

Denominational Thrust in Education: Some Issues Affecting Canadian Teachers

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Recent events indicate increasing support for religion-based education in Canada. This significant development challenges educators to examine denominational education before serious conflicts finally reach the courts. Denominational education has apparently given rise to problems related to the professionalization of teaching and to teachers' human rights. While courts have been asked to resolve recent key cases, some of their judgments have been contradictory. Very likely these conflicting judgments reflect not only judges' personal value presuppositions but also, ultimately, the opposing societal ideologies which have shaped such presuppositions. Consequently, conflict resolution is better achieved, not by recourse to courts, but by enquiring into societal presuppositions and seeking consensus on those that are justifiable. Educators can contribute to the development of consensus by initiating inquiry and debate on denominational education.

La poussée du confessionnalisme dans les écoles: une question qui touche de près les enseignants canadiens. Au Canada, les plus récents événements semblent indiquer un appui favorable à l'éducation basée sur la religion. Ces faits significatifs obligent les enseignants (éducateurs) à se pencher sur le problème de la confessionnalité des écoles, avant que ce dernier n'aboutisse devant les tribunaux. Apparemment, la confessionnalité des écoles a engendré certains problèmes liés au caractère professionnel de l'enseignement, de même qu'aux droits et libertés des enseignants. Récemment, alors que les tribunaux ont dû résoudre quelques cas "significatifs", il s'est avéré que leurs verdicts étaient contradictoires. Très probablement, ces verdicts controversés ne révèlent pas uniquement les préjugés personnels des juges, mais aussi de façon fondamentale, l'antagonisme des idéologies sociales qui est à l'origine de tels préjugés. Par conséquent, ce n'est pas en allant devant les tribunaux que le conflit finira par se résoudre, mais plutôt en analysant le bien-fondé de ces préjugés sociaux, et en recherchant le consensus à propos de leur légitimité. Les enseignants peuvent contribuer au développement d'un consensus en s'impliquant dans la recherche et dans le débat sur l'école confessionnelle.

Denominational education¹ in Canada, for a long time operating quietly on the fringes of secular public education, seems to have achieved notable success in recent years. Its constitutional status was confirmed with the inclusion of Section 29 in the Canadian Charter of Rights and Freedoms.² Its availability to parents as a legal entitlement or right in the area of education was recently re-affirmed by the Alberta Provincial Court in *Regina v. Wiebe* (1978).³ This case came about when Elmer Wiebe and forty-four Mennonite parents withdrew their children from the Alberta public schools because of perceived lax moral standards. Wiebe was charged with violating attendance requirements of the Province's School Act. The court found, however, that the protection of religious freedom

under the Alberta Bill of Rights rendered the School Act “inoperative” insofar as it denied the accused the freedom guaranteed by Section 2 of the Bill (*Regina v. Wiebe*: 62). Thus, Wiebe was acquitted and, together with other Mennonite parents, allowed to send his child to a school they had established.

This judicial success has had its counterpart in the political arena. About a month after the ruling, the Alberta government’s minister of education announced that a fourth type of school would be recognized and added to the existing legislation. Schools of this type would receive no government funding, but they could nonetheless operate without certified teachers and apply for provincial grants after one year of operation provided specified requirements could be met (Orteza y Miranda, 1981, p. 8). Earlier, in 1977, British Columbia passed even more liberal legislation which provided a moderate amount of funding for private schools – religious or non-religious – without requiring teacher certification (Independent Schools Support Act, 1977).⁴

The B.C. legislation completes the picture of government support for denominational education in Canada. Each province now provides some form of assistance to denominational schools, varying from almost total support of nothing but denominational systems in Newfoundland to a relatively modest sharing of facilities in New Brunswick. The fact that “denominationalism has gained an educational prominence few would have predicted twenty years ago” (Wilson and Lazerson, 1982, 17) cannot be denied.

There are signs that religious groups are testing more actively the boundaries of their rights. In Calgary, Good News Christian School and Immanuel Christian Academy have, together with ten other fundamentalist schools, been offering religion-oriented curricula to about 750 pupils. These curricula have not been approved by the Education Department as required under provincial regulations. Moreover, they are taught by church-hired monitors rather than by duly certified teachers (*Good News Christian Schools*, 1981, p. 5). It is interesting that these schools sprang up after Elmer Wiebe and his fellow Mennonites successfully survived the legal challenge to send their children to their unapproved Knee Hill Christian School.⁵

In any case, the motivation for these schools is clear. Parents of pupils at Good News Christian School spoke despairingly of the established systems. Their goal was “to return education to its biblical base where it belongs.” Cameron, in his study of the Canadian situation, expressed the same point:

Parents pull their children out for two basic reasons: powerful principles, and utter desperation. A discernible part of the movement is Christian, often fundamentalist, and repelled by the absence of Christian morality in the public schools. (Cameron, 1982, pp. 12–14)

