But the point is that the following argument seems untenable, at least to me: since not all languages are treated equally, only one should. It

would be unthinkable to take away francophone or native schools because Cantonese or Italian schools are not fully funded. (However, the solution of partially funding independent schools, regardless of the language of instruction, as long as there are policies in place on instruction in English or French, seems more just and feasible.)

Parents should be permitted to enrol their children in fully-funded denominational schools, irrespective of religion, if the children are otherwise qualified and the family is willing to abide by the rules and expectations of the chosen school.³⁴¹ It seems important that in Ontario, Saskatchewan, Alberta and elsewhere the rights of parents to send their children to the denominational or non-denominational school of their choice be respected -- *regardless of the faith of the parents*. Thus I would maintain that a decision like *Schmidt v. Calgary Board of Education* is unjust. Mr. Schmidt, a Catholic, wished to send his child to a local public rather than separate school, but was being asked either to pay special fees to the board or sign a document saying he was no longer Catholic. The Alberta Court of Appeal ruled in favor of the board.³⁴²

All of the above does not mean, obviously, that provinces should not continue providing fully-funded public schooling to parents who desire to have their children educated in such a system.

³⁴¹ Cf Holmes, *op. cit.*, pp. 277, 284.

³⁴² (1976) 6 W.W.R. 717, commented in MacKay, Wayne, *Education Law in Canada*, p. 67.

1.5.3. Rationale

This right is crystal-clear in the international declarations Canada has signed. It is also contained in the Canadian Constitution. Charter s. 2 guarantees the freedoms of conscience, religion, thought, and belief of everyone, including the child -- who, until a certain age, has the right to be brought up in the beliefs of his parents, not of the province, the country, the ministry of education, the teachers, the educational establishment, the judiciary, or anyone else. Section 7, furthermore, guarantees the right to liberty: jurisprudence in Canada and the United States has included in the right to liberty the right of parents to educate their children as they see fit. Section 15, meanwhile, precludes discrimination, in particular based on religion. In my view s. 93 and equivalent provisions concretize one way of protecting the right of parents to choose a school. Charter s. 29 is not therefore an exception to the Charter rights, but rather a re-inforcement of the right of parents to at least partial funding (arguably it could be amended to reduce the obligation of the province: however, there exists the real danger that opponents of parental rights in education might take advantage of that to deny the right to even partial funding). Section 93 does represent a guarantee of a fundamental freedom: the wording of the guarantee could be improved, but it is there and it does not constitute a simple privilege. Partial funding of confessional schools would be a less intrusive measure to achieve the objective of safeguarding the constitutional right of parents to educate their children according to their own philosophy, not the state's or someone else's (until the adolescent starts exercising his or her own freedom of conscience). The public system is not absolutely neutral. It cannot be. Every system, every teacher, has a philosophy. The so-called neutral public system may be teaching children, for example, that they may kill (through abortion,

euthanasia, the death penalty), steal, have sexual relations before marriage, etc. This undoubtedly violates the liberty we are discussing, if parents are not in agreement with these teachings.

It is important, in my opinion, to emphasize the right of the parents, because it has been de-emphasized or overlooked in Canadian legislation and jurisprudence, which more often than not refers to minorities, or classes of persons, etc. I think, in fact, that viewing our subject from the eyes of the parents resolves many, many issues that otherwise seem complicated and go unresolved or are resolved unsatisfactorily. An example: the different arguments of the four opinions expressed by Supreme Court justices in *Adler v. Ontario*.

In *Zylberberg*, *Elgin County*, *Adler* and *Bal*, the majoritarian judges on the one hand called religious discrimination the teaching of the Christian religion to students even though there was an exemption possibility for parents, and on the other did not call discrimination (or denigration of freedom of conscience, to use the *Zylberberg* phrase) the obligatory indoctrination in a philosophy which undermines values many parents hold dear and wish to transmit. It is easy to tell a parent certain theoretical things -- but they are the ones who raise their sons and daughters, who live with them, and *whom the law often makes responsible for certain illegal actions committed by their children*. It is unjust to make parents responsible for the actions of their under-age children -- of negligence, truancy, etc. -- while not allowing them to exercise their natural rights of education, which is precisely the way they often have to ensure their upbringing. In any case, even if a *social engineer*, an educator, a legislator, a religious leader or a judge were correct in his or her appreciation of the values that should be transmitted, the ultimate *judge* should be the parent.

To sum up, a key, and often misleading, concept is that of funding, as part of the right. A constitutional right may or may not be protected. Being protected, it may or may not require state funding. Requiring state funding, it may require full or only partial funding. Thus, in Canada, parents have the right to choose fully-funded English or French schools under certain conditions (Charter s. 23), and fully-funded Catholic schools in certain provinces (Ontario, Alberta and Saskatchewan); they all have the right to choose independent schooling in any religion or belief, and in any language as long as their children also learn one of the two official languages of Canada.

I think that Ontario should find the way of safeguarding the rights of all parents, not only Catholic parents, to freely choose schools for their children. I do not wish to defend only the rights of Catholic parents.³⁴³

1.5.4. Possible Church-State Accords

The Code of Canon Law says:

"Can. 803 -- § 1. A Catholic school is understood to be one which is under the control of the competent ecclesiastical authority or of a public ecclesiastical juridical person, or one which in a written document is acknowledged as Catholic by the ecclesiastical authority. § 2. Formation and education in a Catholic school must be based on the principles of Catholic doctrine, and the teachers must be outstanding in true doctrine and uprightness of life. § 3. No school, even if it is in fact Catholic, may bear the title 'Catholic school' except by the consent of the competent ecclesiastical authority."

³⁴³ Cf Pope PiusXI, Encyclical *Divini Illius Magistri* , 50.

“Can. 804 -- § 1. The formation and education in the Catholic religion provided in any school (...) is subject to the authority of the Church. It is for the Bishops’ Conference to issue general norms concerning this field of activity and for the diocesan Bishop to regulate and watch over it. § 2. The local Ordinary is to be careful that those who are appointed as teachers of (Catholic) religion in schools, even non-Catholic (schools), are outstanding in true doctrine, in the witness of their Christian life, and in their teaching ability.”

“Can. 805 -- In his own diocese, the local Ordinary has the right to appoint or to approve teachers of religion and, if religious or moral considerations require it, the right to remove them or to demand that they be removed.”

“Can. 806 -- § 1. The diocesan Bishop has the right to watch over and inspect the Catholic schools situated in his territory (...). He also has the right to issue directives concerning the general regulation of Catholic schools (...).”³⁴⁴

Given the above norms of the law of their Church, Catholic authorities must clarify the standing of “Catholic” schools.

However briefly, we will mention a solution to some of the Church-state friction -- a way of better accommodating Church-state relations regarding education in Canada -- despite the fact that the topic exceeds the subject of this thesis.

Canadian provinces could follow the lead of German *Länder* and so many other jurisdictions in signing agreements with Catholic Church

³⁴⁴ *Code of Canon Law Annotated*. I have capitalized some words.

authorities and representatives of other religious communities regarding educational matters. This, it seems, is the best way to safeguard the rights of the state, the Churches, and, not the least, families.

