

Catholic Dimension - Legally Speaking - Fall 2012

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There is a perception, correct or incorrect, that the role and mandate of the Alberta Human Rights Commission, laudable and worthwhile in its own right, conflicts at times with the *raison d'être* of Catholic education; the fully-permeated education of the whole student, according to the philosophy, theology and teachings of the Catholic Church, and the principles of the Gospel under the mentorship of the local Bishop. This perception has perhaps been influenced by the recent legislative provisions of section 11.1 of the Alberta Human Rights Act, section 16 of Bill 2, the proposed Education Act, and recent high profile complaints to the Commission about the application and administration of Catholic education.

Alberta passed its first Human Rights Act in 1966 to set up a “comprehensive system for dealing with discrimination”. In 1972, the new government of Peter Lougheed, Q.C. introduced as its first Bill the Individual Rights Protection Act, creating the Human Rights Commission and hiring staff to administer it. Effective April 2, 1998, as a result of the Supreme Court of Canada decision in *Vriend*, sexual orientation was “read in” as a protected ground under the legislation. Effective October 1, 2009 the name of the legislation was again amended to the Alberta Human Rights Act and sexual orientation was added as a protected ground from discrimination.

Effective September 1, 2010, section 11.1 was added to the Act requiring school boards to provide notice to parents or guardians of students “where courses of study, educational programs or instruction materials, or instruction or exercises ... include subject matter that deals primarily and explicitly with religion, human sexuality or sexual orientation”, and allows parents or guardians to request exclusion of students from such instruction or study. In February, 2012, first reading was given to Bill 2: Education Act, section 16 of which provided that all courses or programs of study used in a school must “honour and respect the Canadian Charter of Rights and Freedoms and the Alberta Human Rights Act.” That addition would, of course, include reference to section 2(a) of the Charter protecting not only freedom of conscience and religion, but freedom “from” religion, and the non-discrimination provisions of the Alberta Human Rights Act including on the grounds of “religious beliefs ... marital status, ... or sexual orientation”.

The important social goal of the Act is to protect vulnerable persons from discrimination on specified grounds, so as to provide everyone with an “equal opportunity to earn a living, find a place to live, and enjoy services customarily available to the public”, to foster equality and to “forward the principle that all persons are equal in dignity, rights and responsibilities”. The Commission is tasked with promoting respect for the multicultural heritage of society, promoting an environment in which everyone may participate in the cultural, social, economic and political life of Alberta, and encourage equality of opportunity.

A difficulty arises when these important social goals are interpreted in such a way as to dilute, detract from or abolish Catholic social teaching in Catholic institutions which attempt to reflect the teachings of the Church according to the Gospel message, as interpreted by the local Bishop. Recent examples of this potential conflict include complaints to the Commission by non-Catholics requiring employment, services or use of facilities from Catholic institutions, in a manner which is antithetical to Catholic doctrine.

In March, 2008, a non-Catholic applicant for the position of secretary treasurer in Medicine Hat complained to the Commission that he was asked in his interview whether he thought he could work in a wholly-permeated Catholic environment, be comfortable with and respectful of the teachings and traditions of the Catholic Church. That complaint was later abandoned.

In October, 2009, a substitute teacher, diagnosed as being transgendered, transsexual, and suffering from gender identity disorder filed a complaint with the Commission after she had substitute taught in Legal, Alberta as a female in the 2007-2008 school year, returned to substitute teach as a male in the 2008-2009 school year, and subsequently had her name removed from the substitute teachers' list. That complaint was accepted by the Commission in the area of employment refused and terms of employment, on the grounds of mental disability, physical disability and gender. The complaint was dismissed by the Director in May, 2011, but that decision was overturned by the Chief of the Commission and Tribunals in July, 2012, and ordered to proceed to a tribunal hearing.

In December, 2010, four women residing in Morinville, Alberta, complained to the Commission that the Catholic board did not offer a secular, non-denominational education to their children in their community. This complaint was continued despite passage of the St. Albert and Sturgeon Valley School Districts Establishment Act, effective July 1, 2012, which established a secular, non-denominational public school board in the area, and transformed the Catholic public board serving the students of Morinville into a Catholic separate board. Two of these complaints have been withdrawn, and the existing two remain in the hands of the Director.

