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Canada

THE IMPACT OF THE CANADIAN CHARTER
OF RIGHTS AND FREEDOMS
ON RELIGIOUS FREEDOM

by

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A dissertation submitted to the Faculty of Graduate Studies in partial
fulfillment of the requirements for the degree of

Doctor of Philosophy

Department of Religious Studies

University of Ottawa



William W.T. Wan, Ottawa, Canada, 1989



UNIVERSITÉ D'OTTAWA
UNIVERSITY OF OTTAWA

THE IMPACT OF THE CHARTER OF RIGHTS AND FREEDOMS ON RELIGIOUS FREEDOM

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DEDICATION

DEDICATED
TO THE GLORY OF GOD
WHOSE SUPREMACY
IS RECOGNIZED BY THE SUPREME LAW OF CANADA
AND
WHOSE LOVE
IS MANIFESTED BY HIS SON
JESUS CHRIST
WHO IS
THE LORD AND SAVIOUR OF THE WORLD.

PREFACE

This work could not have been completed without the help and encouragement of a number of people. It would be remiss of me not to acknowledge the key people who provided significant help from its inception to its completion.

I am, first of all, indebted to my supervisor, Professor Roger Lapointe. In the midst of completing his own two-volume *magnus opus* in socio-anthropology of religion he found time to read my draft. He made significant comments and gave constructive criticisms in the course of my research. I am grateful for his friendship in the process and consider it a tremendous privilege to work under his supervision.

I am also thankful to the members of the University Colloquium for helping me to sharpen my focus on the subject.

Grateful thanks are due to my colleague, the Rev. Dr. Joseph Burke, who took pains to proof-read the manuscript and made some invaluable editorial suggestions; and to my secretary Mrs. Yun Chan who single-handedly organized the physical aspects of this work with great skill and professionalism. My friend, Mr. Archibald McDonald, editor of the *Canada Supreme Court Reports* has also given me much practical help and encouragement.

To the Ottawa Chinese United Church I must acknowledge my deep gratitude for giving me time off from my busy church ministry to research and write. I am very grateful to the Session and Official Board of the Church for undertaking some of my pastoral ministries while I was engaged in this piece of research.

I am thankful for the understanding and support of my three children, Li-Ann, Li-Lynn and Le-Ben, who missed my physical and emotional presence because I was often absorbed in the challenge of this research. And last, but not least, I am thankful to my wife, Ruth, who quietly encouraged me to complete what I had begun.

Abstract

Freedom of and from religion has been a long evolutionary process. The historical roots of the evolution of religious freedom are uncovered to reveal the way religious rights were developed. Lawmakers had enacted legislations in the initial stages of Canadian history on a strictly Judeo-Christian frame-work. The *Lord's Day Act* was the height of such legislative efforts in protecting the religious ethos of the time. With the rise of secularization and multiculturalism, there was a need for new interpretations. These secular and cultural changes came with the global consciousness for entrenched human rights.

The development of the *Bill of Rights* and the entrenched *Charter of Rights and Freedoms* was in the context of an increasingly pluralistic social milieu. The role played by the courts in the interpretation of these changes, as reflected in the laws, revealed a clear shift from a Judeo-Christian tradition to that of a pluralistic and mainly secular understanding of religious freedom. In the judicial analysis of the socio-religious situation, the courts balanced the competing interests of individual rights and the interest of the state so that compromise solutions are more prevalent in recent decisions.

The impact of the *Charter* is mostly to be found in the liberalized trend which tends towards a more secularized understanding of the freedom of religion in a pluralistic and multicultural society.

Introduction

Freedom of religion is a large subject with a long history. It is of permanent importance for a democratic society because it profoundly affects the socio-economic and cultural ethos of a community. As well, it has its political dimension involving the sensitive and delicate relations between the citizens, religious organizations and the government. Freedom of religion is the central core of church-state relations, and as such, it is part of the political reality in the endless task of nation-building.

The protection of religious freedom finds its way to the various chambers of the law-makers culminating in human rights legislations. The politics of church and state often involve the courts of justice as interpreters and arbitrators of the law and the contenders. Especially when such freedoms are entrenched in constitutional documents, the courts do find themselves involved in quasi-political decisions.

In recent times, freedom of religion (or religious liberty) has emerged as a normative principle in intra-state community relationships and inter-state political relationships. As one of the axiomatic principles that is almost universally recognized, the denial of religious freedom is virtually condemned by most nations and groups as morally and legally obnoxious. Consequently, guarantees of religious liberties are now almost always entrenched in the constitutions of most nations including nations whose governments are committed to secular humanism, irreligion or atheism. In this regard the *Canadian Constitution Act* of 1982 is historic not only in the repatriation of the Constitution but also its entrenchment of freedom of religion and

conscience in s. 2(a).

The investigation begins, as it must, with some background information about the way freedom of religion eventually finds its way into the Constitution as an entrenched civil right. This is followed by three chapters that cover the historical struggles for religious freedom in early Canada (1534-1867); the period of Confederation till the enactment of the federal *Bill of Rights* (1867-1959) and the period of some twenty years where the *Bill of Rights* exercised its influence on this particular freedom (1960-1982). The most important and climactic chapter, of course, is Chapter V, on the *Charter of Rights and Freedoms*. This chapter covers the period which stretches from 1982 to the first half of 1988.

It is the purpose of this work to undertake in a meaningful way a review and analysis of both the historical development of religious freedom in Canada and the court's jurisprudence on the subject in order to assess the impact of the *Canadian Charter of Rights and Freedoms* on religious freedom.

In regard to research method, a historico-descriptive approach is adopted in the first four chapters. It is essential to put the question in a wider perspective by going to the historical roots. In tracing the evolution of religious freedom in an increasingly multicultural society, it is a significant observation that the practical reasons for supporting religious freedom clearly change as the society moves from a predominantly Christian-oriented community to a multi-religious community. For reason of political expediency, minority religious groups invariably supported religious freedom. However, in many cases, when the group became a dominant and powerful majority group, it tended to resist the granting of the same freedom when it was in conflict with its own religious teachings or perception of truth. Appreciating the past will certainly enlighten the present, and may even help

to forecast the future.

In addition, a legal-analytical approach is also adopted to analyze judicial decisions. This approach seeks to identify the problems and issues in church-state relations. The analyses will reveal the dynamic nature of the multicultural Canadian society that has historical and philosophical underpinnings which are quite different from those of the United States. It will be seen that the dynamics of an entrenched freedom of religion is both similar and dissimilar to that of the American experience. However, there appears to be a liberalizing trend of aligning the Canadian situation with that of the American.

The subject of denominational education as it relates to religious freedom is too large to be included in this study. Hence, although *A Reference Respecting Bill 30, An Act to Amend the Education Act to provide full funding for Roman Catholic Separate Schools* (1987) is an important Supreme Court Charter decision, no reference is made to it in this work. It is a subject worthy of another thesis in its own right. As well, the Court of Appeal decision to keep the Lord's Prayer out of public schools is not dealt with here since it was a post-June 1988 decision.

Notwithstanding these limitations, the thesis analyses almost all the relevant judicial decisions on freedom of religion. It attempts to be comprehensive without being superficial and detailed without being tedious.

Chapter I

THE ADVENT OF RELIGIOUS FREEDOM AS A CONSTITUTIONAL RIGHT

It is universally acknowledged that religion forms an essential lining in the fabric of society. Ninian Smart makes the point that "throughout history and beyond in the dark recesses of man's earliest cultures, religion has been a vital and pervasive feature of human life".¹ This claim is also made by Ringgren and Ström in their joint work, *Religion of Mankind*.² They are convinced that no people in the world may be said to be altogether devoid of religion. Edmund Burke, in 1790, was absolutely convinced that it is "the basis of civil society and the source of all good and all comfort".³ Both the historian and the sociologist appear to agree with Burke in respect to Canada. John Webster Grant writes of the "deep penetration of religion into the fabric of Canadian society",⁴ while Crysedale and Wheatcroft note that "church membership and attendance for generations have been the preferred form of voluntary association in nearly every Canadian Community, and Canadians still attend church more frequently than do people in most parts of the world".⁵ Sociologist Reginald Bibby reported that 83% of Canadians believe in God. He also noted that "the demand for rites of passage is very strong in every region" and that 89% of Canadians claim affiliation with some religious

¹ *The Religious Experience of Mankind*, 3.

² *passim*.

³ Charles W. Eliot (ed.), *Reflections on the Revolution in France*, 226.

⁴ John S. Moir (ed.), *The Cross in Canada*, ix.

⁵ Stewart Crysedale and Les Wheatcroft (eds.), *Religion in Canadian Society*, 3.

organization.⁶

Paradoxically, however, the practice of religion, by its very emotive and passionate nature, often makes people intolerant of others who might not share exactly the same set of beliefs and practices. Precisely for this reason, the need for religious freedom in terms of both freedom for and freedom from religion becomes of utmost importance. As Justice Frank Murphy of the U.S. Supreme Court noted in *Prince v. Massachusetts*.

No chapter in human history has been largely written in terms of persecution and intolerance as the one dealing with religious freedom. From ancient times to present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs.⁷

Religious Freedom and Civil Liberties

Equally paradoxically has come, out of the mire of intolerance and persecution and the resultant struggle for religious freedom, a host of other civil liberties. Historically, freedom of speech resulted from the struggle for freedom of worship according to the dictates of one's conscience. It was the

⁶ *Fragmented Gods*, 88-89.

⁷ 321 U.S. 158 (1944).

For a comprehensive account of religiously motivated oppression of Jehovah's Witnesses in Canada, see M. James Penton, *Jehovah's Witness in Canada: Champion of Freedom of Speech and Worship*. See also William D.K. Kernaghan, *Freedom of Religion in the Province of Quebec with particular reference to the Jews, Jehovah's Witness and Church-State Relations*. With respect to communally oriented religious groups, see William Janzen, *The Limits of Liberty in Canada: The Experience of the Mennonites, Hutterites, and Doukhobors*. More recently the Quebec-based Apostles of Infinite Love, a group claiming to represent the authentic Catholic Church, alleged persecution by the Quebec civil and religious authorities. See their monthly publication, *Magnificat* (Vols 13 No. 5-6, 16 No. 1-2 and esp. Vol. 12 No.6).

struggle for freedom to print religious literature that gave birth to the freedom of the press. Freedom of association and assembly can be traced to the victory in the struggle for freedom to assemble for religious purposes. Even the notion of a fair trial, a fundamental notion within the rule of law, originally grew out of the fight for objectivity and fairness in heresy and other trials of a religious nature.⁸ In fact, freedom of religion is classed under "individual" liberties, which are themselves a part of civil liberties. Individual liberties may be subdivided into "traditional political" liberties and "legal" liberties. These are classified as "substantive" and "procedural" liberties respectively in the United States.⁹

It is one thing, however, to classify freedom of religion and quite another to define it. Civil libertarians and constitutional authorities differ in their definitions. In his classical exposition, M. Searle Bates noted that the term is used in a wide range of meanings which are often ill-determined. Part of this vagueness, he said, "derives from the complex relationships in issues of religious liberty, involving the individual, the religious body, the community, and the state".¹⁰ Even within the religious community, the concept is not altogether in focus.

To some it is utter individualism; to others the unhindered power of a mighty ecclesiastical system. To some it implies open competition of religious bodies; to others unity protected and undisturbed. To some it means the right to challenge a traditional religion which is the sanction for moral and social standards among a large majority of the members of a nation; to others it is

⁸See Leo Pfeffer, *The Liberties of An American : The Supreme Court Speaks*, *passim*.

⁹Bora Laskin, *Canadian Constitutional Law*, 942, included freedom of association, assembly, utterance, communication, conscience and religion in the former group. See also his article in 37 *Canadian Bar Review* (1959), 1-216. It is noteworthy that Walter Tarnopolsky adopted the classification in his important work titled *The Canadian Bill of Rights*, 3.

¹⁰M. Searle Bates, *Religious Liberty : An Inquiry*, 295.

the right to protect a cherished religion against modernism or foreign doctrines or atheism.¹¹

Definition of Religion

Whether it is a right to challenge a traditional religion or a right to protect a cherished religion, the question of definition of religion becomes an issue for purposes of human rights legislation. Given the statutory protection of freedom of religion, it is frustrating that the notion of religion and its related notions of religious creeds or spirituality are left undefined. The courts had not dealt with the content of religion because under the *British North America Act*, the courts were primarily concerned with the scope of religion in relation to the enumerated heads of legislative powers.

It may be helpful to trace in a summary manner the history of definition under the American *Constitution*. In one of the earliest nineteenth century cases, a California court broadly categorized religion as follows:

The word "religion" in its primary sense ... imports, as applied to moral questions, only a recognition of a conscious duty to obey restraining principles of conduct. In such sense we suppose there is no one who will admit that he is without religion.¹²

This open-ended definition is practically useless in that it includes almost all conduct of a moral nature. Its effect is more definitive of conscience than religion.

About a decade later, the Supreme Court held in *Davies v. Benson* that religion has reference to

¹¹ *ibid.* 302.

¹² In *Re Hinckley's Estate*, 58 Cal. 457 at 512 (1881).

one's view of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will with man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief of those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people are not interfered with.¹³

With this case the idea of a transcendent being was introduced in such a manner that his will is supreme unless that will interfered with certain positive laws. But in 1931 the dissenting Chief Justice in a case involving a conscientious objector to war declared that "[t]he essence of religion is belief in a relation to God involving duties superior to those arising from any human relation".¹⁴ To him the existence of a belief as manifested in a supreme allegiance to the will of God was essential to the exposition of religious freedom.

The question, of course, arises in relation to the transcendent in the context of the varieties of religious experiences, namely, which God was the Chief Justice referring to? A Texas District Court preferred the Christian God when it defines religion to mean "specifically, conformity in faith and life to the precepts inculcated in the Bible, respecting conduct of life and duty towards God and man; the Christian faith and practice".¹⁵

In contrast, the judgement of a Pennsylvania court involving some Jehovah's Witnesses followed the definition of *Davies v. Benson*¹⁶ in leaving the Creator unaligned with any religious groups and allowing for the

¹³ 133 U.S. 333 (1890).

¹⁴ *United States v. Macintosh*, 283 U.S. 603 (1931).

¹⁵ *Brochert v. City of Ranger, Texas*, 42 F. Supp. 577 at 580 (1941).

¹⁶ *Supra*, 7.

definition to include non-Christian religions. It defined religion in terms of

...[S]quaring human life with superhuman life ... belief in a superhuman power and an adjustment of human activities to the requirements of that power, such adjustment as may enable the individual believer to exist more happily.¹⁷

Up to this point religion implies belief as opposed to non-belief. By 1947, however, in the celebrated case of *Everson v. Board of Education of Ewing Township* Justice Black included "non-believers" as a category of religion along with Catholics, Lutherans, Baptists, Jews or any other faith.¹⁸ Indeed the Supreme Court of the United States confirmed this view in 1961 in *Torcaso v. Watkins*, a "free-exercise" case:

Neither (a state nor the Federal Government) can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs".¹⁹

With this judicial declaration, the open-ended approach completed the full circle. Thus in *U.S. v. Seeger*, the court held that belief in a "Supreme Being" included "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that fulfilled by God ...".²⁰ And in *Welsh v. U.S.* religion included intensely held beliefs which were "purely ethical or moral in source and content".²¹

Unlike the liberal and open-ended approach of the U.S. court, the British Court of Appeal took a much more conservative view of religion. In

¹⁷ *Minersville School Dist. v. Gobitis*, 108 F. 2d., 683 at 685 (1939).

¹⁸ 330 U.S. 1 (1947) at 18.

¹⁹ 367 U.S. 488 (1961) at 495.

²⁰ 380 U.S. 163 (1965) at 176.

²¹ 398 U.S. 333 (1970) at 339-40.

*R. v. Registrar General , Ex Parte Segerdal*²². the court had to consider whether the services of the Church of Scientology amounted to "religious worship". The Master of the Rolls dealt with the meaning of the phrase "place of meeting for religious worship". Said Lord Denning,

It connotes to my mind a place of which the principle use is a place where people come together as a congregation or assembly to do reverence to God. It need not be the God which the Christians worship. It may be another God, or an unknown God, but it must be reverence to a deity. There may be exceptions. For instance, Buddhist temples are properly described as places of meeting for religious worship. But, apart from exceptional cases of that kind, it seems to me the governing idea behind the words "place of meeting for religious worship" is that it should be a place for worship of God.²³

In rejecting the religious claims of the Church of Scientology, his Lordship considered it more a humanistic philosophy than a religion. He based the conclusion on the meaning of religious worship :

Religious worship means reverence or veneration of God or of a Supreme Being. I do not find any such reverence or veneration in the creed of this church There is considerable stress on the spirit of man. The adherents of this philosophy believe that man's spirit is everlasting and moves from one human frame to another; but still, so far as I can see, it is the spirit of man and not god. When I look through the ceremonies and affidavits, I am left with the feeling that there is nothing in it of reverence for God or a deity, but simply instruction in a philosophy. There may be belief in a spirit of man, but there is no belief in a spirit of God.²⁴

²²[1970] 2 Q.B. 697 (CA).

²³ *ibid.*, 707.

²⁴ *ibid.*

Definition of Religious Freedom

Notwithstanding the difficulties in defining the notions of freedom of religion, Bates listed seven components of this freedom in his definition. They are freedom of conscience, freedom of worship, freedom of association, freedom of propaganda, freedom from civil disability, freedom from discrimination against any or all religions by the state and freedom of the church or any part of it from connection with the state. By this definition, he considered Canada to be in the category of those countries which enjoyed "essentially full and equal religious liberty" to which Professor D.A. Schmeiser of Saskatchewan agreed.²⁵ M. James Penton, however, disagreed with both scholars stating that "there is quite another side to Canadian religious history, which many Canadians have been willing to ignore or overlook".²⁶

Our understanding, then, is that religious freedom is a fundamental freedom. In the Canadian constitutional writings it heads the list in the classification of civil liberties.²⁷ Its importance could well be self-evident. Writes Harvey Cox: "We protect religion because we protect the individual".²⁸ Though Cox cites it as a plausible reason, he thinks that it is somewhat too individualistic a conception and smacks too much of its Lockean roots in bourgeois-enlightenment thought. Like all civil liberties, religious freedom is concerned with human rights. And human rights on the whole are concerned with the protection of "individuals generally, on a natural law or other

²⁵D.A. Schmeiser, *Civil Liberties in Canada*, 54-55.

²⁶Penton, *op.cit.* 2.

²⁷Laskin, *Supra.*, 6 footnote 9.

²⁸See his "Religion and the Law" in Bernard Schwartz (ed.), *The Fourteenth Amendment: A Century in American Law and Life*, 78-84.

basis".²⁹

Before the end of World War II, individuals were perceived as aliens and nationals, and not as individuals. Horrendous events (especially the Holocaust) in the 1930s and in the Second World War highlighted the urgent need to protect and guarantee human rights. Hence, one of the primary objectives for the formation of the United Nations in 1945 was to reaffirm faith in fundamental human rights and to practice tolerance as declared in her Preamble to the *Charter* itself. Art. 55 (c) of the *Charter of the United Nations* makes it crystal clear that the United Nations shall promote "... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

It is significant that the Roman Catholic Church at the Second Vatican Council declared that the human person has the right to religious freedom. It further declared that this right "is based on the very dignity of the human person as known through the revealed Word of God and by reason itself".³⁰

Entrenchment of Religious Freedom

The importance of religious freedom is generally and universally recognized, at least in theory, if not in fact. It is entrenched in the *Universal Declaration of Human Rights, 1948*. Art 18 reads : "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with

²⁹D.J. Harris (ed.), *Cases and Materials on International Law*, 499. *Charter* rights, however, are also concerned with protecting group rights as well. See *R. v. Big M Drug Mart Ltd* [1985] 1 S.C.R. 295 and *R. v. Oakes* [1986] 1 S.C.R. 103.

³⁰See Austin P. Flannery (ed.), *Documents of Vatican II*, 799-812.

others and in public or private, to manifest his religion or belief in teaching, practice, worship or observance".³¹ In 1950, the *European Convention on Human Rights* affirmed it and elaborated on it. Art.9 (1) is verbatim the same as Art.18 of the *Universal Declaration of Human Rights*, 1948 except for the juxtaposition of the words describing the manner in which one's religion or belief is manifested.³² The additional clause in Art.9(2) reads : "Freedom to manifest one's religion or beliefs shall be subjected only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".³³ In the American region, the *American Convention on Human Rights* 1970 came into force in 1978. It was binding on most of the South American states with the United States as a signatory though not a party to it.³⁴ In force since 1978, it contains a comprehensive guarantee of civil, political, economic, social and cultural rights. It also provides for a compulsory system of application leading to a discussion as to the breach of *Convention* by an independent commission. The World Court may also hear the case if the individual parties agree to its jurisdiction.

In the United States, the *First Amendment* to the *Constitution* was adopted and ratified in 1791. It reads in part that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise

³¹G.A. Resolution 217A (III) G.A.O.R., 3rd Sess. Part I Resolutions, 71.

³²E.T.S. No.5; U.K.T.S. 70 (1950), Cmd 8969.

³³Compare this limitation clause with s.1 of the *Constitution Act*, 1982 which reads : "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

³⁴G.I.L.M. 673 (1970).

thereof ...".³⁵ This is both brief and attractive in its formulation. Over the decades, however, its brevity has resulted in much interpretative disputes that are both long and often inconsistent.³⁶ The balance implicit in the establishment clause and the free exercise clause is intellectually most tantalizing indeed. Tussman asks, "Are we against establishment, nevertheless, because of the threat it poses to freedom of worship - so that the establishment clause is instrumental to the end expressed in the free exercise clause? Or does the point of the establishment clause lie beyond its contribution to religious freedom and in its expression of the ideal of a secular society, with freedom of worship therein as a boon to believers?"³⁷

In Canada, civil liberties were not accorded any direct constitutional guarantee until 1982. This is in line with the long standing political tradition of the British. The traditional civil liberties do not derive their existence from either positive law or governmental action. In accordance with British tradition, civil liberties are derived from the very absence of both positive law and governmental action. Hence even though the *First Amendment* of the American *Constitution* was already in existence at the time of the Canadian Confederation, the founding fathers did not choose to emulate it in any way. It was the clear interest of the founding fathers to continue the British

³⁵For a brief history of the amendment, see *Symposium*, "First Amendment Religion Clause : Historical Metamorphosis" in 61 *Northwestern University Law Review* (1966), 760-776. For an informative account of historical antecedents, see Joshua Weinstein, *When Religion Comes to School*. There is also a useful summary of the contributions of Jefferson and Madison to the debate and formulation of the Amendment. Michael Malbin's work on *Religion and Politics : the Intentions of the Authors of the First Amendments* takes one into the legislative history through the shorthand reports of Thomas Lloyd's *Annals of Congress*. The treatment is insightful, interesting and very informative.

³⁶See Joseph Tussman, *The Supreme Court on Church and State* for 29 landmark cases. Many opinions are cited in full.

³⁷*ibid.*, xiv.

tradition in this regard. This interest is engraved in the Preamble of the *British North America Act, 1867* (now renamed *The Constitution Act, 1867*) which describes the desire of the parties "to be federally united into one dominion under the Crown of the United Kingdom of Great Britain and Ireland with a constitution similar in principle to that of the United Kingdom".³⁸ Religious freedom, however, was guaranteed by law through individual Acts of Parliament as and when needed. For example, the *Treaty of Paris* signed on February 10, 1763 which formally ended the Seven Years' War attempted to assure the subjugated French Canadians that they were free to practice their Catholicism "as far as the laws of Great Britain permit".³⁹

Through a series of legislations, touching on religious freedom both in its free exercise and establishment aspects, freedom of religion in terms of a civil right was finally entrenched in the *Constitution Act, 1982*, better known as the *Charter of Rights and Freedoms*.⁴⁰ This constitutional document is the result of much socio-political work done by several Prime Ministers culminating in the historic repatriation of the *Constitution* under the prime ministership of Pierre Elliot Trudeau.⁴¹

³⁸See Peter W. Hogg, *Constitutional Law of Canada*, ch.14.

³⁹"Articles of the Capitulation of Quebec, 1759" in W.P.M. Kennedy (ed.), *Documents of the Canadian Constitution, 1759-1915*, 15.

The Text reads, in part, "His Britannical Majesty ... agrees to grant the liberty of the Catholic religion to the inhabitants of Canada : he will, in consequence, give the most precise and effectual orders, that his new Roman Catholic subjects may profess the worship of their religion according to the rites of the Romish Church, as far as the laws of Great Britain permit".

⁴⁰It came into force on April 17, 1982.

S.2 entitled *Fundamental Freedoms* states, in part, "Everyone has the following fundamental freedoms : (a) freedom of conscience and religion."

⁴¹See Keith Banting and Richard Simeon (eds.), *And No One Cheered* for the socio-political history leading to the successful repatriation.

The Canadian Bill of Rights

The need for a bill of rights was publicly aired as early as 1948 in the *Canadian Bar Review*. In that year two articles were published by the legal counsels of the Jehovah's Witnesses. The American lawyer Hayden Covington published an article entitled "The Dynamic American Bill of Rights" followed a month later by the Canadian counsel Glen How's entitled "The Case for a Canadian Bill of Rights".⁴² The Watch Tower Society reprinted ten thousand copies of each and mailed them with a personal letter to all the key leaders in the nation, including judges, lawyers, legislators, members of Parliament and editors of newspapers.

The campaign of the Jehovah's Witnesses for the entrenchment of a Bill of Rights was to be taken up not only by members of the opposition, but also by the Liberal Government of Lester Pearson and Pierre Trudeau. The sympathy of the public generated by Duplessis' persecution of the Jehovah's Witnesses, was one of the key contributors to the public interest and discussion of the proposed Bill of Rights.⁴³ On December 4, 1946 Duplessis, then Prime Minister of Quebec, cancelled the liquor licence of Frank Roncarelli, a well-known and highly respectable restaurateur in Montreal. This action was taken because Roncarelli was regularly putting up bail for Jehovah's Witnesses as fast as Duplessis was arresting them. Some 800 cases were pending in Montreal. Roncarelli took the case to the Supreme Court and thirteen years later, the court ruled in his favour.⁴⁴

⁴²26 *Canadian Bar Review* (1948), 759.

⁴³See Penton, *op.cit.*, ch. 9 for an account of the persecution and mass arrest of the Jehovah's Witnesses in Quebec during the administration of Premier Maurice Duplessis.

⁴⁴See *Roncarelli v. Duplessis* (1959) S.C.R. 121; 16 D.L.R. (2d) 289.

Other factors could have contributed to the wave of interest and concern. The landmark cases on the *First Amendment* were decided by the U.S. Supreme Court during that time. *Everson v. Board of Education*⁴⁵ was heard in 1947 and *McCollum v. Board of Education of Ewing Township*⁴⁶ in 1948. In the former, reimbursement to parents of parochial as well as public school children for bus fares was upheld in a 5-4 decision which explicitly considered the question of establishment of religion. In the latter, released-time religious education program in Champaign, Illinois, was held a breach of the wall of separation.

In the case of *Girouard v. United States*,⁴⁷ the court reversed previous decisions taken on the naturalization of conscientious objectors. Justice Douglas speaking on behalf of the court says, "the struggle for religious liberty has through the centuries been an effort to accommodate the demands of the state of conscience of the individual. The victory for freedom of thought recorded in our *Bill of Rights* recognizes that in the domain of conscience there is moral power higher than the State".⁴⁸

As well, the final formulation of the *Universal Declaration of Human Rights* was being studied, debated and finalized during that period. And the aftermath of the War with its horrendous memories must have advanced this discussion of human rights from the academic to the world of human experience.

As matters stood under the *British North America Act* of 1867, and in

⁴⁵ 330 U.S.1 (1947).

⁴⁶ 333 U.S. 203 (1948).

⁴⁷ 328 U.S. 61 (1946).

⁴⁸ *ibid*.

spite of all the legal thinking and judicial discussion on matters relating to civil liberties that are not expressly mentioned in the *Act*, it was not altogether clear in which jurisdiction such civil liberties should fall. Are they exclusively within federal jurisdiction? Or are they exclusively within provincial jurisdiction?⁴⁹ Or are they within the competence of each? The constitutional experts were divided on these questions.

After some heated debates, the Progressive Conservative Government of John Diefenbaker successfully secured the enactment of the *Canadian Bill of Rights* in 1960.⁵⁰ Some writers give credit not to Diefenbaker, but to the Jehovah's Witnesses for the successful enactment of this *Bill*. Writing in *The Canadian Annual Review for 1960*, Edward McWhinney said,

There is great truth in the statement, made only half in jest, by Glen How, who has been counsel for Jehovah's Witnesses in their main contests before the Supreme Court of Canada, that Jehovah's Witnesses, and not Mr. Diefenbaker, have given Canada her Bill of Rights.

Almost without exception, the great decisions of civil liberties given by the Supreme Court of Canada since the war are the legal by-products of the pangs and sufferings of individual Jehovah's Witnesses at the hands of provincial or municipal authorities.⁵¹

The Preamble to the *Canadian Bill of Rights* reads:

The Parliament of Canada, affirming that the Canadian Nation is founded upon the principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in society of free men and free institutions;

⁴⁹The Saskatchewan legislature enacted a Bill of Rights in 1947 (see R.S.S. 1965, c.378) which was merely declaratory and of limited application and effectiveness. The means of redress were to be found in penal sanctions and injunctive orders.

⁵⁰1960 (Can) Cap 44.

⁵¹The article is entitled "The Bill of Rights, The Supreme Court and Civil Liberties in Canada" at 271.

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of Law;

And being desirous of enshrining these principles and the human rights and fundamental freedom derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of the rights and freedom in Canada....

S. 1 reads in part :

1. It is hereby recognized and declared that in Canada these have existed and shall continue to exist, neither discrimination by reason of race, national origin, colour, religion or sex the following human rights and fundamental freedoms, namely,
 - (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
 - (b)
 - (c) freedom of religion;

This *Bill* is an ordinary piece of federal legislation and therefore can be repealed through the ordinary procedure. It does not purport to bind provincial legislatures because to do so it would be necessary to amend the *British North America Act, 1867* (now the *Constitution Act, 1867*). Such power to amend, of course, does not reside in the federal legislature.

In regard to the amending procedure relating to the *British North America Act*, Canada was in a very peculiar position. Since the coming into force of the *Statute of Westminster* in 1931,⁵² Canada was given legislative supremacy except in the matter of amending the *Constitution* itself. S. 7(1) of the *Statute of Westminster* provides that "Nothing in this *Act* shall be

⁵² 22 George V. c.4 (U.K.).

deemed to apply to the repeal or alteration of the *British North America Act, 1867* to 1930, or any order, rule or regulations made thereunder". In effect what it meant was that Canada could only amend her own Constitution by requesting the British Parliament in Westminster to do it. Hence the issue of patriation of the *Constitution* had to be ruled by the Supreme Court of Canada. The issue revolved around the question whether the Federal Government must have the consent of all the provinces in order to request Westminster to amend the *Constitution*, entrench the *Bill of Rights* and repatriate it once and for all.

Prior to the historic decision of the Supreme Court delivered on September 28th, 1981, the procedure for amendment was ambiguous. According to the White Paper⁵³ the constitutional position could be summarized in four propositions:

1. Although an Act of the United Kingdom Parliament is necessary to amend the B.N.A. Act "such action is taken only upon formal request from Canada. No act of the United Kingdom Parliament affecting Canada is therefore passed unless it is requested and covenanted to by Canada. Conversely, any amendment requested by Canada in the past has been enacted".
2. The request must take the form of a joint address of the Canadian House of Commons and Senate to the Crown praying that the appropriate measure be laid before the Parliament of the United Kingdom.
3. The Canadian Parliament will not request an amendment directly affecting federal-provincial relationship without prior consultation and agreement with the provinces.
4. No amendment to Canada's Constitution will be made by the British Parliament merely upon the request of a Canadian Province. The British Government will not move the British Parliament to act except on a request originating with the Federal Government of Canada.

⁵³Canada, Department of Justice, *The Amendment of the Constitution of Canada*, 15-16.

In the historic case involving "the Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution", it was contended by the provinces that the proposed resolution affects the federal-provincial relationship and therefore the consent of the provinces was required. The court held that the consent was not required by law, but was only required by convention. The consent, however, needed only to be that of a substantial majority. In pursuit of that decision the Trudeau Government reopened the consultation with the provinces and successfully gained the support of all but Quebec. Consequently the *Constitution* was repatriated with the *Charter of Rights and Freedoms* entrenched in it.

In light of the particular constitutional problem, the question of its effectiveness immediately became an issue. What, then, is the nature and function of the *Canadian Bill of Rights*? It is the weighty opinion of the late Chief Justice Laskin that the real and substantial usefulness of the *Bill* is not as solid as some constitutional writers believe. He writes,

It is an admonitory statute that prescribes a rule of construction for federal statutes; in brief, it is addressed by the Parliament to itself and to the Courts which are directed *to construe and apply* existing and future enactment so as not to abridge or infringe any of the declared rights or freedom, unless any such enactment expressly recites that it shall operate notwithstanding the *Canadian Bill of Rights*.