The depth of parental disenchantment with secular public education is all the more obvious because of the proliferation of Protestant schools. Traditionally the Roman Catholic minority has sought the right to educate students in schools that espouse their beliefs. They have successfully claimed that their values are separate and distinct from those portrayed by the secular public schools. This traditional view of schooling assumed that either the public schools had a Protestant orientation or that these public schools were neutral in their values. Apparently many parents currently take exception to both of these claims because schools that take an explicit value-stance are thriving. In view of the promise of public funds and the added inducement of schools not requiring certified teachers, Protestant groups now seek denominational rights similar to those granted to Roman Catholics (Orteza y Miranda, 1981).

The fortunes of denominational education are clearly in the ascendant, but serious reservations will most likely surface in response to inroads made by various denominations. Indeed, heated controversy raged in Calgary, Alberta (*Religion-laced teaching in schools*, 1982, p. 8; *Maclean's*, p. 48) involving some religion-oriented schools which operate within, and were financed by, the public school system.

There is a need to address such concerns. Unfortunately, because denominational education in Canada is a vast area marked by numerous complex issues, and because of length limitation, this article must restrict itself to a narrow focus. We cannot compare the Canadian situation with its international counterparts. Neither can we outline the history of denominational education, or the recurrent issues raised, in various Canadian provinces. (Fortunately, the latter task has been ably undertaken by such writers as Adams (1968), Clark (1968), Lupul (1974), MacDonald and Chaiton (1978), Phillips (1957), Rowe (1964), and Sissons (1959). Some of their findings and insights obviously bear on our contention here (see last section) concerning the ideological dimension of denominational education in this country. Much more modestly, we will focus simply on two major, contemporary concerns arising in this area: the professionalization of teaching and the human rights of teachers.

THE PROFESSIONAL STATUS OF TEACHERS

The achievement of professional status for teachers on par with the traditional status of professions like medicine, law, and the clergy, remains a goal of educators. One concern in reaction to the denominational thrust is that it might undermine this goal. To see this point, it is important to refer to the criteria which determine the professional status of numerous practitioners and to show how some criteria seem to be contradicted by recent developments related to denominational education. The criteria include: (i) a high level of technical expertise and

knowledge on the part of practitioners; (ii) the practitioners' strong commitment to public service; and (iii) recognition of the practitioners' autonomy.⁶ The following section will show how the denominational thrust affects two of these criteria, namely, concern for technical expertise/knowledge, and concern for teacher autonomy.

Concern for Expertise/Knowledge

Historically, teaching has been considered a semi-profession, or a profession only in a loose sense. As an organized activity, it has differed from the traditional professions of law and medicine with respect to member selection and training, the nature of practice, the theoretical basis of expertise, and public recognition (Henchey, 1977, p. 154).⁷ Nonetheless, the ideal of professionalization along the classic model remains. Due to media proliferation and the rising level of general education in society, the need for more professional teachers possessing superior skills and knowledge has increased. More than ever, in considering the burgeoning knowledge in educational foundations, in the content of teaching subject matter, and in the technology of teaching, longer training for the mastery of educational thought and practice appears necessary. And, whether provided by a governmental body (as is generally the case), or by an autonomous professional body (which is a possibility), teacher certification as a testimony of expertise or competence has become a necessity.

In this light, threats to professional standardization may be perceived as real in provinces where uncertified teachers are permitted to perform the same functions as their certified counterparts. Where legislation expressly and formally countenances the existence of denominational schools that employ uncertified teachers, the impression is given that schools with uncertified teachers perform as effectively as those with certified teachers. This is tantamount to the recognition of uncertified teachers as equivalent to certified teachers. The legislation passed in Alberta in March 1978, for example, which expressly established category four schools, appears to allow religious or denominational groups to hire just about anybody irrespective of his or her lack of professional preparation. While the schools will get no funding unless they meet Department of Education requirements they will, by the same token, teach curricular content and render services which give them all the trappings of any other educational institution. For advocates of teacher professionalization, British Columbia's Independent Schools Support Act (1977) might appear even more worrisome. The act authorizes public support to schools in operation for five years, have adequate facilities, and have no program to promote doctrines of racial or ethnic superiority, religious intolerance of persecution, or social change through violent action.⁸ Quite noticeably, certification requirements are left out.