Andrea Gianni lists several German accords with the Catholic Church, at the diocesan and *Länder* level, as well as with the Holy See.³⁴⁵

Official accords between a province and the Catholic Church, either at the level of the Canadian Conference of Catholic Bishops, of the Holy See, etc., would be a splendid solution to not a few of the problems that have been seen throughout this thesis. These accords could deal with separate schools, with the teaching of religion in non-Catholic public schools, with Catholic Religion teacher training and certification, etc. We have already seen examples of Church-province relations in Quebec and Newfoundland, but there should be more, with as many faith communities as possible.

The Italian-Holy See Concordat of 1984 included provisions on the teaching of religion in public schools which could be a good model to follow, in some respects, in similar agreements between Canadian provinces and the Holy See, the Canadian Conference of Catholic Bishops, etc. Ontario, Newfoundland, Quebec, are just a few of the

³⁴⁵ Land Niedersachsen, 19 Sept. 1967; Land Saar, Oct. 1969; Nordrhein-Westfalen, 21 Dec. 1970; Land Rheinland-Pfalz, 26 Aug. 1964 and 29 April 1969; Land Hessen, 1959 and 1 Dec. 1966. *Modus Vivendi Berlino*, 2 July 1970. Accords with Baviera, 7 Oct. 1968 and 18 Oct. 1974. Concordat Land Niedersachsen, 26 Feb. 1965. Cf *L'insegnamento della religione nel diritto ecclesiastico italiano*, Padova, CEDAM, 1997, p. 2.

provinces that would have an interest in this, based on what we have seen. Please consult Appendix VI.

CHAPTER 2. RIGHTS TO FUNDED MINORITY LANGUAGE SCHOOLS

Introduction

We have distinguished the constitutional right in general to receive education, or *bare* right, from the right to receive *state-funded* education, in a particular language. One thing is to declare illegal or unconstitutional the option of sending one's children to any (independent or state-run) linguistic school of choice, and another is to declare that option constitutional, but without providing government funding.

Here we will briefly touch on the constitutional rights established in the Charter on this point. The reader who desires to know more can see, for example, Foucher and Garant.³⁴⁶

2.1. Constitutional Rights of Anglophone and Francophone Citizen-Parents

The Charter's Minority Language Educational Rights *code*, the fruit of constitutional negotiations leading up to the 1982 Charter and which, as

³⁴⁶ For a study of s. 23, its application in each province, and judicial interpretation thereof, until 1995, cf Foucher, Pierre, *Les droits scolaires des minorités linguistiques*, in Beaudoin and Mendes, *The Canadian Charter of Rights and Freedoms*, Toronto, Carswell, 3d edition, 1996, pp. 16-1 to 16-48 (sic). For a review of its application and interpretation, as well as its historical background, in Canada and especially in Quebec, including this province's restriction and even denial of the right, cf *Chapitre 3: Les aspects linguistiques du droit de l'éducation*, in Garant, Patrice, *Droit scolaire*, Cowansville (Québec), Yvon Blais, 1992, pp. 101-146.

we know, Quebec has not fully accepted, is clearly drafted and quite self-explanatory:

"23. (1) Citizens of Canada (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, *have the right to have their children receive* primary and secondary school instruction in that language in that province.

"(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, *have the right to have all their children receive* primary and secondary school instruction in the same language.

"(3) The *right of citizens* of Canada under subsection (1) and (2) *to have their children receive* primary and secondary school instruction in the language of the English or French linguistic minority population of a province (a) *applies* wherever in the province the number of children of *citizens who have such a right* is sufficient to warrant the provision to them out of public funds of minority language instruction; and (b) *includes*, where the number of those children so warrants, *the right to have them receive that instruction* in minority language educational facilities provided out of public funds." (Emphasis added.)

Paragraph 23(1)(a) does not apply to the province of Quebec, because s. 59 of the *Constitution Act, 1982* states that it will come into

force in respect of Quebec only when this is authorized by the National Assembly or government of the province -- and this has yet to happen.

The Supreme Court has held that

“l’article 23 de la Charte n’est pas, comme d’autres dispositions du même document constitutionnel, de ceux que l’on rencontre communément dans les chartes et déclarations de droits fondamentaux du même genre. Il n’est pas la codification de droits essentiels, préexistants et plus ou moins universels que l’on voudrait confirmer et peut-être préciser, étendre ou modifier et auxquels on veut surtout conférer une primauté et une intangibilité nouvelles en les enchâssant dans la loi suprême du pays. L’article 23 de la Charte constitue, dans sa spécificité, un ensemble unique de dispositions constitutionnelles tout à fait particulier au Canada.”³⁴⁷

The *Constitution Act, 1982* is speaking about *the right of parents to the education of their children*. Although it is dealing with a specific aspect thereof, it is, in my view, *implicitly recognizing the existence of a broader set of parental rights in education*.

2.2. Parents’ Right to a School: The *Mahé* Case (1990)

The 1990 *Mahé* judgment of the Supreme Court is key. French-Albertan parents claimed that their rights under s. 23 were not satisfied by the Edmonton education system. In particular, they argued that s. 23 guaranteed the right, in Edmonton, to the “management and control” of an Alberta-funded French school.

³⁴⁷ *Quebec Association of Protestant School Boards et autres c. P.G. du Québec*, (1984) 2 R.C.S. 66, at 79, quoted in Garant, op. cit., p. 137.

At the time, in the Edmonton area there were 117,000 students in the public and separate school systems and almost 3,000 citizens whose first language was French. These citizens had 3,750 children between 5 and 19 years of age. In 1984, the Roman Catholic Separate School Board established a francophone school in Edmonton. A year later it had 242 students from kindergarten to grade 6.

The parents thus brought an action against Alberta seeking these declarations: (1) that there was a sufficient number of children of the French linguistic minority in the Edmonton area to warrant publicly-funded French language instruction and facilities; (2) that s. 23 entitled them to have their children educated in facilities equivalent to those provided to English-speaking children, with powers equivalent to those of the latter's parents; and (3) that the *Alberta School Act* was inconsistent with s. 23.

Although the Alberta Court of Appeal accepted many of the parents' general arguments, it declined to grant the specific solutions requested. The parents appealed. The main issue was the degree of "management and control" of a French language school which should be accorded to the minority language parents in Edmonton. The Supreme Court, in allowing the appeal, said that

the general purpose of s.23 is to preserve and promote the two official languages and cultures of Canada, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population. Section 23 aims at achieving this by recognizing (English or French) minority language educational rights to minority language parents throughout Canada. Section 23 also desires to correct a national injustice, i.e. the progressive erosion of minority official language (French or English) communities. In order to

fulfill these two purposes, s. 23 should be viewed as providing a general right to minority language instruction with paras. (a) and (b) of sub-s.(3) qualifying this general right. Section 23 encompasses a “sliding scale” of requirements, with sub-s.(3)(b) indicating the upper level of possible institutional requirements, and the term “instruction” in sub-s.(3)(a) indicating the lower level.

Where the numbers of potential students warrant, s. 23 gives minority language parents a right to management and control over the educational facilities in which their children are taught. Such management and control is vital to ensure that their language and culture flourish. It was considered essential that the minority language group have control over those aspects of education which influence their language and culture.

There were sufficient numbers of s. 23 students in the Edmonton area to pedagogically and financially justify a province-funded primary and secondary school. The numbers of potential students, however, were insufficient to mandate the establishment of a francophone school *board*. For that reason, the court held that the minority language parents should be represented on the separate school board.³⁴⁸

2.3. One Historical Example Among Many: The Case of Franco-Ontarians

There have been many struggles over parental rights to educate their children in the language of their choice with state funding: the history of

³⁴⁸ Cf official summary of *Mahé v. Alberta*, (1990) 1 S.C.R. 342.