Warnings have been given elsewhere around Alberta that complaints are contemplated with respect to the decisions of many Catholic boards not to facilitate the distribution of HPV vaccine within Catholic school buildings, but to allow parents the right to seek those inoculations through the public health system, and against the determination of a number of Catholic boards not to utilize funding directly received from gambling and casino revenues.

A number of cases have specifically addressed the potential conflict that arises when there is an apparent conflict between denominational education rights on one hand and the provisions of Human Rights legislation or the Charter of Rights and Freedoms on the other.

Resolution of this conflict in favour of denominational rights was addressed in *Re Casagrande*, (1987) at 390:

"It is clear that s. 29 (of the Charter) reaffirms and continues the constitutional rights granted in respect of denominational schools, giving these rights precedence over the individual rights protected by the other provisions of the Charter";
and at 391:

"This right is expressly protected by s. 29 of the Charter and overrides individual rights to equality granted by s. 15. The rights granted by the Constitution and preserved in s. 29 override not only the individual rights granted by the Charter such as s. 15, but also render inapplicable any rights granted by the Individual Rights Protection Act, the statute of the legislature of the Province of Alberta, to the extent that such rights conflict with the constitutional right of a separate school board to dismiss for denominational cause."

The Supreme Court of Canada in *Mahé*, (1990) said the following about this conflict at 380:

"Under the terms of s. 29 of the Charter any interpretation of s. 23 (minority language rights, the subject of the *Mahé* case) must be consistent with the rights and privileges of denominational schools."

The potential conflict between provisions was addressed at length in several decisions of the Supreme Court of Canada in *An Act To Amend The Education Act (Bill 30)*, (1987). Firstly, Madam Justice Wilson said that reliance upon other Charter and Human Rights provisions cannot render denominational education rights "an empty shell" or "hollow rights" (1188). She then said at 1196:

"The appellants urged upon the Court that Bill 30 contravenes s. 15 and s. 2(a) of the Charter in that it provided full funding for Roman Catholic secondary schools but not for other secondary schools, denominational or non-denominational, in the province";
and at 1197 and 1198:

"I have indicated that the rights or privileges protected by s. 93(1) are immune from Charter review under s. 29 of the Charter. I think this is clear. What is less clear is whether s. 29 of the Charter was required in order to achieve that result. In my view it was not. I believe it was put there simply to emphasize that the special treatment guaranteed by the Constitution to denominational, separate or dissentient schools, even if it fits uncomfortably with the concept of equality embodied in the Charter because not available to other schools, is nevertheless not impaired by the Charter. It was never intended, in my opinion, that the Charter could be used to invalidate other provisions of the Constitution, particularly a provision such as s. 93 which represented a fundamental part of the Confederation compromise. Section 29, in my view, is present in the Charter only for greater certainty....To put it another way, s. 29 is there to render immune from Charter review rights or privileges which would otherwise, ie., but for s. 29 be subject to such review."

Mr. Justice Estey, in the *Bill 30* case said the following about this potential conflict at 1206 and 1207:

"... the real contest in this appeal is clearly between the operation of the Charter in its entirety and the integrity of s. 93. By section 52 of the Constitution Act, 1982, s. 93 is a part of the Constitution of Canada. Section 93 is a fundamental constitutional provision because it is a part of the pattern of sharing of sovereign power between the two plenary authorities created at Confederation. The importance of this provision is underlined by its separate existence outside the catalogue of powers in ss. 91 and 92.

...

"Although the Charter is intended to constrain the exercise of legislative power conferred under the Constitution Act, 1867, where the delineated rights of individual members of the community are adversely affected, it cannot be interpreted as rendering unconstitutional distinctions that are expressly permitted by the Constitution Act, 1867.

...

"The Charter would not be available to disallow the implementation of s. 93(1), or legislation for the protection of the rights imbedded by s. 93(1) or legislation contemplated by s. 93(3)."

The Ontario Superior Court of Justice in Hall (2002) was careful, however, to say at 324 that denominational education rights may only be given effect in the face of an apparent breach of section 15 of the Charter, where the denominational education right claimed was a "specific right... (which) ... goes to the essential denominational nature of the school."

It is clear from these cases that where there is a conflict between denominational educational rights in effect at the time of entry into confederation, protected by s. 93(1) of the Constitution Act, 1867 or s. 17(1) of the Alberta Act or Saskatchewan Act 1905, provisions of Human Rights legislation and the Charter of Rights and Freedoms may not be used to defeat those essential denominational educational rights.