The professionalization advocate might then worry that these legislations appear to allow, without intending to do so, religious affiliation and commitment to substitute for professional expertise and competence. The worry may not be an idle one. A recent case in Ontario involved a Catholic school board which established church membership as a qualification over and above professional competence. In *The matter of Essex County Roman Catholic School Board and OECSTA and Kersey* (1982), grievance was submitted for arbitration on the ground that "the school board failed to place Ms. Kersey in a full-time teaching position, and instead filled the position with a teacher with less seniority ... " (p. 2). At arbitration hearings, it was found that the Board had a long-standing policy and practice to prefer persons of the Roman Catholic faith for full-time positions. Seeking in all cases to hire Catholic teachers, nevertheless a non-Catholic may be hired when no Catholic teacher with requisite academic qualifications is available. In such a case, the board has required that the position be further advertised in order to obtain a qualified Catholic teacher for the ensuing school term (p. 6). Based on this policy, Ms. Kersey, a non-Catholic, was hired to teach music on an occasional or probationary teacher's contract. After teaching regularly for three years with such a contract, she was laid off due to budget and program cutbacks. When a new position for a special education teacher became available, a less qualified Catholic applicant, with less seniority than Ms. Kersey, was hired.

The judgment of the arbitration board, which favoured Ms. Kersey, is interesting on its own account. It stated that the collective agreement between teachers and the Catholic board did not establish church membership as a condition for a laid-off teacher's recall rights. The agreement stipulated that recall rights of teachers (in this case, Ms. Kersey) within the board depended on qualifications and seniority. On this ground, the contested position was awarded to her.⁹ The important point for us, however, is that this case exemplifies graphically the conflict between professional concerns and denominational considerations.

This conflict is also evident in at least two recent litigations in British Columbia and Newfoundland. British Columbia's celebrated case, *Re Caldwell and Stuart* (1980) posed denominational rights against human rights of teachers, and it will be discussed accordingly later. However, its bearing on the concern for professionalization can be noted at this stage. In this case, Supreme Court Justice Toy ruled that religious requirements could not be used as a qualification for discriminatory treatment of teachers. In this case, Caldwell, a commerce teacher at an independent Catholic high school, was dismissed by her school board for marrying a divorced Protestant in a non-Catholic church. As she was a competent, cooperative member of the teaching staff, there was no question as to her ability as a teacher. Yet the school board insisted that the school preferred that the subject not be taught rather than taught by a person who, being a

Catholic, failed to live up to Catholic standards in her private life (*Re Caldwell and Stuart*, 1980, p. 361–363).

It is interesting to note that Justice Toy made, as a preliminary point, a distinction between “qualifications” and “requirements.” In elaborating on this distinction, he stated: “In its primary sense the word ‘qualification’ in the domain of labour relations and employment means some skill, acquired attribute, or accomplishment the minimum level of which is a prerequisite of obtaining or holding a given job” (p. 364). While such examples as degrees of academic achievement, technical training, experience, accepted levels of skills and matters of this nature count for “reasonable cause” for valid discrimination, religion and/or marital status does not constitute a bona fide qualification in hiring or firing teachers. As “requirements” – “other standards or obligations that an employer may wish to impose” – religion and marital status are proscribed by the *Human Rights Code of British Columbia* as bases for discriminatory or preferential treatment of employees. It is equally interesting to note that Justice Toy perceived the relationship between Mrs. Caldwell and her school board as a standard employer-employee relationship. Adverting explicitly to B.C.’s *Human Rights Code* as one which falls within S.9 (13) of the British North America Act (on property and civil rights on the province), he observed thus (p. 373):

The legislation cannot be said to be in conflict with or to appear to be an attack on the Respondents’ fundamental constitutional right of freedom of religion because the decision taken by the School Board of St. Thomas Aquinas was a secular decision not to rehire.

Since the respondents’ (school board and principal) conduct was a civil matter, the code was valid provincial legislation that encompassed Mrs. Caldwell’s complaint (p. 373).

The decision on *Caldwell* seems to further the professional demand for teacher assessment in terms of employment-related competence rather than additional denominational requirements. Yet one might justly complain that the decision fails to understand what teaching in denominational schools is all about. This criticism gains credence in view of the traditional claim that education – or schooling for that matter – involves the development of the whole person. In this development, religiosity and spirituality are the crucial elements (Pius XI, p. 54). Consistently held particularly by the Catholic Church in its papal documents (Benedictine Monks of Solesmes, 1960), teaching is not so much the dissemination of knowledge as the provision of guidance and example for Christian life. In a context where teachers’ moral and religious example is regarded as a crucial element rather than an additional requirement, the contention that hiring, assessment, promotion, and firing should be based solely on teachers’ technical competence would not carry much weight.

