

Rights in Conflict: The Case of Margaret Caldwell

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This paper examines the case of Margaret Caldwell, whose contract was not renewed by the Catholic school at which she was teaching because she married a divorced Methodist in a civil ceremony. Conflicting judgments by British Columbian courts have favoured both parties, and the dispute now faces adjudication by the Supreme Court of Canada. The discussion focuses on the case by examining: the background of the case, the legal status of denominational schools, the rights of the individual in a Canadian context, freedom from discrimination, and the resolution of rights in conflict. It concludes by considering the possible ramifications of the ultimate decision of the Supreme Court of Canada for both the school and Caldwell.

On examine dans cette communication le cas de Margaret Caldwell dont le contrat n'a pas été renouvelé par l'école catholique où elle enseignait parce qu'elle avait épousé, dans une cérémonie civile, un méthodiste divorcé. Les jugements divergents des différentes cours de justice de la Colombie Britannique ont donné raison aux deux parties. On attend maintenant le jugement de la Cour Suprême du Canada. On discute du cas en examinant les faits saillants de la situation, le statut officiel des écoles confessionnelles, les droits de l'individu dans le contexte canadien, l'absence de discrimination et les moyens de faire valoir ses droits en cas de conflit. L'article se termine par la considération des ramifications possibles de la décision de la Cour Suprême du Canada aussi bien pour l'école que pour M. Caldwell.

In the aftermath of the repatriation of the Constitution and the entrenchment of the Charter of Rights, human rights and civil liberties have sustained a high public and political profile. Although debate in this area tends to centre on law enforcement, basic rights and freedoms are clearly of universal concern and applicability. The case of Margaret Caldwell, a teacher in Vancouver, B. C., invites an examination of rights in the sphere of denominational education. Her individual rights as a teacher to be secure from unjustifiable discrimination came into conflict with the autonomy of the school in its employment practices, and it fell upon the courts to resolve the conflict. This paper addresses this dispute by examining: (1) the background of the case; (2) the legal status of denominational schools; (3) the rights of the individual in a Canadian context; (4) freedom from discrimination; and (5) the resolution of rights in conflict. It con-

cludes by considering the possible ramifications of the ultimate decision of the Supreme Court of Canada for both Caldwell and the school.

BACKGROUND TO THE CASE

The dispute between Mrs. Caldwell and her former employer, a denominational school, centres on the extent to which individual rights and provincial anti-discrimination legislation can circumscribe the operations of independent schools. This issue has been previously litigated through actions alleging discrimination in the hiring of staff in denominational schools. Generally, religion may be a *bona fide* occupational qualification for teachers, although it may not be for secretarial and administrative staff (*Gore v. Ottawa Separate School Board*, 1971). Mrs. Caldwell's case was not concerned with discrimination in hiring practices, however, but discrimination in the nonrenewal of her contract of employment. She was hired by St. Thomas Aquinas Catholic High School in 1973 to teach commercial subjects, being qualified through her Roman Catholic upbringing and training at a teacher's college in Scotland. For the first four years of her employment, Mrs. Caldwell's performance was judged acceptable. In 1977 she married a divorced Methodist in a civil ceremony, thereby breaking two important church rules: first, a Catholic ought not to marry a divorced person, and second, if a Catholic should marry a non-Catholic, the marriage ought to take place in a Catholic church. As a result, the school decided not to renew her annual contract when it expired in 1978. Mrs. Caldwell then embarked on a course of action to challenge the school's decision as contrary to the *Human Rights Code of British Columbia* (The Code). The first and third hearings went against Mrs. Caldwell, while the second was decided in her favour. Having made its way through the provincial court system, the case is currently before the Supreme Court of Canada. Regardless of the ultimate outcome, the case raises important issues in nonpublic education, in particular, the extent to which government can interfere with the administration of independent schools. If the teacher's rights are upheld, denominational schools specifically and independent schools in general would face limitations on their employment policies dramatically affecting their current autonomy. In addition, the Caldwell dispute facilitates an understanding of the role of teachers who serve in the nonpublic sector and the discrete obligations and requirements that set them apart from their counterparts in the public school system.

THE LEGAL STATUS OF DENOMINATIONAL SCHOOLS

With Confederation, jurisdiction over education was given to the pro-

vinces, a decision which facilitated diversity rather than uniformity. Nonetheless, section 93(1) of the *British North America Act*, 1867, provided that no province could enact legislation which would "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." In other words, the status of these schools in 1867 was to be respected and maintained. When the Canadian constitution was repatriated in 1981,¹ the *British North America Act* was amended and renamed the *Constitution Act*, 1867, but s. 93(1) was unaffected by the change.²

There have been a number of cases involving the constitutional protection of denominational schools and it is a key argument in the Caldwell case. For example, in the Ontario case of *Essex County Roman Catholic Separate School Board and Porter et al.* (1978), two teachers were challenging their dismissal. Both were Roman Catholic females, employed by the Separate School Board, and both had married in civil ceremonies. Consequently, they were dismissed with the terminations effective immediately. Both teachers applied to the Minister of Education for a Board of Reference as provided by *The Schools Administration Act of Ontario*. On behalf of the teachers, it was argued that they had not been properly dismissed due to insufficient notice. The School Board countered that the Board of Reference had no jurisdiction to deal with the matter because the action was based on rights and privileges protected by s. 93 of the *British North America Act*. This latter argument was upheld by the Ontario Court of Appeal.