Within its limitation to purely federal legislation and common law operating as such it will be ineffective to modify legislation that it enacted in contrary terms, if all it does is express a rule of construction. At the risk of undue repetition, let me reiterate that the *Canadian Bill of Rights* enjoins the Courts to *construe and apply* all federal legislation, past and future, to conform to the fundamental rights that it expresses. If this is merely a rule of construction, it is easy enough to say that it must yield to a contrary expression; and on such a view, the statutory declaration of rights would be fragile indeed. Yet such an appreciation of the enactment would not give adequate weight to the word "apply" -

for the admonition to the courts is to *construe and apply*, and there is force to the suggestion that it is an offending statute that must bow to the *Canadian Bill of Rights* and not *vice versa*.⁵⁴

Laskin further notes that "a considerable literature has grown up around it, much beyond its deserts as an effective measure".

Lederman, on the other hand thinks that the *Bill* is

well worth doing, even though it takes the form of an ordinary federal statute.... It would still be an authoritative expression by the Canadian Parliament of valid general standards and would give leadership and promote education in these matters, though, strictly speaking, its application is confined to the federal part of the Canadian legal system as defined in the *British North America Act*. Law is not primarily a matter of coercion and punishment at all, it is primarily a matter of setting standards for society that attract willing acceptance because they offer some measure of justice.⁵⁵

A Proposed Charter of Rights and Freedom

The inadequacy of Diefenbaker's *Bill of Rights* has been recognized by at least two successive Liberal Governments. It was Prime Minister Lester Pearson who, in February 1968, convened a Constitutional Conference in Ottawa, to consider, *inter alia*, the possibility of a constitutional charter of human rights. In his opening statements, Prime Minister Pearson had hoped that there would be an "acceptance of the principle that certain basic rights should be constitutionally secured for all Canadians".⁵⁶

⁵⁴ Berbard Schwartz, *The Fourteen Amendment : A Century in America Law and Life*, 180-181. Emphasis his.

⁵⁵ Ontario Advisory Committee on Confederation : *Background Papers and Reports*, 35.

⁵⁶ *Proceedings of the Constitutional Conference, First Meeting, February 5-7, 1968* Ottawa 35.

At the same conference, Pierre Trudeau, who was then the Minister of Justice, acknowledged that the Diefenbaker *Bill* has paved the way for the proposal he was making on behalf of the Pearson Government. He described the proposed Charter, which would cover four categories of rights to be constitutionally protected, including the freedom of conscience and religion, as

A Charter of Rights for Canadians which will act as a fetter on the unlimited exercise of power not only of Parliament, but of the provincial legislation as well, and which by its place in the constitution will possess a measure of permanence not now attaching to the 1960 Bill which is in the form of an ordinary statute, subject to repeal at will.⁵⁷

At the conclusion of the conference, the delegates adopted several proposals including setting up the continuing Committee of Officials for the purpose of examining the question of fundamental rights.

Almost exactly a year later, the second meeting of the Constitutional Conference was held. By this time Trudeau had been elected Prime Minister of Canada. In his opening statements he particularly emphasized the need for a constitutional Charter of Rights. His rhetoric was both eloquent and persuasive.

What values can be more important, what possessions more precious to the citizen than the right to life and property, and freedoms of opinion, speech and religion? Those are basic rights of the individual, inherent in the dignity of man, because they are fundamental, natural and, indeed, unalterable. Can these rights be ignored in the Constitution of a modern and civilized country, which claims to be the defender of the dignity and liberty of man?⁵⁸

He then gave two basic reasons for wanting it to be entrenched or

⁵⁷ *ibid.*, 271

⁵⁸ *Proceedings of the Constitutional Conference, Second Meeting. February 10-12, 1969*, 7.

enshrined in the *Constitution*. First, he said, the Federal Government "believes that those rights are equally important for all Canadians ... the Canadian citizen must be assured everywhere of the same free exercise of his basic rights".⁵⁹ Second, he argued,

A constitutional charter of human rights, in addition to meeting a specific need in respect of the citizen, would offer the advantage of having all Canadians participate in the same spirit and the same ideal. We believe in the cultural diversity of the country, a diversity we want to cultivate and encourage. But at the same time we must find the deep-lying reasons which brings us together, we must become aware of the ties which unite us. If we want this country to be a country, and not an agglomeration of territories for administrative purposes, we must give this country a soul, recognize once and for all the principles and ideals we share in common and which inspire us.⁶⁰

Trudeau's understanding of religious freedom was put to a test a year later when a delegate of the Mennonite Central Committee met with him in Winnipeg on March 20, 1970 on the question whether the Mennonites on religious grounds could be exempted from contributing to and benefitting from the Canadian Pension Plan. Trudeau did not think that the Mennonites could opt out on the ground of religious freedom. He said,

Religious freedom exists, I take it, when people are free in their conscience and they can exercise their beliefs freely within the country, belong to a church of their choice, and so on. But in some cases, if the morals which flow from their metaphysics - if I can put it that way - are not morals accepted by the community in which they live, it is unfair to say that preventing those moral precepts from applying is an attack on religious freedom.... And in this particular case, the moral of this small minority are in direct conflict with the scheme of social welfare which the governments of today have adopted in order to serve the communities better. And therefore, while they may continue

⁵⁹ *ibid.*

⁶⁰ *ibid.*, 8.

practicing ... believing the same kinds of faith, but in this particular case there is no practical way of not to be bound by the ethic or the morals of the policies of the ...[sic].... When the government adopts laws which are good for the majority, I don't think that freedom of religion permits people from opting out...⁶¹

The Mennonite interpretation and Trudeau's response to it seemed to have created a conflict between his ideal about cultural diversity to be cultivated and encouraged and the reality of a way of life of a minority group coming in conflict with a government-sponsored program of universal implementation. Trudeau appeared then to give a *stricto sensu* interpretation to the notion of religious freedom which in fact disallows the minority the freedom, for religious reasons, to opt out of the scheme.

The historic vote on the constitutional resolution in the House of Commons was carried by an overwhelming majority of 246 to 24 on December 2nd, 1981. Subsequently the Senate also voted in favour of it. The British Parliament then acted on the request of the Federal Government accordingly and on April 17, 1982, the *Constitution Act, 1982* came into force.

As noted earlier, Part I of the *Constitution* is entitled *Canadian Charter of Rights and Freedoms*. The preamble reads, "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."

The relevant sections in relation to religious freedom are as follows:

- S.1. the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
- S.2. Everyone has the following fundamental freedoms:
 - (a) freedom of conscience and religion

⁶¹ Transcript of a meeting between MCC (Canada) delegation and Prime Minister Trudeau cited in William Janzen, *op.cit.*, 612.

- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication
 - (c) freedom of peaceful assembly
 - (d) freedom of association.
- S.7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principle of fundamental justice.
- S.15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based in race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.⁶²
- S.26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.
- S.27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.
- S.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.
- S.32. (1) The Charter applies
- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the

⁶²This section came into force on April 17, 1985, three years after patriation in order to allow time for Parliament and legislatures to bring offending legislations in line with this section.

- Yukon Territory and Northwest Territories;
and
(b) to the legislature and government of each
province in respect of all matters within the
authority of the legislature of each province.

Insofar as the substance of the rights are recognized and protected, the *Charter* appears not to be too different from the *Canadian Bill of Rights*. However, the court in a recent decision has identified a significant difference between the two. Dickson J (as he then was) noted in *R. v. Big M Drug Mart Ltd.* that

The basis of the majority's interpretation in *Robertson and Rosetanni* is the fact that the language of the *Canadian Bill of Rights* is merely declaratory : by S.1. of the *Canadian Bill of Rights*, certain existing freedoms are "recognized and declared" including the freedom of religion.⁶³

In contrast, the language of the *Charter of Rights and Freedoms* is "imperative". It does not simply "recognize and declare" existing rights at the time of the *Charter's* entrenchment. The *Charter*, he says , "is intended to set a standard upon which *present as well as future* legislation is to be tested".⁶⁴

Conclusions

Canadians are essentially a religious people. In consequence, religious freedom is an important civil right to be safeguarded in the Canadian society. While religion as such is not strictly defined in our legislative documents, the scope of religion and the protection of it is a concern of our courts.

It is in determining the scope of religion that religious freedom takes its

⁶³[1985] 1 S.C.R. 342-3.

⁶⁴*ibid.* 343.

rightful place as an essential political freedom. This political freedom gradually became an important part of the *Canadian Bill of Rights, 1960*. That it finds its way into the *Bill* may be credited to the Jehovah's Witnesses in their insistence on the freedom to practise their version of religious faith. The Bill of Rights Movement is also the result of the general need for civil liberties in the aftermath of the two world wars and the formation of the United Nations with its *Universal Declaration of Human Rights* in 1948.

The *Bill of Rights*, however, is inadequate in that it is merely declaratory of existing rights. Besides, it was only a federal statute liable to be repealed. The experience under the *Bill of Rights* in the courts was not particularly happy in that

with some notable exceptions, the courts have felt some uncertainty or ambivalence in the application of the *Canadian Bill of Rights* because it did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament.⁶⁵

The courts have indicated that they were going to change their ways in the interpretation of rights and freedoms. In *Singh v. Minister of Employment and Immigration*, Wilson J. made it quite clear that

the recent adoption of the *Charter* by the Parliament and nine of the ten provinces as part of the Canadian constitutional framework has sent out a clear message to the courts that the restrictive attitude which at times characterized their approach to the *Canadian Bill of Rights* ought to be reexamined.⁶⁶

It soon became apparent that fundamental rights such as the freedom of religion has to be fundamentally protected. The most obvious way to do that is to entrench it as a constitutional right. With the procedure for

⁶⁵Per le Dain J. in *R. v. Therens* [1985] 1 S.C.R. 613 at 639.

⁶⁶[1985] 1 S.C.R. 177 at 209.

constitutional amendment resolved and the *Constitution* duly patriated, religious freedom became a part of the *Canadian Charter of Rights and Freedoms*, also known as the *Constitution Act, 1982*. The advent of religious freedom as a constitutional right means, *inter alia*, that it sets a standard upon which present as well as future legislation will be tested.

It is then the objective of this study to determine and describe the impact of the *Charter of Rights and Freedoms* on freedom of religion. Important Charter cases will be analyzed so as to understand "the distinctive principle of constitutional interpretation appropriate to expounding the supreme law of Canada".⁶⁷

To fully understand the impact of the *Charter of Rights and Freedoms* on the present understanding of religious freedom, it is necessary to gain a historical perspective on religious freedom prior to the *Charter*.

⁶⁷ *R. v. Big M Drug Mart Ltd.*, [1985] S.C.R. 344.

Chapter II

CHURCH AND STATE IN EARLY CANADA (1534-1867)

New France Before the British Conquest (1534 - 1763)

Until quite recently Canada was essentially a people of two nations. The French and the English with their respective language and faith are still in evidence today. The history of the two peoples highlights the religious differences as well as rivalry in the early days of the founding of Canada. It is necessary to look back into that history in order to understand the notion of religious freedom in Canada today. There is an essential link between history and religious freedom.

Historians are not in agreement as to the significance of the presence of religious motives in the exploration of the St. Lawrence by Jacques Cartier in 1534.¹ The motive was probably mixed as the man could not be separated from his religion even in his commercial venture. According to his own description, he brought the cross of the old world Catholic religion to Canada in the name of the King of France.

On [Friday] the twenty-fourth of the said month [of July], we had a cross made thirty feet high, which was put together in the presence of a number of Indians on the point at the entrance to this harbour [Gaspé] under the cross-bar of which we fixed a shield with three *fleurs-de-lys* in relief, and above it a wooden board, engrave in large Gothic characters, where was written, LONG LIVE THE KING OF FRANCE. We erected this cross on

¹Douglas J. Wilson, *The Church Grows in Canada*, 1 and 3, wrote that "romantic myths notwithstanding, Cartier's motives were not religious", and the "religious and humanitarian goals in Canadian life were not initially present". John Webster Grant, on the other hand, while recognizing the commercial motives, noted that "from the earliest times representatives of the church have been staking claims in Canadian soil." See John S. Moir (ed.), *The Cross in Canada*, vii.

the point in their presence and they watched it being set up. And when it had been raised in the air, we all knelt down with our hands joined, worshipping it before them; and made signs to them, looking up and pointing towards heaven, and by means of this we had our redemption, at which they showed many marks of admiration, at the same time turning and looking at the cross.²

In 1608 Samuel de Champlain founded the Colony of New France and established it as a part of the French Empire and subjected to the laws of France. Missionary enterprises among the Indians were undertaken by the first French Colonists in Acadia in 1604. The Jesuits followed in 1611 and the R collets came to the St. Lawrence Valley and the Huron county in 1615. Other religious orders, including the Capuchins, the Sulpicians and the priests of the Society of Foreign Missions were later active. In religious matters, the Roman Catholic Church had complete control of the people.³ For all intents and purposes it was the established church that enjoyed both the power and influence in the colony that it enjoyed in France.

According to Mack Eastman, by the mid-1600s "Church and State was practically one".⁴ During the last two years of Samuel de Champlain's governorship, ⁵ he was practically under the domination of his spiritual advisors. Indeed, Eastman contended that "Canada was already a theocracy".⁶

There was practically no notion of religious freedom in the sense of

²Moir, *ibid.*, 1-2.

³See Charles Lindsay, *Rome in Canada, the Ultra Montane Struggle for Supremacy Over the Civil Authority* and Edward McChesney Sait, *Clerical Control in Quebec*. Exceptions, however, are found in the Catholic dissidents and the Huguenots. The latter were non-emigr s who "restricted their colonial involvement to trade, shipping, investment, insurance and supplying". See Cornelius J. Jacneu, *The Role of the Church in New France*, 12-13.

⁴Eastman, Samuel Mack, *Church and State in Early Canada*, 16.

⁵He died in 1635.

⁶Eastman, *op.cit.*, 17. It must, however, be noted that the theocratic tendencies relate only to the realities of the period between 1633 and 1663

freedom from religion. The established church effectively repressed irreligion by the force of law. Drunkenness, blasphemy and even absence from the mass were criminal offences punishable by the stocks or wooden horse. Protestantism was proscribed but was "never far from the consciousness of the *habitants* who were taught by their *curés* to regard it as an evil to be repelled at all costs".⁷

The church's authority was largely unquestioned. Its teaching was also unquestioned and beyond being questioned. Its authority extended beyond the spiritual to the temporal as well. Bishop Laval, for instance, who was Bishop of New France from 1659 to 1688, was effectively the *de facto* governor between 1659 and 1665, shaping the policies of the Royal Government.⁸

In the field of education, the church had control of the mind of the people through its control of the educational institutions. Because the faith was orthodox, heretics were not tolerated as no one was supposed to question the Catholic faith in any way. The church, in fact, censored reading material and there was no newspapers or forum for the airing of public opinion. In fact there was no "secular" education as such. According to Walsh,

The prominence given to mystical pursuits stands in sharp contrast to the educational development of the colony. Establishment for the practice of the devotional life and the furtherance of Christian charity took precedence over educational institutions.⁹

Clearly, then, the Roman Catholic Church enjoyed the monopoly of religious influence during the period before the British Conquest. At least two important factors contributed to the maintenance of such sustained

⁷H.H. Walsh, *The Christian Church in Canada*, 87.

⁸See H.A. Scott, *Bishop Laval*, *passim*.

⁹Walsh, *op.cit.*, 58.

religious monopoly.

First of all, Protestants were effectively excluded from New France at the expressed order of Louis XIII and Cardinal Richelieu. In fact, under Louis XIV the policy of exclusion became even more hardened. Even though the Protestant Huguenots played a prominent role in the early colonization of New France, their immigration came to a complete end following the revocation of the *Edict of Nantes* in 1685. Louis XIV ordered Governor Denonville to have all Huguenots in the colony abjure their heresy. Although there was no open Protestant worship or continuous Protestant community, Protestantism was never completely dead.

Secondly, by keeping his diocese independent of any French see, but still linked to Rome, Laval prepared the way for the Ultramontane politics of 19th century Quebec. At least one historian attributes to him the establishment of an "ultramontane citadel".¹⁰ It must be noted, however, that for a period, the spirit of Gallicanism was abroad under the administration of Bishop Saint-Vollier and the *Four Articles* of 1682

In sum, there was no true religious freedom in New France. Catholicism was the established church with both wealth and power concentrated in its hierarchy of priests and bishop. Seigneuries were often granted to religious orders and many priests were landlords upon whom the ordinary people depended for both their spiritual and physical sustenance.

As Careless concludes,

Besides reigning over the religion of a staunchly Catholic colony, it had power over government, education and the life of the countryside. Like the seigneurial system it helped shaped the society of New France, and it was thoroughly authoritarian and

¹⁰ *ibid.*, 44-48. Also Walter A. Riddell, *The Rise of Ecclesiastical Control in Quebec, Columbia University Studies in History, Economics and Public Law*, *passim*.

hierarchical in character. The Church entered deeply into the ordinary life of the people.¹¹

The British Conquest and the Catholic Church

The year 1763 marks the end of the Seven-Years' War with the signing of the *Treaty of Paris*. It was the formal climax to the capitulation of Quebec to the British in 1759 and Montreal in 1760.¹² The surrender of the French to the British was a cause for severe anxiety in view of the humiliating treatment the Acadians received under the British in 1755 when, under the pretext of a new refusal by the Acadians to swear an oath of unconditional loyalty, they were uprooted and deported. To alleviate the bitter prospects of the French Catholics, the representative of defeated Quebec immediately requested the free exercise of the Catholic religion, the security of safety for clergy and the Bishop of Quebec, as well as the continued use of the Church properties. To such requests, General Townshend magnanimously replied,

The free exercise of the Roman religion is granted, likewise the safeguards to all religious persons, as well as to the Bishop until the possession of Canada shall have been decided between their Britannic and most Christian majesties.¹³

General Amherst also acceded to the request from the representative of Montreal for the free exercise of religion. However, he rejected the appeal to respect the privileges enjoyed by the bishop. He also ruled that the right of the priests to require payment of tithes from the Catholic populace was to

¹¹J.M.S. Careless, *Canada : A Story of Challenge*, 67.

¹²See Walsh, *op.cit.*, 62-71.

¹³William Paul. M. Kennedy, "Article of the Capitulation of Quebec, 1759" in *Documents of the Canadian Constitution 1759-1915*, 5-6.

"depend on the King's pleasure".¹⁴

The *Treaty of Paris* was ambiguous insofar as the free exercise of religion in respect of the Catholic faith was concerned. The reference to the status of the Catholic Church reads,

His Britannical Majesty ... agrees to grant the liberty of the Catholic religion to the inhabitants of Canada : he will, in consequence, give the most precise and effectual orders, that his new Roman Catholic subjects may profess the worship of their religion according to the rites of the Romish Church, *as far as the laws of Great Britain permit*.¹⁵

Thus with one stroke of the pen, the special status of the Roman Catholic Church in Canada was removed. The meaning of the critical phrase "as far as the laws of Great Britain permit" was not at all clear or comforting to the Catholic population. It was a cause for concern. Since under British laws, the established church was the Church of England, and since in England the Roman Catholic Church existed under harsh conditions with many civil and religious liabilities, it was naturally assumed that the same conditions would be transplanted to the new British Colony. As well, the *Royal Proclamation* of King George II in October 1763 appeared to confirm their worst fears.¹⁶ In the *Royal Proclamation* of 1763, provisions were made for the civil government of the Catholic British subjects but nothing was said about the practice and privilege of the Roman Catholic Church. It became gradually clear that the Roman Church was merely tolerated while the English Church was beginning to ascend to an established status. The *Proclamation* promised that the new colony would become British in every respect.

¹⁴"Articles of the Capitulation of Montreal, 1760", *ibid.*, 10-11.

¹⁵"Treaty of Paris, February 10, 1763", *ibid.*, 15. Emphasis mine.

¹⁶"The Royal Proclamation, 7 October 1763", *ibid.*, 18-21.

...so soon as the state and circumstances of the said Colonies will admit thereof, [the Governor] shall, with the Advice and Consent of the Members of our Council, summon and call General Assemblies within the said Governments respectively, in such Manner and Form as is used and directed in those Colonies and Provinces in America which are under our immediate Government; and in the mean Time, and until such Assemblies can be called as aforesaid, all Persons Inhabiting in or resorting to our Said Colonies may confide in our Royal Protection for the Enjoyment of the Benefit of the Laws of our Realm of England; for which Purpose We have given Power under our Great Seal to the Governors of our said Colonies respectively to erect and constitute, with the Advice of our said Councils respectively, Courts of Judicature and public Justice within our Said Colonies for hearing and determining all Causes, as well Criminal as Civil, according to Law and Equity, and as near as may be agreeable to the Laws of England.¹⁷

That it was clearly the intention of the British to establish the Church of England in Quebec and merely to tolerate the free exercise of the Catholic faith is evident in both the *Colonial Instructions* to Governor James Murray in 1763 and Governor Guy Carleton in 1775.¹⁸ The main thrust of the instructions was the assimilation of the Catholics into British culture and religion rather than the harsh suppression of the religion and culture of the French.¹⁹

Governor Murray was essentially a gentleman-soldier. He first succeeded General Wolfe as the commanding officer of the Army at Quebec before being appointed as the military governor. On his appointment as the

¹⁷Adam Shortt and Arthur G. Doughty (eds.), *Documents Relating to the Constitutional History of Canada, 1759-1791*, Pt.I, 165.

¹⁸Francis G. Morrissey, *The Juridical Status of the Catholic Church in Canada : 1534-1840*, 56.

¹⁹See John Moir (ed.), *Church and State in Canada 1627-1867 : Basic Documents*, 23-24; *Instructions to Governor Murray 1763*, paras.28-29, at 78-80; and *Instructions to Governor Carleton, 1775*, paras. 20-29, 99-103. Murray was Governor from 1763-1766, and Carleton was Governor from 1766 to 1778 and 1786 to 1796.

first civil governor his order was to establish English law and British institutions. Apparently he "preferred the placid French Canadian habitants and their authoritarian feudal system to the English merchants and their dangerous democratic notions about self-government".²⁰ Because of his moderate stance, and his refusal to establish British institutions, he came into conflict with the merchants and was quickly recalled in 1765.

His successor, Carleton, began by working with the merchants. But he, too, was favourably disposed to the French seigneurial system and opposed to the British legislative system. In 1769, the Lord Commissioners of the Board of Trade and Plantations which acted as the expert body advising on imperial policy, urged Carleton to establish the legislature representing both the French and the English. It was a high level attempt at persuading the British cabinet to implement the anglicizing policies contained in the *Royal Proclamation* of 1763. It practically ignored the first-hand reports of both governors, namely Murray and Carleton. There was no doubt that the Board was of the opinion that the colonial administration of the British Empire ought to be uniform without regard to the vast differences in culture and religion.

From these Letters, and from what has been said, it is evident, That the Colony of Quebec is in the greatest disorder and confusion, and that the authority of the Governor and Council, as limited by the Commission and Instructions, is in no respect competent to these regulations, which either the present state of it does, or the future progress of it may require; and as it appears to us, that there is no Method of curing these disorders, and giving effect and Stability to Government, but by establishing a competent legislative Authority, conformable to the Royal Assurances contained in the Commission and Proclamation; we are therefore of opinion, that it is necessary in the present State of Quebec, that a complete Legislature should be established; and that it would be advisable for the present to adopt not only the

²⁰Careless, *op.cit.*, 102.

measure recommended by the Merchants of admitting, under proper regulations and restrictions, a number of His Majesty's new Subjects into the Council and House of Representatives, but also into the Courts of Judicature, and other Offices of Government, by exempting them from the obligation of Subscribing the Declaration against Transubstantiation declared in the Statute of twenty-fifth of Charles the second, conformable to what has been done in the like case in the ceded Islands, and has been found, both upon Ancient precedent and late opinions of Law, to be a Matter entirely in His Majesty's Discretion.

Upon this occasion we have the satisfaction to find it declared in the Report of His Majesty's Law servants, annexed to your Lordship's order of reference, that, as the several Acts of Parliament which impose disabilities and penalties upon the public exercise of the Roman Catholic Religion, do not extend to Canada, His Majesty is bound by no ties or constitutional necessity to prohibit the profession of this worship there; and that as His Majesty is not bound to prohibit, He is at liberty to tolerate such Worship, so far, and in such form as not to impeach or violate His Royal Supremacy.²¹

Carleton was opposed to the recommendation. He argued cogently that in light of the mounting discontent among the Thirteen Colonies to the south, what Britain needed was a strong ally in Quebec. The best way to ensure a stronghold against disloyalty was not to impose an alien British institution on the French Catholic subjects, but a full recognition of the existing French institution in Quebec. In fact, he urged the winning over of the natural leaders of the Canadians which included the Catholic clergy and the seigneurs. A strong and royal Quebec, he reminded his superiors in London, would enable a French Canadian army to be raised in the event of trouble in America. Quebec could serve as an important military base from which the British could operate to quash the rebellion in the South. In fact Carleton had written to Lord Shelbourne, the Secretary of State in charge of the American

²¹Shortt and Doughty (eds.), *op.cit.*, 383,389.

Colonies, in 1767. In his dispatches he had recommended measures that he considered both practical and just. More importantly he had confidence that these measures would win the gratitude and loyalty of the French Catholics to the British Protestant throne. On the point of potential military strength he had noted,

The King's Forces in this Province ... would amount to sixteen hundred and twenty seven Men. The King's old subjects in this Province, supposing them all willing, might furnish about five hundred Men, able to carry Arms. ...

The new Subjects could send into the Field about eighteen thousand Men, well able to carry Arms; of which Number, above one half have already served, with as much Valor, with more Zeal, and more military Knowledge for America, than the regular Troops of France, that were joined with them.²²

Evidently his arguments won many converts and the original policy of assimilation was set aside. His efforts were greatly strengthened by the Solicitor General Alexander Wedderburn's Report of 1772. The report supported Carleton's preference for an authoritative regime similar to that of the preconquest French administrative system. His basis was simply that the English and French would not be able to work harmoniously together in the legislature. On the issue of religious freedom, the Solicitor General was most pointedly against anglicization.

The Point then, to which all regulations on the head of religion ought to be directed is, to secure the people the exercise of their worship, and to the crown a due controul [sic] over the clergy.

The first requires that there should be a declaration that all the subjects in Canada may freely profess their religion without being disturbed in the exercise of the same, or subject to any penalties on account thereof, and also that there should be a proper

²² *ibid.*, 282.

establishment of parochial clergymen to perform the offices of religion.²³

As the situation in the south became more grave, the *British North America (Quebec) Act* was passed in 1774.²⁴ This Act articulated a renewed policy for dealing more justly with the Catholic population. It recognized the wisdom of the policy of both Murray and Carleton for Quebec and Canada.²⁵

The Quebec Act, 1774 and Freedom of Religion

The *Quebec Bill* was debated and passed in the closing days of the

²³ *ibid.*, 425-426.

²⁴ Better known as the *Quebec Act, 1774*, 14 Geo.3, c.83, s.5. This is a much studied piece of legislation because of its historic importance. Walsh analyzed it in terms of "an open bid for French Canadians loyalty in the struggle that was foreseen between England and her thirteen Colonies *op.cit.* 76-77. This is also in the view of A.L. Burt in his *The Old Province of Quebec*. He contended that the way in which the Bill was railroaded through Parliament is no proof of any evil motive on the part of the sponsors. "It simply proved beyond all shadow of doubt that the coming of the Revolution merely precipitated the birth of the Quebec Act" (185). This is in contrast to Chester Martin, *Empire and Commonwealth*. According to his interpretation "it proved to be not a deterrent but a violent irritant which did much to precipitate resistance by force in the thirteen provinces to the south and nearly lost a fourteenth ... to the cause of the revolution" (138). Martin, though Canadian, was much in accord with the American interpretation. Richard E. Morgan, *The Supreme Court and Religion* commented that "the furor over the Quebec Act was one of the major precipitating events of the Revolution, and it served to link more firmly American nationalism and no-Popery" (16). Careless synthesized the opposing views by noting that "the Quebec Act had not solved the problem of Quebec. Nor did it fully achieve Carleton's purpose of making the province a strong British base in the American Revolution, a revolution which it helped to bring on". *op.cit.*, 104

²⁵ Some scholars are of the view that this new chapter affected the development of Canada so drastically that we are still experiencing the consequences. It constitutes a historical problem in that it marked a crucial decision for Canada's future development as a nation. Lord Durham's famous *Report* of 1838 spoke of "two nations warring in the bosom of a single state". The problem is identified today in terms of "one Canada, or two?" It is a problem of granting to Quebec a distinct identity. As Careless noted, "in some ways the future cooperation between the two language groups in Canada was made more difficult by this measure which increased the French feeling of separateness" (*op.cit.*, 104.) That this "new chapter" is not closed as yet is evidenced by the controversies surrounding the *Meech Lake Constitutional Accord, 1987*.

parliamentary session of 1774. There was much haste and the atmosphere was one of intrigue and government secrecy. There was no official recording of the debates except that of Sir Henry Cavendish who scribbled extensive notes inside his tall hat. These notes, which were released only in 1839, give us a first-hand account of the official explanation for the policy given by Lord North.

On the issue of the free exercise of religion and the type of government, Lord North had argued,

The honourable gentleman next demands of us, will you extend into those countries the free exercise of the Romish religion? Upon my word, Sir, I do not see that this bill extends it further than the ancient limits of Canada; but if it should do so, the country to which it is extended is the habitation of bears and beavers.... the federal purpose is undoubtedly to give a legislature to that country. It was very much, I believe, the desire of every person, if it were possible, to give it the best kind of legislature; but can a better legislature be given than that of a governor and council? The honourable gentleman dislikes the omitting [sic] the assembly; but the assembly cannot be granted, seeing that it must be composed of Canadian Roman Catholic subjects, otherwise it would be oppressive. The bulk of the inhabitants are Roman Catholics, and to subject them to an assembly composed of a few British subjects would be a great hardship....

As to the free exercise of their religion, it likewise is no more than what is confirmed to them by the treaty, as far as the laws of Great Britain can confirm it. Now, there is no doubt that the laws of Great Britain do permit the very full and free exercise of any religion, different from that of the church of England, in any of the colonies. Our penal laws do not extend to the colonies; therefore, I apprehend, that we ought not to extend them to Canada.²⁶

In the preamble, the *Act* reversed the provisions of the *Royal*

²⁶Sir Henry Cavendish (ed.), *Debate of the House of Commons in the Year 1774, on the Bill of Making More effectual Provisions for the Government of the Province of Quebec*, 7-12.

Proclamation of 1763 on ground that they "have been found, upon Experience, to be inapplicable to the State and Circumstances of the said province, the Inhabitants whereof amounted, at the Conquest, to above sixty-five thousand persons professing the Religion of the Church of Rome ...". Hence the *Act* recognized the religion of the French Canadians as distinct from that of the British. Indeed the *Act* was based on this recognition of the distinct identity in terms of religious differences.

On the free exercise of the Catholic religion, the *Act* declared,

That His Majesty's Subject, Professing the Religion of the Church of Rome of and in the said Province of Quebec, may have, hold, and enjoy, the free Exercise of the Religion of the Church of Rome, subject to the King's Supremacy, declared and established by an Act, made in the First Year of their Reign of Queen Elizabeth, over all the Dominions and Countries which then did or thereafter should belong, to the imperial Crown of this Realm; and that the Clergy of the said Church may hold, receive, and enjoy, their accustomed Dues and Rights, with respect to such Persons only as shall profess the said Religion.²⁷

Under the terms of the *Act*, the free exercise of the Catholic religion was granted and the status of the clergy was fully recognized by the Colonial Government. The payment of tithes by the faithful to the church was made enforceable by civil law and Catholics were not to suffer civil disabilities. A special oath which omitted the condemnation of their religion was substituted under the *Act*. The substituted oath enabled Catholics to participate in the business of government which is in itself of great significance. On this issue Bishop Jean Olivier Briand, the Bishop of Quebec, wrote to the Vatican and took some credit for this new freedom.²⁸

²⁷Shortt and Doughty, *op.cit.*, 572.

²⁸Writing in 1774, he said, "... I exercise here my ministry without restraint. The governor loves and esteems me... I rejected an oath which had been proposed and the Parliament of Great Britain changed it in such manner that it is possible for any Catholic to take it". Cited by Walsh, *op.cit.*, 77. Because this substituted oath condemning the Catholics was

Hence the Roman Catholic Church became a quasi-established church in Quebec with its rights and rites guaranteed by law. It could be said that the *Quebec Act* "entrenched the rights of the Roman Catholic Church in Lower Canada".²⁹ Although this *Act* granted legal recognition to the French Catholic as a distinct people with a distinctive Christian faith, and therefore quite rightly hailed as the "*Magna Carta*" of the French Canadians, it did not truly establish the Roman Catholic Church. It was more a political rather than a religious *Magna Carta* in that it ensured the survival of the French-Canadian race with its laws, language and custom. The status of an established church *per se* was, however, not given to the Roman Catholic Church.