Safeguarding moral and religious example has been a denominational concern. It is thus understandable that a Catholic school board in Newfoundland is persistently pursuing its case affecting the existence and maintenance of Christian Brothers in its schools. *Re Roman Catholic School Board, Exploits-White Bay and Newfoundland Teachers' Association* (1982) arose as a consequence of the school board's closing one school (following decline in enrolment) and the attendant need to transfer not only students but also teachers. The school board prepared a list of its teachers in accordance with years of service but placed, in priority, five members of the congregation of Christian Brothers who had fewer years of service than all other teachers on the list (*Re Roman Catholic School Board and NTA*, 1982, pp. 1–2). At arbitration board hearings, the school board insisted that its authority to set a priority list was outside the arbitration board's jurisdiction. The minority opinion in the arbitration board report echoed the school board's position (*Re Roman Catholic School Board and NTA*, 1982):

... The Roman Catholic community ... enjoy a peculiar right or privilege, that being the right to have certain of its schools administered and taught by members of the Christian Brothers of Ireland. I am satisfied that such rights existed prior to 1949 and was recognized by law through ... various legislative enactments ...

Also, it argued that placing members of the Christian Brothers on the same seniority list as lay teachers (and thus being subject to the same criteria as lay teachers)

will ultimately lead to their displacement in situations of layoff thereby interfering with the right or privilege of members of the Roman Catholic community ... to have their children taught at schools administered by members of the Christian Brothers of Ireland (p. 6).¹⁰

In upholding the majority position of the Arbitration Board, the Newfoundland Supreme Court's Trial Division confirmed the jurisdiction of the Board to arbitrate on the matter. Confining itself to certain points of law, it referred the matter back to the Arbitration Board for its judgment on the case's substantive issues in line with the collective agreement between teachers and the school board. Subsequently the Appeal Division of the Newfoundland Supreme Court, on appeal by the school board, upheld the judgment (*Order governed by act covering local teachers*, 1983, p. 2).

Given the denominational viewpoint, decisions cited above will prove threatening to denominationalists. It should not be surprising that, at a later date, the Canadian Supreme Court will be asked to pronounce on the matter.

Concern for practitioners' autonomy

Professionalization of teaching would require promoting in teachers a certain degree of autonomy in discharging their services. This, of course, does not imply removing standards. Traditional professions police their members within their professional ranks by use of boards or committees made up of peer professionals. In cases where capacities of practitioners are challenged, appropriate deliberations centre on the practitioner's possession of relevant skills and knowledge and on whether their judgments and actions conform to them (Becker, 1962; Covert, 1982).

Teachers rarely enjoy the level of autonomy accorded to professionals, being fundamentally under the control of school boards that seldom have expertise in educational matters (Henchey, 1977, pp. 148–151). School boards exercise decision-making power in matters of policy, curricular concerns and employment and dismissal. In instances involving denominational school boards, the underlying moral principles outlined by religious groups add a new dimension to teacher evaluation. Still, as Henchey argues, a compelling – or at least reasonable – argument can be made that time has come for teachers to be certified by professional associations, for the professional bodies to determine and apply criteria of responsibility and competence, and for them to contribute towards educational policies, supervision of services, and encouragement of new initiatives (pp. 154–155).

Such an argument for teacher autonomy could encounter legal opposition particularly in relation to curricular materials used in schools. Admittedly, cases on public record are not plentiful in this country. As late as 1968, McCurdy could report that legal cases affecting teacher academic freedom or autonomy in teaching had not reached Canadian courts (McCurdy, 1968, p. 146). This contrasts with the American situation where litigation in this area abounds (Fischer and Schimmel, 1982, pp. 94–112). This is not to say, however, that tension related to teacher autonomy does not exist in this country.¹¹

The pressure for teachers to compromise might well be felt in teaching science. What has now been called creation science has made itself felt recently in both Canada and the United States. Already, in the United States, some states have been pushed into passing laws forcing the schools to teach creationism alongside the theory of evolution (*Education: Putting Darwin back in the fight*, 1981, pp. 62–65). In Canada, school authorities faced with conflicting pressure groups have adopted a wide-open policy in some provinces (Amernic, 1982, pp. 27–28). Consequently, as in several public schools in Alberta, creationism and science are given equal time and the students are left to form their own conclusions. Here, a science teacher who would rather not teach creationism, because he perceives it to be outside of science, does not have much choice. The problem is perhaps compounded in the case of science teachers in

denominational schools that do not allow treatment of the theory of evolution, not to mention teachers in such schools that do not allow teaching of science at all.

Science teaching is, however, only one among several potential points of conflict between teacher autonomy and denominational school board's authority. Critical inquiry into denominational tenets, assignment of reports on controversial issues, books or articles, inclusion of some "objectionable" reading materials in the library, speaking out on school issues – these and others of a similar nature are areas where teacher autonomy could be compromised. Eventually, the conflict is, among others, whether teachers are to be conceived as a party to a conventional employer-employee relationship (Goldstein, 1976), or as professionals whose participation in curriculum development, in choice of materials and methodology, in teaching controversial issues, and in discussion of school policies ought to be recognized and upheld (American Civil Liberties Union, 1969, pp. 7–9).