In the case at hand, the constitutional protection is invoked to prevent provincial anti-discrimination legislation from regulating employment policies in denominational schools. Clearly, there is a concern that if this freedom were to be eroded, the quality or character of denominational schools would be weakened. As one commentator observes (Bucsis, 1982)

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

The distinguishing characteristic of a Catholic school is the pervasiveness of the church's teachings. Either expressly or by implication, Catholic schools adhere to principles similar to those stated by St. Thomas Aquinas School:

We ... are a learning and teaching community under God, growing by sharing our Faith, Knowledge, Love and Hope, to foster the spiritual, intellectual and physical development of the students to enable them to become more responsible Christians.

As a result, teachers are selected and hired on the basis of their commitment to Catholicism, in addition to their professional ability. Thus, the constitutional protection of the integrity of denominational schools demands the professional *and* personal commitment of the teacher. The individual religious freedom of the teacher is sacrificed to the demands of the institution. The paradox of this position has been noted by one observer: "It is ironic that constitutional guarantees should be used to violate fundamental rights" (Mackay, 1978, pp. 745-746).

THE RIGHTS OF THE INDIVIDUAL IN A CANADIAN CONTEXT

Particularly since the Second World War, the notion that individuals possess fundamental and inalienable rights and freedoms has achieved almost universal acceptance, in theory at least. The United Nations has recognized "an autonomous area, however limited, of individual existence within which the individual is inviolable" (Humphrey, 1979, p. 140). Nonetheless, this inviolability is not absolute. J. S. Mill posited on this theme:

The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of any of their number is self-protection The only purpose for which power can be rightfully exercised over any member of a civilized community against his will is to prevent harm to others. (cited in Humphrey, 1979, p. 140)

The *Universal Declaration of Human Rights* lays down similar guidelines for ascertaining the extent to which individual rights can be limited, stating "The limitations placed on freedom in the interest of the general welfare must be just, and such as would be compatible with a democratic state."

Actions justified in the name of "general welfare" are open to interpretation. Further, an examination of what is "just" in a "democratic state" must necessarily be a political judgment relative to time, place, and circumstances. Some societies are more tolerant of limitations on individual rights than others. Canada, by tradition, has tended to favour the rights of the group over the rights of the individual.

The "general welfare" of Canadian society has justified the expulsion of the Acadians in the eighteenth century, the loss suffered by the Métis of their homeland, and the evacuation and internment of Japanese-Canadians during the Second World War. Official surreptitious surveillance is a fact of Canadian life. In 1977 the MacDonald Commission reported that the R.C.M.P. had dossiers on more than 800,000 Canadians (Berger, 1982, p. 160). Given that Canada then had a population of less than 25 million, half of whom were adults, this suggests that well over 6%

of the adult population have been and continue to be spied upon, allegedly for the national good.

What is noteworthy about the curtailment of human rights in Canada, is that Canadians are generally unperturbed by, if not downright indulgent of the infringements. Friedenbergh (1980) states that "the Canadian public is generally too complaisant to demand more freedom" from its government, and, "if external vigilance be the price of liberty, Canada faces – with disturbing equanimity – the continuous threat of foreclosure" (p. 131). In their study of this issue, MacDonald and Humphrey (1979) similarly contend: "in Canada, lower priority is given to personal freedom and the traditional civil and political rights than the collective rights and the egalitarian economic and social rights, which often come into conflict with individual rights and freedoms" (p. xvii). This attitude permeates virtually all relationships between individuals and collectives, be they governments or school bodies. Margaret Caldwell's case raises the following issue: when a conflict arises between an individual teacher and the denominational school system, in whose favour should it be resolved? The tendency in Canada to downplay individual rights is a pervasive factor which will influence how it is resolved.

FREEDOM FROM DISCRIMINATION

There is, however, another factor to be taken into account in resolving the conflicting rights in the Caldwell case. In recent years, provincial in addition to federal governments have taken legislative action in the sphere of human rights and civil liberties. Specifically, they have made substantial inroads into the laissez-faire concept of freedom of contract by enacting anti-discrimination legislation. This seeks to prevent discrimination on the grounds of race, colour, creed, or sex in the provision of goods, services, and accommodation and in employment practices. For example, the *Human Rights Code of British Columbia* provides:

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

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

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

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

(a) the race, religion, colour, age, marital status, ancestry, place of origin, or

political belief or any person or class of persons shall not constitute reasonable cause;

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

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

(3) No provision of this section relating to age shall prohibit the operation of any term of a bona fide retirement, superannuation, or pension plan, or the terms or conditions of any bona fide group or employee insurance plan, or of any bona fide scheme based upon seniority.