The question of the established church was settled in 1775 by the instructions of Governor Carleton. What the *Act* granted was mere "toleration of the free exercise" of the Roman Catholic religion. The *Act*, it was made clear, did not grant the Roman Church the status of an established church. This status belonged to the Church of England.³⁰ Nonetheless as Kennedy noted, it was a miracle.

It certainly looks like a remarkable miracle to find men traditionally tory and reactionary handing out to a conquered people, of a race historically hostile to Great Britain and of a religion condemned by bell, book and candles in scores of British statutes, such a character of liberties at the close of the eighteenth century.³¹

still a part of the British Parliamentary Oath until 1829, the substitution was widely disapproved in England on the grounds that "it removed one of the essential safeguards to the Protestant Constitution". [W.R. Riddell, *The Constitution of Canada in its History and Practical Working*, 45. cited by E.R. Norman, *The Conscience of the State in North America*, 51-52.]

²⁹Roger Hutchinson, "Religion, Ethnicity, Public Policy" in Harold Coward and Leslie Kawamura (eds.), *Religion and Ethnicity*, 137.

³⁰Kennedy, *op.cit.*, 154.

³¹Kennedy, *op.cit.*, 58.

That there was true religious freedom enjoyed by the Catholics in the fullest sense of the word, was without question. In 1921 the Privy Council, speaking of the status of the Roman Catholic Church in Quebec in 1774, declared that,

every individual had the right to progress and practice the Catholic religion without let or hindrance. But it must be borne in mind that this is a privilege granted to the individual. There is no legislative compulsion of any kind whatsoever. He may change his religion at will.... In other words, each member of the Roman Catholic community in Quebec possessed the same privileges as any other citizen as far as religious freedom is concerned.³²

The immediate reaction of the non-Catholic colonies to the south was one of condemnation. The colonies were afraid that the special privileges and status granted to the Catholics showed that Britain intended to make Canada a check on the freedom of the colonies. As well, the *Act* extended Quebec's boundaries deep into the Ohio Valley. To the Americans this was one of the "*Intolerable Acts*" that granted both religious and real privileges to their defeated foe in the Seven Years' War for which many fought for the cause of protestantism. Religious feelings were running high and no doubt they helped spark off the American Revolution. As one commentator puts it,

After all the inherited and patriotic No-Popery of the colonist had been aroused by the barbarous aggression of the Romish French and their wily Indian allies, the imperial government at Westminster saw fit to recognize the Catholic faith in Canada, and prohibit colonial expansion into these territories - a Papist polity on American's back doorstep! Generations of Americans who had never seen a Catholic, and for whom the inherited demonology might have been fading, felt confirmed in their hatred of Rome, and the stage was further set for periodic outbursts of anti-Catholic feeling throughout the nineteenth

³² *Despaties v. Tremblay* (1921) A.C. 702 at 714.

century.³³

Notwithstanding a very important proviso in the *Act* which appears to establish the Church of England,³⁴ the Catholic Church and the population were deeply appreciative of the religious freedom granted under this *Act*. It was a rare thing in the century where religious persecution and intolerance were commonplace. A year later the Catholic subjects were presented with an opportunity to declare their loyalty to the British monarch when the revolution broke out in the south. Bishop Briand urged his people through his pastoral directive to rally to the British cause. What is significant was that he based his call to loyalty to the British Crown on the basis of gratitude for the free exercise of religion granted by the British a year earlier.

The singular kindness and leniency with which we have been ruled by His Very Gracious Majesty King George III, since the time when, by the fate of war, we were made part of his empire; the recent favours that he has heaped upon us, by giving us back our laws, the free exercise of our Religion, and by extending to us all the privileges and advantages of British subjects, will be enough to excite your gratitude and your zeal to maintain the interests of the Crown of Great Britain.³⁵

³³Morgan, *op.cit.*, 16.

³⁴Whether in fact the Church of England was established under the *Quebec Act* is controversial. Arguments have been raised by several authorities that in point of legal fact, the church was never established in Upper and Lower Canada. See D.A., Schmeiser, *Civil Liberty in Canada*, 64., A.H. Young, "A Fallacy in Canadian History", 15 *Canadian Historical Review* (1934), 351-360; J.J. Talman, "The Position of the Church of England in Upper Canada, 1791-1840", 15 *Canadian Historical Review* (1934), 361-375; and John S. Moir, *The Church in the British Era from the British Conquest to Confederation*, 58-79. See also J.L.H. Henderson, "The Abominable Incubus : The Church As By Law Established", XI. 3 *Journal of the Canadian Church Historical Society* (Sept. 1969), 55-66.

³⁵Moir (ed.), *The Cross in Canada*, 68.

British Ecclesiastical Establishments Outside Quebec

With reference to the status of the Church of England in the *Quebec Act*, Denise Doyle submitted that "at the same time that these privileges were given to the Catholics, establishment was intended for the Church of England but not in actuality implemented, at least at that time".³⁶ That might well have been the case. The Church of England, however, was certainly established for a brief period outside of Quebec.

As early as 1758, the Church of England was established in Nova Scotia. Unlike Quebec, the Catholics in Nova Scotia were not granted their religious freedom in fact, though like the Quebecois they were promised that freedom in law. Under the *Treaty of Utrecht* signed in 1713 the French ceded Nova Scotia to the British. The terms of the *Treaty* guaranteed religious freedom to the Acadians.³⁷ The Acadians who chose to remain were to "be subjects to the Kingdom of Great Britain" and to enjoy the free exercise of their religion according to the usage of the Church of Rome as far as the laws of Great Britain do allow the same."³⁸ Under the pretext that the Acadians refused to swear the oath of allegiance to the British Crown in the Seven-Years' War, they were forcefully expelled between 1755-1762.³⁹ Soon after, two pieces of legislation were passed establishing the Church of England.

In 1758 Nova Scotia's first legislature passed *An Act for the Establishment of Religious Publick Worship in this Province and for the*

³⁶Denise J. Doyle, "Religious Freedom in Canada", 26 *Journal of Church and State* (1984), 415.

³⁷Moir (ed.), *Church and State in Canada : Basic Documents*, Art. XIV.

³⁸See Walsh, *op.cit.*, 88.

³⁹W. MacNutt, *The Atlantic Provinces : The Emergence of Colonial Society 1712-1857*, 42-43

Suppressing Property.⁴⁰ It is clearly enacted that "the liturgy of the Church established by the laws of England shall be deemed the fixed form of worship among us". According to Henderson, "its true intent appears to have been to assume freedom of worship and exemption from church rites for all Protestant dissenters, and the summary banishment of all popish clergy".⁴¹ The *Act* did provide "that the Protestant, dissenting from the Church of England, whether they be Calvinists, Lutherans, Quakers or under what denomination soever, shall have free liberty of conscience", while at the same time legislated "that every popish person, exercising an ecclesiastical jurisdiction, and every popish priest or person executing the function of a popish priest, shall depart out of this province on or before the twenty-fifth day of March, 1759".⁴² A year later *An Act for the Better and More Effectual Establishment of the Church of England in This Province* was also passed.⁴³ New Brunswick, too, followed with *An Act for Preserving the Church of England, as by Law Established in this Province, and for securing Liberty of Conscience in Matters of Religion*.⁴⁴

⁴⁰S.N.S. 1958. c.5.

⁴¹Henderson, *art.cit.*, 60.

⁴²The anti-Catholic legislation can only be appreciated in the context of the Anglo-French war. "It bears the marks of its time, 1758, and the Anglo-French War", noted Henderson, *art.cit.* 60. The war had accelerated and increased in intensity during that year. In Britain, William Pitt, the brilliant strategist had taken over the direction of the war. On all fronts the British were determined to bring the war to a climactic victory. Under such circumstances the suppressive and discriminatory statute is understandable. See Careless, *op.cit.*, 73-93.

⁴³S.N.S. 1759, c.10.

⁴⁴S.N.B. 1786, c.4.

The Constitution Act of 1791 and the Established Church

Perhaps more significant than the Conquest of New France and the *Quebec Act* of 1774 is the *Constitution Act* of 1791.⁴⁵ New tensions were created by the demographic changes in Canada as a result of the American Revolution. Between the years 1783 and 1784 there was an influx of Loyalists.⁴⁶ Some 30,000 loyalists settled in Nova Scotia with some 2,000 in Quebec. About 7,500 moved into what would become Ontario. The Loyalists influx partly resulted in the creation of Upper Canada in 1791. It brought about a politico-religious problem for the newly conquered British Colony.

Loyalism "stood for the recognition of law as against rebellion in any form, for the unity of empire as against a separate, independent existence of the colonies, and for monarchy instead of republicanism".⁴⁷ The Loyalists supported Britain for highly diverse reasons. Many were conservatives and monarchists. Some feared that revolution could result in anarchy. There were others who were new immigrants, minorities who were not yet fully integrated into the American society. These saw themselves as weak or threatened within American society and needed an outside defender. The vast majority were neither wealthy or of high social standing. Many were hard-working farmers and Protestants.

Before long these Loyalists naturally asked for their rights and privileges to be recognized. They began to agitate for a representative government. It all began with the issue of better educational facilities for the English-speaking Loyalists. The disunity within the Catholic hierarchy on this

⁴⁵ 1791, 31 Geo. 3 c.31.

⁴⁶ Walsh, *op.cit.*, 102.

⁴⁷ A.Clarence Flick, *Loyalism in New York During the American Revolution*, 11 quoted in Walsh, *op.cit.* 103.

question led the Loyalists to "agitate for the annulment of the *Quebec Act* and to demand that English law and speech should supersede French.⁴⁸ Thus in 1791 the enactment of the *Constitution Act* sought to address this tension.

In typical British colonial style of government, it was an act giving the British a means to "divide and rule". By order-in-council dated August 24, 1791, the Province of Quebec was divided into two separate Provinces of Upper and Lower Canada. The Province of Upper Canada was populated by some 7,000 Loyalists alongside a thousand French Canadians and some 20,000 Indians. The Province of Lower Canada was largely French Catholics. Each was to have elected its own representative assembly.

Of special significance are the sections dealing with religion. There is no explicit statement concerning the Church of England or the established church in either Upper or Lower Canada. It is the view of some scholars that ss. 35-40 "evidenced a clear intention that the Church of England be established in Upper Canada, but left its actual establishment to local initiative when circumstances should permit."⁴⁹ Indeed it recited and reaffirmed the successive instructions to the colonial governors "for the encouragement of the Protestant religion".

The controversial sections dealt with a number of issues which appeared to have given the Protestant Church a very special position. S. 35 provided for the collection of tithes for the support of the Protestant clergy. Ss. 36 and 37 provided for the setting aside of one-seventh of the allocated lands in the province for the support and maintenance of the clergy. These Crown lands

⁴⁸Walsh, *op.cit.*, 78-79.

⁴⁹A.H. Oosterhoff, "Religious Institutions and the Law in Ontario : An Historical Study of the Laws Enabling Religious Organizations to Hold Land", 13 *Ottawa Law Review* (1981), 448.

See also A.H. Young, *art.cit.*, (1934), 351 at 357; and J.J. Talman, *art.cit.*, (1934), 361.

were known as the clergy reserves. Some four thousand square miles of land were set aside for this purpose. S. 38 provided for the constitution of parsonages or rectories "according to the Establishment of the Church of England" in every township or parish upon the authorization of the King and for the endowment of the rectories and parsonages with land. It was also enacted that the presentation to such parsonages and rectories and their enjoyment were to be under the authority of the Bishop of Nova Scotia "according to the laws and canons of the Church of England." A further s. 42 made it impossible for local legislatures to "vary and repeal" any of the ecclesiastical clauses without references to both Houses of Parliament. It was tantamount to constitutional entrenchment as certainly "a measure to encourage the established church".⁵⁰

The right to collect tithes under s. 35 existed for thirty years. It was abrogated by *An Act Relative to the Right of Tythes Within this Province*⁵¹ in 1821. According to Talman, it was thought politically inexpedient to attempt such a collection.⁵² As for s. 38, no rectories were constituted until 1836. In that year forty-four rectories were endowed with glebes by Sir John Colborne who was about to relinquish his office. These were established by letter patent and to each were assigned four hundred acres of reserved lands.⁵³ When this became known, there was a "spontaneous outburst of anger against both the government and the Anglican Church".⁵⁴ Not long after, s. 38 was repealed

⁵⁰This was the defence of William Pitt who guided the *Bill* through the Commons in London. See Henderson, *art.cit.*, 60.

⁵¹S.U.C. 1821, c.32.

⁵²Talman, *art.cit.*, 367.

⁵³A. Wilson, *The Clergy Reserves of Upper Canada : A Canadian Mortmain* (1968), 216.

⁵⁴Walsh, *op.cit.*, 182. This event could have precipitated the rebellion of 1837.

by the *Rectories Act* of 1851,⁵⁵ thus doing away with the establishment of rectories and parsonages "according to the establishment of Church of England". The already endowed rectories became a burden and proved difficult to manage. They were eventually sold pursuant to the *Sale of Rectory Lands Act*, 1866.⁵⁶ The biggest controversy revolved around the clergy reserves question. It was a focal point of prolonged and sometimes bitter controversy between church and state authorities. The interpretation of the words "Protestant Clergy" was a cause of bitter disputes among the Protestant denominations for more than thirty years. This was mainly the result of the Church of England claiming its established status and thereby identifying the "Protestant Clergy" with its own clergymen.

Bishop John Strachan, the first Anglican Bishop of Toronto, contended that the reserves were a gift of a godly Christian King who was exercising his just prerogative. This contention was hotly disputed by the leaders of the other Christian denominations. According to one historical source, King George III had only seen the *Bill* for half a day in October 1789.⁵⁷ The fact was that the British legislature was interested in reproducing the English social structure of squire and parson in the colony. For that reason, the lands were in the hands of the government to be used for the benefit of the Church of England as and when it was appropriate.⁵⁸

Critics of the clergy reserves abounded. Voluntarists and reformers were banded together against it. The other Protestant groups were also not in

⁵⁵S.C. 1851, c.175.

⁵⁶S.C. 1866, c.16. See also Wilson, *op.cit.*, 217.

⁵⁷Samuel Wilberforce, *A History of the Protestant Episcopal Church in America*, 241.

⁵⁸Henderson, *art.cit.*, 65.

favour of it, though they could not have minded a share of it if the system remained in place. The Church of Scotland did claim to be eligible for a share of the clergy reserves on the ground that it was equal to the Church of England insofar as the status of being an established church was concerned. This claim was not without legal foundation as the *Act of Union* between England and Scotland passed in 1706 did bring the Church of Scotland to an equal position with that of the Church of England.⁵⁹ In 1828 the Canada Committee of the House of Commons brought in a report asserting that the Church of Scotland had the right to participate in the benefits of the clergy reserves. With regard to the revenue from the reserves, the report also submitted that the government had "the right to apply the money if they so thought fit, to any Protestant clergy".⁶⁰

This last point gave rise to the thorny problem of interpreting the ambiguous words "Protestant Clergy" in the *Act*. If the Anglicans conceded to the Church of Scotland, then it would open the way for all the dissenting churches to make similar claims. This became "one of the most thorny issues in the political life of the infant Province of Upper Canada".⁶¹ The Methodist leader Egerton Ryerson described the reserves as "the abominable incubus" *par excellence*.⁶² The political question was tied to the issue of public education. In the name of religious equality, political reformers challenged the system in and out of the legislature. William Lyon MacKenzie, the most prominent member of the Upper Canadian radical reformers, commented on

⁵⁹See W.S. Reid, *The Church of Scotland in Lower Canada : Its Struggle for Establishment*

⁶⁰W. Gregg, *History of the Presbyterian Church in the Dominion of Canada*, 433.

⁶¹Walsh, *op.cit.*, 136.

⁶²Henderson, *art.cit.*, 65.

the failure of the government to use the revenues from the reserves for general education. Having heard that the proceeds of the reserves might be divided among the different churches, he wrote eloquently against it in favour of using the proceeds for general education.

Up to Monday evening this really important measure has slept its way upon the order of the day of the orange-tory assembly -- altho' rumour tells us that Lawyer Draper and others, who know as well as we do that no such bill ever will pass in this world, are about to angle for sectarian popularity, by ministering to the gullibility and avarice of the parsons, priests and preachers, and gravely proposing to divide the reserves and their proceeds among the Church of England and Scots Kirk Clergy, the Catholic Priest and Prelates, and the Ryersonian Methodist Preachers. Of course the crafty crew at 14 Downing Street would never consent to build up three sets of paid priesthoods, made independent of them by law, to wit the Kirk, which owns the jurisdiction of an assembly in Scotland, the Catholic, whose spiritual head is at Rome, and the Wesleyans, who bow the knee to a Conference sitting in Leeds, Sheffield or Manchester. An old man in his dotage, a girl in her teens, a profligate George Guelph, or Charles Stuart, or a lustful and beastly Henry 8th, these, or either of them may be in turn the "one shepherd", who, according to the creed repeated from Archdeacon Strachan's soft cushioned rostrum every Sunday, the faithful call *The Head* of the Holy Catholic Church -- that church, with that head, would have the reserves if the Assembly willed it - but the others - Never!

But why divide the reserves in this way? There can only be *One True Faith*, there cannot be two, three, or four. Are we to pay the three protestant churches for teaching, as we ourselves were taught in infancy, that the head of the Roman Catholic Church, in which the whole Christian world worshipped for 1500 years, is the "beast, the man of sin, and the scarlet whore," mentioned in the Revelations? Are we to pay the Episcopalians, Methodists and Presbyterian Parsons for preaching and teaching, as they do in their pulpit, homilies, associations, confessions of faith, and Christian Guardians, that the God of Heaven bestowed these names upon the Bishops of Rome, and that the Roman religion is damnable in its doctrines and idolatrous in its worship? Upon the other hand, would it be right, that the King, Governor, two

Houses of Parliament, Legislative Council, and the House of Assembly should consent to pay out of the public lands the ministers and prelates of the Roman Catholic church, the ancient religion of Christendom, for denouncing the Protestant churches as the propagators of a damnable heresy, those in their communion as unbelievers and heretics, and on the broad way to hell and eternal destruction?

Again -- how vehemently does the Presbyterian system assail English prelacy -- as the eldest daughter of the scarlet whore -- popery in disguise -- and anti-Christian hierarchy!

Once more -- Are the five and twenty denominations left out in this calculation -- the Quakers, Mormons, Tunkards, Independents, Irvingites, Congregationalists, Baptists, Unitarians, Seceders, Mennonist, Children of Peace, Christians, etc. to have no share?

Of all these there can only be one true faith. Are we then to pay alike for truth and error -- for religion and idolatry -- and thus prove King and Parliament of no moral principle at all?

Better would it be for the Assembly to follow in the wake of past parliaments, and give the reserves for the education of the people of the country.⁶³

In a similar vein, John Rolph, a leader of the reformers, argued against the clergy reserves on the ground that Christianity is best served by a policy of separation of church and state.

Instead of making a state provision for any one or more churches; instead of appropriating the clergy reserves among them with a view to promoting Christianity; instead of giving pensions and salaries to ministers to make them independent of voluntary contributions from the people, I would studiously avoid that policy, and leave truth unfettered and unimpeded to make her own conquests Let gospel ministers, as the Scriptures say, live

⁶³Quoted in John S. Moir, *The Cross in Canada* from W.L. MacKenzie, *The Constitution, December 14, 1836*. A year after writing this diatribe, MacKenzie led an armed rebellion in the province. One of his objections was to end the clergy reserves. The rebellion failed, and the clergy reserves continued to be a bone of contention till 1854.

by the gospel.⁶⁴

Quite apart from the intra-religious quarrels and the political reasons against the clergy reserves, the fact is that the reserves were a nuisance to the general development of the land. The lands were scattered all over Upper Canada so that they impeded the building of roads and divided farmlands and farmers. They hindered the pioneering of settlements and were the source of irritation to politician and businessmen alike. Every land speculator saw them as competition and sought to acquire them for profits. Many others squatted on them, abused the leases and destroyed the timber. All told they were a pain to one and all.⁶⁵

At the turn of the nineteenth century, the dissenters grew in number so that they outnumbered the Anglicans before long. The nineteenth century also opened with a Methodist revival and the strength of the voluntarists grew by leaps and bounds. These Christian groups were not in favour of state-sponsored religion and therefore actively agitated for the secularization of the clergy reserves.

As part of the compromise solution, the reserves were initially leased. The income was then used to support the Anglican clergy as well as the other Protestant clergy including the Church of Scotland, the British Wesleyan Methodist Church, the Methodist Episcopal Church and other denominations that had seceded from the Church of Scotland. Even the Church of Rome had a share of the revenue. Eventually an Imperial Statute, the *Clergy Reserves (Canada) Sale Act* was passed in 1840.⁶⁶ The *Act* authorized the sale of the

⁶⁴John Charles Dent, *The Last Forty Years : Canada Since the Union of 1841*, Vol.2, 192.

⁶⁵See *The Seventh Report on Grievances*, ch.14 (1835), quoted in Oosterhoff, *art.cit.*, 448. This report was part of the work of the reformers. Careless, *op.cit.*, 173.

⁶⁶3 and 4 Vict. c.78.

reserves, and authorized one third of the proceeds to be distributed to the Church of England, one sixth to the Church of Scotland and the residue of the income to be applied for the purposes of public worship and religious instruction in Canada. A portion of the land was to be divided in the future among other Christian denominations.⁶⁷ The Roman Catholic Church and several Protestant denominations also benefitted from the use of the residue through an annual grant paid out of the reserved funds. However, some voluntarist groups were reluctant to accept any money from this source.⁶⁸ This comprehensive *Act* was in fact preceded by an earlier statute, the *Clergy Reserves Sale and Improvements Act* of 1827 which authorized the sale of only one quarter of the reserves.⁶⁹

For many of the reformers and voluntarists, the 1840 *Act* was still not good enough. They demanded complete secularization. Any funding of the churches was unacceptable to them. Finally an enabling act was passed by the Imperial Government in 1853 called the *Canada Clergy Reserves (Power to Provincial legislature) Act*,⁷⁰ which enabled the legislature to pass the *Clergy Reserves Act* the following year.⁷¹ This very important legislation created two funds, one each for Upper and Lower Canada, for the benefit of the municipalities. It was clearly intended to cut the link between the church and state through the secularization of the fund. As part of the process, the *Act* provided the continuation of existing stipends during the lives of the

⁶⁷J.S. Moir, *The Church in the British Era From the British Conquest to the Confederation*, 124-125.

⁶⁸Wilson, *op.cit.*, 197-198.

⁶⁹7 & 8 Geo 4, c.62.

⁷⁰16 & 17 Vict. c.21.

⁷¹S.C. 1854 c.2.

incumbents, with the possibility of commutation. In the latter case the capital value was to be paid to the designated churches. In the result the four denominations that had received certain rights to the fund by the *Act* of 1840 were the biggest beneficiaries. These churches, namely, the Church of England, the Roman Catholic Church, the Presbyterians and the Methodists received substantial capital endowments out of the reserves.⁷²

Clergy Reserves : An Attempted Establishment?

The question whether the clergy reserves were a legal attempt to establish the Church of England in the Colony of Upper Canada is a question that exercised some very good minds. MacVern pointed out that it was an attempted establishment.⁷³ It is important to appreciate the context of the colonization in the wake of the war with France to understand the conservatism of the British colonizers. In reaction to the French Revolution, the war with France, and the American Revolution, the establishment of the Church of England was seen to be both rational and utilitarian. Edmund Burke argued that it was "the first of our prejudices, not a prejudice destitute of reason, but involving it in profound and extensive wisdom".⁷⁴

Accordingly, the church "by law established" was seen to be a providential act. No one seemed to be concerned as to what law by which it

⁷²Wilson, *op.cit.*, 216; Moir, *The Church in the British Era From the British Conquest to the Confederation*, *op.cit.*, 182-83.

⁷³See William Campbell MacVern, *The Clergy Resources : An Attempted Establishment*. See also Gordon Barkwell, *The Clergy Reserves in Upper Canada - A Study in the Separation of Church and State 1791-1854*.

⁷⁴Charles W. Eliot, *Reflection on the Revolution in France*, 228.

was established. Thus in the Colony of Upper Canada, there was not much difficulty for many conservatives about the established church. After all, Canada was, during the Loyalist era of 1776 and 1784, the "refuge of those who chose British institutions rather than remain in the lands of revolution".⁷⁵ To the question, as far as these Loyalist were concerned, "When was the Church of England established in Upper Canada?", they could answer "and when was it not?" On their understanding the Church of England was "by law established" according to the *Canons of 1603*. There was no need for any law to establish it in the colony. What was needed was the practical instruments to carry out the work of the established church. It needed from the local legislature, endorsement, regulations, settlement and support. These were provided for in the *Constitution Act* of 1791. The establishment of the Church of England was assumed. As E.R. Norman puts it, "the Church of England was implicitly established in Upper Canada from the first settlement of the province under English direction, simply on the basis that as part of the King's realm overseas, it participated in the Royal supremacy".⁷⁶ The details and the degree of support was left to the prerogative of the Crown and the Parliament. Young had suggested that it was "not endowments, property, support of the clergy, and a share on government of a province or of its municipalities [which] are the essential points in an establishment, after all, but rather beliefs, doctrine, discipline, forms of worship and of orders."⁷⁷ The appointment of the first Anglican Bishop of Quebec in the person of Jacob Mountain in 1793, barely two years after the *Constitution Act* of 1791,

⁷⁵Henderson, *art.cit.*, 59.

⁷⁶E.R. Norman, *op.cit.*, 49.

⁷⁷A.H. Young, *art cit.*, 351.

appears to support this theory of attempted establishment of the Church of England. Walsh noted,

The purpose of his appointment may not have been as ambitious as was the establishment of an earlier episcopate at Halifax, but it was still the hope of the British government that an established church in the Canadas would help to protect the new citizens flocking into the western provinces from the levelling ideas associated with sectarian Protestantism; it was also intended to remind the French Canadians that their Roman Church was merely tolerated by a government now showing its own religious preference.⁷⁸

It was in an attempt to reaffirm the established church that was under attack that John Strachan, who was then a member of the Upper Canada Executive and Legislative Councils, wrote about his convictions in 1824. He reported to the Colonial Office his deeply held belief that the province needed a real as well as a nominal church establishment if loyalty was to be preserved.

That the Canadas might be attached to the Parent State by religious as well as political feelings was the intention of the great William Pitt when in forming a constitution for the Canadas he provided for the religious instruction of the Episcopal Clergy and their congregations remained during the American Rebellion loyal and faithful to the King proving by their conduct that had proper care been taken to promote a religious Establishment in Union with that of England the Colonies would never have been separated. The same wise policy is still maintained by His Majesty's government and the great Bond of attachment between the Colonist and Great Britain depends entirely upon the progress and influence of Church principles. Were two or three hundred Clergymen for example living in the Canadas amidst their Congregations and paid through the munificent arrangements of the British Government, they would infuse into the population a tone and feeling entirely English and acquiring by degrees the direction of Education which the Clergy at home have always possessed the very first feelings and opinions of the youth would

⁷⁸Walsh, *op.cit.*, 135.

be British.⁷⁹

Earlier on, in 1790, John Graves Simcoe, who was to become the first Lieutenant Governor of Upper Canada, had written to the Archbishop of Canterbury in support of the established church. He said: "I am decisively of opinion that a Regular Episcopal Establishment, subordinate to the primacy of Great Britain, is absolutely necessary in any extensive colony which this country means to preserve".⁸⁰ This sentiment is perfectly understandable coming from an officer in a Loyalist regiment during the American Revolution. He had a profound dislike for the democratic principles of the newly established United States. He also believed that the sects in Canada were extending these loathful principles and it was to combat the republican spirit of the sects that he desired an established church. "In regard to the Colony of Upper Canada which is peculiarly situated among a variety of republics", he further said, "every establishment of Church and State which upholds a distinction of ranks and lessens the undue weight of the democratic influence must be indispensably introduced".⁸¹

The real attack, however, on the established church dates from 1826 when Strachan overstated his case by publishing a sermon questioning the loyalty of the dissenters. In 1827 he gave the colonial office an "Ecclesiastical Chart" purporting to show that most of Upper Canada was either Anglican or sympathetic to the Church of England. The controversy created by both his published sermons and his chart stirred up the people who more or less had acquiesced to the assumption of the established church till then. In 1828, a Select Committee of the Upper Canada Assembly investigated and reported on

⁷⁹George W. Spragge (ed.), *The John Strachan Letter Book : 1812-1834*, xiv-xv.

⁸⁰T.R. Millman, *Jacob Mountain, First Lord Bishop of Quebec*, 57.

⁸¹See also Aileen Dunham, *Political Unrest in Upper Canada, 1815-1836*, 84.

the whole question of religious privileges which were supposed to inculcate loyalty.

There can be no doubt that in addition to the Methodist there are, in the Province, several denominations of Christians who are more numerous than the members of the Church of England. Besides these there are probably many other persons who are not attached to any particular church or form of worship: compared with the whole population, the members of the Church of England must therefore constitute an extremely small proportion. It would be unjust and impolitic to exalt this church, by exclusive and peculiar rights, above all others of His Majesty's Subjects who are equally loyal, conscientious and deserving. A country where there is an established church from which a vast majority of the subjects are dissenters, must be in a lamentable state : the Committee hopes that this Province will never present such a spectacle.... There is besides no necessity for such an establishment. It cannot be necessary for the security of the Government; the loyalty of the people is deep and enthusiastic, and it may be doubted how far it would be improved or increased by any state establishment of clergymen. Religious instruction, it is true, will promote and strengthen loyalty and all other virtues; but no more when communicated by clergyman of the Church of England than by those of other sects, and probably less if they are or appear to be political teachers and servants of the state, rather than ministers of the Gospel. It cannot be necessary for the ends of religion; other denominations of course will not be benefited by it; and the church itself will derive probably but little if any real advantage. The piety and religious prosperity of a church can gain but little from men who are induced by secular motives to assume the sacred functions of the clerical office....⁸²

The sentiment expressed in the Select Committee report for religious equality gained momentum toward the middle of the nineteenth century. This was the result of the combined forces of the dissenters and the radical reformers working indefatigably together, though in some instances they were

⁸²A.G. Doughty and N. Story (eds.), *Documents Relating to the Constitutional History of Canada, 1819-1828* 379-380.

strange bedfellows.⁸³

Towards Religious Equality

In the opening decades of the nineteenth century there was a religious revival of sorts among the dissenters. The great American frontier revivalism with its camp meetings was spilling across the border of the Canadas. Circuit preachers of the Methodist Church in the United States were pouring into Upper Canada. The Dutch Reformed Church and the Congregational Church as well as the Scottish Presbyterian Church were also increasingly active. The Baptists were not to be left behind. They too began to preach and establish themselves, especially in the Eastern Townships and the Ottawa Valley. As one historian puts it,

The preacher was a most important figure on the frontier. His regular visits supplied almost the only release from the monotonous toiling round of daily life, and so it is small wonder that religious services among the pioneers were emotional in the extreme. The services held in the little log churches built for travelling ministers, or in great camp meetings' under the trees were religious revivals, popular holidays, and exciting public festivals all rolled in one. As a result, the more formal and restrained Church of England, which claimed religious control in the principal English-speaking colonies, was not widely popular on the frontier. Indeed its clergy tended to stay among the officials and well-to-do merchants in the towns and left the back-country to Presbyterian, Methodist and Baptist ministers. The Methodist 'circuit riders', in particular, who were often from the United States, built up the power of Methodism among the

⁸³Egerton Ryerson and the Methodists were allied with the radical politicians until he was shocked by the secularism of the English radical leaders whose grievances were based not on religious convictions but on the infidelity of English radicalism. He severed ties with them in 1836. See Norman, *op.cit.*, 54-55.

pioneers of British North America.⁸⁴

Careless further noted that "the widespread growth of Churches in the colonies was also a sign of the beginnings of culture".⁸⁵

Part of this "beginnings of culture" is the alliance of the dissenters with the radical political reformers in their fight for religious equality. Politically the Church of England was associated with the aristocracy and the governing party. Politicians like Richard Cartwright had, as early as 1793, attacked the Church of England on the basis of its inherent injustice. "To attempt to give the Church the same exclusive political advantages that it possessed in Great Britain, and which are even there the cause of so much clamour", he had remarked, "appears to me to be as impolitic as it is unjust".⁸⁶

The clamouring in Great Britain at the time was indeed real and troublesome for the Imperial Government. Dissenters and political reformers in the motherland were mounting strong and sustained assaults upon the privileges of the established church. They were claiming for redistribution of the endowed properties and calling for non-sectarian education. The mood was for complete voluntaryism, a principle that all religious bodies should maintain themselves by the voluntary financial offerings of their own voluntary memberships. This principle is derived from the belief that all concession between the church and the state is corrupting and compromising to both alike. The Canadian situation of the mid-nineteenth century was thus described by Norman, as "an exaggerated version of the experience of Britain itself ... an early flowering in the favourable circumstances of colonial life".⁸⁷

⁸⁴Careless, *op.cit.*, 161.