TEACHERS' HUMAN RIGHTS V. DENOMINATIONAL RIGHTS

The denominational thrust in education raises no fewer problems in relation to teachers' enjoyment of human rights. Some recent legal cases have seen teachers appealing to courts to protect their rights to equal treatment or non-discrimination. Provisions for fundamental freedoms (section 2) and for equality rights (section 15) in the Constitution's Charter of Rights and Freedoms, which apply to federal and provincial levels, could make the problems acute in the near future. The reason is that the Constitution continues its guaranteed protection of denominational rights in education. Whether ultimately the Canadian Supreme Court will rule on the priority of (teachers') human rights or of denominational rights remains to be seen.

It is interesting to note that, in some provinces, courts have favoured teacher enjoyment of human rights in the face of denominational encroachment. It is just as interesting to see, however, that denominational prerogatives are also given legal recognition. Thus in *Board of Education for Moose Jaw School District No. 1 v. Attorney-General for Saskatchewan* (1975), the province's Court of Appeal made clear that certain rights belong to denominational school boards even as it agreed with a lower court ruling that *The Teacher Collective Bargaining Act* (1973) was *intra vires* (within the capacity) of the provincial legislature (pp. 318–319). Neither did it take issue with the lower court ruling that a section of the act, which provided for arbitration of "any matter involving disciplinary action by a school board against a teacher except dismissal," was outside the capacity (*ultra vires*) of the legislature (p. 320).¹²

The strongest affirmation of denominational rights in recent years has come from the Ontario Court of Appeal by way of *Re Essex County Roman*

Catholic Separate School Board and Porter et al. (1978). This case involved two female teachers dismissed by a Roman Catholic School Board in Ontario for marrying in civil ceremonies. The two teachers appealed the decision before a board of reference which ordered their reinstatement. This order was reversed by a divisional court. Subsequently, the teachers brought their case up to the Ontario Appeals Court which upheld the dismissal on the ground that a denominational school board can use religious reasons as just cause for dismissal. In part Justice Zuber stated (p. 447):

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

Quite explicitly, he noted that the board of reference had no jurisdiction to deal with teacher dismissal in the case because the Ontario legislature had no power to give it that jurisdiction. There was no doubt in his mind that "as of 1867, separate school trustees in Ontario possessed the power to dismiss teachers for denominational cause" (p. 448). He argued that by virtue of section 93 of the *British North America Act*, 1867, Ontario cannot pass legislation (e.g., giving powers to boards of arbitration) affecting that power or right.

Trustee power of dismissal for denominational cause has not received support as a right or privilege with respect to denominational schools in some other jurisdictions, however. In fact, Newfoundland's Supreme Court (Trial Division) has openly opposed Justice Zuber's argument. The Court's divergent judgment was rendered in *Re Stack and the R.C. School Board for St. John's* (1979) where an arbitration board's authority to rule on the grounds for dismissal was disputed. The case was an appeal against the arbitration board's decision that it had no competence to rule whether a consultant was fired for just cause. It acceded to the school board's contention that it possessed constitutional right to hire and fire for denominational reasons. Justice Noel declared that a board of arbitration has jurisdiction in determining whether the consultant was fired for just cause. Using the authority of *Ottawa Separate Schools Trustee v. McKell* (1917) which identified a denominational right or privilege as a right attached to (i) denominational teaching or (ii) the integrity of specified denominational schools, Justice Noel established that the provincial legislature has power to enact laws of general application relating to education (*Re Stack and R.C. School Board for St. John's*, p. 7). The Schools (Amendment) Act, 1974, which put the conditions of employment of teachers into the hands of the school boards subject to collective bargaining, was, in his mind, of general application. "It did not relate to

denominational teaching or the integrity of specified schools ... It did not prejudicially affect any right or privilege ... of the defendant" (p. 9). In other words, it is *intra vires* of the legislature.

Beyond its capacity to arbitrate on Stack's grievance, the arbitration board has the authority to uphold or deny the grievance. Pointedly taking issue with the Ontario court by declaring that "denominational cause" has no meaning in law, and that phrases such as "gross misconduct" and "similar just cause" are conceptual rather than factual, Justice Noel wrote:

It was the duty of the arbitration board to determine whether or not the plaintiff's conduct ... was such as to justify his dismissal without notice ... The opinion of the defendant school board is not material to that issue. That question of fact had to be determined by the arbitration board on the evidence placed before it. The arbitration board had to arbitrate the opinion of the defendant. It was not bound by it (p. 14).