Canada is intertwined with these issues. One example, related to subject-matter familiar to the reader, follows.

In the late 1960s Franco-Ontarian leaders negotiated with the government of Ontario regarding the creation of francophone secondary schools. Private francophone secondary schools were in trouble in Ontario, in part because of the sudden dearth of teaching Religious. So Franco-Ontarians looked to the government, asking for the creation of French secondary schools. But the government decided that there would be no francophone separate secondary schools. Faced with this predicament, Franco-Ontarian leaders accepted the handing over to the government of private schools and the creation of French *public* secondary schools, with only vague promises and no legal assurances that the Catholic religion would be able to be taught there.

Ontario's *Regulation 45* allowed public boards to authorize religious instruction in one or more of their schools without requiring all their schools to do the same. Some Franco-Ontarian negotiators grasped at this possibility. But the Mackay Report recommended its abolishment. And the laws that created the French secondary schools, passed in July 1968, did not provide for religious instruction.

In sum, Franco-Ontarian educational organizations in the late 1960s agreed to turn their private Catholic secondary schools over to the public system (in order to allow their children to continue to learn in their own language). The rights of Franco-Ontarian parents to have their children receive Catholic religion courses in public francophone schools were not satisfied. Because they foresaw that, as has been already studied, the Ontario government would continue to refuse (until 1984) to extend full funding to grades 11-13, and because Religious institutes were pulling out of education, representatives of Franco-Ontarian parents opted for

language over religion. Their hopes that the Ontario authorities would allow Catholic religion courses in public secondary schools were not fulfilled.³⁴⁹ On the other hand, their century-long struggle to have their children taught in French up to grade 13 was won in 1968: the *Schools Administration Amendment Act* passed that year obliged boards to provide francophone education when demanded by at least 30 parents.³⁵⁰

Conclusion

I distinguish between the bare right of parents to educate their children in English or French, and their right to funded education in those languages, even though s. 23 does not.

The first is, in my view, based on pre-existing rights and even though it can be limited for collective goals, I do not think it could be totally suppressed.

The Charter restricts the rights to Canadian citizens.

³⁴⁹ Cf Walker, Frankin, op. cit., pp. 237-266. "At the end of the sixties when French Canadians agreed to accept French public schools, it was because of the inadequacy and the financial crises of these religious schools, not because of a turning away from religion (...): Not because of a sudden rejection of Rome, but because of the monumental and urgent problem of how to train thousands of French-speaking students who could" not adjust to anglophone secondary schools. Ibid., pp. 250, 253.

³⁵⁰ Cf ibidem, p. 247. In effect, English Canadians had become more tolerant of their French-speaking connationals. Pierre Trudeau's Liberals had been elected in 1968; the new prime minister strengthened the status of French all across Canada.

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Quebec restricts the rights to Canadian citizens under certain conditions, which have been controversial.

The Supreme Court has interpreted the right to funding, in *Mahé* and other cases, to include province-financed facilities. It views s. 23, because of the history of Canada, as a way of promoting minority cultures which have been eroded and of correcting past injustices.

CONCLUSION

Canada's Constitution explicitly guarantees the rights of parents to fully-funded Catholic separate primary and secondary schools for their children, in Ontario, Alberta and Saskatchewan, and to some fully-funded Protestant separate schools in the same provinces. It used to explicitly protect those rights in the other provinces (which, unlike Quebec and Newfoundland, never sought nor obtained constitutional amendments), but judicial re-interpretation of the Constitution eliminated the right to funding.

Since 1982 Canada's Constitution also explicitly protects the rights of citizen-parents to English or French schools for their children, but Quebec has yet to agree to that provision of the Charter.

Canada's Constitution implicitly protects other educational rights of parents: the rights to independent (including private-denominational and home) schooling, to found and direct independent schools, to funded special education in public schools, to some participation in the schools of their children, etc.

It is my interpretation that Canada's Constitution implicitly safeguards the right of parents to ensure the religious education of their children in conformity with their own convictions: in public schools, through some type of provincial funding of independent schooling, etc. But this right has been jeopardized by recent court cases, which tend to view the rights of parents to funded denominational schooling as mere privileges.

Among the *supra-constitutional* norms that Canada should comply with, since they belong to international agreements ratified by the Canadian government, two stand out: UDHR art. 26.3, and the

International Covenant on Economic, Social and Cultural Rights art. 13, paragraphs 3 and 4. These, especially the latter, can be broken down into four rights: 1) The right of parents to ensure the religious education of their children in conformity with their own convictions; 2) the right of parents to choose for their children schools other than those established by the public authorities; 3) the right of individuals and bodies to establish educational institutions; 4) the right of individuals and bodies to direct educational institutions.

Canada's Constitution respects all four rights in theory. But 1) is not respected absolutely, for example, in public schools; nor is 2) respected absolutely, for example when independent schools receive no funding from the province. What is worse is that these are precisely the most important parental rights.

One of the main conclusions of this thesis is that, unwittingly or not, members of a certain *establishment* are imposing their ideology -- their *moral* convictions -- on children without the consent or against the wishes of their parents. This is unacceptable and unjust. It also flies in the face of international public law, and, I repeat, of Canadian constitutional law correctly interpreted.³⁵¹

³⁵¹ Judicial and scholarly interpretation at times thinly veils prejudice. Probably unknowingly, there is anti-Christian, anti-Catholic, anti-Jewish, anti-Moslem, prejudice. Sometimes, though, judges have uncovered prejudice on the part of believers who do not respect the creeds of others: cf *Chabot v. Les commissaires d'écoles de Lamorandière*, (1958), 12 D.L.R. (2d) 796 (Quebec Court of Appeal); (1957), Que. Q.B. 707 (C.A.).

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Much relevance has been given, by certain judges and writers, to the equality provisions of the Charter, in their interpretation of constitutional rights regarding religion in public schools and provincial funding of denominational schools. This interpretation owes much to legal positivism, to ignorance of public international law, and to not realizing that implicit ideological positions impose moral convictions on children -- moral convictions which, not being those of their parents, are unjustly imposed (regardless of whether one agrees with them or not). An example will suffice. Many Canadians suffer because their children undergo what they consider to be their moral corruption at the hands of teachers of certain sexual education programmes which are set up without the consent or against the desires of the parents. More important than the opinion of the teacher, principal, trustee, education minister or judge is the opinion of the parent -- whose responsibility in many civil and criminal law cases will ultimately be called into account, anyway. The law cannot have it both ways: restricting the parents' freedom but burdening them with responsibility. "Parents have duties in relation to the education of their children and corresponding rights must exist as well."³⁵²

Nor, as I have already pointed out, can one affirm on the one hand that the Constitution's s. 93 on denominational schools *is not* based on any fundamental right, and on the other, assert that the Charter's s. 23 on minority language educational rights *is* based on fundamental principles.