Originally, the victims of discrimination were responsible for lodging a complaint and pursuing it through to a conclusion. This was a patently unsatisfactory process since these people rarely had the means, knowledge, and fortitude to do so. Since 1962 the provinces have attempted to remedy this defect by establishing commissions charged, *inter alia*, with investigating and settling disputes. Once the victim initiates a complaint, the commission takes over, using a conciliatory model of dispute-settlement. Only when mediation fails is a more formal method of resolution used. Black (1978), a law professor at the University of British Columbia, has conducted extensive research on the *Code* and the role of the provincial Human Rights Commission. He states that during the investigation and settlement of a claim "great emphasis is placed on conciliation and voluntary settlement on the assumption that such a resolution is more likely than litigation to eliminate discriminatory attitudes" (p. 206). If an amicable settlement cannot be reached, the Director has to report the matter to the Minister of Labour who has a discretionary power to appoint a Board of Inquiry to adjudicate the case. At a Board of Inquiry, all parties have the opportunity to argue their case through legal counsel. This was done in the *Caldwell* case. Redress for discrimination takes the form of financial compensation or other remedies such as mandatory orders "to make available to the person discriminated against such rights, opportunities, or privileges, as in the opinion of the Board, he was denied" (s. 17(2)). If either side is dissatisfied with the Board's decision, then an appeal can be lodged under s. 18 of the *Code*. In the *Caldwell* dispute, both parties have exercised this prerogative. The sections of the *Code* involved in *Caldwell* are those pertaining to employment and the applicability of the *Code* to private organizations – sections 8 and 22.³ Essentially, had Mrs. Caldwell suffered discriminatory treatment on the basis of her marital status, and, more importantly from the point of view of the denominational school system, were the terms applicable to St.

Thomas Aquinas School, thereby limiting the traditional autonomy of independent schools?

RIGHTS IN CONFLICT

The *Caldwell* dispute is thus being decided in the context of a longstanding tradition of ascribing a low priority to individual rights vis-à-vis the rights of bodies, collectives, and states. The lower court decisions clearly indicate that simply protecting the individual through anti-discrimination legislation is insufficient to give the individual highest priority. Reliance must be placed on the courts and the judiciary to translate the legal right into a real right. The Canadian judiciary has, to date, been reluctant to do so. The disparity between liberal human rights legislation and prevalent judicial attitudes is highlighted in the *Caldwell* case.

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

It is somewhat ironic that the Canadian judiciary took a fairly liberal stance on human rights during the 1940s and 1950s even in the absence of a bill of rights. Once the *Canadian Bill of Rights* became law in 1960, however, it retreated behind a shield of conservatism. Leavy (1979) notes that

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

This cannot simply be ascribed to the confused legal status of the Bill of Rights. Rather, it reflects a more general attitude as to the priority of individual rights and freedoms. This attitude was also apparent when the Supreme Court of Canada considered the impact of another case under the B. C. *Code* in *G. A. T. E. v. Vancouver Sun* (1979). In that instance, freedom of the press in relation to its advertising policy was given priority over the rights of homosexuals not to be discriminated against. The *Caldwell* case is consistent with this overall pattern. Whether this will be

altered by the constitutional entrenchment of the *Charter of Rights* remains to be seen.

Given that the rights granted in it are subject to a number of qualifications and limitations, it seems unlikely that the Charter will effect major changes in the absence of a redefinition of the judicial role. For example, the Charter states at the outset that rights and freedoms are guaranteed, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free society." This will necessarily involve continued judicial prioritization of conflicting rights and claims.

While the Charter will have no applicability to Mrs. Caldwell's case, the ultimate decision will reflect and contribute to Canadian human rights jurisprudence. The question of individual freedom is relative to the established institutions and accepted norms of society. Past cases demonstrate that denominational schools possess a protected status and the courts are prepared to interpret the constitutional provision broadly in order to preserve the integrity of these institutions. To date, these schools have had little cause for concern that their special status is being eroded. Alternatively, the staff employed in the schools should be cognisant of the implications this has for them.

CALDWELL, THE SUPREME COURT, AND INDEPENDENT SCHOOL AUTONOMY

When the Supreme Court of Canada adjudicates the Caldwell dispute, it will probably focus beyond the *Human Rights Code of B. C.* and the *British North America Act* to consider the broader policy implications of its decision. Educational choice is regarded by some as a civil liberty, and such choice can be seen as extending to the appropriateness of the teacher. Further, denominational schools consider that teacher selection is based on religious considerations which in turn come under the rubric of freedom of religion. This leads to a fundamental question of whether the state can, or should, require a denominational school to employ a teacher whose values conflict with those of the religious institution.