Re Stack finds reinforcement in *Re Caldwell and Stuart*. The latter case (referred to earlier) was, perhaps, the easier to decide technically. If Justice Toy is correct that "in British Columbia, there were no pre-Confederation statutes giving Catholics or any other denominations any rights or privileges in the field of education" (p. 371), then s. 93 (1) of the *British North America Act* does not offer B.C. Catholic schools much legal ground for their case. This is because Canadian courts have interpreted this provision as recognizing constitutional denominational rights in education only where they were *legally* recognized before Confederation. This is true of Newfoundland, but not of British Columbia. What is particularly significant, however, is that *Caldwell* squarely confronted, even if briefly, the conflict between the denominational rights to propagate or preserve religious commitment, on one hand, and the human rights of teachers on the other hand. Nodding in the direction of religious freedom, the judge nevertheless insisted that "The Respondents' right to freedom of religion must be exercised within the laws of this Province" (p. 372). Interestingly, on appeal by the school board, the B.C. Court of Appeal reversed this decision. In his judgment joined by three other justices, Mr. Justice Seaton declared that the lower court erred by narrowly interpreting s. 22 of B.C. Human Rights Code, which exempted religious and other non-profit organizations from charges of violating the act for granting preferences to their members. Construed appropriately, it over-rides s. 8 on anti-discrimination. In his words, "When s. 22 is interpreted in other than a narrow fashion ..., freedom of religion remains and the right to separate schools continues" (p. 13).

THE UNDERLYING PROBLEM: CONFLICT OF IDEOLOGIES

The contradictory judgments rendered by courts in provincial jurisdictions accentuate the lack of uniformity in treating denominational school

boards and their teachers across Canada. This differential treatment within one country served by a single constitution is almost certain to give rise to legal challenges pursued as far as the Federal Supreme Court. It should not take long for Canadians' sense of justice to seek the elimination of such differential treatment wrought by varied historical circumstances.

But the opposing legal judgments reflect something more fundamental and more troubling. These judgments point to underlying realities which we in Canada have failed to face decisively thus far. It is true that the Canadian judiciary is still widely regarded as the institution which objectively interprets and applies the law based on strict construction of precedents and established legal principles. As Russell sees it, there is a hankering for a greater source of objectivity or rationality for judicial decisions than that of the attitudes or preferences of judges (Russell, 1975, p. 80). The fact remains that the judiciary in Canada has and exercises the power to initiate "significant changes in our customs, our laws, or institutions and the maintenance of some important features of the established order" (Russell, 1975, p. 75).¹³ The other inescapable fact is that individuals exercising this power are human beings who have internalized socio-political perspectives of their own. The late (Nova Scotia) Supreme Court Justice Vincent MacDonald pointed out this reality in blunt terms:

... (W)ide areas of discretion and choice are largely free from binding authority ... and the ultimate decision depends, to an unusual extent, upon qualities personal to the judges of last resort. No judge is free from the influence of his own conception of the basis of our Federal system, of what has been called his "Ideal Constitution". Every judge has his own theory of his function, as requiring him to call the shots, in terms of whatever scrap of authority he can find, on the one hand, or permitting him to consider that freedom from exact authority entitled him to write into the law his own views of public policy, on the other hand (1971, p. 154).

Judges' views of public policy, we might say, gain even wider latitude where public policy is torn between competing ideologies. This happens to be particularly true with respect to denominational education and what it stands for. We have, on one hand, the traditional religious ideology insisting on a holistic viewpoint which weaves, in a seamless pattern, all of life, religion, education, and teaching together. On this viewpoint, teachers are an important part of religious-life education and must therefore always be academic, moral, and religious examples for the child. Equally important, however, is the primacy of the religious community – particularly the teaching church – in determining not only the operation of schools but also its members' and teachers' conduct. On this viewpoint, therefore, the teacher subserves the purposes of the church as laid down by church authority. As a ranking denominational official in Newfoundland frankly stated it, "There would be little point in having

Catholic school boards or a Catholic school system if there were teachers in the schools who did not share our goals, or even worse, who actively worked to undermine them" (Tracey, 1976, p. 2).¹⁴

On the other hand, the secular, individual-oriented ideology has established strong inroads in Canadian society and education. As Lupul pointed out in his excellent study, the nineteenth century saw the surge of intense nationalism, the ideological roots of which traced back to developments in the old world where popular democracy resolutely opposed religious authority. Emphasizing the primacy of the state as educator, as well as the development of patriotic citizenry, it could not tolerate any competitor – not even the church (Lupul, 1974, p. viii). Moreover, this nationalistic trend emphasized democracy as a form of government and as a way of life for free individuals. Thus, as Phillips (1957) observed:

... The issue of public versus separate schools is more than an educational problem. It is a clash between control of the people by traditional old-world authorities and a way of life still being worked out by the people of North America (p. 306).

And so it is with the issue of teachers' rights in denominational schools. Whether teachers should have rights to personal and professional autonomy, or whether they should have such autonomy circumscribed by denominational authority, cannot be resolved by arguments about schools. Inevitably we are brought to an examination of competing ideologies in society.

