

## Catholic Dimension - Legally Speaking - Fall 2004

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### Teachers of faith – An expectation and a right

Catholic separate school rights are constitutionally protected by virtue of s. 93(1) of the Constitution Act, 1867, section 17(1) of the Alberta Act, 1905 and section 29 of the Charter of Rights and Freedoms. The provisions of the School Ordinance, 1901, make it clear that at the time Alberta entered Confederation, Catholic separate ratepayers, now electors, had the right to establish Catholic separate school districts, and that once established, the trustees of that district had all of the "rights, powers, privileges and... liabilities" as set out with respect to public school districts, including the right to: engage and dismiss teachers; impose duties and obligations upon teachers; ensure that the schools operated according to the provisions of the *School Ordinances*, including those provisions protecting denominational education.

In order for a constitutional right to preferential hiring, promotion and denominational dismissal for cause to be protected, it must have been a right enjoyed by Catholic separate ratepayers by law at the time Alberta entered Confederation, and that right must relate to denominational education, or non-denominational aspects necessary to delivery of the denominational aspects of education. See *PSBAA v. Alberta* [2000], *OECTA v. Ontario* [2001], *A.G. of Quebec* [1991], and *Ottawa Separate School Trustees v. Mackell* [1917].

If these criteria are met, denominational education rights will be a defence to the enforcement of the provisions of the *Human Rights, Citizenship and Multiculturalism Act* and ss. 2(a) and 15 of the *Charter of Rights and Freedoms* as against a Catholic board.

Courts in Canada have unanimously agreed in *Brophy v. A.G. of Manitoba* [1895], *Tiny Separate School Trustees v. The King* [1927], *Caldwell v. Stuart* [1984], *Daly v. Ontario A.G.* [1997], and *Hall v. Powers* [2002], that Catholic education has a distinct Catholic denominational philosophy which fundamentally recognizes the duty of the Catholic Church to focus upon the formation of the whole person, according to the doctrine of the Catholic Church, attempting to achieve a synthesis of faith and culture fully permeated with the spirit and meaning of the gospel. The purpose and mission of a Catholic separate school is the inculcation of Catholicism in every aspect of the school, not simply in religion class, and the Catholic school that does not provide such a denominationally-focused education may be deprived of its separate school status. See *Jacobi v. Aqueduct RCSSD No. 374* [1994].

Given this very distinct role of Catholic education, it is not surprising that the role of the teacher in the Catholic school is to emulate by personal example and modeling the teachings of the Catholic Church. In the Catholic philosophy of education, the teacher is required to live in "imitation of Christ" and to be a constant example of the teachings of the Church, not only in their words but in their conduct. They are required to be the "highest model of Christian behaviour" and to transmit the Catholic faith to their students through their personal example, beliefs, values, attitudes and lifestyle. It is this expectation which is incorporated in the contractual relationship between the teacher and the Catholic board, requiring that the teacher follow, both in and out of school, a lifestyle and deportment in harmony with Catholic teachings and principles. See *Caldwell, supra*, and *Daly, supra*.

It has been clear since the earliest days of Confederation that Catholic separate schools are entitled to preferential hiring; that is, the preference to hire Catholic teachers over others and the preference to require all teachers to live as examples of the Catholic faith. The Courts have found that such a preferential hiring right was in existence at the time of Confederation and has been legally recognized throughout history. More recently, the Courts have recognized the right of Catholic separate schools to terminate the employment of teachers for "denominational cause," including marrying in a civil rather than a Church ceremony, marrying a divorced person, or engaging in pre-marital sexual intercourse, as evidenced by requests for maternity leave. In addition, the Courts have recently recognized the right to preferential promotion of teachers to the positions of principal, vice-principal or departmental heads, on the basis of Catholic preference, if the promotion policy was a specific religious requirement necessary to maintain the denominational character of the school. See *Re Essex RCSSB and Porter et al* [1978], *Caldwell, supra*, *Re Daly, supra*, *OECTA v. Dufferin-Peel RCSSB* [1999], and *Re Casagrande and Hinton RCSSD No. 155* [1987].

The standard to which a teacher in a Catholic school will be held is an elevated standard of Christian behaviour and requires attentive compliance in all aspects with Catholic teachings and principles. We live in a society in which others may behave in ways not always in strict communion with Catholic theology and doctrine. Teachers in Catholic schools are not expected to permit such relaxations of standards. They are held to a higher standard, not necessarily fair by societal comparison, but fundamental to the permeation of Catholic teaching in the Catholic school.

Where there has been a direct conflict between the provisions of human rights legislation, or sections 2(a) and 15 of the *Charter of Rights and Freedoms*, with denominational education rights preserved by section 93(1) of the *Constitution Act*, 1867, and section 17(1) of the *Alberta Act*, 1905, the Courts have resolved that conflict in favour of upholding denominational education rights, relying on section 29 of the Charter and the "special treatment guaranteed by the Constitution to denominational, separate or dissentient schools" even where those rights currently fit uncomfortably with other Charter guarantees. See *Re Casagrande, supra*, *Mahe v. Alberta* [1990] and *An Act to Amend the Education Act (Bill 30)* [1987].

Finally, the Courts have held that the constitutional rights enjoyed by separate Catholic schools are not frozen "as at 1905," but as educational modes and methods evolve, so do such rights. As a result, the recent phenomenon of reliance upon teacher assistants and other non-teachers in the classrooms, as an extension of mode or method of instruction in the classrooms, attracts the constitutional protections relevant to teachers as they existed in 1905. See *Ottawa Separate School Trustees v. City of Ottawa* [1915], *Hirsch v. Protestant School Commission of Montreal* [1928], *Jacobi, supra*, *Ontario Home Builders' Assoc. v. York Region Board of Education* [1996], *OEFTA v. Ontario, supra*, and *Bill 30, supra*.