To date, the majority of independent schools in British Columbia have attempted to work within government guidelines regarding curriculum and professional standards. Other than this, these independent schools have continued to experience the autonomy they enjoyed before government funding was made available in 1977. Yet how "independent" should independent schools be, and should funding be made conditional on their adherence to governmental human rights standards? If so, this would surely constitute an unwelcome intrusion into private school affairs, ostensibly for the greater good. The outcome of the Caldwell case will provide a ruling which dictates whether schools can hire on religious

grounds and later refuse further employment due to perceived contravention of church law. As the choice of teacher is an integral part of independent school philosophy, the outcome is crucial to independent schools in general. In an endeavour to develop employment policies which are in line with provincial statutes, independent school policy makers may need to change the focus or direction of philosophical goals and reassess their priorities in light of emerging human rights jurisprudence, thus avoiding costly and protracted litigation.

If Margaret Caldwell should lose her case, there will be ramifications not just for her but for all those individuals who choose to work in the nonpublic section, for their personal rights may be relegated vis-à-vis those of the institution. Society may be saturated with the subject of human rights, but some of these hard-won rights may be foregone by independent school teachers once they enter the school gates. The provincial Human Rights Commission may not be able to assist such teachers to realize the rights which their public school counterparts take for granted. The implications are not just confined within the independent school perimeter; as shown in this paper, they have wider societal impact. The resolution of conflict in this instance may in fact determine that, when teachers decide to work in an independent school, they must abide by and respect the rules of the institution, as they would be obliged to do as members of a private club.

Independent schools may consider that teacher behaviour regarding philosophical matters is relevant to job performance, and therefore such required behaviour is not a question of unnecessary discrimination. The Caldwell dispute is precedent setting and will be considered a litmus test of what is and is not acceptable behaviour on the part of the teacher, as well as of the school. It raises the questions: to what extent should autonomy be allowed, and how far can an independent school go in attempting to regulate teachers' behaviour in their private lives? Blatant and persistent disregard of independent school ideals, or public denigration, could be seen as unacceptable behaviour by school boards. It is not unreasonable that independent schools should expect teachers to exemplify, to the best of their ability, the ideals of the institution, but the difficulty arises in defining the boundary between what can be realistically expected of teachers in today's society and what serves to impinge too greatly upon their private lives.

NOTES

¹ As Margaret Caldwell's case arose prior to 1981 it will be decided in accordance with the law in existence at that time, notably, the *Canadian Bill of Rights* and the *Human Rights Code*

of *British Columbia*. The potential impact of the new constitutional arrangements will be discussed *infra*.

² In addition, the *Constitution Act, 1981*, s. 29 explicitly preserves the protected status of denominational schools.

³ The school seeks exemption from the *Code* under s. 22. "Where a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or group shall not be considered as contravening this Act because it is granting a preference to members of the identifiable group or class of persons."

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Diese Arbeit untersucht den Fall der Margaret Caldwell, deren Vertrag von der katholischen Schule, wo sie unterrichtete, nicht erneuert wurde, da sie einen geschiedenen Methodistens standesamtlich geheiratet hatte. Widerstreitende Urteile der Gerichtshöfe in British Columbia unterstützten beide Parteien und die Kontroverse steht nun vor der gerichtlichen Entscheidung des obersten Gerichtes Kanadas. Die Diskussion konzentriert sich auf den Fall, indem sie folgendes untersucht: den Hintergrund des Falles, die Rechtslage der Konfessionsschulen, die Rechte des Einzelnen im kanadischen Milieu, Freiheit von Diskriminierung, und der Beschluß von Rechten im Konflikt. Die Arbeit schließt, indem sie die Verzweigungen der endgültigen Entscheidung des obersten Gerichtes Kanadas für die Schule und Caldwell betrachtet.

Este artículo examina el caso de Margaret Caldwell, cuyo contrato no fué renovado por la escuela católica donde ella enseñaba pro haberse casado, en una ceremonia civil, con un hombre metodista divorciado. Diversas decisiones de las cortes de la Colombia Británica favorecieron primero a una parte y luego a la otra, y la disputa está ahora ante la Suprema Corte de Canadá para su adjudicación final. La discusión centra en el caso y examina: los antecedentes del caso; la situación de las escuelas religiosas ante la ley; los derechos del

individuo en el contexto canadiense; la libertad de ser discriminado; y la resolución de derechos en conflicto. Concluye examinando las posibles ramificaciones de la decisión final de la Suprema Corte de Canadá tanto para la escuela como para Caldwell.

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