Needless to say, the conflict between ideologies is difficult to resolve. It would be a mistake, however, to look to the judiciary to settle it for us. Of course, the judiciary will render judgments on our behalf if we appeal to them. But there is a danger that we will do so prematurely before, with the use of the socio-political process, we give ourselves the chance to come up with creative accommodation to eliminate conflicts. There is also a danger that we will perpetuate an illusion – the illusion that, because the courts have spoken, issues have been thereby resolved objectively and fairly.

Educators, particularly at the beginning of a new judicial era dominated by the Charter of Rights and Freedoms, have a significant role to play in fostering the resolution of conflict. There is no evidence to show that Canadian society has so far carried on a sustained, dispassionate, and profound enquiry into its own underlying value assumptions in order to sort out the justifiable from the unjustifiable ones. Only by making our societal values explicit can we develop some degree of confidence in our decision making on educational issues. For the justification or validation of these values, and of educational policies and judgment flowing from them, both conceptual analysis and substantive value discussions are required. Clearly, the time for serious enquiry is now.

NOTES

- ¹ For discussion purposes in this article, we will use "denominational education" broadly to refer to that education established by denominational or religious groups based on their religious or denominational tenets and principles. For more strict definition, Peter Bargen (1961) provides an adequate discussion.
- ² Section 29 reads (*The Charter of Rights and Freedoms*, 1982, p. 31):
 - 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.
- ³ An early constitutional case upholding rights of religious groups is *Winnipeg v. Barrett* (1892) which ruled that Roman Catholics and members of every other religious body in Manitoba are free to establish schools throughout the province, to charge school fees or receive voluntary subscriptions, and to conduct their schools without molestation or interference.
- ⁴ One may well observe that these developments are the complete reverse of the (successful) attempts to deny funding to denominational schools in the late 1800s and early 1900s. For a good discussion of these earlier attempts, see Berger, 1981, chapter 3.
- ⁵ Strangely enough, in Newfoundland where virtually all schools are denominational, a Baptist group has recently applied for permission to establish its own privately funded school (Tentative approval for proposed school, 1981b, p. 2).
- ⁶ We shall assume, to enable us to carry on our discussion further, that these are minimal and basic criteria for a profession. For an extended discussion, see Becker, 1962; Cogan, 1953; Covert, 1982; and Volmer and Mills, 1966.
- ⁷ This is not to limit the number of professions or to say that law and medicine have no problems of their own.
- ⁸ Compare the requirements for funding of B.C.'s category 1 schools with those for category 2 school (Independent Schools Support Act, 1977, pp. 3-4):
 - 5** The inspector may grant Group 1 classification for a school-year to an authority in respect of an independent school funded and operated by the authority where the inspector is satisfied that
 - (a) no program is in existence or is proposed at the school that would in theory or in practice, promote or foster doctrines of (i) racial or ethnic superiority, or (ii) religious intolerance or persecution, or (iii) social change through violent action,
 - (b) the facilities of the school are adequate, and
 - (c) the authority had filed with the inspector a statement in prescribed form showing that the authority has operated the school as an independent school for at least five consecutive school years, including the school year immediately prior to the date of the filing.
 - 6** The inspector may grant Group 2 classification for a school-year to an authority in respect of an independent school funded and operated by the authority where the inspector is satisfied that, in addition to qualifying for Group 1 classification in respect of the school, the authority has
 - (a) established a curriculum for the school year that complies with the minimum instructional time requirements detailed in the administrative bulletin governing the school-year for course subject areas designated by the minister under this paragraph respecting (i) elementary schools, or (ii) secondary schools,
 - (b) agreed to establish or has established a pupil testing program satisfactory to the inspector to demonstrate pupil progress in the appropriate course subject areas under paragraph (a),
 - (c) agreed to assist or has assisted an external evaluation committee established by the inspector to examine and assess programs, operations and administration in the school,
 - (d) agreed to participate or has participated in a learning assessment program established by the minister or a local board respecting school age children in the area served by the school, and