Daniel Proulx maintains that s. 93 is not based on any fundamental right -- that it is an odious privilege which should not exist since it

³⁵² MacKay, A. Wayne, *Education Law in Canada*, p. 70.

violates the equal rights of all parents. On the other hand, he applauds s. 23: he speaks of "droits fondés sur des principes" -- when referring to these minority *language* rights.³⁵³

One cannot have it both ways. The *raison d'être* of human rights declarations is precisely to avoid a cafeteria-style choice of rights. Many parents would say that the freedom to choose a funded denominational school is more important to them than the freedom to choose a subsidized French or English school.

There is, then, no room for complacency. Parents should act to defend their rights more forcefully, because the parental right to educate is not clearly perceived or understood by citizens, politicians, journalists,

³⁵³ "Loin d'être des droits fondamentaux, les garanties confessionnelles protégées par l'article 93 sont donc bien davantage (...) des *privilèges* et des *pouvoirs* (des) croyants catholiques et protestants (...) On sait que la Cour suprême a (distingué) entre, d'une part, les droits issus de compromis politiques (...) et, d'autre part, les droits fondés sur des principes. (...) Ce qui ne veut pas dire, toutefois, que tous les droits linguistiques ne sont que des compromis politiques et qu'ils doivent tous recevoir une interprétation étroite. Ceux qui sont enchâssés directement dans la Charte canadienne, comme son article 23 en matière d'enseignement, commandent une interprétation large et libérale en raison de leur caractère réparateur des injustices passées.(...) La Cour suprême affirme que la protection des droits des minorités est elle-même 'un principe distinct qui sous-tend notre ordre constitutionnelle' et que 'ce principe se reflète clairement dans les dispositions de la *Charte* relative à la protection des droits des minorités'." Proulx, Daniel, *La "Modification constitutionnelle de 1997" relative aux structures scolaires au Québec: une mesure opportune et juridiquement solide*, in *58Revue du Barreau*, printemps 1998, pp. 41-94, at pp. 51-52.

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religious leaders -- nor by many educators, jurists, judges, and mothers and fathers.³⁵⁴

Several obstacles must be overcome:

a) Recall that *children are not creatures of the state*.

"All parents, regardless of their religious convictions, should be free to choose the kind of education they want for their own children. The supposition that most parents do not know what is best for their own child is both condescending and anti-democratic. (...) A public school monopoly is an instrument of oppression calculated to mold the minds of

³⁵⁴ If necessary parents may want to initiate formal protests with the United Nations, submitting claims to U.N. human rights tribunals, such as the Human Rights Committee. Complaints against the violation of human rights can be brought to the U.N.'s attention by an individual or a group under more than one procedure: a) The confidential "1503 Procedure" allows the U.N. Economic and Social Council to receive communications pertaining to situations that constitute a "consistent pattern of gross violations" of human rights. Individuals or groups who claim to be victims, or a person or group (including NGOs) with direct, reliable knowledge of such violations, may submit communications. b) The Optional Protocol to the International Covenant on Civil and Political Rights provides for individual communications alleging violations of the Covenant to be submitted to the Human Rights Committee on violations, perpetrated by a State party, of any of the covenant's articles. c) UNESCO also has complaints procedures.

Inquiries could be addressed to the Office of the U.N. High Commissioner for Human Rights, U.N. Office at Geneva, 8-14 avenue de la Paix, 1211 Geneva 10, Switzerland; www.unhchr.ch. Or to the Office of the U.N. High Commissioner for Human Rights, United Nations, New York NY 10017, U.S.A.

children in the image preferred by the state. There is no place for such an oppressive institution in a democracy. Ideally, all parents who are not satisfied with the quality of education provided in the public and separate schools should be allowed to operate an independent school of their own. Provided these independent schools comply with minimal government standards, they should get the same level of public-funding per student as schools operating within the existing publicly funded systems.³⁵⁵

b) *Avoid legalism.* Human rights pre-exist, they are not endowed by statute, not even by the Constitution. In fact, too often in this thesis

³⁵⁵ Leishman, Rory, column in the *Ottawa Citizen*, 26 January 1998. He adds: "The key to improving education efficiency and quality is (...) to open up the entire system -- separate and public -- to more competition. One option for the (Ontario) government is to mandate all school boards to establish experimental charter schools, each operating under the immediate direction of a school council elected by parents of the children enrolled in the school. To be effective, these parental councils must have complete authority over all school policies, including the hiring and firing of the principal and teachers."

"So what should concerned parents do -- just sit back? (...) That's not what the Pope recommends to parents. 'They must not expect everything to be given them. (...) They should assume their mission as educators while seeking opportunities and creating adequate structures within civil society.' Many thousands of Canadian parents have already adopted this approach, by educating their children at home or enrolling them in an independent school. These dedicated parents must pay full education taxes, yet get nothing in return for the education of their children. That's neither right, fair nor democratic." (For papal quote cf John Paul II, *Homily in Santa Clara, Cuba*, 22 Jan. 1998, in *Documentos Palabra*, Madrid, 1998, pp. 13-14.)

have we come across legalistic, positivistic, interpretations of fundamental rights. This legal positivism is a real problem. It would help if judges and scholars read more carefully, as has often been said, international declarations of rights. In some cases judicial re-interpretation even defies common sense.³⁵⁶

c) *Distinguish between the right and the right to funding.* And distinguish between the right to partial funding and the right to full funding.

The reason for these important distinctions seems trite. Yet it seems to be often overlooked, also by distinguished judges.

Not even the Constitution itself is immune from this confusion. Thus, when s. 23 of the Charter declares that citizens of Canada have the right to have their children receive primary and secondary school instruction in either official language, what it means is that they have the right to receive publicly-paid schooling in English or French.

But if they have the right to the latter, a fortiori they have the *bare* right to English or French independent schooling.

³⁵⁶ Underpinning this thesis is the conviction that the human person has rights, regardless of the positive law. To think otherwise leads to a legal order based on power and to injustice. Although it could have been done in many other pages of this thesis, I take this opportunity to thank the professors of the Canon Law Faculty of the Pontificia Università della Santa Croce, so many of whom underlined in one way or another these ideas. In particular Prof. Carlos J. Errázuriz gave enlightening lessons in Philosophy of Law and in Fundamental Theory of Canon Law. Cf also Hervada, Javier, *Natural Right and Natural Law: A Critical Introduction*, Pamplona, University of Navarra, 1987, passim.

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This distinction (or confusion) is important because many arguments turn on it.

Also, this confusion (or non-distinction) creates a climate of all-or-nothing which is inimical to fair and objective reasoning and ultimately to justice.

Thus: the constitution should explicitly guarantee to all parents the bare right to send their children to schools that respect their convictions; it should also guarantee some funding; it should not necessarily entrench full funding.

d) Distinguish between secularism as ideology and as *autonomy of the temporal*.

Secularism as ideology (*laïcisme*) “throws the baby out with the bathwater”, if a colloquial expression may be permitted, i.e. upon modernity *discovering* that secular affairs such as education should be autonomous vis-à-vis religious affairs, some *moderns* throw out religion from the schools.

Secularism as *autonomy of the temporal* is a de-clericalization of education, but not a de-Christianization thereof (in the case of Christian communities or schools). It affirms the autonomy of secular affairs inasmuch as education has its own laws and values which are to be respected, guaranteed, developed.³⁵⁷

e) Demand the *right* of parents *to participate* in all schools, state-run or independent.

³⁵⁷ Cf Part I, Chapter 2, section 2.4.

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f) Remember *the principle of subsidiarity*, i. e. the *sovereign family* has rights and empowerments the sovereign state cannot violate. The family's sovereignty comes first, has priority. The mission of education must always be carried out in accordance with a proper application of this principle.