⁸⁵*ibid.*

⁸⁶Quoted in S.D. Clark, *Church and Sect in Canada*, 130.

⁸⁷E.R. Norman, *op.cit.*, 8-9.

Although the religious census of 1851 disclosed that the Church of England enjoyed

As noted earlier⁸⁸ one of the radical politicians who took advantage of the dissatisfaction of the dissenting churches was William Lyon Mackenzie. He edited the radical paper of the day, aptly called *The Colonial Advocate*. His paper was the leading exponent of religious equality and was filled with

an absolute majority over the non-Conformist bodies in England, yet most of the demands of the dissenters were conceded. It was the fruitful work of the joint forces of both the dissenting churches and radical political organizations including the Liberation Society (for freedom of religion from state control), the Protestant Dissenting Deputies of London, the Education League and the non-Conformist press. The voluntarist cause was also propelled forward by the Liberal Party of Gladstone.

With the combined forces of a growing religious consortium of dissenting churches and the political reformers hammering away at the established church demanding its disestablishment on grounds of political justice, the rights and privileges of the Church of England were gradually diminished. A series of Acts of Parliament cumulatively took away many of the constitutional safeguards of the established church.

In 1828, the *Test and Corporation Acts* were repealed. These laws enabled dissenters to sit in the House of Commons and to hold local and national office under the Crown only by the passage of annual indemnity measures. With the repeal of these laws, the Protestant dissenters could be admitted to these benefits in their own right. The Catholics were also denied their rights to hold office by a parliamentary oath they had to take. This oath involved having to swear to the idolatrous nature of Catholicism. By the *Catholic Emancipation Act* of 1858 Jews were admitted to Parliament and following the celebrated case of Bradlaugh, free thinkers were also admitted to Parliament without the commission of hypocrisy or perjury under the *Affirmation Act* of 1888 and the *Religious Disabilities Removal Act* of 1891.

The establishment principle was further eroded by the cessation of parliamentary grants for established church buildings in 1824. With the establishment of the University of London in 1836, the monopoly of higher education by the established church was broken. In the same year its monopoly over marriage ceremonies was also taken away by the *Marriage Act*. A series of *Burial Acts* after 1852 recognized the rights of dissenters to their own forms of services.

Religious tests in the University of Scotland were abolished in 1853 and at Oxford and Cambridge in 1871. The *Liberty of Worship Act* of 1855 took away the state's right to prosecute dissenters for meeting in unrecognized places of worship.

In matters of divorce and matrimony the jurisdiction of the Ecclesiastical Courts was abolished 1857. By 1860 the endowed grammar schools were opened to non-Conformists. Six years later an oath restricting many offices of state to protestants was withdrawn. In 1868, compulsory church rates, a very unpopular taxation in support of the Church of England, were ended. In 1870, the system of non-sectarian state primary schools was established ending the established church's practical monopoly of education.

See Cyril Garbett, *Church and State in England. passim.*

⁸⁸ *Supra.* 52ff

vehement attack on the Church of England. Religious freedom was defined by MacKenzie to include the right of all churches to carry on ecclesiastical functions such as baptismal and marriage rites, the right to hold property, and the right to education without religious distinction. It meant, for him, the absolute end to the clergy reserves.⁸⁹

Methodist leader and educationist, Egerton Ryerson, wrote a paper on the issue of clergy reserves for the guidance of the Imperial Parliament. In it he reproduced the argument of the American revolutionaries. He said: "What the Canadians ask, they ask on grounds originally guaranteed to them by their Constitution, and if they are compelled to make a choice between British connection and British constitutional rights, it is natural that they should prefer the latter to the former?"⁹⁰

In 1831, Egerton Ryerson co-drafted a petition entitled "The Friends of Religious Liberty" on behalf of an interdenominational committee of Upper Canada. Among other things it demanded that the clergy reserves be sold and the proceeds be used for non-sectarian education. Some historians consider this the beginning of the great campaign for the secularization of the clergy reserves.⁹¹ Even before that, Ryerson became editor of the newly founded *Christian Guardian*, a paper that strongly advocated the disestablishment of the Church of England.

The Presbyterians, though not necessarily pleased with the proposed secularization of the clergy reserves because of their claim to have an interest in it as "the other established church"⁹², nevertheless argued for religious

⁸⁹See Charles Lindsay, *The Life and Times of William Lyon MacKenzie*, 20ff.

⁹⁰E.R. Stimson, *History of the Separation of Church and State in Canada*, 78-79.

⁹¹Walsh. *op.cit.*, 178.

⁹²*Supra*, 51-52.

equality in terms of equal rights upon equal conditions. In 1841, the *Christian Examiner*, the official Presbyterian organ, summed it up as follows:

Year after year, at least during the last decade, the general sentiment of this colony has been uttered in no equivocal form that no church invested with exclusive privileges derived from the State, is adapted to the condition of society among us. It cannot be doubted that this is the conviction of nine-tenths of the colonists. Except among a few ambitious magnates of the Church of England, we never hear a contrary sentiment breathed. Equal rights upon equal conditions is the general cry.⁹³

The principle of religious equality was in fact the basis of an address to the King by the provincial assembly some fifteen years before the article in the *Christian Guardian*. The reference to "the last decade" harks back to 1826 when the dissenters debated at length on the whole question of clergy reserves.

The lands set apart in this Province for the maintenance and support of a Protestant clergy ought not to be any one denomination of Protestants, to the exclusion of their Christian brethren of other denominations equally conscientious in their respective modes of worshipping God, and equally entitled as dutiful and loyal subjects, to the protection of your Majesty's benign and liberal Government; we therefore hope it will, in your Majesty's wisdom, be deemed expedient and just that not only the present Reserves, but that any fund arising from the sales thereof should be devoted to the advancement of the Christian religion federally and the happiness of all your Majesty's subject, of whatever denomination; or, if such application should be deemed inexpedient, that the profits arising from such appropriation should be applied to the purposes of education and the general improvement of the province.⁹⁴

⁹³Stimson, *op.cit.*, 58.

⁹⁴*Parliamentary Papers. 1826-7*, XV. 499.

The debate, once again, was fuelled by Strachan's tactless attack on the dissenters at the formal service of Bishop Mountain of Quebec in 1825. He called the Methodist circuit riders "uneducated itinerant preachers". With regard to their standing, he declared:

The movement towards religious equality was only temporarily mollified by the *Clergy Reserve (Canada) Sale Act* of 1840.⁹⁵ A decade later "the conditions were ready, even conducive, for a union of forces of political radicalism and militant voluntaryism".⁹⁶ Politically, the Reformed Party had the issue of separation of church and state on the priority list of the party's agenda. In pursuance of the party's priority, the Anti-State-Church Association was formed. Initially it was called the Anti-Clergy Reserves Association. In England, the Liberation Society worked tirelessly in support of this cause and acted as the agent for the Anti-State-Church Association.

Eventually, as we have seen, the clergy reserve question was finally settled by the *Clergy Reserves Act* of 1854.⁹⁷ This final settlement redefined the church-state relations in Upper Canada. As noted by Norman, "religious equality had more or less received official recognition as the principle which should govern public policy in religious questions. It was also a measure of disestablishment".⁹⁸

The measure of disestablishment certainly presupposes that there was in

When it is considered that the religious teachers of the other denominations of Christians, a very few respectable ministers of the Church of Scotland excepted, come almost universally from the Republican States of America, where they gather their knowledge and form their sentiment, it is quite evident that if the Imperial Government does not immediately step forward with efficient help, the mass of the population will be nurtured and instructed in hostility to our parent church, nor will it be long till they imbibe opinions anything but favourable to the political institutions of England.

See E.R. Stimson, *op.cit.*, 109.

⁹⁵ *Supra.*, 55.

⁹⁶ J.S. Moir, *Church and State in Canada West : Three Studies in the Relation of Denominationalism and Nationalism, 1841-1867*, 52.

⁹⁷ *Supra.*, 56.

⁹⁸ Norman, *op.cit.*, 65.

fact an establishment. There was in fact no definitive statute establishing the Church of England and consequently there was no explicit statutory disestablishment. There was an end to state support in terms of the secularization of the clergy reserves. To many the end of state support is tantamount to the end of the state church. That assumption was questioned by Stimson as late as the 1880s. For him there was no complete separation notwithstanding the *Clergy Reserves Act* of 1854.

We speak of the *Separation* in its popular acceptance. For a *complete* separation has not occurred, otherwise we would not witness the wrangling of lawyers over denominational and religious difference of opinion, nor find courts adjudicating over millions of dollars held in trust for the promotion of the tenets of a particular Church, established, so far as this very money [the commuted interests funds] is concerned, upon this particular part of the Dominion.⁹⁹

Indeed the Church of England still draws on the commuted funds which are the last remnant of the endowments from the sale of the clergy reserves. The patents for the endowed rectories of 1836 are still valid in Ontario. Their incumbents still profit from the nominal incomes they afford. These anomalies indicate that the disestablished church is still supported by the state though it does not enjoy the special status of the state church.

The Protestant Church in Lower Canada after 1774

Except for the Eastern Townships, the Protestant Church was a minority faith in Lower Canada. As noted earlier¹⁰⁰ the Protestants were like

⁹⁹ *Stimson*, op.cit., 198.

¹⁰⁰ *Supra.*, 32-33.

islands in the sea of Roman Catholicism. They were culturally aliens in a province whose Catholic population embraced national, cultural and religious aspirations entirely different from their own.

Although by the *Act* of 1791, land was also reserved for "Protestant clergy" in Lower Canada, the *Quebec Act* of 1774 had already guaranteed the tithes and seignorial rights of the Catholic clergy. As well, the people of Lower Canada were politically emancipated by the substituted oath of allegiance to the Crown without subscription to the supremacy of the Church of England.

By the the beginning of the 19th century the Catholic Church in Quebec came to her own so that Bishop Joseph-Octave Plessis was able to acquire the right to sit in the legislative council in 1817. As well, He could use his title as Bishop of Quebec without fear of persecution. This permission to discard the old designation "Superintendent of the Romish Church" effectively placed him in a position of equality with the Anglican Bishop of Quebec. Walsh suggested that "his greatest triumph came during his trip to England in 1819 when he secured permission to create four auxiliary dioceses and also received from the pope bulls for the nomination of auxiliary bishops."¹⁰¹

The British attempted to check the growing power of the Catholic Church by strengthening the Protestant Church. On at least two occasions, in 1763 and 1775, the governors were directed to establish the Church of England by law as 'the established church' in Quebec. After 1791 the endowment for the benefit of the Church of England was formed from the clergy reserves. As well, the state directly funded the church through the appointment of Jacob Mountain as the Bishop of Quebec in 1793. He was

¹⁰¹ Walsh, *op.cit.*, 81. More accurately, he secured permission to create administrative units which is still the basis for today's diocesan organization.

provided a handsome stipend and a cathedral at public expense.

Notwithstanding these efforts, the Anglican Church was left far behind.

Bishop Mountain was under no illusion and he constantly warned the British authorities of the dangers of granting special favours to the Roman Catholic Church. In his final communication to the Home Secretary, Lord Barthurst, he stressed "the importance of continuing to maintain the establishment and ascendancy of the Church of England...."¹⁰²

Bishop Charles James Stewart succeeded Bishop Mountain in 1826. He was realistic enough to know that an Anglican establishment in Quebec was an impossible objective. Not only did he compromise on the clergy reserves question, he also pleaded with the congregations to support their own clergy very much like the voluntary churches.¹⁰³ Millman commented that it "was the first call ever made upon Canadian Anglicans to pay for the support of their Church".¹⁰⁴ So it was that by the 1830s, "it was clear that the Church of England, which was by then itself largely existing on the voluntary system, was merely one among the minority of Protestant denominations competing without much prospect of enlargement in a predominantly Catholic inheritance".¹⁰⁵

The Church of Scotland also attempted to claim its rights as an established church in Lower Canada.¹⁰⁶ Like the Anglican Church, the ministers in both the cities of Quebec and Montreal were given maintenance

¹⁰² Millman, *op.cit.*, 99.

¹⁰³ Walsh, *op.cit.*, 147-148.

¹⁰⁴ Millman, *op.cit.*, 122.

¹⁰⁵ Norman, *op.cit.*, 67.

¹⁰⁶ See W.S. Reid, *The Church of Scotland in Lower Canada its Struggle for Establishment*

grants. Indeed there was even a bill declaring the Church of Scotland an established church in Lower Canada. The Bill was in fact passed by the Assembly in 1804 but was quickly thrown out by the Executive Council!¹⁰⁷

In Quebec the other Protestant groups were even less significant in numerical strength. Notwithstanding the smallness in number, the Baptists attempted to push for secularization of the clergy reserves in 1838. Bishop George Mountain observed then that the disputes were "marked often by a mutual jealousy, heightened, where the Church is an object of it, to an acrimonious and unscrupulous hostility".¹⁰⁸

Notwithstanding the various attempts to establish the Church of England and the Church of Scotland in Quebec, the status of the Catholic Church was not weakened to any appreciable extent. Just before the Confederation of 1867, a careful educational package was worked out with the Protestant churches in such a way that state support of a dual confessional schools system in Quebec was entrenched.

Because the Catholic Church in Quebec had come a long way from a subjugated situation to a situation of equality with numerical strength, she is perceived to be more "established" than the Protestant Church. The American Constitutional lawyer, L. Pfeiffer has aptly observed about the status of the Catholic Church in Quebec.

The political authority of the Catholic hierarchy, the entrenched position of their schools in the public educational system, and the subsidies that church welfare enterprises receive from the provincial treasury, amount to many aspects of a state church, though establishment in the literal sense is absent.¹⁰⁹

¹⁰⁷ Norman, *op.cit.*, 68.

¹⁰⁸ "A Journal of Visitation to a Part of the Diocese of Quebec by the Lord Bishop of Montreal in the Spring of 1843.", *The Church in Canada*, 18. Quoted by Norman, *op.cit.*, 68.

¹⁰⁹ Leo Pfeiffer, *Church State and Freedom*, 42

As seen from the perspective of a Quebecois, John C. Jacneu, "Quebec governments have gladly proclaimed themselves to be Catholic in spite of the wording of the Constitution that assign to them a more impartial role".¹¹⁰

Church and State : An Uneasy Relation

The relation between church and state in early Canada is rather complicated.¹¹¹ Although in both Nova Scotia and New Brunswick, the Church of England was more or less established by Acts of Parliament, revivalism in these provinces changed the equation.¹¹² The Church of England was itself weakened in public esteem by its clear detestation of the revival".¹¹³

Opposition to the state church came from the dissenters led by the Presbyterians. The government compromised by way of concurrent endowments resulting in the Presbyterians, Congregationalists and Lutherans accepting state aid at the same time. In the 1750's the Nova Scotia Assembly introduced a bill to bring in the full parochial system of the motherland. The opposition to this idea was partially successful, and it gave courage to the dissenting movement.

In due course, the Presbyterian, Methodist and Baptist Churches in

¹¹⁰J.W. Grant (ed.), "Tradition of the Catholic Church in French Canada" in *The Churches and the Canadian Experience*, 12.

¹¹¹See John Cornelius Jacneu, *The Relations Between Church and State in Canada, 1647-1685*.

¹¹²See Walsh, *op.cit.*, 117-132.

¹¹³Norman, *op.cit.*, 70

Nova Scotia decided to organize a united front to campaign for religious equality in 1789. They fought for the right to perform marriages, for legal securities of their property holdings and for their share in the state education funds. By 1795 they were partially successful in that they could conduct marriages in those places where there was no Church of England. By 1830, they were given the absolute right to conduct marriages.¹¹⁴ The same held true in New Brunswick in 1849 where the Free Baptists were given the right to perform marriages.

The Anglican Church, of course, was tacitly established in Upper Canada. Again through the dissenting movement for religious equality, much of the rights and privileges of the Church of England were gradually stripped away.¹¹⁵

In Lower Canada, the Catholic Church is probably the most deeply established church compared to the Anglican Church in the Maritimes or Upper Canada. Ironically, the Catholic Church was in fact, the least legally established compared to the Church of England. Yet in reality it became more visibly established than the latter. This is largely due to its cultural and religious homogeneity compared to the diversity in Protestant denominationalism.

It was through the process of protests and compromises that the peculiarly Canadian principle of disestablishment was brought to bear in the colonies before Confederation. It was a process of redefinition in the relation of church and state. There were at least two related reasons for the impossibility of transplanting the parochial system to the colonies from the motherland. For one thing, the rise of Protestant pluralism militated against

¹¹⁴ See Walsh, *op.cit.*, 94

¹¹⁵ *Supra*, 57ff.

duplicating British institutions overseas. For another, Quebec, by the *Act* of 1774, was both recognized and confirmed as a distinctly different province with a different culture and religion.

By 1851 the legislature of Canada passed the *Freedom of Worship Act*¹¹⁶ which contains the following section.

The free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so as the same be not made an excuse for acts of licentiousness, or justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of the Province allowed to all her Majesty's subjects within the same.

This was the first explicit declaration of religious freedom in Canada. By the terms of the *British North America Act, 1867* (now renamed *The Constitution Act*), 1867, this *Freedom of Worship Act* is still good law applicable to the Province of Quebec and Ontario. This statute makes the prospect of establishing a state church highly improbable.

Just before Confederation in 1867, the British Privy Council handed down two decisions dealing with church-state relations in the colonies. It is especially relevant with regard to the status of the Church of England. In *Long v. Bishop of Capetown* (1863), the Privy Councillors held that "the Church of England, in places where there is no church established by law, is in the same position with any other religious body - in no better but in no worse position."¹¹⁷ What this case established is simply that in the colonies, including Canada, there is religious equality and the Church of England is not the established church. A similar case decided a year later declared that when the Church of England is not established then it enjoys the same position

¹¹⁶Schmeiser, *op.cit.*, 66.

¹¹⁷15 E.R. 756 at 774.

before the law as any other voluntary association.¹¹⁸ In other words, the Church of England does not have any special privileges or rights before the law. But in Upper Canada, the Church of England was, and to a lesser degree still is, "more equal than others". There is the commuted funds and the endowed rectories whose incomes, though much reduced, are still enjoyed by the church.¹¹⁹

Equality of religion, however, was not always practically attainable in Quebec even though the Privy Council's ruling was exactly the same as in the case of *Long v. The Bishop of Capetown*. Only seven years after Confederation, the case of *Brown v. Curé de Notre Dame de Montréal* was heard by the Privy Council.¹²⁰ The facts were straightforward enough. A certain Mons. Guibord was a member of the Institut Canadien of Montréal. The Institut was in constant conflict with the Roman Catholic Church. On his death bed he was refused the last rites by the church authorities. He was also denied the right to be buried in the church's consecrated grounds upon his death.

The Privy Council held that he was fully entitled to be buried in the consecrated ground of the church. Bishop Bourget was not about to abide by the ruling. He immediately declared that the ground was interdicted and therefore separated from the consecrated portion of the cemetery. Legally, the Institut had scored a triumph over the Church, but it may be argued that spiritually it had not.

¹¹⁸ *Re The Lord Bishop of Natal* (1864) 3 Mos. P.C.C. (N.S.) 115.

¹¹⁹ *Supra.*, 80

¹²⁰ (1874) 6 PC. 157. This case is described in Lovell C. Clark, *The Guibord Affair*.

Conclusions

Although the establishment of New France may not have been religiously motivated, the religious ethos of this era of early Canada was inescapably Roman Catholic. It was practically a reflection of France both in culture and religion up until the British Conquest in 1763. There was, for a brief period, with the British Conquest, the possibility of assimilating New France as evidenced from the colonial instructions to the governors. The fact that anglicization was not carried out was due to the enlightened attitude of British governors like Murray and Carleton. They resisted the British attempts to administer Quebec without due regard to the vast differences in culture and religion.

As the situation in the south became more grave, it was conceded by the British that it was more important to have an ally in Quebec with their own religious faith than to attempt to anglicize and consequently alienate them. The *Quebec Act* of 1774, giving free exercise of the Catholic religion, was probably an act of expediency. It did keep Quebec loyal to the British but it also probably ignited further the revolutionary flame in the south.

In regard to the status of the Anglican Church, the *Quebec Act* appears to leave open the possibility of establishing it as the state church. The intention was probably there though it was never seriously carried out. Outside of Quebec, however, the Anglican Church was briefly established in several provinces. Nova Scotia was the first to establish the Church of England by law. This was followed by New Brunswick. These statutes establishing the Church were eventually repealed.

With the influx of the Loyalists from the south after the successful American Revolution, there was a demand for the annulment of the *Quebec*

Act and the establishment of British institutions. The *Constitution Act* of 1791 sought to resolve this tension by dividing Canada into Upper and Lower Canada. In Upper Canada, the Protestant Church appeared to be given a special status.

Some of the most controversial provisions of the *Constitution Act, 1791* had to do with the clergy reserves which were land set aside for the support and maintenance of Protestant clergy. These provisions created much bitter disputes between the Protestant Churches partly because the terms were not clearly defined. In addition, reformers and voluntarists banded together against the system on the ground that the church and the state should be separated. The secularization of the clergy reserves for the purposes of supporting public education was called for by secularists and other Christian groups alike. Eventually the reserves were secularized in 1854 which resulted in the Anglicans, Roman Catholics, Presbyterians and Methodists receiving substantial capital endowments out of the sale of the land.

The belief that the clergy reserves established or attempted to establish the Church of England as the state church was not without grounds. The appointment of the first Anglican bishop two years after the *Constitution Act, 1791*, was seen as an effort to so establish the Anglican Church. Lieutenant Governor Simcoe clearly supported the idea in his letter to the Archbishop of Canterbury just one year before the *Constitution Act, 1791* was passed. The fact that the other churches fought against the special privileges of the Anglican Church in the name of religious equality also suggests that they perceived the Anglican Church as being established.

In Lower Canada, the picture was quite different. In relation to the Roman Catholic Church, protestantism was almost completely disestablished. In contrast, the Roman Catholic Church was for all intent and purpose the

state church. The political authority of the Catholic hierarchy and the state support of Catholic schools are two signs of the establishment of Roman Catholicism in Quebec. It was established *de facto* though not *de jure*.

Notwithstanding the practice of securing establishment, especially in Lower Canada, of a state church, the enactment of the *Freedom of Worship Act* in 1851 explicitly declared that there was religious freedom in Canada. This *Act* is still in force and it is safe to say that on the basis of this *Act* alone, legal establishment of a state church is impossible. This position is confirmed by three pre-1900 case law which effectively declared that the church when not established by law enjoys the same position before the law as in any other voluntary association. In practice however, commuted funds, endowed rectories and their incomes are still enjoyed, to a much reduced extent, by the Anglican and Roman Catholic Churches. The latter did retain sufficient political power to temper with the effect of a Privy Council decision granting the appellant the right to be buried in the consecrated ground of the church. In the words of church historian John Moir,

[t]he tradition of church and state in Canada has grown into a peculiar paradox - antiestablishmentarian, but not secularist. Our history and our constitution require that the state be neither indifferent to nor involved in the church, and vice versa.¹²¹

Freedom of religion and equality of religion before the law was not yet free from political interference in the period of "legally disestablished religiosity".¹²² To what extent was the *Constitution Act* of 1867 able to protect religious freedom before the enactment of the *Bill of Rights* of 1960, will be addressed in the next chapter.

¹²¹ John Moir (ed.), *Church and State in Canada, 1627-1867*, xix.

¹²² *ibid.*, xiii.

Chapter III

CONFEDERATION AND FREEDOM OF RELIGION (1867-1960)

The Religious Situation Just Before 1867

After 1791 the Roman Catholic Church began to consolidate its internal powers in Lower Canada. By 1822 the influence of the Roman Catholic Church was perceived to be too pervasive to be left alone. The British Parliament proposed a union of Upper and Lower Canada. In that proposal, the free exercise entrenched in the 1774 *Quebec Act* was confirmed. However, it also recommended the subjection of the Roman Catholic clergy to the governor on the matter of the nomination of priests.¹ These proposals were another attempt to assimilate the French and, naturally, were vigorously opposed by virtually all sectors of the French-Canadian society. As a result, the proposed union did not materialize at that time.

In 1839, Lower Canada passed the *Parish and Fabrique Act*.² This statute confirmed the special status of the Roman Catholic Church and clearly modified the notion of separation of church and state. It was, as noted³ a situation of quasi-establishment as far as the Catholic Church in Quebec was concerned. The *Act* authorized the church legally to enforce contributions by the church members for the construction and maintenance of church properties. The assessment made against the property of Roman Catholics in

¹Kennedy (ed.), "Proposed Act of Union" in *Document of the Canadian Constitution 1759-1915*, 311-312.

²(1939), 2 Vict. c.29. [Included in Revised Statutes of Quebec (1941), c.308.]

³*Supra.*, 43f.

the province constituted a privileged debt on that property. The church was also legally entitled to the tithes of her members.

At about the same time, the Imperial Government began to consider seriously the necessity for solving the problem of "responsible government" in the Canadas in light of the various movements toward reform and radicalism. Lord Durham was appointed in 1838 to settle the troubles in the Canadas. Besides settling the immediate and foreseeable problems, Durham investigated the roots of the problems by conducting a hearing of complaints and suggestions from all parties. By February 1839, Lord Durham released his *Report on the Affairs of British North America*.⁴

The Durham Report was very comprehensive in its scope. It condemned the evils of oligarchy, the abuses of land grants and the privileges of the Church of England. He saw clearly that the source of conflict in the Canadas was to be identified in the bicultural differences between the French and the English. His main recommendations were threefold, namely the granting of responsible government, the division of powers between the Imperial and local government and the union of the Upper and Lower Canadas.⁵

On the religious question, Durham noted the difference between Lower Canada and Upper Canada. He stated that in Lower Canada, "a degree of practical toleration, known in very few communities" had existed there ever since the Conquest.⁶ The Roman Catholic Church, he observed, had greatly "conciliated the good-will of parsons and creeds" and "in the general absence

⁴See G.M. Craig (ed.), *Lord Durham's Report* and C.P. Lucas (ed.), *Lord Durham's Report on the Affairs of British North Americas*.

⁵See C. P. Lucas, *op.cit.*, *passim*.

⁶*ibid.*, Vol.II, 137.

of any permanent institutions of civil government, the Catholic Church has presented almost the only semblance of stability and organization, and furnished the only effectual support for civilization and order".⁷

With regard to Upper Canada, the Report was less complimentary. He thought that the privileges granted to the Church of England were not conducive to the spirit of tolerance and religious freedom in Upper Canada. His recommendation was unequivocal.

It is most important that this question should be settled as to give satisfaction to the majority of the people of the two Canadas, whom it equally concerns. As I know of no mode of doing this but by repealing all provisions in Imperial Acts that relate to the application of the clergy reserves, and the funds to the local legislature, and acquiescing in whatever decision it may adopt. The views which I have expressed on this subject sufficiently mark my conviction, that, without the adoption of such a course, the most mischievous practical cause of discussion will not be removed.⁸

He felt that the peace and order of the Canadas could be best established through the principle of union and responsible government. Though he did not use the words "responsible government" in the Report, the idea of responsible government was certainly advocated. It was a proposal to grant self-government to the Union of Upper and Lower Canada while retaining relations with Great Britain through some sharing of powers with the motherland.

... It needs no change in the principles of government, no invention of a new constitutional theory, to supply the remedy which would, in my opinion, completely remove the existing political disorders. It needs but to follow out consistently the

⁷*Ibid.*, 138. While Lord Durham recognized that there was no separation between church and state, some historians accuse the Catholic bishops of this period of being lackeys of the British governors.

⁸Craig, *op.cit.*, 97.

principles of the British constitution, and introduce into the Government of these great Colonies those wise provisions, by which alone the working of the representative system can in any country be rendered harmonious and efficient.... I would not impair a single prerogative of the Crown. But the Crown must, on the other hand, submit to the necessary consequences of representative body, it must consent to carry it on by means of those in whom that representative body has confidence.... Every purpose of popular control might be combined with every advantage of vesting the immediate choice of advisers in the Crown, were the Colonial Governor to be instructed to secure the co-operation of the Assembly in his policy, by entrusting its administration to such men as could command a majority; and if he were given to understand that he need count on no aid from home in any difference with the Assembly, that should not directly involve the relations between the mother country and the Colony. This change might be effected by a single dispatch containing such instructions... Perfectly aware of the value of our colonial possessions, and strongly impressed with the necessity of maintaining our connexion with them, I know not in what respect it can be desirable that we should interfere with their internal legislation in matters which do not affect their relations with the mother country. The matters, which so concern us, are very few. The constitution of the form of government, - the regulation of foreign relations, and of trade with the mother country, the other British Colonies, and foreign nations, -and the disposal of the public lands, are the only points on which the mother country requires a control.⁹

In 1840, one of Lord Durham's recommendations, namely the union of the two Canadas, came into effect by the *Act of Union*.¹⁰ This *Act* established a single Legislative Council and a Legislative Assembly. The question of the status of the two churches remained unchanged. However, in 1851, a statute enacted by the united legislature revoked those sections in the *Constitution Act of 1791* which provided for the creation and endowment of

⁹ *ibid.*, 277-282.

¹⁰ 3 and 4 Vict. c.35.

rectories and parsonages. The *Freedom of Worship Statute*¹¹ completely put to rest the conflicting struggle for preferred status among the churches especially generated by the clergy reserves.¹² A key clause in the *Act* laid the foundation for religious freedom and church-state relations in the *British North America Act* of 1867 just as the *Act of Union* laid the foundation for the union of the four chartered provinces in the Confederation. The significant clause reads,

That the free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so as the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, is by the constitution and laws of this Province allowed to all Her Majesty's subjects within the same.

This was indeed the first piece of legislation to explicitly declare freedom of worship and separation of church and state in Canada in terms of affirming the equality of all religious denominations. As we shall see, this statute is still in effect by the terms of the *British North America Act, 1867*.¹³ The courts have also affirmed the principle of separation of church

¹¹ 14 and 15 Vict. c.175. Reproduced in Revised Statutes of Canada (1859) c.74. The *Act* was also reproduced by the Province of Quebec in Revised Statutes of Quebec (1881), art.3439; (1909), art.4387; (1952), c.198; (1941), c.307. In Ontario, it was reproduced in the Revised Statutes of Ontario, (1877), vol.2, c.215; (1887), vol.2, c.236; (1897), vol.2 c.306.

¹² *Supra.*, 74.

¹³ S.129 of the *British North America Act, 1867*, 30 and 31, Vict. c.3 (now renamed *Constitution Act, 1867*) reads : Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, all Officers, Judicial, Administrative, and Ministerial, existing there in at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished, or altered by the Parliament of Canada, or by the legislature of the respective province, according to the Authority of the Parliament or of that Legislature under this Act.

[It is to be noted that the restriction against altering or repealing laws enacted by or existing under the statutes of the United Kingdom was removed by the *Statute of Westminster*,

and state in two important cases. *Dunnet v. Forneri*¹⁴ ruled in respect of the Church of England in Ontario and *Brown v. Curé de Notre Dame de Montréal*¹⁵ ruled in respect of the Roman Catholic Church in Quebec.

The British North America Act, 1867

It is in the context of the socio-political struggle for religious freedom that we can begin to understand the ethos of the *British North America Act* of 1867. The *Act* made no express statement on the subject of religion or religious freedom. Unlike constitutional documents that have come out of revolutions, the *British North America Act* "marked no comparable break with the past".¹⁶ While the document created the Dominion of Canada through the Confederation of three provinces (since Quebec and Ontario were one through the *Act of Union*, 1840), the immediate effect was the division of Canada into four provinces, namely Ontario (Upper Canada), Quebec (Lower Canada), Nova Scotia and New Brunswick.¹⁷ The principle of continuity is clearly stated in the preamble. The Constitution was to be "similar in Principle to that of the United Kingdom" and that "such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire". As Hogg noted, "the *British North America Act* was not

1931, 22 Geo. V. c.4 (U.K.) except in respect of certain constitutional documents. Comprehensive procedures for amending enactments forming part of the Constitution of Canada were provided by Part V of the *Constitution Act*, 1982, (U.K.) 1982, c.11.]

¹⁴(1877), 25 Gr. 199.

¹⁵(1874), 6 PC. 157.