- (e) submitted to the inspector (i) a list of certified teachers, a list of teachers who are not certified, a description of the educational qualifications of each teacher and a description of the teaching and other responsibilities of each teacher employed at the school, and, (ii) a program of action on the part of the authority, that is satisfactory to the inspector, to ensure that all teachers employed at the school are certified within 5 years after the date of application for Group 2 classification.
- ⁹ The significance of the board's reasoning in this case would allow us to quote from it extensively: It seems to us an obvious fallacy in the Employers position that it is here arguing that Roman Catholicism is an inherent and basic qualification for any full-time teaching position, including the one at issue here, while, at the same time, stating that non-Catholic teachers have been, and continue to be, employed precisely because they have been found to be qualified for a certain teaching position where no qualified Roman Catholic is available. To find that Roman Catholicism is a fundamental qualification for a full-time classroom teaching position within this system would compel a conclusion that the non-Catholics employed are, therefore, not qualified when, in fact, that was the very reason for their employment in the first place. ... One would not reasonably expect a School Board in the 1980s to blindly assume in all cases that, simply by the fact of Roman Catholicity, a teacher is qualified to teach various academic subjects, even religion, where a non-Catholic with identical other "qualifications" is not. Nor, it seems to us, does the fact of denomination in and of itself necessarily ensure the Board's stated aim of an educational service consistent with the philosophy of Catholic education regardless of the individual teachers personal commitment to, or performance of, his religion (pp. 17-19).
- ¹⁰ The problem of displacement is real in Newfoundland because Christian Brothers are regularly rotated from one school board to another for their assignments and thus do not accumulate seniority within any school board. In the province, seniority is seniority *within an individual board*.
- ¹¹ Unreported cases cited by the Canadian Teachers' Federation (1981, pp. 18 and 24) that have some bearing on teacher autonomy are *Wheaton v. The Flin Flon School Division No. 46* (1947) and *Kopchuck v. St. Boniface School Division No. 4* (1972). The recent dismissal of Mr. Keegstra from an Alberta school comes to mind because his school board claimed that he had departed from approved social studies course in teaching his racial theories. In his defense, Keegstra claimed the right to freedom of thought and expression guaranteed in the new constitution. While it is easy to criticize what he taught, the principle of curricular autonomy is clearly in question (*Teaching hate in Alberta schools*, 1983, 24-25).
- ¹² The section was amended before the case reached the appeal court. The court, in the latter part of the judgment, declared the amendment *intra vires*.
- ¹³ Paul Weiler (1974, p. 53) put it this way: "Canadian judges are naturally reluctant to admit, even to themselves, the truly creative role they play in composing the legal system which they administer. But the age of judicial innocence is long past." For a concise but perceptive discussion of judicial discretion, see Russell (1975). A lengthier discussion is provided in chapter 6 of Weiler, 1974. Gall (1977) has a brief account of a study which surveyed Alberta judges' perceptions of their judicial roles. For a general treatment, particularly of the American context, see Levy (1967), Mason (1968), and Schubert (1965).
- ¹⁴ The board of inquiry's submission, part of which was extensively quoted in *Re Caldwell and Stuart*, outlines a strong and straightforward statement of this position.

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Jüngste Ereignisse deuten auf wachsende Unterstützung der Erziehung auf religiöser Basis in Kanada hin. Diese Entwicklung verlangt von den Pädagogen, daß sie die Erziehung auf religiöser Grundlage auf diese Zeichen hin untersuchen, ehe schwerwiegende Konflikte die Gerichtshöfe erreichen. Die Erziehung auf religiöser Grundlage hat offensichtlich Probleme für den Berufsstand des Lehrers und seine Menschenrechte aufgeworfen. Die Gerichte haben zwar einige neuere vorgebrachte Präzedenzfälle entschieden, ihre Entscheide waren jedoch teilweise widersprüchlich. In aller Wahrscheinlichkeit geben die widersprüchlichen Richtersprüche nicht nur die persönlich-individuellen anschauungen der vorsitzenden Richter, sondern letztlich auch die gegensätzlichen Ideologien, die solche Anschauungen geformt haben, wieder. Eine Lösung der Konflikte wird folglich nicht durch die Gerichtshöfe erreicht: eine Meinungsumfrage nach gesellschaftlichen Vorstellungen und das Bestreben auf Einigung auf vertretbare Anschauungen sind bessere Wege zu diesem Ziel. Die Erzieher sind in der Lage, das Zustandekommen einer Einigung durch die Eröffnung von Diskussionen über die Erziehung auf religiöser Grundlage und durch eine Meinungsumfrage vorzubereiten.

Eventos recientes indican un creciente respaldo en Canada por la educación basada en la religión. Este importante desarrollo echa un desafío a los educadores a que examinen la educación denominacional antes de que conflictos serios terminen en las cortes. Al parecer, la educación denominacional resultó en problemas relacionados a la profesionalización del magisterio y a los derechos humanos de los maestros. Si bien se ha pedido a las cortes que resuelvan recientes casos clave, algunas de sus decisiones han sido contradictorias. Es probable que estos juicios contradictorios reflejen no sólo las presunciones de juicio personal de los jueces, sino que, finalmente, las ideologías opuestas de la sociedad, que han dado forma a tales presunciones. Es por eso que los conflictos se resuelven mejor no tanto apelando a las cortes, sino tratando de llegar a un consenso aplicable a las presunciones sociales justificables. Los educadores pueden contribuir al desarrollo de un tal consenso iniciando la investigación y el debate sobre la educación denominacional.

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