APPENDICES

I. PREAMBLE OF THE *CONSTITUTION ACT, 1867*

“Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom (...) with a Constitution similar in Principle to that of the United Kingdom:

“And whereas such a Union would conduce to the Welfare of the Provinces and promote the interests of the British Empire:

“And whereas (...) it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

“And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America:” be it enacted by Queen Victoria and this present Parliament as follows.

II. QUASI-CONSTITUTIONAL HUMAN RIGHTS STATUTES

1. The Canadian Bill of Rights

Prime Minister John G. Diefenbaker’s Conservative government passed the *Canadian Bill of Rights*³⁵⁸, a federal statute without constitutional status, but which was the predecessor of the 1982 Charter. It extended only to matters which came within the legislative authority of the Parliament of Canada.

³⁵⁸ S.C. 1960, c. 44.

Herewith relevant excerpts.

"The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

"Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law (...) enacts as follows: (...)

"1. (a) the right of the individual to life, liberty (...); (c) freedom of religion; (d) freedom of speech; (e) freedom of assembly and association (...)"

2. Provincial Human Rights Statutes

2.1. That same year Ontario enacted a *Human Rights Code*, updated several times up to 1995.³⁵⁹ Its preamble refers to the UDHR. Section 19(1) says that "this Act shall not be construed to adversely affect any right or privilege respecting separate schools enjoyed by separate school boards or their supporters under the *Constitution Act, 1867* and the *Education Act*."

The 1970s saw seven provinces enact similar statutes.

2.2. Newfoundland's *Human Rights Code*.³⁶⁰

2.3. New Brunswick's *Human Rights Code*.³⁶¹

³⁵⁹ S.O. 1961-62, c.93; and R.S.O. 1990, c. H. 19.

2.4. Quebec's *Charte des droits et libertés de la personne*³⁶² contains several provisions directly or indirectly regarding parental rights in education:

"Art. 41. Les parents ou les personnes qui en tiennent lieu ont le droit d'exiger que, dans les établissements d'enseignement publics, leurs enfants reçoivent un enseignement religieux ou moral conforme à leurs convictions, dans le cadre des programmes prévus par la loi."

"Art. 42. Les parents ou les personnes qui en tiennent lieu ont le droit de choisir pour leurs enfants des établissements d'enseignement privés, pourvu que ces établissements se conforment aux normes prescrites ou approuvées en vertu de la loi."³⁶³

³⁶⁰ R.S. Nfld. 1970, c. 262; R.S.N. 1990, c. H-14.

³⁶¹ R.S. N.B. 1973, c. H-11.

³⁶² L.R.Q., c. C-12.

³⁶³ "Art. 39. Tout enfant a droit à la protection, à la sécurité et à l'attention que ses parents ou les personnes qui en tiennent lieu peuvent lui donner."

"Art. 40. Toute personne a droit, dans la mesure et suivant les normes prévues par la loi, à l'instruction publique gratuite."

"Art. 43. Les personnes appartenant à des minorités ethniques ont le droit de maintenir et de faire progresser leur propre vie culturelle avec les autres membres de leur groupe."

"Art. 47. Les époux ont, dans le mariage, les mêmes droits, obligations et responsabilités. Ils assurent ensemble la direction morale et matérielle de la famille et l'éducation de leurs enfants communs."

2.5. Prince Edward Island's *Human Rights Act*³⁶⁴, in its preamble, declares:

"WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights (...); AND WHEREAS in 1968 *An Act Respecting Human Rights* was passed by the legislature of this province in response to the Universal Declaration of Human Rights (...)"

2.6. The *Saskatchewan Human Rights Code*³⁶⁵ declares in *Part I, Bill of Rights*, ss. 4, 5, and 6, the rights to freedom of conscience -- including "freedom of teaching" --, to free expression, and to free association, respectively. Section 13 contains a *Right to education* :

"(1) Every person and every class of persons shall enjoy the right to education in any school, college, university or other institution or place of learning, vocational training or apprenticeship without discrimination because of his or their race, creed, religion, colour, sex, sexual orientation, family status, disability, nationality, ancestry, place of origin or receipt of public assistance.

"(2) Nothing in subsection (1) prevents a school, college, university or other institution or place of learning from following a restrictive policy with respect to enrolment on the basis of sex, creed, religion or disability, where it enrolls persons of a particular sex, creed or religion

³⁶⁴ S.P.E.I. 1975, c. 72; R.S.P.E.I. 1988, c.H-12.

³⁶⁵ S.S. 1979, c. S-24.1.

exclusively, or is conducted by a religious order or society, or where it enrolls persons who are disabled.”

In the 1980s the remaining provinces followed suit.

2.7. Alberta's *Human Rights, Citizenship and Multiculturalism Act*.³⁶⁶

2.8. British Columbia's *Human Rights Code*³⁶⁷ declares in s. 13(4) that “discrimination in employment” is allowed when “a refusal, limitation, specification or preference” is “based on a bona fide occupational requirement”. (Most of the other provincial human rights statutes have similar provisions.)

2.9. Manitoba's *Human Rights Code*³⁶⁸, like Prince Edward Island's, explicitly bases itself in its preamble on the UDHR -- as well as on the Charter, “and other solemn undertakings, international and domestic, that Canadians honour”, adding that the protections of the *Code* “are of such fundamental importance that they merit paramount status over all other laws of the province”.

³⁶⁶ R.S.A. 1980, c. H-11.7. Section 1(1) says: “Unless it is expressly declared by an Act of the Legislature that it operates notwithstanding this Act, every law of Alberta is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act”.

³⁶⁷ S.B.C. 1984, c. 22; R.S.B.C 1996, c. 210. See s. 2: “If there is a conflict between this Code and any other enactment, this Code prevails.”

³⁶⁸ C.C.S.M., c. H175, first enacted in 1987, amended in 1997.

2. 10. Nova Scotia's *Human Rights Act* ³⁶⁹

3. Territorial Statutes

The territories also have similar statutes.

3.1. The Yukon has a *Human Rights Act*.³⁷⁰

3.2. The Northwest Territories passed a *Fair Practices Act* in 1988 which was proclaimed in force in 1991.³⁷¹ Besides also referring to the UDHR in the preamble, and to bona fide occupational qualifications for employment as not constituting discrimination in s. 2(3), it says, in s. 2(2), that "nothing in this Act deprives any school or District Education Authority or Divisional Education Council of the right to employ persons of any religion or religious creed where religious instruction forms or can form the whole or part of the instruction or training provided" there under the *Education Act*.

³⁶⁹ R.S.N.S. 1989, c. 214, amended by S.N.S. 1991, c. 12, which repealed the preamble.

³⁷⁰ R.S.Y. 1986 (Suppl.), c. 11, enacted S.Y. 1987, c. 3. In its preamble it states "that Canada is a party to the United Nation's" UDHR and other international undertakings; and s. 1 seeks "to promote recognition of the inherent dignity and worth and of the equal and inalienable rights of all members of the human family, these being principles underlying the *Canadian Charter of Rights and Freedoms* and the *Universal Declaration of Human Rights* and other solemn undertakings, international and national, which Canada honours".

³⁷¹ R.S.N.W.T. 1988, c. F-2.

III. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Part I of the *Constitution Act, 1982*.³⁷², entitled the *Canadian Charter of Rights and Freedoms*, has the following brief preamble, and outline: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law".

Guarantee of Rights and Freedoms: s. 1. Fundamental Freedoms: s. 2. Democratic Rights: ss. 3-5. Mobility Rights: s. 6. Legal Rights: ss. 7-14. Equality Rights: s. 15. Official Languages of Canada: ss. 16-22. Minority Language Educational Rights: s. 23. Enforcement: s. 24. General: ss. 25-31. Application of Charter: ss. 32-33. Citation: s. 34.

Section 1 states that the Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". This formulation of the so-called limitations clause echoes the European Convention of Human Rights: for example, art. 9(2) thereof.³⁷³

³⁷² Part II, ss. 35 and 35.1 (the latter added in 1983), is entitled *Rights of the Aboriginal Peoples of Canada*. Part III, s 36, is on *Equalization and Regional Disparities*. Part IV, a transitory section, was repealed. Part V, *Procedure for Amending Constitution of Canada*, comprises ss. 38-49: prior to its enactment certain provisions of the Canadian Constitution and of the provincial constitutions could be amended pursuant to the BNA Act., ss. 91(1) and 92(1); other amendments however could only be made by the British Parliament. Part VI, ss. 50-51, contains two amendments to the BNA Act. And Part VII, is a *General* part: ss. 52-61.

³⁷³ Cf Magnet, op. cit. p. 863-867.

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Section 2's fundamental freedoms are: "(a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association."

Sections 3-5 speak of the democratic right to vote and of the obligation of Parliament and provincial legislatures to sit yearly, and to call elections at least once every five years, except "in time of real or apprehended war, invasion or insurrection".

Sections 7-14 are the legal rights: "7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."³⁷⁴

Sections 8-14 refer to unreasonable search or seizure, arbitrary detention, rights on arrest and detention, proceedings in criminal matters, cruel and unusual punishment, self-incrimination, and the right to an interpreter.

Section 15(1) sets out the equality rights as follows: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in

³⁷⁴ The word "everyone" includes unborn children according to logic, common sense, medical science, justice, common-law and civil-law judicial decisions and doctrine, and the drafting process of the Charter -- but recent jurisprudence has changed its meaning, although the latter is hotly contested in many circles. Cf Christian, *Section 7 of the Charter of Rights and Freedoms: Constraints on State Action*, in (1984), 22 *Alberta Law Review* 222; Rhéaume, *op. cit.*, pp. 81-149.

particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Section 15(2) explicitly allows affirmative action laws, programs or activities.

The official languages of Canada (ss. 16-22) are English and French. Sections 17-19 re-state the linguistic rights set out in s. 133 of the BNA Act in respect of the federal Parliament and the courts established under that Act, and also guarantee those rights in respect of the legislature and courts of New Brunswick. Although Manitoba, Quebec, Ontario and some other provinces also provide services in both languages, the issue is controversial and in some cases constitutionally complicated or simply not contemplated.

Section 23, entitled *Minority Language Educational Rights*, says: " (1) Citizens of Canada (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside,³⁷⁵ or (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.

"(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada,

³⁷⁵ Paragraph 23(1)(a) does not apply to the province of Quebec, because s. 59 of the *Constitution Act, 1982* states that that paragraph shall come into force in respect of Quebec only when this is authorized by the National Assembly or government of the province -- and this has yet to happen.

have the right to have all their children receive primary and secondary school instruction in the same language.

“(3) The right of citizens of Canada under subsection (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.”

Other relevant sections are:

“26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.”

“27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”

“29. 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.” (A reference to s. 93 of the BNA Act and its counterparts.)

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

“(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

“(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

“(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

“(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).”

(Quebec makes use of this notwithstanding clause (clause dérogatoire, clause nonobstant) to safeguard from Charter scrutiny its confessional schools legislation and its language legislation.)

IV. ALBERTA SCHOOL ACT

This is an example of provincial legislation on education. Herewith some excerpts from this statute.

“WHEREAS the best educational interests of the student are the paramount considerations in the exercise of any authority under this Act; and

WHEREAS parents have a right and a responsibility to make decisions respecting the education of their children; and

WHEREAS there is one publicly funded system of education in Alberta whose primary mandate is to provide education programs to students through its two dimensions, the public schools and the *separate schools*

in such a way that *the rights under the Constitution of Canada of separate school electors are maintained*; (...)

"Section 17(3). A board of a separate school district or a division made up only of separate school districts, by resolution, may require that the parents of students enrolled in a school operated by the board who are members of the school council must also be of the same faith as those who established the separate school districts, whether Protestant or Roman Catholic. (...)

"Section 27(4). Where a separate school district is established, an individual residing within the boundaries of the separate school district who is of the same faith as those who established that district, *whether Protestant or Roman Catholic*, (a) is a resident of the separate school district, and (b) is not a resident of the public school district. (...)

"Powers of separate school boards : Section 43. Unless otherwise provided for in this Act, the board of a separate school district (a) *possesses and may exercise all the rights, powers and privileges of*, (b) is subject to duties and liabilities the same as those of, and (c) has the same method of government as, *the board of a public school district*. (...)

"Section 132(1) When (a) a separate school district exists, and (b) the faith of an individual, whether Protestant or Roman Catholic, is the same as the faith of those who established the separate school district, the property of that individual is assessable for separate school purposes. (1.1) All property owned by an individual who is not referred to in subsection (1) is assessable for public school purposes.

"(2) When (a) a separate school district exists, and (b) the property is held by 2 or more individuals as joint tenants or tenants in

common, each individual shall be assessed for the purposes of the district of which he is a resident, in proportion to his interest in the property."³⁷⁶

V. INTERNATIONAL DECLARATIONS OF RIGHTS

1. The Universal Declaration of Human Rights. 10 December 1948.

"Article 26. 1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

"2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

"3. Parents have a prior right to choose the kind of education that shall be given to their children."³⁷⁷

³⁷⁶ R.S.A. 1988 c. S3.1; 1990 c. 36; 1993 c. 24; 1994 c. 29; 1995 c. 27. Emphasis added.

³⁷⁷ Cf also Art. 16.3, which declares that the family as a natural and fundamental element of society has the right to the protection of society and of the state.

2. The (Council of Europe's) Convention on the Protection of Human Rights and Fundamental Freedoms. 4 November 1950.

"Article 9 (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

Additional Protocol (No. 1) to the European Convention for the Protection of Human Rights and Fundamental Freedoms :

"Article 2. No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."³⁷⁸

³⁷⁸ Approved 20 May 1952, in force 18 May 1954. Cf Hervada, Javier and Zumaquero, José Manuel, (eds.), *Textos Internacionales de Derechos Humanos*, Pamplona, 1978, no. 583. Cited in Eur. Court H. R., Case of Kjeldsen, Busk Madsen and Pedersen, judgment of 7 December 1976, Series A no. 23, paragraphs 49 ff.

3. The Declaration on the Rights of the Child. 20 November 1959.

“Principle 7. The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture, and enable him on a basis of equal opportunity to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of society.

“The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents. (...)”