¹⁶Peter W. Hogg, *Constitutional Law of Canada and Canada Act 1982 Annotated*, 2

¹⁷S. 5. *British North America Act*, 1867.

a complete statement of all the new nation's constitutional rules because the colonists desired many of the old rules to remain in both form and substance exactly as before".¹⁸ In its very nature, it was meant to be in continuity with the British constitutional tradition. Cairns describes its nature as follows,

It is a document of monumental dullness which enshrines no eternal principles and is devoid of inspirational content. It was not born in a revolutionary, populist context, and it acquired little symbolic aura in its subsequent history. The movement to Confederation was not a rejection of Europe, but was rather a pragmatic response to a series of economic, political, military and technological considerations. There was no need for the kind of political theorizing which accompanied the America experience of creating a new political entity, and which exercised a spell on subsequent generations. With the important exception of the federal system, Canada was endowed "with a Constitution similar in Principle to that of the United Kingdom." Constitutional monarchy and responsible government in a parliamentary setting were already part of the Canadian heritage which was approvingly translated to the larger sphere of action which the new Dominion created. No resounding assertions of human rights accompanied the creation of the new polity. The British tradition precluded any approach to their protection premised on comprehensive declarations of principle.¹⁹

At the time of Confederation in 1867, the Americas to the south have had their *Bill of Rights* for nearly a hundred years. The founding fathers of the Confederation eschewed the alluring American precedent and chose to leave the civil liberties to be protected by the moderation of the legislative bodies and the common law. Clearly the Constitution of Canada is not exclusively located in the *British North America Act* of 1867, but is also enshrined in the British tradition, conventions, customs and usages. As Dawson and Ward pointed out,

¹⁸Hogg, *op.cit.*, 3.

¹⁹Alan C. Cairns, "The Living Canadian Constitution" in J. Peter Meekison (ed.), *Canadian Federalism : Myth or Reality*, 143.

[It] also embraces principles of the common law as defined by the courts; some British and Canadian acts of Parliament and orders-in-council, judicial interpolations of the written constitution and other laws; the rules and privileges of Parliament; and many other habitual and informal methods of governing in addition to those noted above. All these and many of them (in spite the term *unwritten*) were committed to writing, others in much more intangible and elusive form, exert a powerful influence on constitutional practice.²⁰

Thus within the limits of the federal distribution of powers and other common law restraints, the Canadian Parliament and legislatures received powers as "ample and plenary" as those of the United Kingdom Parliament at Westminster. This was stated clearly in *Hodge v. The Queen* (1883).²¹ In regard to traditional liberties, including freedom of religion, then, "the doctrine of parliamentary sovereignty meant that in the United Kingdom those unregulated residues of individual liberty had no constitutional protection".²² This is due to the fact that the doctrine of parliamentary sovereignty means that Parliament can make any laws no matter how seriously they affect civil rights.²³ As well, civil rights, under the British system, are not derived from

²⁰R. MacGregor Dawson and N. Ward, *The Government of Canada*, 60.

²¹9 App.Cas. 117. At 132, the court held, in regard to provincial legislative power, that it has power "as plenary and as ample within the limits proscribed by s.92 as the Imperial Parliament in the plenitude of its power possessed and could bestow."

²²Hogg, *op.cit.*, 418.

²³The classic proposition of the doctrine is found in A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, ed. by E.C.S. Wade, 39. The principle of parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English Constitution, the right to make or unmake any law whatever, and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.

This view, however is contradicted by Hamish R. Gray in "The Sovereignty of Parliament Today", 10 *University of Toronto Law Journal* (1953), 54 at 54-57. At 54 he expressed the contradiction as follows : " [I]f Parliament is sovereign, there is nothing it cannot do by legislation; if there is nothing Parliament cannot do by legislation, it may bind itself hand and foot by legislation; if Parliament so binds itself by legislation there are things it cannot do by legislation; and if there are such things, Parliament is not sovereign".

positive law or government action. The British, however, do have safeguards for civil liberties. Hogg pointed out several of these safeguards.²⁴

The first safeguard is in the democratic character of the political institutions. These institutions are supported by long traditions of free elections, political parties and a free press. In sum, British democratic tradition is the strongest safeguard of civil liberties. Another safeguard is the common law which generally favours the individual rights and freedoms over against the state. And thirdly, there is the independence of the judiciary which is a long standing tradition of the British democratic institution. This tradition dates back to the *Act of Settlement*, 1701,²⁵ which guaranteed the tenure of judges "during good behaviour" and which provided for their removal "upon the address of both Houses of Parliament".²⁶ S. 99 of the *British North America Act* of 1867 guarantees the independence of the judiciary and is clearly modelled after the *Settlement Act*.²⁷

In the context of the *British and North America Act*, 1867, and the judicial review of the distribution of powers, Walter Tarnopolsky remarked that "... [E]ven if one were to conclude that the Canadian Parliament is sovereign in the sense that it cannot be prevented from passing any legislation within its jurisdiction, it cannot ignore a 'manner and form' requirement for passing valid Acts of Parliament, even if Parliament can change the 'manner and form' required by Simple Statute." *The Canadian Bill of Rights*, 104-105.

²⁴Hogg, *op.cit.*, 418-419

²⁵12 & 13 Will. 3 c.2.

²⁶See *ibid.*, 120. The *Act of Settlement* is a revolution settlement on the accession of William and Mary after the overthrow of the Stuart Kings. The latter body impaired the independence of the judiciary by the practice of removing judges who ruled against them.

²⁷S.99 (1) Subject to subsection two of this section, the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.
(2) A Judge of a Superior Court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.

On the interpretation of s. 99, it is widely accepted that judges may only be removed by a joint address of the two chambers and only on ground of bad behaviour. In practice, however, this section has not been tested at all. As a matter of record, no superior court judge has ever been so removed. Dawson's study concluded that superior court judges are "virtually irremovable".²⁸ In another study Lederman, the leading authority on constitutional law, concluded that "an independent judiciary of highest quality would seem a necessity for the tasks of adjusting and also safeguarding the inner boundaries surrounding the essential core of our freedom".²⁹

Another important safeguard in relation to the sovereignty of Parliament and judicial review is that the court would interpret any statute which is relied upon as the justification for abridging any civil rights according to a strict construction. Accordingly "many civil libertarian values have been introduced into the law as canons of interpretation".³⁰ Hence, it is observed that

Even prior to the passage of the Diefenbaker Bill of Rights, the Supreme Court, and particularly Mr. Justice Rand, began to develop a court-supported jurisprudence for the protection of civil liberties. Basing their decision largely on the flimsy constitutional basis of the preamble to the *British North America Act* which stated that Canada was to have "a Constitution similar

²⁸Dawson, *op.cit.*, 401. In fact, they are not removed because they resigned before the joint address is necessary.

²⁹W.R. Lederman, "The Nature and Problems of a Bill of Rights" in *The Ontario Advisory Committee on Confederation : Background Papers and Reports*, 36.

³⁰Hogg, *op.cit.*, 421.

Dawson, *op.cit.*, 21 commented that "all these constitutional interpretations, whether of jurisdiction or of the meaning to be placed on the words and phrases of a statute, are clearly almost as significant as the actual provisions of the *British North America Act*."

in Principle to that of the United Kingdom" the court enunciated an important series of civil liberties decisions.³¹

Although the observation is generally valid, exception may be taken to his view that the court based their rulings "on the flimsy constitutional basis of the preamble to the *British North America Act*".³² As noted, the safeguards stem from a long tradition of British democratic institutions. Through a long and sometimes difficult struggle in the process of common law development, the doctrine of the "Rule of Law" is now sacrosanct.³³ What it means is that everyone is equal before the law. The law is applied to all, kings and peasants alike. This rule is particularly striking in its application to administrative laws and criminal matters.³⁴ Professor H.W. Jones characterized the rule of law as follows :

The rule of law is a tradition of decision, a tradition embodying at least three indispensable elements : first, that every person whose interests will be affected by a judicial or administrative decision has the right to a meaningful "day in court", second, that

³¹Cairn, in Meekison, *op.cit.*, 148. See *Re Alberta Statutes* [1938] S.C.R. 100; *Saumur v. City of Quebec* [1953] 2 S.C.R. 229, 330ff and *Switzman v. Elbling* [1957] S.C.R. 285, 306.

³²A preamble to a statute is defined by *Halsbury's Laws of England*, 371 as "a preliminary statement of the reasons which have made the passing of a statute desirable". Historically, the preamble did not form part of the statute [See Holt C.J. in *Mills v. Wilkins* (1703) 6 Mod. Rap. 62; 87 E.R.822], but since the middle of the 19th Century it has been accepted as part of the statute. [See Pollock C.B., in *Salkeld v. Johnson* (1848) 2 Ex. 256, 283; 154 E.R., 487, 499]. In any case the preamble had always been regarded as an aid to interpretation. [See *Stowel v. Lord Zouch* (1569) 1 Plowd. Comm. 353, 369; 75 E.R. 536, 560 where Dyer C.J. referred to it as "a key to open the minds of Makers of the Act, and the mischiefs which they intended to redress"]. See also *Re Clearwater Election* (1913) 4 W.W.R. 1025 (Alta. C.A.). The *Interpretation Act* R.S.C. 1970 c.1-23 incorporates the principle : "The Preamble of an enactment shall be read as part thereof intended to assist in explaining its purpose and objective."

³³See Potter, *Outlines of English Legal History*, in R.P. Nadin-Davis, *et al*, *Legal Institutions*, 6-14.

³⁴In criminal matters, it is a long-standing maxim of law that one is presumed innocent until proven guilty. The burden of proof lays squarely on the prosecution to prove beyond reasonable doubt.

deciding officers should be independent in the full sense, free from external direction by political and administrative superiors in the disposition of individual cases and inwardly free from the influence of personal gain and partisan or popular bias; and third, that day-to-day decisions shall be reasoned, rationally justified, in terms that take due account both of the demands of general principles and the demands of the particular situation.³⁵

He further explained "a day in court" to mean that a claimant has "a fair opportunity to state his case, orally or in writing, and ... assurance that someone in real authority will consider that statement in good faith and high seriousness before the decision comes down".

In the context of the right to freedom of religion the case of *Roncarelli v. Duplessi* s³⁶ illustrates the "rule of law" as applied to administrative matters. Rand J. in the course of his judgement made it clear that "on public administration of the sort there is no such thing as absolute and untrammelled 'discretion', and that 'discretion' necessarily implies good faith in discharging public duty".³⁷ The action of the Premier was "a gross abuse of legal power"³⁸ he declared, and expounded the principle infringed as follows :

That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superceded by action

³⁵ "The Rule of Law and Welfare State" (1958), *Columbia Law Review* 143, at 145. The classical definition popularized by A.V. Dicey and E.C.S. Wade (ed.), *Introduction to the Study of the Law of the Constitution*, 10th ed. 202-203 contains three elements, namely, 1) the supremacy of regular law as opposed to the influence of arbitrary power, excluding the existence of arbitrariness, prerogative, or even of wide discretionary authority on the part of the government; 2) equality before the law, excluding the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens; and 3) the law of the Constitution is not the source but the consequence of the rights of individuals as defined and enforced by the courts.

³⁶(1959) S.C.R. 121.

³⁷ *ibid.*, 140

³⁸ *ibid.*, 141.

dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public offices acting before their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.³⁹

Martland J. who concurred in the decision against Duplessis stressed that the question whether the Premier acted *intra vires* his official capacity was not to be determined by his own subjective appreciation of his official functions. The question, he ruled, "must be determined according to law".⁴⁰ Abbot J. also declared in the same view,

The proposition that in Canada a member of the executive branch of government does not make the law but merely carries it out or administers it requires no citation of authority to support it. Similarly I do not find it necessary to cite from the wealth of authority supporting the principle that a public officer is responsible for acts done by him without legal justification.⁴¹

In his Plaunt Memorial Lectures on "Civil Liberties and Canadian Federalism", (1959), the late F.R. Scott commented that "it is always a triumph for the law to show that it is applied equally to all without fear or favour. This is what we mean when we say that all are equal before the law".⁴²

Looking at the *British North America Act* of 1867 from another angle, it may be argued that there is an implied Bill of Rights in the *Act* itself.⁴³ Some case law appears to support this view. *In Reference Re Alberta*

³⁹ *ibid.*, 142.

⁴⁰ *ibid.*, 158.

⁴¹ *ibid.*, 184.

⁴² Quoted in Whyte and Lederman, *Canadian Constitutional Law*, 4-134. See also F.R. Scott, *Essay on the Constitution*, 192-196.

⁴³ The implied *Bill of Rights* view is advocated by F.R. Scott, *Civil Liberties and Canadian Federalism* (1959) and D.A. Schmeiser, *Civil Liberties in Canada*. Opponents of this view included Lyon and Atkey, *Canadian Constitutional Law in a Modern Perspective* (1970) and Bora Laskin, *Canadian Constitutional Law*.

*Statutes*⁴⁴ the issue was the civil right of political discussion. The Alberta Bill, if upheld, would have compelled each newspaper in that province, when called upon to do so by the Provincial Government, to publish the Social Credit Government's reply to the newspaper's criticism of it. The Supreme Court held that the Bill was incompetent to the provincial legislature. There is an implied right to free speech. After noting that the Preamble of the *British North America Act* shows plainly enough that the Constitution of the Dominion is to be similar in principle to that of the United Kingdom, Duff, C.J. continued,

The statute contemplates a Parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals. This is signally true in respect of the discharge by Ministers of the Crown of their responsibility to Parliament, by members of Parliament of their duty to the electors, and by the electors themselves of their responsibilities in the election of their representatives.

The right of public discussion is, of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means, to quote the words of Lord Wright in *James v. Commonwealth of Australia*, [1936] A.C. at 627, "freedom governed by law".

Even within its legal limits, it is liable to abuse and grave abuse, and such abuse is constantly exemplified before our eyes; but it is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the

⁴⁴[1938] S.C.R. 100.

breath of life for parliamentary institutions.⁴⁵

The *dicta* of Duff C.J. can be read suggesting that the inherent right of free speech is such that neither Parliament nor legislature can take it away. Indeed this was the view of Kellock J. in *Saumur v. City of Quebec*.⁴⁶ He pointed out that it was possible to read an imperial *Bill of Rights* into Duff C.J.'s dicta. Abbott J. in *Switzman v. Elbling and A. G. of Quebec*⁴⁷ cited Duff C.J.'s dicta with approval and stated the same view as follows,

The right of free expression of opinion and of criticism, upon matters of public policy administration, and the right to discuss and debate such matters, whether they be social, economic or political, are essential to the working of a parliamentary democracy such as ours. Moreover, it is not necessary to prohibit the discussion of such matters, in order to protect the personal reputation or the private rights to [sic] the citizen.

He concluded,

... I am of the opinion that as our *Constitutional Act* now stands, Parliament itself could not abrogate this right of discussion and debate. The power of Parliament to limit it is, in my view, restricted to such powers as may be exercisable under its exclusive legislative jurisdiction with respect to criminal law and to make laws for peace, order and good Government of the nation....

The more recent case of *A.G. (Can.) and Dupond v. Montreal* [1978], however, collapsed the implied Bill of Rights theory.⁴⁸ Beetz J. concluded that freedoms of speech, of assembly and association, of the press and of religion are not enshrined in the constitution by the preamble of the *British North America Act, 1867* as to be above the reach of competent legislation.

⁴⁵[1938] S.C.R. 133.

⁴⁶[1953] 2 S.C.R. 299 at 354.

⁴⁷[1857] S.C.R. 285 at 328.

⁴⁸[1978] 2 S.C.R. 770 at 796.

Further, none of those freedoms is a single matter coming within exclusive federal or provincial competence. Each of them, he held, is an aggregate of several matters which, depending on the aspect, come within federal or provincial competence.

This "implied Bill of Rights" view of the Constitution is quite opposed to the "exhaustive distribution of powers" view. In the latter, there is a division of legislative power between Parliament and the legislature. Each legislative body was given the power to make laws in relation to certain classes of subjects and denied the power to make laws in relation to other classes of subject. The function of the courts is to determine whether or not the legislative body concerned has acted *ultra vires* its power to enact.⁴⁹ Hence,

⁴⁹Hogg, *op.cit.*, 43ff; Whyte and Lederman, *op.cit.*, ch. 4-5.

See W.R. Lederman, "Classification of Laws and the British North America Act" in *The Courts and the Canadian Constitution*, 177-199. At 199 he summarized his conclusion as follows :

1. Basically, in applying ss.91 and 92 of the B.N.A. Act, we are concerned with a classification problem, which is really the problem of language itself. There are certain difficulties inherent in all processes of classification.
2. In legal analysis, classification of facts must be distinguished from classification of laws, since facts and laws are different orders of things.
3. When the constitutional validity of a law is challenged, we must seek to ascertain its full or total meaning. In part, this involves the process of classifying facts, and in part it calls for determining the effects of doing what the law requires.
4. Logically, a given law may be classified by any one or by any combination of the distinct features of meaning which it has. Thus, a given law can be classified in many different ways. The idea that there is only one true classification is a fallacy.
5. The application of ss. 91 and 92 of the B.N.A. Act is a process of classification of laws, but inevitably the categories there specified are largely overlapping. Therefore a challenged law with features of meaning relevant to both federal and provincial categories of laws has to be classified by that feature of it deemed most important for purposes of the division of legislative powers in the country. The heart of the interpretative process thus often lies in the criteria of relative importance employed by the judges in making this type of choice.
6. Precedents on classifications are important, but the degree of certainty they can afford is usually much overestimated.
7. The task of the judges in this regard is as difficult as it is important. Criticism of what the courts have done, if it is to be constructive, should acknowledge with some humility that this is a field which honest and able men may differ.

on the question of civil right within this view, "the constitutional issue ... is simply whether the particular suppression or enlargement is competent to the Dominion or to the Province, as the case may be".⁵⁰ In the absence of either the Bill of Rights or implied Bill of Rights, where civil rights are trampled upon, the issue is tied to the sovereignty of Parliament and the question is "which jurisdiction should have power to work the injustice, not whether the injustice should be prohibited completely".⁵¹

The doctrine of parliamentary sovereignty poses some difficulties for the "implied Bill of Rights" view. In the tradition of the United Kingdom, as we have seen,⁵² respect for civil rights is not entrenched in the Constitution. Parliament can take away any of the civil liberties should it choose to do so. It is therefore argued that since the founding fathers of Confederation chose to model the *British North America Act* after the British tradition, it must be assumed that Canadian Parliament enjoys the same sovereign power. If there is to be any limitation of the powers, it ought to be clearly expressed and not inherently implied. In any case, it is contended by some that if the framers had wanted to include a Bill of Rights, they had the American precedent to follow. The fact that they did not do so must strongly suggest that they did not want to do so.

Both views on the Constitution concede to the existence of a number of provisions which are explicitly entrenched and expressly protected from change. These are, after all, fundamental rights. Reading s. 129 in the

⁵⁰Bora Laskin, *Canadian Constitutional Law*, (4th Rev. ed.) 900.21. Quoted in Hogg, *op.cit.*, 429.

⁵¹Paul C. Weiler, "The Supreme Court and the Law of Canadian Federalism", 23 *University of Toronto Law Journal* (1973), 307, 344.

⁵²*Supra.*, 86ff.

context of rights to religious freedom and separation of church and state, it would appear that the *Freedom of Worship Statute* is maintained in force as a legislative document. As well, s. 93 guarantees the constitutional rights of denominational schools and s. 92 (12) grants to the provincial legislatures virtual control over a very important aspect of religious life by giving the provinces the right to grant marriage licenses to whatever religious groups they chose. The provisions would indicate that at Confederation there was a measure of religious equality with special treatments given to the Province of Quebec.⁵³

The special treatment is, of course, explicable by the troubled history of early Canada in relation to Catholic French and Protestant English conflicts.⁵⁴ Quite apart from that it is in itself an interesting commentary on the existence of certain rights which are not individualized but collectivized. Reginald Whitaker had argued that the *British North America Act* was the arrangement

⁵³Unlike the situation in the United States where any direct support for religious or "parochial schools had been declared unconstitutional time and again, s.93 specifically guaranteed support for such schools. In *Everson v. Board of Education* (1947) 330 US.1., the United States Supreme Court, however, applied the "public purpose" and "child benefit" doctrine and upheld a statute authorizing bus fare reimbursement to parents of parochial as well as public school students. The "child benefit" doctrine was also applied in *Board of Education v. Allen* (1969) 392 US.236. The court sustained a statute requiring local school districts to lend books *gratis* to seventh to twelfth grade children in private and parochial schools.

As against the statutes upheld by the court, there were a spate of cases where the court struck down statutes and regulations on the ground that they violated the separation of church and state principles in the first Amendment: *McCullum v. Board of Education* 333 US 203 (Released time religious program on public school property under attendance sanctions), *Engel v. Vitale* (1962) 370 US 421 (Non-denominational prayer in school); *Abington Township School District v. Schempp* (1963) 374 US 203 (Bible reading and the Lord's prayer recitation in public school) and *Lemon v. Kurtzman* (1971) 403 US 602 (Direct aids to parochial schools including use of public funds to pay salaries of parochial school teachers).

On the right to solemnize marriages under s.92 (12) the province may not recognize some religion and therefore deny the license to solemnize marriages. This may force members of the religious group so denied to have their marriages solemnized by ministers of another faith.

⁵⁴ *Supra.* ch.II

between political elites and not between people and their government. However, he saw in s. 93 some recognition of the rights of the people. He commented,

The concern about the Protestants of Quebec also led to one of the closest brushes with recognition of people to be found in the original Act. Section 93 speaks of protection of the "Right and Privileges" of Catholic and Protestant subjects in education, of appeals to the national government against provincial Acts affecting the educational rights of religious minorities, and of "remedial Laws" to be made by the Parliament of Canada where such rights are judged to have been so affected. Without touching upon the tortuous and troubled history of this section in relation to Manitoba and Ontario, it might simply be noted that this unusual sign of recognition of the rights of citizens was not on the basis of individual citizenship at all, but rather on the basis that individuals had rights only as bearers of a recognized collective identity, in this case membership in a particular church.⁵⁵

In the nature of the Constitution, it is probably more accurate to say that "Canada has adopted, but in part only, the principle of parliamentary sovereignty".⁵⁶ This view of parliamentary supremacy would reconcile the exceptions to the parliamentary supremacy view of the civil rights and the implied Bill of Rights. In either case, the court plays a very important role in interpreting the parameters of the rights either in terms of determining the categorization of the laws and the division of legislative process in enacting them, or finding an implied right in the Constitution.

From the 1930s, the Jehovah's Witnesses began to exercise their rights of religious freedom in Quebec. When their claims to the rights were interfered with by the civil authorities, they challenged the interference in the

⁵⁵Reginald Whitaker, "Democracy and the Canadian Constitution" in Keith Banting and Richard Simen (eds.), *And No One Cheered: Federalism, Democracy and the Constitution Act*, 247.

⁵⁶F.R. Scott, "Dominion Jurisdiction Over Human Rights and Fundamental Freedoms" in *Essays on the Constitution*, 213.

courts of law. Through the judicial resolutions, the parameters of religious freedom were determined, clarified and expanded. The rest of this chapter will be devoted to an analysis of these and other cases.

The Courts and Religious Freedom

Unlike the situation in the United States, there has not been a spate of cases on church-state relations or freedom of religion. Both the Roman Catholic Church and the Church of England enjoyed a certain amount of quasi-established status even though there was supposed to be theoretical equality of religions under the *British North America Act* of 1867. The groups that have challenged the *status quo* have been smaller religious groups like the Jehovah's Witnesses. Because of the nature of the constitutional rights, "the main protection afforded by our law to a person whose religious freedom has been violated is that of the right of civil action".⁵⁷ The violations complained of were mostly related to the sense that the members of the minority religion groups were oppressed, discriminated against or persecuted by the majority religious groups or by the state. To that extent there is a loss of religious freedom suffered by the complainants. Penton listed 38 such cases involving the Jehovah's Witness in his work.⁵⁸

⁵⁷Schmeiser, *op.cit.*, 114.

⁵⁸*Jehovah's Witnesses in Canada : Champions of Freedom of Speech and Worship*. For an understanding of the organizations, doctrines and beliefs of the Jehovah's Witnesses see Herbert Hewitt Stroup, *The Jehovah's Witnesses*; Rayston Pike, *Jehovah's Witnesses* and Marley Cole, *Jehovah's Witnesses*. Also see their own publications : *Let God Be True* and *All Scriptures Is Inspired of God and Beneficial*.

Most of the court cases involved the work of the Jehovah's Witnesses in the Province of Quebec. Through their visibility in propagating their faith and the publication for mass distribution of their literature, they literally flooded Quebec with their gospel. In particular, the pamphlet *Quebec's Burning Hate*⁵⁹ was most inflammatory. It was a scathing denunciation of the French establishment with the worst reserved for the Roman Catholic Church. Naturally, one of the reactions was to stop the distribution of such "hate"

⁵⁹Its full title was *Quebec's Burning Hate for God and Christ and Freedom Is the Shame of All Canada*. The pamphlet recounted the "persecutions" of their compatriots in Quebec including the Lachine and Chateauguay mobbings, attacks on individual witnesses, arrest and trial of E.M. Taylor, a Septuagenarian, who was charged with sedition for distributing the Bible without a permit, the arrest of a nine-year-old girl for distributing circulars without a licence and the expulsion of a nine-year-old girl from school for refusing to make the sign of the cross. All these troubles and more, charged the pamphlet, were the work of hatred of the Roman Catholic Church, particularly its "priest domination". Its passionate attack on the Catholic Quebecois was captured in these words.

Quebec, Jehovah's witnesses are telling all Canada of the shame you have brought on the nation by your evil deeds. In English, French and Ukrainian languages this leaflet is broadcasting your delinquency to the nation. You claim to serve God; you claim to be for freedom. Yet if freedom is exercised by those who disagree with you, you crush freedom by mob rule and gestapo tactics. Though your words are, your actions are not in harmony with that for which democracies have just fought a long and bloody global war. And your claims of serving God are just as empty for your actions find no precedent in the exemplary course laid down for Christians by His Son, Christ Jesus. You should remember that though Christ Jesus and early Christians were often mobbed, they never under any circumstances meted out mob violence. What counts is not whom you claim to serve, but whom you actually do serve by deeds. The Catholic Version Bible says: "Know you not, that to whom you yield yourselves servants to obey, his servants you are whom you obey." (Romans 6:16) Quebec, you have yielded yourself as an obedient servant of religious priests, and you have brought forth bumper crops of evil fruits. Now, why not study God's Word, the Bible, and yield yourself in obedience to its commands, and see how bounteous a crop of good fruits reflecting love of God and Christ and freedom you will bring forth? The eyes of Canada are upon you, Quebec.

See James Penton, *Jehovah's Witnesses in Canada : Champions of Freedom of Speech and Worship*, ch.9.

literature and it fell upon the courts to decide on the legality of its distribution.

In *Boucher v. The King*,⁶⁰ a Jehovah's Witness was convicted of publishing seditious libel in distributing copies of the pamphlet, *Quebec's Burning Hate*. The conviction was affirmed by the Quebec Court of King's Bench (Appeal). On appeal to the Supreme Court of Canada, the majority of the court ordered a new trial on the ground that the trial judge failed to instruct the jury properly on the defence of speaking in good faith. Rand and Estey J.J., in dissent, stated that if proper instructions were given to the jury concerning the nature of the offence a conviction could not be supported and therefore an acquittal should be directed. At the second hearing the full court by a five to four majority, reversed the Appeal Courts decision by its ruling that the accused should be acquitted for lack of evidence upon which a jury, properly instructed, could convict him of seditious libel.⁶¹

The case turned on the definition of seditious libel. For the pamphlet to fall within the definition of seditious libel, it was necessary to prove that it was published with "illegal intention" of causing hostility or overthrowing the establishment. Raising discontent or disaffection among subjects, or promoting ill-will or hostility by themselves were not sufficient to sustain a

⁶⁰[1951] S.C.R. 265.

⁶¹ According to W.R. Lederman, the case illustrates the way the Supreme Court subscribes to the doctrine of *stare decisis* in respect of its own decisions. In his "The Judicial Review of the British North America Act" in P.H. Russell (ed.), *Leading Constitutional Decisions : Cases on the B.N.A. Act*, 151, he commented as follows:

...the Supreme Court concede the inconclusiveness of its reasoning after a first hearing by granting a re-hearing; and Mr. Justice Kerwin gave a welcome illustration of open-mindedness by modifying his conclusion about the case. In the result, an acquittal was directed rather than a new trial. Only the Court can tell us, by its conduct in the cases that lie ahead, whether this signals the spirit of its new status.

conviction of seditious libel.⁶²

What is significant for our analysis is the court's understanding of religious freedom, since the intent of the Jehovah's Witnesses was the promotion of their religion. Rand J. who dissented in the first hearing and moved for acquittal gave a wide interpretation of religious freedom in these words:

There is no modern authority which holds that the mere effect of tending to create discontent or disaffection among His Majesty's subjects or ill-will or hostility between groups of them, but not tending to issue in illegal conduct, constitutes the crime and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere illwill as a product of controversy can strike down the latter with illegality. A superficial examination of the word shows its insufficiency. What is the degree necessary to criminality? Can it ever, as mere subjective condition, be so? Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in morals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and

⁶²In fact at the retrial, eight out of nine judges agreed that besides causing ill-will, seditious libel must include the intent to produce rebellion or resistance against duly established authority. On the facts the accused was acquitted by a five-to four decision.

It is interesting to note that the Supreme Court of South Africa, in *The Magistrate, Bulawayo v. Kebungo* [1938] S.A. Law Report, 304-316, held that the literature of Jehovah's Witnesses did not violate the *Sedition Act of Southern Rhodesia*. The court ordered all the literature belonging to Jehovah's Witnesses which had been seized and detained by the magistrate to be returned, because it was not illegal for them to distribute the same as they did not violate the sedition laws.

The High Court of Australia also ruled in favour of the Witnesses in *Adelaide Company of Jehovah's Witnesses, Inc. v. The Commonwealth* (1943), 67 C.L.R. 116. The court held, *inter alia* that the Order-in-Council barring the Jehovah's Witnesses in Australia was *ultra vires* and therefore illegal, because the Witnesses was not engaged in any seditious enterprises or engaged in publishing or printing literature which was seditious within the meaning of the criminal law of Australia.

deeper uniformities as bases of social stability. Similarly in discontent, disaffection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and, as we believe, in the search for the constitution and truth of things generally.⁶³

Clearly his decision was influenced by the sincerity he perceived in the religious conviction held by the accused. Commenting on the circumstances surrounding the distribution of the pamphlet, he wrote,

The incidents, as described, are of peaceable Canadians who seem not to be lacking in meekness, but who, for distributing, apparently without permits, Bible and tracts on Christian doctrine; for conducting religious services in private homes or on private land in Christian fellowship, for holding public lecture meetings to teach religious truth as they believe it is the Christian religion; who, for this exercise of what has been taken for granted to be the unchallengeable rights of Canadians, have been assaulted and beaten and their Bibles and publication torn up and destroyed, by individuals and by mobs; who have had their homes invaded and their property taken; and in hundreds have been charged with public offences and held to exorbitant bail.⁶⁴

He was also impressed with the accused's conduct.

The conduct of the accused appears to have been unexceptionable; so far as disclosed, he is an exemplary citizen who is at least sympathetic to doctrines of the Christian religion which are, evidently, different from either the Protestant or the Roman Catholic versions; but the foundation in all is the same, Christ and his relation to God and humanity.⁶⁵

In contrast, the Chief Justice, who was the only dissenting judge in the second hearing, took a cautious and qualified approach to religious freedom.

[To] interpret freedom as licence is a dangerous fallacy.

⁶³ *ibid.*, 288

⁶⁴ *ibid.*, 285.

⁶⁵ *ibid.*

Obviously pure criticism, or expression of opinion, however severe or extreme, is, I might almost say, to be invited. But as was said elsewhere, "there must be a point where restriction on individual freedom of expression is justified and required on the grounds of reason, or on the ground of the democratic process and the necessities of the present situation." It should not be understood from this Court ... that persons subject to Canadian jurisdiction "can insist on their alleged unrestricted right to say what they please and when they please, utterly irrespective of the evil results which are often inevitable."⁶⁶

Kernaghan concluded in his study that the cautious and qualified approach to freedom in general, and freedom of religion in particular, postulated by the Chief Justice and the view that under certain conditions freedom of expression must be subordinated to the other demands or exigencies is representative of the French-Canadian approach to individual liberties. He further suggested that if the "necessities of the present situation" require restrictions on fundamental freedoms in the interest of the protection of religious or racial concerns, such restrictions are to the French-Canadian mind not only justified but mandatory.⁶⁷

Two years later, on October 6, 1953, the Supreme Court handed down an important judgement which raised questions of momentous significance to the issue of religious freedom. It was a long and protracted case that was first heard in the Supreme Court in November 1948. The original applicant in the case was Damase Daviau who sought an injunction against the City of Quebec to restrain it from interfering with the religious activities of the Jehovah's Witnesses under the Quebec *City Bylaw 184*.⁶⁸ Daviau subsequently

⁶⁶ *ibid.*, 277.

⁶⁷ William D.K. Kernaghan., *Freedom of Religion in the Province of Quebec with Particular Reference to the Jews, Jehovah's Witnesses and Church-State Relations*, 206.

⁶⁸ Bylaw 184 s.1 reads, in part,

It is by the present by-law forbidden to distribute in the streets of the City of Quebec any book, pamphlet, circular or tract whatever, without having

dropped out of the proceedings and Laurier Saumur, who was involved in litigation similar to Daviau, was substituted as the applicant plaintiff by mutual consent of the parties. Hence the case became known as *Saumur v. City of Quebec*.⁶⁹

The facts were rather straight-forward. The appellant sought a declaration that the *City Bylaw 184* was beyond the legislative power of the province to pass. The grounds upon which the by-law was challenged were that it infringed the freedom of religious worship secured by the *Freedom of Worship Act, 1851*;⁷⁰ and that it trenched upon the jurisdiction of the Dominion in restraining freedom of communication by writing. In response, the counsel of the City of Quebec argued that s. 92 of the *British North America Act, 1867* places civil rights within the authority of the provinces;⁷¹ that the by-law related not to religion or free speech but to the administration of the streets; and that, in any case, the Jehovah's Witnesses did not constitute a religion.

All nine members of the Supreme Court participated in the case and seven separate judgements were handed down. That there was a diversity of

previously obtained for so doing the written permission of the Chief of Police.

Violation of the by-law was punishable by a fine or by imprisonment in case of default of payment.

⁶⁹[1953] 2 S.C.R. 299. Tarnopolsky, *op.cit.*, 9, remarked that this "was significant as the first post-war case in which a substantial majority of the Supreme Court dealt with the problem of jurisdiction in relation to freedom of speech, assembly, and religion."

⁷⁰ R.S.Q. 1941, c.307. *Supra*, 74, 83.

⁷¹S.92 reads, in part,

In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated : that is to say,-

13. Property and Civil Rights in the Provinces.

judicial opinions is an indication of the complexity of the matter. For one thing, there was a question whether the by-law in question had to do with religious freedom. In another, by the Jehovah's Witnesses' own testimony, the Jehovah's Witnesses were not a religion. Their own publications had used the word "religion" in a pejorative manner. Religion was synonymous to false worship and since they claimed to be the true worshipper, "religion" could not have applied to them! As Penton remarked, "in a way the Witnesses were seemingly hoist with their own petard".⁷²

On the question whether civil rights under s. 92 (13) of the *British North America Act* of 1867 included religious freedom, Rinfret C.F.C. and Taschereau J., held it did. They found the support in the *Bill of Rights* enacted by the Provinces of Saskatchewan and Alberta. As well, they referred to the *dictum* of the Privy Council in *Citizens Insurance Co. v. Parsons*,⁷³ where Sir Montague Smith was of the view that the "property and civil rights" were plainly used in the largest sense. In the result, Rinfret C.J.C. held, with Taschereau J. concurring, that the by-law was a valid municipal exercise of street control. Furthermore, he held that the right of distribution did not constitute an exercise of worship, and that, in any case, the contents of the literature were such that their distribution would constitute a practice inconsistent with the peace and safety of the city and province.

Kerwin J. concurred with the view that religious freedom was a civil right but held that while the by-law was *intra vires* the provincial powers, it

⁷²Penton, *op.cit.*, 211

In Grundy v. The King (1943, Unreported), the Crown Counsel for the Australia Government ingeniously contended that "Religion" as used in the *Defence Acts* means organized religion within a ministry but Jehovah's Witnesses were only an organized society for putting out publications and, as they claim to be opposed to religion, their beliefs and actions cannot be a religion.

⁷³(1881-82), 7 App. Cas. 96.

did not have the effect of prohibiting the applicant from distributing the literature because the *Freedom of Worship Act* granted him the freedom to do so. Furthermore, he held that the act of distributing the literature which were clearly offensive to the majority of the people in Quebec, did not fall within the exception to the freedom. His rationale was as follows.

It appears from the material filed on behalf of the appellant that Jehovah's Witnesses not only do not consider themselves as belonging to a religion but vehemently attack anything that may ordinarily be so termed but in my view they are entitled to "the free exercise and enjoyment of (their) Religious Profession and Worship". The Witnesses attempt to spread their views by way of the printed and written word as well as orally and state that such attempts are part of their belief. Their attacks on religion generally, or on one in particular, do not bring them within the exception "so as the same be not made an excuse for acts of licentiousness, or justification of practices inconsistent with the peace and safety of the Province". While several definitions of "licentious" appear in standard dictionaries, the prevailing sense of that term is said to be "libertine, lascivious, lewd". To certain biblical expressions the pamphlets, etc., of Jehovah's Witnesses which they desire to distribute attach a meaning which is offensive to a great majority of the inhabitants of the Province of Quebec. But, if they have a legal right to attempt to spread their beliefs, as I think they have, the expressions used by them in so doing, as exemplified in the exhibits filed, do not fall within the first part of the exception. Nor in my opinion are their attacks "inconsistent with the peace and safety of the Province" even where they are directed particularly against the religion of most of the Province's residents. The peace and safety of the Province will not be endangered if that majority do not use the attacks as a foundation for breaches of the peace.⁷⁴

Four of the judges held that the laws in relation to religious freedom did not fall within the provincial legislative competence.⁷⁵ Rand J. held that the meaning of "civil rights" did not include matters of religious belief, on the

⁷⁴ *ibid.*, 321-322.

⁷⁵ They were Rand, Kellock, Locke, Estey J.J.

ground that

The statutory history of the expression "Property and Civil Rights" already given exhibiting its parallel enactment with special provisions relating to religion shows indubitably that such matters as religious belief, duty and observances were never intended to be included within the collocation of powers. If it had not been so, the exceptional safeguards to Roman Catholics would have been redundant.⁷⁶

Rand J. further held that the language of the by-law comprehended the power of censorship, and, accordingly, the by-law was *ultra vires* provincial power. Kellock J. concurred with Rand J. on the historical understanding of "civil right". Together with Locke, J., Kellock J. and Rand J. agreed that the by-law was *ultra vires* the 1851 *Freedom of Worship Act*. Locke and Estey J.J. also took the view that legislative jurisdiction in relation to religious freedom resided in Parliament under its criminal law power.

Cartwright and Fauteux J.J. avoided the constitutional issue by holding that the by-law was in relation to the use of highway and not in relation to religion, and therefore *intra vires*.

In sum, three judges held that civil right under s.92 (13) included religious freedom and four held that it did not. Two did not deal with the question.⁷⁷ Four of the judges held that the by-law in question was *ultra vires* provincial powers and five held to be *intra vires*. However, one of the five

⁷⁶ *ibid.*, 329.

⁷⁷ With the decisions in *Birks & Son (Montreal) Ltd. v. City of Montreal* [1955] S.C.R. 799 where Rand, Kellock and Lock J.J. repeated their view in Saumur's case with respect to religion as not within provincial jurisdiction, and *Robertson and Rosetanni v. The Queen* [1963] S.C.R. 651 where Rand J.'s was affirmed, it is quite conclusive that religion is a subject matter for federal legislation and therefore not a civil right under s.92 of the *British North America Act, 1867*. In fact, the 1959 Symposium published in 37 *Canadian Bar Review* contains expert opinions including that of Laskin, Scott and Pigeon to the effect that the Saumur case already made it practically certain that religion is a matter within federal jurisdiction. Hence there is a necessity to distinguish between "civil liberties" and "civil rights" so that the former refer to fundamental freedom like freedom of religion. See Tarnopolsky, *op.cit.*, 2.

held that the by-law violated the *Freedom of Worship Act* and therefore did not operate so as to prohibit the applicant from distributing the religious literature. In the result the Jehovah's Witnesses won their case but the by-law remained in the books. Commented Schmeiser, "with such result, and with such variation in the judgements, it is indeed difficult to cite the decision as authority for very much."⁷⁸

Again like the *Boucher* case, the Supreme Court overturned the decisions of the Quebec trial court and the Court of Queen's Bench (Appeal side). Interestingly enough the two French Canadian judges, Rinfret C.J.C., and Taschereau J., upheld the legality of the by-law. On the question whether this by-law pertained to religious freedom, at least two English Canadian judges agreed with the Witnesses' claims that the by-law was enacted to specifically prohibit the religious propagation of the movement.⁷⁹ It was a consensus of four of the six English Canadian judges that the by-law aimed at imposition of censorship and that it could be utilized to restrict the distribution of *inter alia* religious literature.⁸⁰ In contrast both Rinfret C.J.C. and Taschereau J., denied that the possible ulterior motive of the City of Quebec was of any consequence and that even if the by-law was in fact aimed at the Jehovah's Witnesses, that would not be a basis for declaring it illegal or unconstitutional.⁸¹

⁷⁸Schmeiser, *op.cit.*, 82.

See Lederman, *op.cit.*, 163-164. He noted that there is a wide diversity of opinion among writers as to the grounds upon which the individual judges reached their conclusions. Further, he remarked that the case "illustrates the frequent difficulty of determining the *ratio* of a judgement as a whole and what great divergences can exist in the matter of classifying a statute in terms of its true nature and aspect".

⁷⁹Estey J. at *ibid.*, 361 and Locke J. *ibid.*, 368-369.

⁸⁰Rand, Kellock, Estey and Locke, J.J..

⁸¹*ibid.*, 311.

On the question whether the Jehovah's Witnesses were a religion, two expert witnesses from the Catholic faith denied that they were a religion at the trial court. Herve Gagne, a priest at Laval University claimed that "what they teach is philosophically and theologically false, and morally evil. That is why they cannot even be tolerated in a society which is Christian and which intends to remain Christian".⁸² At the Supreme Court, the French Canadian judges, Rinfret C.J.C. and Taschereau J., appeared reluctant to concede that the Witnesses were a religion. They held that even if "counter to the proof" the Witnesses were classified as a religion, their distribution of their literature in the city that was 90 percent Catholic in faith would have fallen within the qualified clause of the *Freedom of Worship Act* as a practice inconsistent with the peace and safety of the city or province.⁸³ In contrast, Kerwin J. held that "even where they are directed particularly against the religion of most of the province's residents", the "peace and safety of the Province will not be endangered, if that majority do not use the attacks as a foundation for breaches of the peace."⁸⁴

This particular episode did not end with the split decision of the Supreme Court. On January 12 1954, Premier Maurice Duplessis proposed amendments to the *Freedom of Worship Act* which were obviously designed to counter the effects of the Supreme Court ruling. Bill 38 became law on January 22. The amendments read as follows:

- 2a. It does not constitute the free exercise or enjoyment of religious profession and worship

⁸² *Daviau v. The City of Quebec* [1951] Que. P.R. 140.

⁸³ *ibid.*, 318.

⁸⁴ *ibid.*, 328.

- a. to distribute, in public places or from door to door, books, magazines, tracts, pamphlets, papers, documents, photographs or other publications containing abusive or insulting attacks against the practice of a religious profession or the religious beliefs of any portion of the population of the Province or remarks of an abusive or insulting nature respecting the members or adherents of a religious profession; or
- b. to make, in speeches or lectures delivered in public places, or transmitted to the public by means of loud-speakers or other apparatus, abusive or insulting attacks against the practice of a religious profession or the religious beliefs of any portion of the population of the Province, or remarks of an abusive or insulting nature respecting the members or adherents of a religious profession; or
- c. to broadcast or reproduce such attacks or remarks by means of radio, television or the press.

2b. Every act mentioned in paragraph a, paragraph b or paragraph c of section 2a is an act endangering the public peace and good order in this Province.

2c. Every act contemplated in paragraph a, paragraph b or paragraph c of section 2a is prohibited in this province.⁸⁵

Violation of the amended *Act* carry stiff penalties in the form of fines up to a thousand dollars. Imprisonment from thirty days to six months was also provided. As well, search and seizure of offending material by police without warrants were provided for in the *Act*.⁸⁶

On January 23, 1954, the Witnesses appeared before Judge Choquette of the Supreme Court of Quebec in order to obtain "protection of this

⁸⁵S.Q. 1953-54. c.15.

⁸⁶The press across the country expressed great concern. The Winnipeg Free Press issued a pamphlet entitled *Constitutional Freedom in Peril : The Jehovah's Witnesses Case* (Pamphlet No. 40, 1954). The Supreme Court was criticized for its less definite stand on civil liberties. It also censured Ottawa for ignoring the implication of the *Saumur Case*. Furthermore, it took up the campaign for the *Bill of Rights* in cooperation with the witnesses.

constitutional right".⁸⁷ The lawyers representing them asked for a declaration to the effect that the amendments to the *Act* were *ultra vires* the province. In essence, they argued that religious freedom was a fundamental right that belongs to all Canadians and therefore should not be limited by any one province. They made use of Rand and Estey J.J.'s reasoning in *Saumur v. City of Quebec* to prove that this fundamental right cannot be amended by the provincial legislature. Rand J's historical reasoning covered a lot of ground.

The Christian religion, its practices and profession, exhibiting in Europe and America an organic continuity, stands in the first rank of social, political and juristic importance. The Articles of Capitulation in 1760, the Treaty of Paris in 1763, and the Quebec Act 1774 [(Imp.), c. 83] all contain special provisions placing safeguards against restrictions upon its freedom, which were in fact liberations from the law in force at the time in England. The Quebec Act, by s.5, declared that His Majesty's subjects, "professing the religion of the Church of Rome of and in the said Province of Quebec, may have, hold, and enjoy, the free Exercise of the Religion of the Church of Rome, subject to the King's Supremacy."

And by s. 15 that "no Ordinance touching Religion ... shall in any Force or Effect, until the same shall have received his Majesty's Approbation". This latter provision, in modified form, was continued by s.2 of the Constitution Act of 1791 [c.31] : "Wherever any act or acts shall ... in any manner relate to or affect the enjoyment or exercise of any religious form or mode of worship" the proposed Act was to be laid before both houses of Parliament and the assent of the Sovereign could be given only if within 30 days thereafter no address from either House to withhold assent had been presented. The Union Act, 1840 (Imp.), c. 35, s. 42 contained a like provision. In each of the latter Acts existing laws were continued by ss.33 and 46 respectively. From 1760, therefore, to the present moment religious freedom has, in our legal system, been recognized as a principle of fundamental

⁸⁷Penton, *op.cit.*, 214.

character; and although we have nothing in the nature of an established church, that the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.

...
Finally, the Confederation Act of 1867 effected a distribution of legislative power for the "Peace, Order and Good government of Canada" between the Dominion and the Provinces. Section 6 of c. 118, 1854, remains unrepealed save by the effect upon it of that Act : and it would appear that its provisions for assent and reservation are incompatible with the provincial status.⁸⁸

The matter was heard by the Supreme Court but the matter was not adjudicated because there was no legal issue as no one was ever charged under the *Act*.⁸⁹

Notwithstanding the amendments to the *Freedom of Worship Act*, the courts had held in two successive cases that distribution of religious literature on streets is an integral part of the free exercise of religion. In *Rex v. Kite*⁹⁰ and *Rex v. Naish*⁹¹ decided in 1949 and 1950 respectively, it was clear that this fundamental right could not be abridged by either requiring a licence for the distribution of religious literature, or forbidding the religions to do so.

Under the Duplessis administration, the Witnesses continued to labour under difficulties. While they scored important judicial victories in the court, the pressure on them from the authorities did not cease. The case of *Chaput v. Romain*⁹² involved the important right of peaceful assembly for worship. The case arose out of the action of three provincial police officers who

⁸⁸ *ibid.*, 327, 328.

⁸⁹ *Saumur v. Flag. of Quebec* [1964] S.C.R. 262.

⁹⁰ (1949) 2 W.W.R. 195.

⁹¹ (1950) 1 W.W.R. 987.

⁹² (1955) S.C.R. 834.

disrupted a peaceful assembly of some forty Witnesses in a home. Not only did the police forcefully disperse the worshippers, they also seized their books and bibles and forced the visiting preacher out of town by transporting him against his will in a police car to the Pembroke ferry and across to Ontario. The police officers had no search warrants and they did not lay any charges on the Witnesses.

In the lower courts the police officers defended their action on the ground that they believed that Chaput was in possession of literature which contained seditious libel. They also pleaded that they acted in good faith and upon orders from superior officers.⁹³ The officers were acquitted in both the trial court and the Quebec Court of Appeal. S. 7 of the *Magistrate's Privilege Act, 1941*, protected the police officers who acted in good faith even when their action was "contrary to law".⁹⁴ The Supreme Court, however, unanimously reversed the decisions of the lower courts. They found that the officers had acted unlawfully, if not criminally, by violating the appellant's right to the free exercise of his religion.⁹⁵ The police officers were found to have misused their legislative authority to discriminate against the applicant and the other worshippers. Damages in the amount of \$2,000 was awarded against them. Taschereau J. made the now famous remark in affirming the equality of all religious groups,

In our country there is no state religion. All religions are on equal footing, and Catholics as well as Protestants, Jews and other adherents of various religious denominations, enjoy the most complete liberty of thought. The conscience of each is a personal matter and the concern of nobody else. It would be distressing to

⁹³ *ibid.*, 848-849

⁹⁴ *Revised Statutes of Quebec* (1941), c.18.

⁹⁵ Lock J. at 862; Cartwright and Fauteux J.J. at 865.

think that a majority might impose its religious views upon a minority, and it would also be a shocking error to believe that one serves his country or his religion by denying in one province, to a minority, the same rights which one rightly claims for oneself in another province.⁹⁶

Two other cases decided in the same year highlight the extent the Duplessis government was prepared to go to deny freedom of religion to the Witnesses. In the case of *Lamb v. Benoit*,⁹⁷ Louise Lamb was charged with distributing copies of *Awake* containing a reprint of "Quebec's Burning Hate" even though she was not in possession of the pamphlet at the time of the arrest. She was imprisoned for two days though she was not charged for any offence. At the Verdun jail in Quebec, she was denied legal counsel. On the third day of her arrest, Benoit, the officer who arrested her, offered to release her on the condition that she signed documents releasing the police from all liabilities. She was also threatened with formal charges if she chose not to cooperate. Upon her refusal to sign, she was released and promptly charged with sedition. The charge did not stick and Lamb was duly acquitted at a preliminary hearing.

Lamb commenced civil action against Benoit for damages for false arrest and imprisonment as well as malicious persecution. The Supreme Court of Quebec and the Quebec Bench dismissed her action on technical grounds that the action had not been brought within the six months period required by the *Provincial Police Act* and the *Magistrate's Privilege Act*.

On appeal to the Supreme Court of Canada, the majority of the judges allowed the appeal on the ground that the police officers' action had been

⁹⁶ *ibid.*, 840. No doubt the judge was thinking of the majority Catholic in Quebec who becomes the minority Catholic in other provinces. The judge also remarked that the three officers' conduct was "highly reprehensible" and that "obedience to the order of a superior is not always an excuse".

⁹⁷(1959) S.C.R. 321.

unlawful and therefore could not be excused by either the provisions of the *Provincial Police Act* or the *Magistrate's Privilege Act*.⁹⁸ Rand J. ruled that "an honest mind, intent on enforcing the law, and belief in facts justifying arrest" were essential to any act of an officer done "in his official capacity".⁹⁹ Against Benoit the court awarded damages to Lamb in the sum of \$2,500 plus cost, but not before Rand J. gave him a dressing down.

The arrest and prosecution, as the Court of Queen's Bench found, were quite without justification or excuse and the detention of the appellant over the weekend was carried out in a manner and in conditions little short of disgraceful.¹⁰⁰

The Roncarelli Affair

No doubt the case of *Roncarelli v Duplessis*¹⁰¹ decided in the same year captured the attention of press and people alike. After all, Maurice Duplessis was the Premier and Attorney General of Quebec, and he was personally sued for the sum of \$118,741 as damages alleged to have been sustained as a result of the cancellation of a licence or permit for the sale of alcoholic liquors held by the appellant.

In his defence, Duplessis submitted that the liquor licence was a privilege held at the pleasure of the Quebec Liquor Commission. As a

⁹⁸ Kerwin C.J. (who succeeded Rinfret C.J. upon his retirement), Rand, Cartwright, Judson, Lockes and Maitland, J.J.

⁹⁹ *ibid.*, 343.

¹⁰⁰ *ibid.*

¹⁰¹ (1959) S.C.R. 121. See Michel Sarra-Bournet, *L'Affaire Roncarelli : Duplessis contre les Temoins de Jehovah*.

privilege, it could be revoked at the Commission's discretion. He categorically denied any personal intent in the matter since he had acted only in his official capacity in ordering the cancellation. In any case, he pleaded that the suit should be dismissed because he had not received proper notice of the action as required by art. 88 of the *Code of Civil Procedure*.¹⁰²

Judge McKinnon of the Quebec Superior Court awarded \$8,123.53 to Roncarelli on the grounds that the cancellation of the licence was arbitrary and that Duplessis had no legal authority to direct the Commission to take such action.¹⁰³ Duplessis appealed the decision while Roncarelli cross-appealed for an increase in the amount of damages. The cross-appeal was dismissed while the appeal was allowed. Four of the five Queen's Bench judges rejected any cause and effect relationship between Duplessis' instruction to Mr. Archambault, the Manager of the Commission, and the cancellation of the licence. The court was of the view that Mr. Archambault had already decided to exercise his discretion in cancelling the licence.¹⁰⁴ Casey and Martineau J.J. ruled that the Commission could properly cancel the licence since Roncarelli was supporting the propaganda efforts of the Jehovah's Witnesses.¹⁰⁵

¹⁰² The section reads,

No public officer or other person fulfilling any public function or duty can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any verdict or judgement be rendered against him, unless notice of such action has been given him at least one month before the issue of the writ of summons.

Such notice must be in writing : it must state the grounds of action, and the name of the plaintiff's attorney or agent, and indicate his offence, and must be served upon him personally or at his domicile.

¹⁰³ *ibid.*, 148-149.

¹⁰⁴ *ibid.*, 149-150

¹⁰⁵ *ibid.*, 150.

On appeal, the Supreme Court held that the Premier in ordering the cancellation of the liquor licence had acted without any legal authority whatsoever. By reason of the acts in excess of his legal authority, the premier was held liable under art. 1053 of the *Civil Code* for damages sustained by the appellant. Damages was fixed at \$33,123.53. Moreover, it was held that the respondent was not entitled to avail himself of the exceptional provision of art. 88 of the *Code of Civil Procedure* since the act complained of was not "done by him in the exercise of his functions" but was an act done by him when he had gone outside his function to perform it, and he was bound to know it.

Justice Rand summed up the majority's concern about such arbitrary use of power.

That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, than an administration according to law is to be by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.¹⁰⁶

It is worthy of note that two of the dissenting judges based their decision to disallow the appeal on a technicality that the premier had not received proper notice of the action before it was instituted.¹⁰⁷ Justice Cartwright disallowed the appeal on the ruling that Duplessis and Archambault, the Commission's manager, believed their action was in the interests of the province. Besides, he ruled that the action of ordering the cancellation was purely an administrative action and therefore could not be an actionable

¹⁰⁶ *ibid.*, 142.

¹⁰⁷ Tashereau and Fauteux J.J.

wrong.

The dissenting judgements are particularly curious since the evidence was undisputed before the court that the appellant's licence had been cancelled and the stock of liquor seized because he was an adherent of a religious sect or group known as the Witnesses of Jehovah. As Abbott J. said in his judgement,

It soon became clear from statements made by the respondent to the press and confirmed by him at the trial as having been made by him, that the cancellation of the licence had been made because of the appellant's association with the sect summoned before the Recorders' Court on charges of contravening certain city by-laws respecting the distribution of printed material.¹⁰⁸

Indeed the vindictiveness of Premier Duplessis was fully recognized by Justice Rand.

To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred. There was here not only the revocation of the existing permit but a declaration of a future, definitive disqualification of the appellant to obtain one : it was to be "forever".¹⁰⁹

He remarked further,

The act of the respondent [Duplessis] through the instrumentality of the [Liquor] Commission brought about a breach of an implied public statutory duty toward the appellant; it was a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a

¹⁰⁸ *ibid.*, 183. cf. *The Montreal Gazette*, December 5, 1946 : Turning to Roncarelli's case, Mr. Duplessis stated that : A certain Mr. Roncarelli has supplied bail for hundreds of Witnesses of Jehovah. The sympathy which this man has shown for the Witnesses in such evident, repeated and audacious manner, is a provocation to public order, to the administration of justice and is definitely contrary to the aims of justice. He does not act, in this case, as a person posting bail for another person, but as the mass supplier of bails, whose great number by itself is most reprehensible.

¹⁰⁹ *ibid.*, 141.

restaurant keeper within the Province.¹¹⁰

Sometime later, Frank Scott, who acted on behalf of Roncarelli and who was professor of law at McGill University at the time, commented in his essay, "Duplessis versus Jehovah",

What Roncarelli really did was not to promote disorder, but to check Mr. Duplessis' mass persecution of the Witnesses. Because while the laying of a charge -- in this case of peddling literature without a license -- is not necessarily persecution, it becomes so when we learn that the number arrested reaches many hundreds, and particularly when Mr. Duplessis tries to deny the accused the normal right of every citizen to bail. At the present moment, under a pretence of legal process, and in Mr. Roncarelli's case without even a pretence, a small religious sect is being persecuted and indeed martyred in many parts of Quebec.¹¹¹

The issue indeed rose above religion and party lines as newspapers joined in a common protest against the arbitrary action of the first minister of Quebec. It was the cumulative effect of the high-handedness of Duplessis that drew the most fire from the Press. The *Ottawa Citizen*, for example, traced the series of cases from *Boucher* to *Saumur* and editorialized that "Mr. Duplessis' law for discouraging opinion of which he disapproves have taken quite a battering".¹¹² The *Toronto Daily Star* satirized : "Premier Duplessis of Quebec said in effect : 'I am the law'. The Supreme Court of Canada ruled otherwise".¹¹³

¹¹⁰ *ibid.*

¹¹¹ Frank R. Scott, *Essays on the Constitution*, 195.

¹¹² *Ottawa Citizen*, January 28, 1959.

¹¹³ *The Toronto Daily Star*, January 28, 1959.

Jehovah's Witnesses and Education

On the issue of public education, the Jehovah's Witnesses also found themselves in much trouble in their relation to the state. Part of their teachings declare that the Ten Commandments are to be taken literally so that idolatry in any form is forbidden. According to their interpretation, performing patriotic rituals such as singing the national anthem, saluting the flag or making a pledge of allegiance are idolatrous in nature. During the war years, many of the children of the Witnesses refused to participate in the school rituals of patriotism. The price they had to pay in their determination to be faithful to their belief was often expulsion from schools. As a result, the Jehovah's Witnesses brought the issue to court. Two of the more important of the cases will now be analyzed.

The first case was *Donald v. Hamilton Board of Education*.¹¹⁴

Donald was the father of two infant appellants who were attending a public school in the City of Hamilton. One day they were sent home with a letter from the principal addressed to the father. In it the reasons for sending them home were that they refused to take part in the opening exercises of the school. They had also refused, on religious principles, to sing "God save the King", to repeat the pledge of allegiance and to salute the flag. The letter was dated September 18, 1940.

Two years later, after having taken private tuition and having passed the high school entrance, the older boy was expelled for "not joining in the singing of the National Anthem or saluting the flag at the morning exercise". In both instances the Board authorized the expulsion and accepted full responsibility for the action taken.

¹¹⁴[1945] O.R. 518. Ontario Court of Appeal.

The appellant did not deny the facts. In defence they claimed that the acts in which they refused to participate were both contrary to and forbidden by Scriptures. They therefore argued that on religious grounds they ought to be exempted from such acts. The Board of Education, on the other hand, argued that the regulations empowered school boards or teachers of pupils in public schools to require pupils to perform the acts in question.

At the trial, the trial judge agreed with the School Board and ruled that "not only that power is vested in principals and teachers to require pupils to join in the salute to the flag and in the singing of the National Anthem, but that there is an imperative duty on them to exercise such powers".¹¹⁵

On appeal the court referred to the *Public School Act*¹¹⁶ and particularly s. 7(1) which provides that "No pupil in a public school shall be required to read or study in or from any religious book, or to join in any exercise of devotion or religion, objected to by his parent or guardian". Reg. 13 also provided that "no pupil shall be required to take part in any religious exercises objected to by his parent or guardian". This provision was also found in the *High School Act*, s. 12.¹¹⁷

Gillander J.A. with Roach and Henderson J.J.A. concurring, allowed the appeal saying that "the regulations relating to both public and high school specifically contemplate that a pupil who objects to joining in religious exercise may be permitted to retire or to remain, provided he maintains decorous conduct during the exercises".¹¹⁸ He disagreed with the School

¹¹⁵ *ibid.*, 523.

¹¹⁶ R.S.O. 1937, c.357.

¹¹⁷ R.S.O. 1937, c.360.

¹¹⁸ *ibid.*, 530.

Board that exempting them would be viewed as conduct injurious to the moral tone of the school or class.

Of greater interest to us is the way the court dealt with the question whether the acts or exercises were exercises of devotion or religion. It was the Jehovah's contention that they were religious or devotional in nature, and therefore obnoxiously inconsistent with their faith. The School Board, on the other hand, prescribed the flag salute, in good faith. The sole reason was not religious but civic - to inculcate respect for the flag and loyalty to the nation. Gillander J.A. commented,

If I were permitted to be guided by my personal view, I would find it difficult to understand how any well disposed person could offer objection to joining in salute on religious or other grounds. To me, a command to join in the flag salute or the singing of the National Anthem would be a command not to join in any enforced religious exercise but, viewed in proper perspective, to join in an act of respect for a contrary principle, that is, to pay respect to a nation and country which stands for religious freedom, and the principle that people may worship as they please, or not at all.¹¹⁹

However, the judge did not permit himself to be guided by his personal views. Instead he allowed himself to be guided by two American cases. In one, Justice Jackson focused on the meaning of symbols in various contexts.

Symbolism is a primitive but effective way of communicating ideas. The use of an emblem of flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followers to a flag or banner, a colour or design. The State announces rank, function, and authority through crown and maces, uniform and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of state often convey political ideas just as religious symbols come to convey theological ones. Associated with these symbols are appropriate

¹¹⁹ *ibid.*, 528-529.

gestures of acceptance or respect, a bowed or bared head, or bended knee. A person gets from a symbol the meaning he puts in it, and what is one man's comfort and inspiration is another's jest and scorn.¹²⁰

In the other earlier case of *New York v. Sandstrom* (1939) Lederman J. was quoted to have said,

There are many acts which are not acts of worship and which for most men have no religious significance and are entirely unrelated to the practice of any religious principle or tenet but which may involve a violation of an obligation which other men may think is imposed upon them by divine command or religious authority. To me a homely illustration, partaking of food is ordinarily in no sense 'any approach to a religious observance'. It is purely mundane, with no religious significance, and yet ordinances establishing fast days or prohibiting the use of certain kinds of food are a part of the religion of many people.¹²¹

The court took notice of the fact that the statute in question, which absolved the pupils from joining in the exercise of devotion or religion to which the parents objected, did not define or specify what such exercises were to include or exclude. It would have made a difference if the statute had done so. Since it did not do so the court held that "For the court to take to itself the right to say that the exercises here in question had no religious or devotional

¹²⁰ *West Virginia State Board of Education v. Barnette* (1943), 319 US 624 at 632-633.

In this case the Board of Education adopted a policy to the effect that all teachers and pupils shall be required to participate in the salute honouring the nation represented by the flag. Refusal to salute the flag was to be regarded as an act of insubordination and expulsion was a necessary penalty. As members of the Jehovah's Witnesses, Barnette and his relation's children were taught to decline the act and was found guilty of insubordination and accordingly expelled from school. The court ruled in favour of the Jehovah's Witnesses. Justice Jackson warned that "[Those] who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard". The Judge then concluded : "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein". *ibid.*, 141.

¹²¹ 279 N.Y. 523 at 535.

significance might well be for the court to deny that very religious freedom which the statute is intended to provide."¹²²

Thus the Appeal Court declared that the Jehovah's Witnesses might consider such exercises religious if they so chose and awarded \$378 damages to the appellant Donald for expenses incurred in paying for private tuition for the children. The Supreme Court of Canada refused to hear the appeal from the Hamilton Board of Education and so allowed the decision to stand. It was a judgement that gave the Jehovah's Witnesses some constitutional protection against the school authorities in relation to mandatory participation in patriotic exercises. Penton thought that "alone, the Donald decision did not serve as a strong judicial precedent, but taken along with later decisions of the Supreme Court of Canada ... it probably makes compulsory flag salutes legally unenforceable under Canadian law".¹²³

What is significant is the court's adoption of the opinions of American cases while stating that "although various cases in the United States dealing with questions arising out of the flag salute are not binding here, and are not concerned with the legislation here being considered..."¹²⁴ As a matter of fact the case cited by Gillander J.A. in support of his decision was noteworthy in that it reversed an earlier decision.¹²⁵ Tresolini remarked that "seldom has

¹²² *Donald v. Hamilton Board of Education* [1945], O.R. 518 at 530.

¹²³ Penton, *op.cit.*, 353.

¹²⁴ [1945] O.R. 518 at 529.