4. The Convention Against Discrimination in Education. 14 December 1960.

“Article 5. 1. The State Parties to this Convention agree that: a. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms; it shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace;

“b. It is essential to respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities and, secondly, to ensure in a manner consistent with the procedures followed in the State for the application of its legislation, the religious and moral education of the children in conformity with their own convictions; and no person or

group of persons should be compelled to receive religious instruction inconsistent with his or their convictions;

“c. It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language, provided however: (i) That this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty; (ii) That the standard of education is not lower than the general standard laid down or approved by the competent authorities; and (iii) That attendance at such schools is optional.”³⁷⁹

5. The International Convention on Economic, Social and Cultural Rights. 16 December 1966.

“Article 13. 1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote

³⁷⁹ Cf Hervada, Javier and Zumaquero, José Manuel, (eds.), *Textos Internacionales de Derechos Humanos*, Pamplona, 1978, no. 829. Paragraph 2 of Art. 5 reads: “The State Parties to this Convention undertake to take all necessary measures to ensure the application of the principles enunciated in paragraph 1 of this Article.”

understanding, tolerance and friendship among all nations and all racial, ethnic and religious groups, and further (...) peace. (...)

"3. The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

"4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State."³⁸⁰

**6. The International Convention on Civil and Political Rights.
16 December 1966.**

"Article 18. 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and *teaching*. (...)

³⁸⁰ Hervada and Zumaquero, op. cit., nos. 1342-1344. This convention came into effect on 30 January 1976. Emphasis added.

"4. The State Parties to the present Covenant undertake to have respect for the *liberty of parents* and, when applicable, legal guardians *to ensure the religious and moral education of their children in conformity with their own convictions.*"³⁸¹

*16 December 1966. Optional Protocol of the International Convention on Civil and Political Rights*³⁸²

7. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. 25 November 1981.

"Art . 5. (...) 2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle. (...)

"4. In the case of a child who is not under the care either of his parents or of legal guardians, due account shall be taken of their

³⁸¹ Ibidem, no. 1427. This convention came into force on 23 March 1976. Emphasis added.

³⁸² Ibidem, nos. 2555-2582. This protocol also came into effect on 23 March 1976. It establishes the procedure of the U.N. Human Rights Committee. For a Canadian case, cf *Lovelace*, 8 April 1981, Communication No. R6/24, Report of the Human Rights Committee, 36th Session, Supplement No. 40 (A/36/40), a commentary of which can be found in Magnet, op. cit. 866-867.

expressed wishes or of any other proof of their wishes in the matter of religion or belief (...)"³⁸³

8. The (United Nation's) Convention on the Rights of the Child. 20 November 1989.

"Preamble: (...) Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of (...) children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community (...)

"Art. 13. 1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers (...)

"Art. 14. 1. States Parties shall respect the right of the child to freedom of thought, conscience and religion. 2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. (...)

"Art. 28. 1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) Make primary education compulsory and available free to all; (b) Encourage

³⁸³ OIDEL, *Freedom of Education. International Instruments*, Geneva. This document has the official English version of most of the declarations being excerpted in this Appendix.

the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need; (c) Make higher education accessible to all on the basis of capacity by every appropriate means; (d) Make educational and vocational information and guidance available and accessible to all children; (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates. (...)

"Art. 29. 1. States Parties agree that the education of the child shall be directed to: (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; (e) The development of respect for the natural environment. 2. *No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.*

“Art. 30. In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.”³⁸⁴

VI. THE ITALIAN CONCORDAT

With the 1984 *updating* of the 1929 Lateran Concordat, the Holy See and the Italian Republic also updated the agreement as to what part of, how and how often, and by whom the Catholic faith should be taught in Italian public schools.³⁸⁵

Art. 9.2 of the Italy-Holy See Accord of 18 February 1984 states:³⁸⁶

“La Repubblica italiana, riconoscendo il valore della cultura religiosa e tenendo conto che i principi del cattolicesimo fanno parte del patrimonio storico del popolo italiano, continuerà ad assicurare, nel quadro delle finalità della scuola, l’insegnamento della religione cattolica nelle scuole pubbliche non universitarie di ogni ordine e grado.

“Nel rispetto della libertà di coscienza e della responsabilità educativa dei genitori, è garantito a ciascuno il diritto de scegliere se avvalersi o non avvalersi (*to opt in or opt out*) di detto insegnamento.

³⁸⁴ Emphasis added.

³⁸⁵ Cf Gianni, Andrea, *L’insegnamento della religione nel diritto ecclesiastico italiano*, CEDAM, Padova, 1997.

³⁸⁶ Ibidem, p. 250.

“All atto dell’iscrizione gli studenti o i loro genitori eserciteranno tale diritto, su richiesta dell’autorità scolastica, senza che la loro scelta possa dar luogo ad alcuna forma di discriminazione.”

This Accord and an Additional Protocol amended the Lateran Concordat; complemented by an Education Ministry-Italian Episcopal Conference agreement, canon law norms, some parliamentary and diplomatic documents, and court judgements, it established the following *formula*: (a) The Italian government commits to having the Catholic religion taught, (b) as a regular subject in all public schools, (c) guaranteeing the Church exclusive competence on doctrinal aspects via the training and approval of teachers, the co-drafting with the state of the programs of study, and the approval of textbooks. And (d) the Italian Constitution’s principles of freedom of conscience and of educational autonomy of the family underlie the right to opt in or opt out of Catholic religious instruction, and the prohibition of religious discrimination; besides having the right to opt out, all students, whether Catholic or not, have the right to opt in -- choosing to attend religion class is independent of belonging to that religion.

Catholic religion teachers are usually trained in Catholic institutes of religious education, and their degrees are convalidated by the state. This is one of the ways in which bishops safeguard the rights of the faithful to receive sound doctrine. There are also agreements between the Italian state and the Waldensians, the Assemblies of God, Seventh-Day Adventists, Jews, Baptists, and Lutherans, all of which deal in part with religious education.³⁸⁷

³⁸⁷ Gianni, in op. cit. p. 201, says that “l’ordinamento italiano ha imboccato una strada precisa in materia di regolamentazione dell’istruzione religiosa nelle

VII. SOME ELEMENTS OF CATHOLIC SOCIAL TEACHING ON PARENTS' EDUCATIONAL RIGHTS

1. The Charter of the Rights of the Family

On 22 October 1983, the Holy See issued a comprehensive statement of family rights. Canadian bishops together with bishops of the whole Catholic Church had asked for such a statement. (*Proposition* no. 42 of the 1980 Synod of Bishops, Rome, on "The Role of the Christian Family in the Modern World".) The document is addressed in the first place to governments. It says little that is new: almost all the rights expressed therein had been previously stated elsewhere. But it attempts to clearly define and assemble them in a systematic and organic way.³⁸⁸

The preamble says that "the rights of the person, even though they are expressed as rights of the individual, have a fundamental social dimension which finds an innate and vital expression in the family. (...) The family, a natural society, exists prior to the state or any other community, and possesses inherent rights which are inalienable (...) Society, and in a particular manner the state and international

scuole statali, quella di contrattare con i rappresentanti degli interessi religiosi l'adozione di un sistema a due facce su una delle quali sono alcune precise forme di controllo e sull'altra l'autonomia delle confessioni religiose nella gestione dei contenuti. (...) Lo Stato, tra le due ipotesi di insegnamento confessionale gestito dalle chiese e di istruzione religiosa 'laica' gestita dallo Stato, (ha) preferito la prima preoccupandosi di trovare all'interno del suo sistema le garanzie di pluralismo e di libertà."

³⁸⁸ 29 *The Pope Speaks* 78 (1984).

organizations, must protect the family through measures of a (...) juridical character (...) so that it can exercise its specific function."

"Art. 5. Since they have conferred life on their children, parents have the original, primary and inalienable right to educate them; hence they must be acknowledged as the first and foremost educators of their children.

"a) Parents have the right to educate their children in conformity with their moral and religious convictions, taking into account the cultural traditions of the family which favor the good and the dignity of the child; they should also receive from society the necessary aid and assistance to perform their educational role properly.

"b) Parents have the right to choose freely schools or other means necessary to educate their children in keeping with their convictions. Public authorities must ensure that public subsidies are so allocated that parents are truly free to exercise this right without incurring unjust burdens. Parents should not have to sustain, directly or indirectly, extra charges which would deny or unjustly limit the exercise of this freedom.

"c) Parents have the right to ensure that their children are not compelled to attend classes which are not in agreement with their own moral and religious convictions. In particular, sex education is a basic right of the parents and must always be carried out under their close supervision, whether at home or in educational centers chosen and controlled by them.

"d) The rights of parents are violated when a compulsory system of education is imposed by the state from which all religious formation is excluded.

"e) The primary right of parents to educate their children must be upheld in all forms of collaboration between parents, teachers and school authorities, and particularly in forms of participation designed to give citizens a voice in the functioning of schools and in the formulation and implementation of educational policies.

"f) The family has the right to expect that the means of social communications will be positive instruments for the building up of society, and will reinforce the fundamental values of the family. At the same time the family has the right to be adequately protected, especially with regard to its youngest members, from the negative effects and misuse of the mass media."³⁸⁹

2. A Summary of Some Aspects of Catholic Social Teaching Relevant to This Thesis³⁹⁰

2.1. Parents, having given life to their children, have a most serious duty-right to raise them. They must be thus considered to be the *first and foremost educators of their own children*. Common experience in fact shows that this task is so important that when it is not performed it can hardly be replaced. The duty-right of parents to educate their

³⁸⁹ Cf also articles 3, 4, 7, 8, 9, 10, and 12, especially:

Art. 3 a): "The activities of public authorities and private organizations which attempt in any way to limit the freedom of couples in deciding about (the spacing of births and the number of) their children constitute a grave offense against human dignity and justice."

³⁹⁰ Cf also the *Catechism of the Catholic Church*, Libreria Editrice Vaticana, 1994, nos. 2221-2230.

offspring is thus *unreplaceable and inalienable*. Though public authorities also have duty-rights vis-à-vis the community, they should not take advantage of their position to replace parents. Parents must be able to choose the educational methods, the ethical and civic content, and the religious inspiration in which they want their children to be formed.³⁹¹

2.2. The rights of parents -- who have corresponding obligations -- in the education of their children thus include: a) the fact that parents are the primary and principal educators and that their right and duty to educate their offspring are originary, primordial and inalienable; b) the right to educate them according to their moral and religious convictions; the duty of society to assist them in this; c) the fundamental right to choose a school for them; the duty of public authorities of guaranteeing this right and of ensuring the concrete conditions for its exercise; d) children should not be obliged to follow courses or programmes that are not in accordance with the moral and religious convictions of their parents, such as in sexual education; e) the rights of parents are violated when the state imposes an obligatory system of education which excludes any religious formation; f) the primary right of parents should be respected in all forms of cooperation among parents, teachers and school authorities.³⁹²

2.3. "*Parents are the first and most important educators of their own children, and they also possess a fundamental competence in this area:*

³⁹¹ Cf John Paul II, homily in Santa Clara, Cuba, 22 Jan. 1998, in *Dcomentos Palabra*, Madrid, 1998, pp. 13-14.

³⁹² Cf *Charter of the Rights of the Family*, above.

they are *educators because they are parents*. They share their educational mission with other individuals or institutions, such as the Church and the State. (...) For parents by themselves are not capable of satisfying every requirement of the whole process of raising children, especially in matters of schooling and the entire gamut of socialization. Subsidiarity thus complements paternal and maternal love and confirms its fundamental nature, inasmuch as all other participants in the process of education are only able to carry out their responsibilities *in the name of the parents, with their consent* and, to a certain degree, *with their authorization*. (...)

“Certainly one area in which the family has an irreplaceable role is that of *religious education* (...) We are speaking of a right intrinsically linked to the *principle of religious liberty*. Families, and more specifically parents, are free to choose for their children a particular kind of religious and moral education consonant with their own convictions.”³⁹³

2.4. We could speak of a *right*, in the singular, of *parents*, to *educate, their children*. This right is prior, primordial, primary.³⁹⁴ It is originary. It is inalienable. It is irreplaceable.

We could speak of the family as a *sovereign*, as we are accustomed to refer to the state as a sovereign. The family, often compared to the basic cell of society, possesses a particular subjectivity of its own.³⁹⁵ This ‘social subjectivity’ is bound up with the proper identity of marriage

³⁹³ John Paul II, *Letter to Families*, Vatican City, Vatican Press, 1994, no. 16.

³⁹⁴ Cf *Charter of the Rights of the Family*; and UDHR, art. 26.3.

³⁹⁵ Cf *Letter to Families*, nos. 4, 17.

and the family. Marriage, which undergirds family, is constituted by the covenant in which a man and a woman establish between themselves a partnership of their whole life, and which of its very nature is ordered to the well-being of the spouses and to the procreation and education of children.³⁹⁶

³⁹⁶ Cf *Code of Canon Law*, c. 1055, para. 1.

BIBLIOGRAPHY AND SOURCES

Laws and International Agreements

N.B. First are included the constitutional statutes, secondly the quasi-constitutional ones, thirdly, ordinary legislation, and fourthly, international agreements. This listing includes the major laws and international agreements cited in this thesis: it makes no claim to being a complete classification of Canadian laws, nor of international agreements signed by Canada or of importance to Canada, relating to education -- however, the major constitutional and quasi-constitutional statutes on our topic *are* here.

1. Constitution

Constitution Act, 1867 = British North America Act, 1867.

(The *British North America Act, 1867*, 30-31 Vict., c. 3 (U.K.), after the constitutional amendment of 1982 is called *Constitution Act, 1867*; cf *Canada Act, 1982, Schedule I*, c. 11 (U.K.) in R.S.C., 1985, Appendix II, no. 44. In this thesis I refer to the *Constitution Act, 1867* and to the BNA Act (1867) indistinctly.)

Manitoba Act, 1867.

British Columbia Terms of Union.

Constitution Act, 1871.

Prince Edward Island Terms of Union.

Alberta Act.

Saskatchewan Act.

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Canada Act 1982 (U.K.) c. 11: it includes the *Constitution Act, 1982.*

Canadian Charter of Rights and Freedoms (Part I of the Constitution Act, 1982).

Constitution Amendment, 1997 (Newfoundland Act) .

Constitution Amendment, 1997 (Quebec Act) = Modification constitutionnelle de 1997.

Constitution Amendment, 1998 (Newfoundland Act).

2. Quasi-Constitutional Laws

Alberta's *Human Rights, Citizenship and Multiculturalism Act.* S.S. 1979, c. S-24.1.

British Columbia's *Human Rights Code.* S.B.C. 1984, c. 22; R.S.B.C. 1996, c. 210.

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