¹²⁵ It is of interest to note that in *Minersville School District v. Gobitis* 310 US. 586 (1940) decided by the U.S. Supreme Court three years earlier on almost similar facts to *West Virginia Board of Education v. Barnette* the court by a majority of eight judges ruled in favour of the School Board. Justice Frankfurter, on behalf of the court, found that the main issue was whether the local school boards and the state legislatures may determine the appropriate means to develop certain common, basic and proper attitudes in school children vis-a-vis the state. The issue involved a balance of interest, that of the state and that of the individual. The task of the court was to "reconcile two rights in order to prevent either from destroying the other". (*ibid.*, 593)

the Supreme Court so completely reversed itself in such a short time"¹²⁶ Two of the judges in the latter case were part of the majority in the earlier case and felt obliged to explain why they changed their minds within such a short interval of time. They said,

In deciding against the individual, the court viewed the purpose of flag saluting to be an attempt to develop "a common feeling for a common country". In short, it was the court's opinion that national unity was "an interest inferior to none in the hierarchy of legal values". The judge stressed the relationship between symbolism and national unity, the latter being "the basis for national security". He maintained that "we live by symbols" and that the flag is a symbol of our national unity, transcending all internal differences, however large, within the frame work of the constitution".

Justice Frankfurter concluded on behalf of the majority, with Justice Johnson dissenting, that the means used to achieve this goal of national unity through compulsory flag-saluting in school was appropriate and that the court should always exercise judicial restraint and not interfere with the existing "education policy".

He held that:

The wisdom of training children in patriotic impulses by those compulsions which necessarily pervade so much of the educational process is not for our independent judgement ... the courtroom is not the arena for debating the issues of educational policy. It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncrasies among a people so diversified in racial origins and religious allegiances. So to hold in effect makes us the school board for the country. The authority has not been given to this court, nor should we assume it. (*ibid.*, 598)

And clearly to avoid misunderstanding, Justice Frankfurter added the following proviso:

The preciousness of the family relation, the authority and independence which give dignity to the parenthood, indeed the enjoyment of all freedom, presuppose the kind of ordered society which is summarized by our flag. A society which is dedicated to the preservation of these ultimate values of civilization may in self-protection utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser indifferences and difficulties. That is to say that the process may be utilized *so long as men's right to believe as they please, to win others to their way of belief, and their right to assemble in their chosen places of worship for the devotional ceremonies of their faith, are all fully respected.* (*ibid.*, 600. Emphasis mine).

¹²⁶Rocco J. Tresolini, *These Liberties*, 202.

Reluctance to make the Federal Constitution a rigid bar against state regulations of conduct thought inimical to the public welfare was the controlling influence which moved us to consent to the *Gobitis* decision. Long reflection convinced us that although the principle is sound, its application in the particular case was wrong. We believe that the statute before us fails to accord to the appellees full scope to the freedom of religion secured by the First and Fourth Amendments.¹²⁷

The shift in the *Barnette* case is from one where as long as the regulation is reasonable and the goals are legitimate the court would not interfere, to one where the court interfered because of a compelling interest in

¹²⁷ Justice Frankfurter, who stood absolutely firm in the face of desertion by his legal brethren, took a dim view of the shift. His critique included :

One's conception of the constitution cannot be severed from one's conception of a judge's function in applying it. The court has no reason for existence if it merely reflects the pressures of the day. Our system is built on the faith that men set apart for this special function, freed from the influences of immediacy and from the reflections of worldly ambition, will become able to take a view of longer range than the period of responsibility entrusted to congress and legislatures. We are dealing with matters as to which legislators or voters have conflicting views. Are we as judges to impose our strong convictions on where wisdom lies? That which three years ago have seemed to five successive courts to lie within permissible areas of legislation is now outlawed by the deciding shift of opinion of two Justices. What reason is there to believe that they or their successors may not have another view a few years hence? Is that which was deemed to be of so fundamental a nature as to be written into the Constitution to endure for all times to be the sport of shifting winds of doctrine?

It may be added that the radical shift within three years may have had much to do with the social condition of the time. The *Gobitis Case* (1940) was surrounded by the atmosphere highly charged with near fanatical patriotism. It was heard during the height of Nazi triumphalism. The Germans were taking Europe by storm and the army of the Third Reich was sweeping through Netherlands, Belgium and Luxembourg with out meeting much resistance. When the decision was handed down on June 2, 1940, the British army had evacuated Dunkirk. France was already occupied and Norway was invaded. England was expecting the German army to cross the channel at any moment. The situation created much anxiety for the allies. America was caught in the wave of fanatical patriotism in her reaction to the war. That the *Gobitis* decision in favour of the flag did create a division among the Americans was unavoidable. At stake was the balance between religious freedom and national security. On the question of religious freedom, the decision was seriously criticized. [See David Manwaring, *Render Unto Caesar : The Flag Salute Controversy* (Chicago : University of Chicago Press, 1962)]. Yet at the same time, many of the members of the public in the Minersville district projected their fear of the German invasion into the *Gobitis* family. Indeed the Jehovah's Witness were attacked by their fellow Americans in the name of patriotism. [See Rocco J. Tresolini, *These Liberties*, 192].

preserving religious freedom. By 1943 it was no longer a question of national unity (arising from the threat to national security during the war) versus religious freedom, but freedom of religion versus coercion of unity through regulations at the expense of freedom of religion. Justice Frankfurter challenged the majority's view that there was regulatory coercion in the school exercises by defining the nature of religious freedom as protected by the American Constitution. He reasoned,

The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom of conformity to religious dogma, not freedom from conformity to law because of religious dogma. Religious loyalty may be exercised without hindrance from the state, not the state may not exercise that except by leave of religious loyalties if within the domain of temporal power. Otherwise each individual could set up his own censor against obedience to laws conscientiously deemed for the public good by those whose business it is to make laws ... the lawmaking authority is not circumscribed by the variety of religious beliefs, otherwise the constitutional guaranty would be not a protection of the free exercise of religion but a denial of the exercise of legislation.... The essence of the religious freedom guaranteed by our constitution is therefore this : no religion shall receive the state's support or incur its hostility. Religion is outside the sphere of political government. This does not mean that all matters on which religious organizations or beliefs may pronounce are outside the sphere of government. Were this so, instead of the separation of church and state, there would be the subordination of the state on any matter deemed within the sovereignty of the religious conscience. Much that is the concern of temporal authority affects the spiritual interests of men. But it is not enough to strike down a non-discriminatory law that it may hurt or offered some dissenting view. It would be too easy to cite humorous prohibitions and injunctions to which laws run counter if the variant interpretations of the Bible were made the tests of the obedience to law. The validity of secular laws cannot be measured by their own conformity to religious doctrines. It is only in a theocratic state that ecclesiastical

doctrines measure legal right or wrong.¹²⁸

Justice Frankfurter's reasoning highlights the constant need to balance the interests of the state and the interests of the citizens whose concerns are determined by their religious conscience. It implies the need to define religion so that "the domain of temporal power" is not invaded. But the precise problem is whether education is within temporal domain or spiritual domain. It appears from the *British North America Act* as well as the *Charter of Rights and Freedoms* that it is a religious concern as well.¹²⁹

In 1957 the Court of Appeal had to deal with another similar conflict. Unlike the *Donald's* case, however, *Chabot v. School Commissioners of Lamorandière*¹³⁰ was not religious (Jehovah's Witnesses) against secular (public school), but religious (Jehovah's Witnesses) against religious (Roman Catholic schools). The issue was whether in a situation where only Catholic education was available, the Catholic school can be legally compelled to educate non-Catholic pupils, without requiring them to participate in Catholic religious classes and exercises. Like the *Donald's* case, the question arose after children of Jehovah's Witnesses were expelled from school for refusing to participate in religious classes and exercises on religious grounds.

The Court of Appeal recognized the natural right of the parents to determine the education of the children. This right is anterior to and cannot

¹²⁸ 319 U.S. 624 (1943) at 653-654.

¹²⁹ cf. s.93 of the *British North America Act, 1867*. Of course there is much tortuous history behind the right and privilege protected by s.93. The Supreme Court has confirmed the Catholic right in the matter of Education in *Reference re. An Act to Amend the Education Act* (On.) (June 25, 1987, S.C.C.). The court ruled that since both rights and privileges protected by s.93 (1) of the *Constitution Act 1867* (i.e. *British North America Act, 1867*) and legislation enacted pursuant to the province's plenary power under the opening words of s.93 in relation to denominational, separate or dissenting schools are immune from Charter review, s.2(a) has no application to legislation providing full funding to Roman Catholic separate high schools.

¹³⁰ (1957) Q.B. 707; 12 D.L.R. (2d) 796 (CA).

be taken away by positive law. Speaking of the natural rights Casey J. said,

...they find their existence in the very nature of man, they cannot be taken away and they must prevail should they conflict with the provisions of positive law. Consequently if the regulations under which, rightly or wrongly, this school is being repeated made it mandatory that non Catholic pupils submit to religious instructions and practices enacted by the Catholic Committee, then these regulations are *ultra vires* the Committee, and invalid.¹³¹

With the two decisions in their favour, the Jehovah's Witnesses were assured of their right to an education without religious indoctrination outside their own tradition. They could not be compelled to participate in exercises and activities that they considered religiously antithetical to their faith regardless of the objective interest of the regulations.¹³²

Freedom of Religion and Blood Transfusion

One of the distinctive features of the Jehovah's Witnesses' faith is their belief about blood. They accept literally the biblical teaching against the eating of blood in any form. When blood transfusion became a widespread medical practice in 1937¹³³, the Jehovah's Witnesses began to resist blood transfusion for themselves and their children on the ground that it is a

¹³¹ *ibid.*, 802.

¹³² Justice Carey elaborated on the close affinity between religion and education. He remarked, "Thus if one considers the natural law, first of all our laws, it is necessary to conclude that children who attend school are not obliged to follow a religious teaching to which their father is opposed". *ibid.*,
cf. *Regina v. Wiebe* (1978) 3 W.W.R. 36.

¹³³ The first large scale blood bank was established at Cook County Hospital in Chicago in 1937. See Penton, *op.cit.*, 230.

violation of the apostolic teaching to not abstain from blood.¹³⁴

Because of their uncompromising stand, they found themselves in conflict with the medical profession and the law. Penton documented a number of cases that generated a great deal of negative press publicity.¹³⁵ Many of the cases involved minors who, when judged in need of blood transfusion, were sometimes removed from the custody of the parents and given blood transfusion against the wishes of their parents. In one province, the *Child Welfare Act* was changed because a Jehovah's Witness died of an accident gunshot wound. In the mind of the coroner's jury, the death could have been avoided had the parents consented to blood transfusion.¹³⁶ Consequent to his death the jury recommended an amendment to the *Manitoba Child Welfare Act* which would then empower the medical doctors to give blood transfusion to minors without parental consent.¹³⁷

In *Wolfe v. Robinson*,¹³⁸ a member of the Jehovah's Witnesses gave birth to a child with haemolytic disease. Doctors ordered the child to be given blood transfusion. The parents, true to their religious conviction, refused to give consent. The child was taken away from the custody of the parents and made a ward of the Children Aid Society. There he was given blood

¹³⁴ Acts 15:20. Also Psalm 16:4.

¹³⁵ Penton, *op.cit.*, ch.11.

¹³⁶ Donald Holland accidentally shot himself on November 4, 1958 and died on November 14. Although great pressure was put on his parents to permit blood transfusion, the Attorney General of Manitoba, Stirling Lyon, had indicated that the doctors were legally bound not to give him the transfusion without the consent of his parents.

¹³⁷ S. M. (1959), c.9. With the amendment, a child may be declared "neglected" so that he may be removed from the custody of the parents and be given medical treatment including blood transfusion without parental consent. It is interesting to note that parental care in accordance with religious beliefs that conflict with the general consensus of society is translated "neglected".

¹³⁸ [1962] O.R. 132; 31 D.L.R. (2d) 233.

transfusion but died shortly thereafter. The coroner, on the evidence of the attending physician, ruled that he died because the transfusion had not been administered earlier. On appeal, the court confirmed the coroner's verdict. Both the Ontario Supreme Court and the Supreme Court of Canada refused to review the case. Penton remarked that "in effect, Canadian courts proved unwilling to examine the blood transfusion case".¹³⁹

The Ontario Supreme Court did hear and rule in *Forsythe v. Kingston's Children's Aid Society*.¹⁴⁰ Gregory Russell was born with haemolytic disease. The doctor called the boy's father for a discussion at the hospital. When Mr. Russell arrived at the meeting he found himself at an impromptu court hearing before Judge James Gavin. Although there was no strong indication that Gregory the infant needed immediate blood transfusion, he was placed under the guardianship of the Children's Aid Society. Transfusion of blood was administered to him without the parent's consent having been asked.

Before Justice Hughes of the Ontario Supreme Court, the Society's argument that the child was deemed 'neglected' under the circumstances did not move the court. The court quashed the temporary wardship on the procedural grounds that there was no proper notice for the hearing and that the hearing itself was a haphazard affair that did not meet the test of a fair judicial proceeding. It was a small victory for the Jehovah's Witnesses in that the forceful seizure of the children without parental consent was exposed for

¹³⁹ Penton, *op.cit.*, 242

A similar case where guardianship was granted on a Sunday to the Children's Aid Society was resolved by the Ontario Supreme Court on the petition of the child's mother. Mr. Justice Samuel Hughes' ruling was made on the narrow ground that the order of wardship was made on a Sunday!

¹⁴⁰ [1963] O.R. 49; 35 D.L.R. (2d) 690.

what it is.

These medical situations raise some fundamental questions of the conflict of rights. On the one hand there is the parent's right to believe and on the other hand there is the child's right to life. Hence the intervention of the authorities is almost always justified by the claim to protect the child's right. The question of enforced medical treatment also touches on the wider issue of compelling interests on the part of the state which limit the religious freedom of the individual. Because the higher courts have not dealt with the issue in depth, the question remains an open one.¹⁴¹

Conscientious Objection and Alternative Service

The war years also proved to be difficult years for the Jehovah's Witnesses as well as for some other religious groups.¹⁴² The fall of France to the Nazis during World War II created a very pressing situation in Europe. At home in Canada, tremendous pressure was exerted on the Liberal Government to enact a law that will give the government the power to call every man in Canada for the defence of the nation. Hence the *National Resources Mobilization Act* 1940 was passed.¹⁴³ It gave the government

¹⁴¹ See *infra* for comments under the *Bill of Rights* (Ch. IV) and the *Canadian Charter of Rights and Freedoms* (Ch. V).

¹⁴² For an account of the Mennonites, Hutterites and Doukhobors, see Janzen, *op.cit.*, s.III, 360ff.

¹⁴³ S. C. (1940) c.13.
In part it reads,

An Act to confer certain powers upon the Governor-in-Council for the mobilization of national resources in the present was...

1. ...
2. Subject to the provisions of s.3 hereof, the Governor-in-General may do and authorize such acts and things, and make from time to time such orders

sweeping powers to mobilize Canadians for the defense of the nation.

In the *Act* itself there was no mention of exemption from military service. However, religious groups such as the Mennonites, the Hutterites and Doukhobors were in touch with the Government lobbying for exemptions.¹⁴⁴ In fact Prime Minister MacKenzie King, in the course of introducing the Bill assured "the House and the country that the government has no desire and no intention to disturb the existing rights to exemption from bearing arms which are enjoyed by members of certain religious groups in Canada We are determined to respect their rights to the full"¹⁴⁵.

Pursuant to the *Act*, and to the assurance given by the Prime Minister, the *National War Services Regulations* came into force on August 27, 1940.¹⁴⁶ S. 17 granted exemption to the Mennonites and the Doukhobors pursuant to the arrangements made between the Canadian government and the religious groups at the time of their immigration. On proof of their membership in the religious bodies they "shall be entitled ... to the infinite postponement of their military training."

S. 18 provides for conscientious objectors in government. Subs. (1) reads :

Any man who, from the doctrines of his religion, is averse to bearing arms or undertaking combatant service, may apply for an

and regulations, requiring persons to place themselves, their services and their property at the disposal of His Majesty in the right of Canada, as may be deemed necessary or expedient for securing the public safety, the defence of Canada, the maintenance of public order, or the efficient prosecution of the War, or for maintaining supplies or services essential to the life of the community.

¹⁴⁴ William Janzen, *The Limits of Liberty in Canada : The Experience of the Mennonites, Hutterites, and Doukhobors*, 561 footnote 19.

¹⁴⁵ *House of Commons Debates*, June 18, 1940. 904.

¹⁴⁶ The *Canada Gazette*, Government of Canada, Vol. 74 No.23, August 27, 1940. 7.

order deferring or postponing his military training indefinitely, provided that it is established that such man consciously objects to the bearing of arms or the undertaking of combatant service and is prohibited from the bearing of arms or undertaking combatant service by the tenets and articles of faith in effect of the first day of September 1939, of any organized religious denomination to which such man aforesaid, in good faith, belongs.

Ministers of organized religious denominations were, of course, exempted upon proof of their status.

When the applicant succeeds in getting the exemption or postponement of military training, s. 19(2) provides for a system of alternative service. It reads,

It shall be a condition of the postponement of military training of any person by or pursuant to the two next preceding sections, that such person is compellable to do non-combatant duty either with the Naval, Military or Air Force or with any civil authorities, or both.

As provided for in the *Regulations*, the Minister of National War Services could enter into agreement with any civil authorities for the implementation of the alternative service programme. Thus many work camps were organized all over the country. Many of the Mennonites, Hutterites and Seventh Day Adventists took advantage of the exemptions and were called up for alternative services.

The Jehovah's Witnesses, however, were not always able to take the same advantage. For one thing, between July 4, 1940 and October 14, 1943, the Witnesses as an organization was banned.¹⁴⁷ Although the Witnesses teach

¹⁴⁷ See Penton, *op.cit.*, ch. 7.

The *Defence of Canada Regulations (Consolidation, 1941)*. S.39c clearly spelled out the restrictions and burdens placed on members of the proscribed organization :

- 2) Every person who is an officer or member of an illegal organization, or professes to be, or who advocates or defends the acts, principles or policies of such illegal organization shall be guilty of an offence against this Regulation.
- 3) In any prosecution under the Regulation for the offence of being a member

that every member is a minister, and ministers are exempted from military service, it was obviously useless for any Jehovah's Witness to claim such a status when the organization was under a ban. According to Penton, many young pioneer evangelists were already arrested and punished for belonging to the organization and attempting to carry on the religious work.¹⁴⁸ He made reference to the files of the Watch Tower Society in Toronto containing records and newspaper clippings of more than thirty Witnesses sentenced to prison for refusing military or alternative service prior to 1943. He noted that the punishment given to the young evangelist-pioneers were particularly severe.

In October 1943, the ban against the Jehovah's Witnesses was lifted, and ironically the policy of the government against the Witnesses claim for exemption became more hardened thereafter. Since there was no distinction in the doctrine of the Witnesses between the laity and the clergy, and since the

of an illegal organization, if it proved that the person charged has-

- a) attended meetings of an illegal organization
- b) spoken publicly in advocacy of an illegal organization; or
- c) distributed literature of an illegal organization by circulation through the Post Office mails of Canada, or otherwise it shall be presumed, in the absence of proof to the contrary, that he is a member of such illegal organization.

- 4) a) All property, rights and interests in Canada belonging to any illegal organization shall be vested in and be subject to the control and management of the Custodian, as defined in the Regulations respecting Trading with the Enemy, 1939;
- b) Subject as hereinafter provided, and for the purposes of the control and management of such property, rights and interests by the Custodians the Regulations respecting Trading with the enemy, 1939, shall apply *mutatis mutandis* to the same extent as if such property, rights and interests belonged to an enemy within the meaning of the said Regulations;
- c) The property, rights and interests so vested in the subject to the control and management of the Custodian, or the proceeds thereof, shall on the termination of the present war be dealt with in such manner as the Governor in Council may direct.

¹⁴⁸ Penton, *op.cit.*, 164.

mobilization board refused to recognize any Witness as an ordained minister for exemption purposes, the conflict became even more accentuated after the ban.¹⁴⁹

In the Commons debate, the matter was raised by the Minister of Justice, St. Laurent. He spoke against any exemption for the Witnesses in no uncertain terms :

The second point [for which they had been banned] was the propaganda to the effect that one could be an ordained minister of Jehovah's Witnesses by making an individual compact with the Almighty, that by doing so one became an ordained minister not subject to mobilization regulations. This is something which I look upon as contrary to the policy which this state has to maintain in war time.¹⁵⁰

Obviously the biggest problem lies in the different understanding of ordination. Unlike the other denominational practices, the Witnesses considered themselves ministers without formal training and ordination. Furthermore they also came to the conclusion that voluntary civilian service, which was the solution for the other religious pacifist groups,¹⁵¹ was also unacceptable to them.

The matter came to a head when many of the Witnesses refused to be

¹⁴⁹ *National War Services Regulations, 1940*. S.6(c) provided that "Regular Clergymen or Ministers of religious denominations" are exempted.

¹⁵⁰ *House of Commons Debates, 1944, Vol. 3, 2917.*

¹⁵¹ See William Janzen, *op.cit.*, ch. 9. Even the Doukhobors, considered more extreme in relation to the Hutterites and the Mennonites, did consider the possibility of alternative service. One of their leaders, P.G. Makaroff, wrote in 1940 :

... it is just possible that our privilege may be in danger unless we do something to allay the criticism and ill feelings ... Those in authority would welcome some voluntary effort on the part of our people ... such a gesture would take the form of some construction work having nothing to do with war, or some project in the way of improving our National Parks perhaps... we should be giving some thought to some such effort ... (Quoted by Janzen, *op. cit.*, 490)

drafted. They were handed over to military authorities and were apparently brutally treated. According to the Hansard, some of the alleged brutalities were raised by opposition Members of Parliament. Apparently shock tactics were employed to break the will of the Witnesses. These included tortures in the form of beating with sticks behind the ears, hands and back, strangulation, bodily assaults, forced bread and water diet and ice-cold water shower.¹⁵²

In spite of the opposition demand for public hearing, the alleged brutalities were denied and kept from becoming a public issue. Generally, after a brief imprisonment for refusing the draft, most witnesses were quietly transferred to alternative-service camps. There they were put to work on the farm and were paid a fixed sum for the labour. However, they were required to pay a special assessment to the Red Cross Society. Upon their refusal they were rearrested, jailed and sent back to the farm. And the vicious circle continued.

It was through their protest in this regard that the matter came to the courts. Their objection to paying the assessment was threefold.¹⁵³ Firstly, they considered the Red Cross Society as indirectly involved in the war effort, therefore it was supporting the war effort. Secondly, they held that the special assessment was discriminatory because many of their members were *bona fide* farmers and ought not to be required to support the Red Cross Society. And thirdly, they believed that no one shall be subjected to alternative-service regulations simply because of his belief, if he was in no way liable to military services.

Thus in the case of *Leonard Ratz v. Gill* (unreported),¹⁵⁴ Judge J.N.

¹⁵² See Penton, *op.cit.*, 166. *Commons Debates* 1944 vol. 3, 2905ff.

¹⁵³ *ibid.*, 169-170.

¹⁵⁴ *ibid.*, 170 and footnotes 60-61 at 355.

Hanbidge of the District Court of Humboldt, Saskatchewan, was sympathetic. He ruled that a man should not be confined in an alternative service camps merely because he was a conscientious objector. Such an interpretation, he thought would mean that in place of having been passed to assist the war effort, the *Regulation* were merely a subterfuge for imprisonment of men on account of their conscientious belief or religious view. In any event, he noted that in the course of evidence it was mentioned that the Witnesses were picked out to be made an example. That was, of course, discriminatory since other conscientious objectors were not put on the same footing.

A series of cases on the question of the ministerial status of the Jehovah's Witnesses were brought before the courts between the years 1944 and 1946. In them the Witnesses claimed exemption under s. 6(c) of the *National War Services Regulations, 1940*, whereby certain persons should "be exempted from being called out". These persons included, as we have noted, "Regular Clergymen or Ministers of religious denominations". They were all tried during the time when the parent organization in Pennsylvania and its branch in New York were under the ban. At the time, the Witnesses were not incorporated or governed independently of the banned American societies. As well, the overseers and pioneers in Canada were appointed by these banned societies. It is also a significant and relevant fact in the adjudication process that no province had granted any of the witnesses the legal right to solemnize marriages under s. 92(12) of the *British North America Act, 1867*.

In 1944, the British Columbian Appeal Court declared that Jehovah's Witnesses were not "ministers" within the meaning of the *National War Services Regulations, 1940*. It followed the Scottish High Court in *Saltmarch*

v. *Adain* [1942].¹⁵⁵ Part of the rationale was that since the overseers and pioneers were appointed by banned organizations in the United States, they could not be recognized as *bona fide* ministers of religion. The following year, the Ontario Court decided in the same vein in *Greenlees v. Attorney General for Canada* [1945].¹⁵⁶ It was noted that the Jehovah's Witnesses in Canada were not incorporated or governed independently of the banned organizations, they could not be recognized as a denomination within the meaning of the *Regulations*. The matter was appealed in 1946 but the Ontario Court of Appeal refused to deal with the issue of ministerial status on the ground that the Jehovah's Witnesses were not a denomination within the meaning of the *Regulations*.¹⁵⁷ In the same year, a Saskatchewan judge ruled against the Witnesses after concluding that the word "regular" in the phrase "Regular Ministers of denominations" did not apply to the circuit overseers of the Watcher Tower Bible and Tract Society.¹⁵⁸

It is also of interest that in *Rex v. Jazewsky* (No.1), [1945]¹⁵⁹ the court denied that the leaders of the Witnesses were ministers of religion because none of the provinces had granted them any legal right to solemnize marriages. This is especially curious in light of *Re Bien and Cooke*, [1944]¹⁶⁰ in which a Saskatchewan Court of the King's Bench granted a writ of *habeas corpus* to the applicant on the ground that he was a minister of the

¹⁵⁵ *Rex v. Stewart*, [1944], 2 W.W.R. 86; [1944] 3 D.L.R. 331 at 338 affirming.

¹⁵⁶ [1945] 2 D.L.R. 641.

¹⁵⁷ [1946] 1 D.L.R. 550 affirming.

¹⁵⁸ *White v. Coverly* [1948] unreported. But see *White v. Regem* [1946] 2 W.W.R. 337.

¹⁵⁹ [1945] 1 W.W.R. 95; see also (No.2) [1945] 1 W.W.R. 107.

¹⁶⁰ 1 W.W.R. 237; [1944] 2 D.L.R. 187.

Church of Christ. The fact that he spent six days a week as a farmer and that the Church of Christ was less "organized" than the Jehovah's Witnesses did not make any difference. Neither did the fact that the Church of Christ was also not granted the legal right to solemnize marriages. No special educational requirements were necessary for the ministry. He simply had to satisfy his church's General Secretary that he believed in the New Testament and that he met the necessary moral requirements.

The case of the Church of Christ minister appears to follow English precedent in the World War I case of *Offord v. Hiscock*, [1917].¹⁶¹ There the Court of Appeals in England held that a part-time minister of a Strict Baptist Church who served six days a week as a solicitor's clerk could be exempted from military service because he preached regularly on Sundays. In giving judgement, Viscount Reading said :

I have come to the conclusion that there is an absence of any evidence from which the Justice could draw the conclusion that he had not brought himself within the exception to the statute enforcing military service. In my view, it is clear that he had determined to devote himself to the ministry.¹⁶²

Other precedents of a similar nature were also to be found in American and Australian cases. Thus in *Hull v. Stalter*, [1945]¹⁶³ the United States Court of Appeals (Seventh Circuit) discharged a Jehovah's Witness from selective service custody on the grounds that he had not been properly classified under the terms of the *Selective Service Training and Service Act* as a minister of religion.¹⁶⁴ In discharging the applicant the court noted that it

¹⁶¹ 86 L.J.K.B. 941.

¹⁶² *ibid.*, 943.

¹⁶³ 151 F. 2d 633.

¹⁶⁴ S.5(d) : "Regular or duly ordained ministers of religion ... shall be exempt from training and service (but not from registration) under this Act".

was irrelevant "whatever the draft board or a court, or anybody else for that matter, may think of them". "What was important, it continued, was the fact that the Witnesses had been recognized by the selective service system as a religious organization and were therefore "entitled to the same treatment as the members of any other religious organization ...".

The court clearly based its decision on the *Second Report of the Director of Selective Service to the President*.¹⁶⁵ On the definition of the term "regular minister of religion", the report stated :

The ordinary concept of "preaching and teaching" is that it must be oral and from the pulpit or platform. Such is not the test. Preaching and teaching have neither locational nor vocal limitations. The method of transmission of knowledge does not determine its value or affect its purpose or goal. One may preach or teach from the pulpit from the kerbstone, in the fields, or at the residential fronts. He may shout his message "from housetops" or write it "upon tablets of stone." He may give his "sermon on the mount," heal the eyes of the blind, write upon the sands while a Magdalene kneels, wash disciples' feet or die upon the cross.... He may walk the streets in daily converse with those about him, telling them of those ideals that are the foundation of his religious conviction, or he may transmit his message on the written or printed page, but he is none the less the minister of religion if such method had been adopted by him as the effective means of inculcating in the minds and hearts of men the principles of religion.... To be a "regular minister" of religion the translation of religious principles into the lives of his followers must be the dominating factor in his own life, and must have that continuity of purpose and action that renders other purposes and actions relatively unimportant....¹⁶⁶

In a Supreme Court case, the court affirmed the ministerial status of the Jehovah's Witnesses by recognizing his "ordained" status even though the

¹⁶⁵ *Selective Service in Wartime*.

¹⁶⁶ *ibid.* 239-40

Witnesses themselves did not practice "ordination" as such. Thus the court in *Dickinson v. United States*¹⁶⁷ declared that Jehovah's Witnesses who follow the ministry as their vocation, and give evidence of this by devoting the bulk of their time in the pursuit and preaching of their faith are exempted under the terms of the *Universal Military Training and Service Act*. In its own words the Supreme Court said :

We think Dickinson made out a case which meets the statutory criteria. He was ordained in accordance with the ritual of his sect and, according to the evidence here, he meets the vital test of regularly, as a vocation, teaching and preaching the principles of his sect and conducting public worship in the tradition of his religion. That the ordination, doctrine, or manner of preaching that his sect employs diverge from the orthodox and traditional is no concern of ours; of course the statute does not purport to impose a test of orthodoxy.

Why, then, was Dickson denied IV-D? It may be argued that his five hours a week as a radio repairman supplied a factual basis for the denial. We think not. The statutory definition of a "regular or duly ordained minister" does not preclude all secular employment. Many preachers, including those in the more traditional and orthodox sects, may not be blessed with congregations or parishes capable of paying them a living wage. A statutory ban on all secular work would mete out draft exemptions with an uneven hand, to the detriment of those who minister to the poor and thus need some secular work in order to survive. To hold that one who supports himself by five hours of secular work each week may thereby lose an exemption to which he is otherwise entitled, would be to achieve a result that Congress so wisely avoided.¹⁶⁸

In the unreported Australian case of *Grundy v. The King*,¹⁶⁹ the Crown argued that Frank Grundy, a Jehovah's Witnesses could not be a

¹⁶⁷ 346 U.S. 389.

¹⁶⁸ *ibid.*, 395-396.

¹⁶⁹ See Penton, *op.cit.*, 175.

minister of religion under the terms of the *Australian Defence Act, 1903-41*, because the Witnesses were not a *bona fide* religion. "Religion" as defined in the *Act* means an organized religion with a ministry. The Witnesses, it was contended, was only an organized society for putting out publications. Besides, they claimed to be opposed to religion as such. The Witnesses, on the other hand, argued that "religion" in the *Act* was to be understood in its popular sense, and within that sense, the Jehovah's Witnesses were a religion and Grundy was a minister of religion. The court ruled in favour of Grundy.

With all these Commonwealth and American precedents, it is surprising that with very few exceptions, the Canadian courts ruled against the Jehovah's Witnesses. After all, the terms excepting ministers of religions were similar in these countries, and the main thrusts of such regulations were also similar. As a matter of fact, the Witnesses attempted to appeal the *Greenlees* case to the Supreme Court of Canada but it refused to hear it on the ground that the court could not hear cases in which no monetary interest was involved.¹⁷⁰ There was an attempt to appeal to the Privy Council to which the government responded by repealing the *National War Services Regulations*. The matter was thus closed as by then the war had long ended.

But for the Witnesses the battle for religious freedom did not end there. Witnesses interned for refusing the draft on ground of religious conscience were still interned. The alternative service work camps in the national parks were still staffed by Jehovah's Witnesses and other religious groups. The comparison of the two-year period of 1944 and 1945 is quite revealing. During the period from April 1, 1944 through March 31, 1945, there were 595 camp workers. Out of the total, 226 were Jehovah's Witnesses, 206 Mennonites and 101 Hutterites. From April 1, 1945 through March 31, 1946,

¹⁷⁰[1946] S.C.R. 462.

the camp workers were reduced to 456. But the population of the Witnesses actually increased to 286 with both the Mennonites and the Hutterites reduced to 100 and 44 respectively.¹⁷¹

From the disproportionate number of cases decided by the courts on religious freedom involving the Jehovah's Witnesses, it is plain that the "Jehovah's Witnesses have played a unique role in Canadian history".¹⁷² In many ways they performed "a useful function in about any society as defenders of rights and liberties of the common citizens".¹⁷³ As most of the cases were in the context of Quebec society, it is interesting to read what Michel Sarra-Bournet concluded in his study of *L'affaire Roncarelli*:

Les Témoins décident d'engager une bataille judiciaire pour se libérer des accusations de sédition et de distribution sans permis qui pèsent sur des centaines d'entre eux. De plus, ils réclament des dommages et intérêts à des policiers pour arrestations illégales et abusives, à d'autres individus pour avoir usé de la force contre eux, et à Duplessis lui-même pour son geste arbitraire contre Roncarelli. Dans la plupart des cas, les tribunaux québécois ne donnent pas raison aux Témoins, et c'est la Cour suprême, où siègent une majorité d'anglophones protestants, qui leur rend justice. Ces jugements font jurisprudence et tiennent lieu de charte des droits jusqu'à l'adoption de la Déclaration des droits de 1960 et de la Charte canadienne des droits de 1982. Ces deux dispositions législatives ne diminuent guère l'importance de ces jugements car les textes adoptés par le Parlement fédéral n'offrent pas une protection complète aux minorités religieuses et laissent autant, sinon plus, de pouvoir à la Cour suprême.¹⁷⁴

¹⁷¹ See J.D.B. MacFarlane, "Operation of Alternative Service Work Camps in National Parks for the Period April 1st, 1944, to March 31st, 1945" and "for the Period April 1st, 1945 to March 31st, 1946". *Department of Northern Affairs and National Resources Papers* (Public Archives of Canada Reference R.G. 22 B, vol. 217 and 218).

¹⁷² Penton, *op.cit.*, 5.

¹⁷³ *Saturday Night*, June 8, 1946.

¹⁷⁴ Sarra-Bournet, *op.cit.*, 141.

Miscellaneous Cases

Apart from the Jehovah's Witnesses, several other religious groups also encountered some difficulties as their religious practices conflicted with the law. Among them, the Salvationists had the distinction of coming into conflict with the law in the 19th century. In the case of *City of Montreal v. Madden* (1884),¹⁷⁵ the Salvation Army officers were charged with disturbing the peace in a public place in the course of their religious activities which included playing music and public preaching. The charges were dropped because it was conceded by the Crown that the defendants had not acted willfully.

In a similar case, however, the plaintiff in *Le Cribbin v. The City of Toronto* (1891)¹⁷⁶ was convicted of an offence for carrying out his religious work as a salvationist officer. There the by-law of the City of Toronto provided in part that "no person shall on the Sabbath-day, in any public park, square, garden, or place for exhibition in the City of Toronto, public preach, lecture or declaim". The plaintiff's defence that the by-law was unconstitutional failed. Cartwright, in *Saumur's* case, commented :

I do not think an individual could have successfully argued that the by-law, although otherwise valid, did not apply to him because it was one of his belief and a teaching of the body to which he belonged that he must preach not only in churches, chapels or meeting houses or on private properties but also in parks and public places.¹⁷⁷

Analyzing the two conflicting decisions relating to the public display of

¹⁷⁵ 29 *Lower Canada Jurist*, 134.

¹⁷⁶ 21 O.R. 325.

¹⁷⁷ *ibid.*, 727.

religious belief, it is important to note the nature of the conflict. The conflict is between religious freedom which includes conduct motivated by religious beliefs and religiously motivated conduct that violates the law of the land. It raises the important question, to what extent should religiously motivated conduct be protected even when the law is violated? It is an important question for religious people because for many the freedom to believe includes the freedom to disseminate their beliefs publicly. Indeed, freedom to hold a belief without the freedom to translate that belief into action is freedom without substance. It is hollow freedom, at best. At the same time, freedom for religion must surely not be taken to mean freedom from the law. This issue is best expressed by Whyte and Lederman.

Traditionally we preserve the sanctity of these basic societal goals by permitting self-expression. We view expression as the paradigm incident of individuality. Traditionally we also recognize religious belief and religious expression as inviolate incidents of individuality. Furthermore we make no distinction between religious belief and religious conduct because we can perceive the hollowness of allowing religious belief without a corresponding ability to translate the mandates of that belief into action. Does it follow, then, that of all human activity, religious activity is most closely interwoven with the development of the individual personality and does it also follow that we excuse conduct, motivated by religious belief, which we would not otherwise excuse because that conduct is inextricably linked with the achievement of the basic goals in a modern liberal society?¹⁷⁸

On the educational front, several cases appear to have confirmed the government's prerogative to determine the educational needs of religious minorities. In a 1919 case of *Rex v. Hildebrand*,¹⁷⁹ a Mennonite was charged with violating the provisions for compulsory attendance by failing to

¹⁷⁸ *op.cit.*, 20-21.

¹⁷⁹ (1919) 3 W.W.R. 286.

send his daughter to public school or making other "satisfactory provisions" for her schooling. By way of defence he cited the Federal Government's letter dated July 25, 1873, under the instruction of the Honourable the Minister of Agriculture, stating the advantages offered to settlers and the immunities offered to Mennonites, which provided, *inter alia* :

10. The fullest privilege of exercising their religious principles is by law afforded to the Mennonites without any kind of molestation or restriction whatever, and the same privilege extends to the education of their children in schools.¹⁸⁰

The Manitoba Court of Appeal noted paragraph 10 in the letter which provided them the privilege of operating their own schools and paragraph 10 of the order-in-council, P.C. 957 (a), approved on August 13, 1873, which stated "that the Mennonites will have the fullest privilege of exercising their religious principles, and admitting their children in schools, as provided by law, without any kind of molestation or restriction whatever".¹⁸¹

The court then connected the letter to the Order-in-Council and ruled that the government's position set out in the letter of July 25, 1873 "must be taken as merged". The net result was that the promise in the letter and the Order-in-Council was of no effect because of Manitoba's constitutional authority to make laws in relation to public education. In part, the court stated its position as follows:

This province came into being on May 12, 1870, by virtue of the Manitoba Act, ch.3, 33 Vict., confirmed by the Imperial Act, ch.28, 34s. 35 Vict. By sec.22 of the Act it is provided that "In and for the Province, the said legislature may exclusively make laws in relation to Education". Nothing can be plainer. The Dominion Parliament itself could and can pass no legislation

¹⁸⁰ PAC, RG 76, vol.175. Part 9 (Microfilm Reel c7330) quoted by Janzen, *op.cit.*, 698.

¹⁸¹ *ibid.*, 698-699.

affecting education in this province, save in the circumstances indicated in subsecs. 2 and 3 of sec.22, which have absolutely no application here. And if it cannot be done by a statute of Canada how is it possible that it could be accomplished by an order of the Governor-General in Council or by the letter of an official of a department of the Dominion Government?¹⁸²

Effectively, the court ruled that both the letter and the Order-in-Council went beyond federal jurisdiction as the matter of education was the prerogative of the provincial legislature. In light of this ruling the provincial laws regarding attendance at the public school stands and the appeal was disallowed. The Mennonites attempted to appeal to Privy Council but leave to appeal was not granted.¹⁸³

The Doukhobors were also opposed to public education. They too did not have too much success with the courts. Three years before the *Bill of Rights* was passed, Perepolkin, a member of the radical Sons of Freedom, brought the matter to court in relation to the government forcefully detaining the Doukhobor children at Denver for public education purposes.¹⁸⁴ The case arose out of a lengthy period of confrontation between the Doukhobors and the British Columbian Government.¹⁸⁵ It was their view that education was the responsibility of the home and not the public schools. To them, education means being "a good Doukhobor". And being "a good Doukhobor" means:

... to love all living things and to do no evil, not to shoot, not to eat meat, not to smoke, not to drink liquor. We teach these things to our children. And more, too. The mothers teach their daughters to bake and to cook and to spin and to embroider, and the fathers teach their sons to be handy with an axe, a carving

¹⁸² *Rex. v. Hildebr and, Rex v. Doerken* (1919), 3 W.W.R. 289.

¹⁸³ Janzen, *op.cit.*, 219.

¹⁸⁴ *Perepolkin v. Superintendent of Child Welfare* (no.2) (1957) 23 W.W.R. 592.

¹⁸⁵ See Janzen, *op.cit.*, ch. 6.

knife, a plough, and a team of horses. *Such things are useful and are good, and the other things that you educated people speak of ... you can have them.*¹⁸⁶

The more radical Sons of Freedom group had written a very strong letter addressed to the leaders of the province including judges, government inspectors (presumably of public schools), the police and "all other servants of man-made laws". The letter read in part :

The time has come to reveal ... why we reject the government of schools and their orders. We are conscious of our history, and denote it by saying that Christ was the first Doukhobor. We are the direct Spiritual descendents of the Apostles of Christ and his followers, the so-called Christian martyrs of this time. It was the same kind of government as the Canadian, that crucified Christ two thousand years ago.... Savage barbarism is practised today as freely as two thousand years ago.... Take our Government school education : people are so hypnotized by it that they do not see that its results are demoralizing. The present government schools are nurseries of militarism and capitalism.... If there are men to be found among educated people like George B. Shaw, Tolstoy, Tagore, Gandhi, and many others, those men received enlightenment through Spiritual Regeneration, heeding the voice of Christ, and if such men are to be given honour, it was not attained by college education.¹⁸⁷

Such hardened attitudes towards public education caused them not only to boycott public schools, but also to demonstrate and commit arson against some schools and physical buildings. On June 29, 1929, three community schools built by the Doukhobors themselves were burnt down, followed by three more in August of the same year.¹⁸⁸ This naturally resulted in the

¹⁸⁶ M.G. Hindus, "Bookless Philosophers", *The Century Magazine*, January 1923, 205, quoted in John Edward Lyons, *A History of Doukhobor Schooling in Saskatchewan and British Columbia, 1899-1939*. Emphasis mine.

¹⁸⁷ Koozma J. Tarasoff, *In Search of Brotherhood : The History of the Doukhobors*, 588.

¹⁸⁸ *ibid.*, 590.

investigation and arrests of a couple of suspects belonging to the Sons of Freedom. In protest, a nude demonstration by the radical Sons of Freedom, who were earlier disowned by the leader of the mainstream Doukhobors,¹⁸⁹ took place. As a result, more than one hundred persons were arrested and sentenced to imprisonment up to six months at the Oakalla Prison Farm in New Westminster, British Columbia. Hence, for the first time and out of necessity, some of the children of the imprisoned were held in custody by the government until the release of the parents.¹⁹⁰

In order to deal with the continuing militant attitudes of the radical Doukhobors, the Attorney-General of British Columbia issued an order,

to sequester a member of their younger children by proper court action under the Neglected *Children's Act* and place them with such bodies as Children Aid Societies for education.... If the Doukhobors behave themselves for a period they will get their children back. If they persist in disorderly habits they will lose their children until we have them all under training institutions.¹⁹¹

The conflict with the government continued incessantly through the thirties and forties. Demonstrations grew in intensity and size so that as many as six hundred adults were imprisoned at one time with three hundred and

¹⁸⁹ See *ibid.*, 589. Their leader Peter P. Verigin released to the Press the following statements dated February 6, 1929 :

Please take notice that the Christian community of Universal Brotherhood, limited, had nothing to do and will never have any connection with these people and with their dirty insolent violence, and all their stupid, childish actions, such as unclothing to the skin ... these persons do not belong to the membership of the community for their actions materially or morally and moreover the Community refuses to consider such persons as brothers and to have any connection with them.

¹⁹⁰ *ibid.*, 591ff.

¹⁹¹ Mary Ashworth, *The Forces Which Shepherd Them : A History of the Education of Minority Group Children in British Columbia*, 148.

sixty five children taken into custodial care by the government.¹⁹²

In 1947 Judge H. Sullivan was appointed by the British Columbia government to look into the Doukhobor problem in relation to their objection to public education. He conducted a public hearing and came to the conclusion that the Sons of Freedom were lunatics and criminals deserving drastic penal action against them.¹⁹³ In practical terms he recommended that

the only real and permanent solution to the 'Doukhobor problem' lies in the education and assimilation, and ... that opportunity must be provided the Doukhobor children to participate in all the educational, cultural and recreational activities which our larger schools afford.¹⁹⁴

Three years later the president of the University of British Columbia was requested by the Attorney-General to assemble a team of social scientists to study the matter further. Under the chairmanship of H.B. Hawthorn, the Hawthorn Report was issued. It was more conciliatory and sympathetic in tone. Of particular interest was the advice against sequestration of the Doukhobor children and the recommendation to accommodate the Doukhobor by abolishing flag-saluting, singing of patriotic songs and the addition of Russian as a language to be studied.¹⁹⁵

By 1952 there was a change in the Government of British Columbia. The Social Credit Party was elected as a minority government and went back

¹⁹² Tarasoff, *op.cit.*, 607.

¹⁹³ George Woodcock and Ivan Avakermovic, *The Doukhobors*, 327.

¹⁹⁴ As quoted in F. Henry Johnson, "The Doukhobors of British Columbia : The History of a Sectarian Problem in Education", 70 *Queen's Quarterly* (1964), 535.

¹⁹⁵ Harry B. Hawthorn (ed.), *The Doukhobors of British Columbia*, 97ff.

There was an earlier study of a similar nature in 1913. See William Blackmores, *Report of the Royal Commission on Matters relating to the Sect of Doukhobors in the Province of British Columbia*.

to the people for a larger mandate in 1953 on a "getting tough with the Doukhobor" platform.¹⁹⁶ The government was returned with the desired majority and on September 9 of that year one hundred and forty-eight Doukhobors were arrested, subsequently convicted and jailed. Perepolkin was one of them. As well, one hundred and four children were taken to New Denver under the *Children's Protection Act* and made wards of the Provincial Superintendent of Child Welfare.¹⁹⁷

It was Perepolkin's argument that the action of the government violated religious freedom. In his judgement, Sidney Smith, J.A. rejected the appellant's contention. He ruled to the effect that a declaration by a group that certain actions are part of the religion is not in itself sufficient to give these actions a "religious colour "within the legal definition. He categorically stated:

I, for my part, cannot feel that in this case there is any religious element involved in the true legal sense. It seems to me that a religion is one thing : a code of ethics, another; a code of manners, another. To see that exact dividing line between them is perhaps perilous but I absolutely reject the contention that any group of tenets that some sects decide to proclaim form part of its religion thereby necessarily takes on a religious colour.¹⁹⁸

Turning to the specific arguments of the appellant he said,

...the objection to public schools is that they interpret history so as to glorify, justify and tolerate intentional taking of human and animal life or teach or suggest the usefulness of human institutions which have been or can be part to such purposes... that public schools "expose their children to materialistic influences and ideals"...that Doukhobors object to education on

¹⁹⁶ Johnson, *op.cit.*, 538.

¹⁹⁷ George Woodcock and Ivan Avakumovic, *The Doukhobors*, 341.

¹⁹⁸ *Perepolkin v. Superintendent of Child Welfare* (No.2) 1957, 23 W.W.R. 592, at 599.

secular matters being separated from education or spiritual matters.¹⁹⁹

He rejected their arguments on the ground that they involve the claim that a religious sect may make rules for the conduct of any part of human activities and that these rules thereby become a part of the sect's religion.²⁰⁰

This ruling raises again the question of the relation between faith and action. It is a question relating to the extent to which the faith of a minority people may express itself in actions that may conflict with the value system of the majority in a given society. How important it is, in a mass society where the pressure to conform is so great, to protect the self-expression, however unique of the Doukhobors?²⁰¹ The court clearly ruled, in this case, that it is not as important as the compelling interests of the state in its prerogative over public and universal education.

Perhaps one of the last landmark cases before the coming into effect of the *Bill of Rights* is *Henry Birks and Sons v. Montreal*.²⁰² The Supreme Court was asked to deal with the question whether a statutory provision authorizing the city of Montreal to pass by-laws closing stores on Catholic holidays was a valid exercise of provincial legislative power. The provision in question reads,

¹⁹⁹ *ibid.*, 599-600.

²⁰⁰ *ibid.*, 600.

²⁰¹ cf. *The People v. Woody* (1964) 394 P.(2d.) 813, where the Supreme Court of California ruled that since the use of peyote (an illegal drug under the Health and Safety Code) incorporates the essence of religious expression of the Native American Church presents only a slight danger to the state and to the enforcement of its laws, the constitutional protection ought to be given to the Church. The court said : "We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practised an old religion in using peyote"

²⁰² *Henry Birks and Sons (Montreal) Ltd. v. City of Montreal and Attorney-General of Quebec* [1955] S.C.R. 799, 5 D.L.R. 321.

The municipal council may order, by by-law, that those stores be closed all day on New Year's day, on the festival of Epiphany, on Ascension day, All Saints day, Conception day and on Christmas day.

The court by a unanimous decision held that the legislation of the character here in question is properly "criminal law" within the meaning of s.91 (27) of the *British North America Act* of 1867 and therefore beyond the jurisdiction of the provincial legislature.²⁰³ Kellock and Roche J.J. also held that it was beyond the jurisdiction of the provincial legislature as being legislation with respect to freedom of religion dealt with by the *Freedoms of Worship Statute (1852)*.²⁰⁴ Schmeiser stated that "the potentialities of [this] decision are immense. It is noteworthy that some of Canada's leading authorities on constitutional law have concluded that religious freedom is within federal competence under the criminal law power, and rely strongly on the Birks decision."²⁰⁵ However, he suggested that, notwithstanding the weight of authority, it might be better to read the decision as denying provincial competence over religious freedom without handing it to Parliament. He added that "the day might well arrive when our courts would like the power to deny the competence of both Parliament and the legislatures to interfere with religious freedom".²⁰⁶

For our purpose, this case is of great interest in that it traces the origin of such "Blue Sunday" laws. Rand J. delineated its historical development as follows :

Centuries have witnessed the struggle between church and state

²⁰³ *ibid.*, 813.

²⁰⁴ 1852 (Can) 14-15 Vict. c.175.

²⁰⁵ Schmeiser, *op.cit.*, 86.

²⁰⁶ *ibid.*, 87.

for supremacy in human government which for England and this country was long ago settled. In the course of that strife, legislation forbidding or compelling religious professions or celebrations or creating disabilities was the subject of many statutes. The law relating to Sunday since the Conquest goes back to the reign of Edward III and through three centuries to that of Charles I. As an example, by c.1 of the first year latter's reign, 1625, it was forbidden to have "any meetings of people outside their own parishes on the Lord's Day for any sports or pastimes whatsoever". Today we see the continuance of such enactments in the Lord's Day Act of Parliament.

The association of other "holy" days with Sunday is demonstrated by the history of this legislation. C.14 of 28 Ed.III, (1354), entitled "Upon which days wool may be shewed in the staple, and in which not", which remained in force until 1863, treated all holy days alike. In 27 Hen. VI (1448), a statute still unrepealed, was entitled "Fairs and Markets shall not be holden on Sundays and upon high feast days". In this enactment Parliament was giving effect to the rules of the canon law prescribing the celebration of the principle feast days. In 1464, 4 Ed.IV, c.7, repealed in 1863, was entitled "Shoemakers prohibited from selling shoes on Sunday and Holy Days". Following the Reformation, c. 56 Ed. VI, still in force, was entitled "An Act for the keeping of Hollie Daies and Fasting Daies". Legislation of this nature was paralleled by the jurisdiction of Ecclesiastical courts over such offences as heresy, blaspheme, Brawling in churches or churchyards, profaning the Sabbath, etc.²⁰⁷

In rejecting the respondent's argument that the purpose of the legislation in question was either to give ease from labour to employees or to prevent the sale of goods as a measure of regulating local trade and commerce, Rand J. held:

That Sunday observance legislation is within the field of the Dominion as criminal law has long been settled : *Attorney General of Ontario v. The Hamilton Street Railway Company*, [1903] A.C. 524. The enactments reflecting the religious struggles of the 14-18th centuries were of public law within the classification under our constitution of Criminal Law : they

²⁰⁷ *ibid.*, 812-813.

forbade or unenjoined certain conduct under pain of punishment. I cannot distinguish the prohibition here, with sanctions for non-compliance, of carrying on business on days given their special and common characteristic by church law from those of the past. It is in the same category as the law of Sunday observance.

But these considerations show equally that the statute is enacted in relation to religion; it prescribes what is in essence a religious obligation.²⁰⁸

Kellock J. also traced the historical development of Sunday observance laws in terms of the "religious character of the day". He noted :

The legislation prohibiting the sale of merchandise on Sunday has always been recognized in Canada, as in England, as enacted upon moral or religious grounds, is well illustrated by the Statute of Lower Canada of 1805, 4-5 Geo. III., c.10, which contains the recital that it was enacted "in order, therefore, to remedy such immoral and irreligious practices". If Sunday observance legislation was designed to enforce under penalty the observance of a day by reason of its religious significance, there is no basis for distinction, in my opinion, historically or otherwise, with respect to legislation directed to the enforcement of the observance of other days from the standpoint of their significance in any religious faith. Legislation, to employ the language of Duff J., as he then was, in the *Ouimet* case, 46 S.C.R. at 526, 3 D.L.R. at 607, 20 Can. C.C. at 476, "enacted solely with a view to promote some object having no relation to the religious character of the day" may well be of a different character.²⁰⁹

It appears to be quite clear that on the question of legislation in relation to Sunday observance and other religious days, Parliament, and not the provincial legislature, can prohibit certain actions on certain days on religious grounds. This was the position at least, before the coming into effect of the *Bill of Rights* (1960) or the *Charter of Rights and Freedoms* (1982).

²⁰⁸ *ibid.*, 813.

²⁰⁹ *ibid.*, 822.

Conclusions

As a general conclusion, it may be said that religious freedom between 1867 and 1960, as declared by the courts, appears to be summed up in two statements made by two Supreme Court judges in two different cases involving the Jehovah's Witnesses.

Rand J. summarized the situation in *Saumur v. City of Quebec*:

From 1760 therefore, to the present moment, religious freedom has, in our legal system, been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church, that the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.²¹⁰

In *Chaput v. Romain*, Taschereau J. (as he then was) pronounced as follows :

Dans notre pays, il n'existe pas de religion d'Etat. Personne n'est tenu d'adhérer à une croyance quelconque. Toutes les religions sont sur un pied d'égalité, et tous les catholiques comme d'ailleurs tous les protestants, les juifs, on les autres adhérents des diverses dénominations religieuses, ont la plus entière liberté de penser comme ils le désirent. La conscience de chacun est une affaire personnelle, et l'affaire de nul autre. Il serait désolant de penser qu'une majorité puisse imposer ses vues religieuses à une minorité.²¹¹

These two pronouncements appear to suggest that there is a body of law that could be seen to demonstrate some concern on behalf of the legislative and judicial authorities for free exercise of religion in Canada, not unlike the

²¹⁰[1953] 2 S.C.R. 299, 327.

²¹¹[1955] S.C.R. 834, 840.

situations in the United States²¹² and Australia.²¹³ But unlike these two countries, there is no principled doctrine of free-exercise. Indeed, while there are some interesting *obiter* on free-exercise, religious dissenters had really won victories based on unrelated doctrines of legal federalism and such likes. Another difference is that there is nothing in our law before 1960 prohibiting the establishing of religion. Indeed as Schmeiser noted, while there is no blatant establishment of religion in Canada, the separation of church and state has never been unequivocal. In fact Canada had established churches here and there in the past though only for relatively brief periods.²¹⁴

It is clear that while freedom of religion would include freedom of belief, the self-expression of that belief is not absolute. Thus there are compelling interests of the state that prevailed against the self-expressions of faith. The military service cases and the education cases bear this out. In the *Alternative Service Regulations*, a compromise solution was offered to conscientious objectors. Jehovah's Witnesses, Hutterites and Mennonites in their uncompromising stance paid the price of their pacifistic faith by being incarcerated.²¹⁵

On the education question, it is clear that parents cannot withhold their children from schools on religious grounds. Thus Perepolkin failed to have his children discharged from the custody of the government for compulsory

²¹²cf. *The American Bill of Rights, First Amendment*: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof

²¹³cf. s.116 of the *Constitution of Australia*: The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, for prohibiting the free exercise of any religion.

²¹⁴Schmeiser, *op.cit.*, 54-71.

²¹⁵*Supra.* 157ff.

education.²¹⁶ Mennonite families also found themselves forced to attend public schools as in *Rex v. Hiderbrand*, *Rex v. Doerksen*.²¹⁷ However, where the only schools in the district is a public school which requires religious observance of a particular faith, parents of children of another faith can insist on the children being exempted from observing the religious exercises of the majority. This is the *dictum* of *Chabot v. School Commissioners of Lamorandière and Attorney General of Quebec*.²¹⁸ In the landmark case of *Donald v. Hamilton Board of Education*²¹⁹ the court ruled that the meaning of religious acts is to be decided by the believers. In that case the children of Jehovah's Witnesses were exempted from patriotic exercise in school because of the religious connotation to them. This freedom to avoid an act considered religious by them is possible because the regulations provided for exemption from the exercises. Tarnopolsky reconciled the cases as follows :

It would seem that the best view would be that the courts would have to decide whether a certain requirement is, in "pith and substance" an educational regulation within provincial jurisdiction, or some additional, or peripheral requirement relating to religious conduct and not merely conduct in schools as such.²²⁰

When the self-expression of religious beliefs in public places came into conflict with the law, the court looked at the division of powers of the law-making bodies. Most of the attempts to prohibit the distribution of religious

²¹⁶[1957] 23 W.W.R. 592.

²¹⁷(1919) 31 C.C.C. 419 (Man. C.A.).

²¹⁸(1958) 12 D.L.R. (2d) 796 (Que Q.B.).

²¹⁹[1945] 3 W.W.R. 340 (Alta. S.C.).

²²⁰Tarnopolsky, *op.cit.*, 178.

literature in public places were invalidated on the grounds that the statutes in question was *ultra vires* the province and the municipality involved.²²¹

It must be mentioned that the *Criminal Code* gives protection to free exercise of religion in s. 172 which provides that it is an offence to obstruct or disturb or interrupt "an assemblage of persons met for religious worship or for moral, social or benevolent purpose". Indeed the court ruled in favour of the Jehovah's Witnesses in *Chaput v. Romain* partly because the acts of the police violated the *Criminal Code*.²²² The *Code* also provided for a possible criminal offence where parents deny blood transfusion to their children deemed in need by medical authorities.²²³ In blood transfusion cases the courts generally disregard the religious scruples of parents by resorting to child welfare legislations.

As well the *Code* provides against the offence of blasphemy. S. 260 makes blasphemous libel an offence. There is no definition in the *Code* on what constitutes blasphemous libel and there are no Canadian cases on it. However, the House of Lords did review the authorities in the common law and defined blasphemy as publication of any matter with reference to God, Jesus Christ, the Bible, the Hymn Book, which is intended and calculated to incite contempt and hatred for religion.²²⁴ An exception is provided for in the *Code* so that expression in proper and decent language in good faith of an opinion or argument on a religious subject is a valid defence.

²²¹ *Supra*, 99ff.

²²² [1955] S.C.R. 834. So held Kerwin C.J.C., Taschereau and Estey J.J. See *infra*, 201-203

²²³ *Criminal Code* s.197. See *Rex v. Brooks* (1902); 5 C.C.C. 372 (B.C.C.A.); *Rex v. Lewis* (1903) 7 C.C.C. 261 (On. CA)

²²⁴ *Bowman v. Secular Society Ltd.*, [1917] A.C. 404. See *infra*, 170-171.

On the criminal offence of sedition provided for under s. 60-61 of the *Criminal Code*, the court had decided in *Boucher v. The King*.²²⁵ The court by a majority of five to four ruled that the literature of the Jehovah's Witnesses, especially "Quebec's Burning Hate" was not seditious. In terms of religious freedom, this is a very important case in that "it protects the widest range of public discussion and controversy, so long as it is done in good faith and for the purposes mentioned (namely religious purposes)".²²⁶

And, finally, the question of legislation competence in relation to religion is highlighted by *Henry Birks and Sons (Montreal) Ltd. v. City of Montreal and Attorney General of Quebec*.²²⁷ By holding that legislation relating to religion is properly "criminal law" and therefore not within provincial legislative power, the Supreme Court follows the historical approach in determining the nature of law relating to Sunday observance. In so deciding, the court appears to anticipate denying to both Parliament and the Provincial legislature any competence to interfere with religious freedoms.

²²⁵ [1951] S.C.R. 265.

²²⁶ *ibid.*, 290.

²²⁷ [1955] S.C.R. 799; 5 D.L.R. 321.

Chapter IV

THE CANADIAN BILL OF RIGHTS AND FREEDOM OF RELIGION (1960-1982)

Judicial Decisions On Religious Freedom

The cases on religious freedom decided by the courts prior to 1960 dealt with fundamental rights of the individual and collective practitioners of religions in relation to the state. Almost all the cases claimed that the state should leave the practitioners alone in their practice of a particular religion. This claim for non-interference of state is a form of a demand for religious freedom. It may take the shape of "freedom for religion" or "freedom from coercion" to practice an act against their religion.

Most of the cases, as we have seen,¹ have arisen out of the religious activities of the Jehovah's Witnesses. During the late forties and early fifties they had been charged under by-laws that required a license or permit for distributing literature. Outside of Quebec, they had mostly been acquitted by the lower courts on the ground that the by-law was intended to apply to the sale of commercial literature and not to the distribution of religious literature. Thus the British Columbia Court in *R. v. Kite* (1949)² and the Saskatchewan Court in *R. v. Naish* (1950)³ so decided.

In Quebec, however, the Jehovah's Witnesses found relief only in the Supreme Court of Canada in several famous cases. In *Saumur v. City of*

¹*Supra.*, ch. III.

²[1949] 2 W.W.R. 195 (B.C.).

³[1950] 1 W.W.R. 987 (Sask). See also *Ottawa v. Irving* (1951), 99 C.C.C. 318; *R. v. Mustin* [1940] O.R. 393 and *R. v. Napier* [1941] O.R. 30.

Quebec⁴ the Supreme Court held that the by-law could not prevail against the *Freedom of Worship Act*.⁵

The Supreme Court, in *Chaput v. Romain*,⁶ also ruled in favour of state non-interference. There a Jehovah's Witness was awarded substantial damages against police officers who broke up a religious service in his home. In *Lamb v. Benoit*⁷ the court awarded damages to a Witness for false imprisonment arising from the distribution of religious literature.

Perhaps the most famous case highlighting the principle of state interference in terms of the arbitrary use of administrative power is the case of *Roncarelli v. Duplessis*.⁸ The court held that the Premier of Quebec overstepped his authority in ordering the cancellation of the liquor license of a Jehovah's Witnesses. It was clearly a victory for the Witnesses' claim to non-interference of state in religiously motivated activities.

On the claim of freedom from coercion to practice an act against their religion, the Jehovah's Witnesses were successful in the flag-salute cases. Thus in *Donald v. Hamilton Board of Education*⁹ the Ontario Court of Appeal held that the *School Act* excused students whose parents objected to participation in the school opening exercises. Earlier in *Ruman v. Lethbridge School Board*,¹⁰ as soon as the Albertan Court held that the

⁴[1953] 2 S.C.R. 299.

⁵R.S.Q. 1941 c.307.

⁶[1955] S.C.R. 874.

⁷[1959] S.C.R. 321.

⁸(1959) S.C.R. 121.

⁹[1945] O.R. 518.

¹⁰[1943] 3 W.W.R. 340 (Alta).

school board was entitled to expel the students, the legislature promptly amended the section to exempt them from opening exercises.¹¹

In a similar vein, the Quebec Court of Appeal recognized the natural right of parents to determine the education of the children so that children of Jehovah's Witnesses attending Catholic schools are not compelled to submit to religious exercises of the school.¹² The decision was grounded in the natural law theory that to give one's children the education of one's choice is anterior to positive law.

On the question of medical care, especially in regard to blood transfusion, the Jehovah's Witnesses had less success in claiming non-interference from the state. In *Wolfe v. Robinson*¹³ the Court of Appeal and the Supreme Court of Canada had refused to review a lower court ruling confirming a coroner's verdict that the death of a haemolytic infant was due to the parent's refusal to give consent to blood transfusion. However, in *Forsythe v. Kingston's Children's Aid Society*¹⁴ the court did rule against forceful seizure of a "medically neglected" child on a technicality.

In wartime situation, the Jehovah's Witnesses were also less successful in their claim for "freedom from coercion". In spite of their strenuous protests on religious grounds, many of the Jehovah's Witnesses were not exempted from alternative military services under the *National War Services Regulations, 1940*.¹⁵ However, in an unreported case of *Leonard Ratz v.*

¹¹R.S.A. 1944 c.46 s.9.

¹²*Chabot v. School Commissioners of Lamorandière* (1957) 12 D.L.R. (2d) 796 (Que.).

¹³[1962] O.R. 132, 31 D.L.R. (2d) 233.

¹⁴[1963] O.R. 49, 35 D.L.R. (2d) 690.

¹⁵See *Rex v. Stewart* [1944], 2 W.W.R. 86; [1944] 3 D.L.R. 331 at 338 affirming; and *Greenlees v. A.G. for Canada* [1945] 2 D.L.R. 641 and [1946] 1 D.L.R. 550 affirming.

Gill, a district court judge in Saskatchewan did rule in favour of the Witnesses.

The celebrated case of *Boucher v. The King*¹⁶ stands by itself as a civil rights case arising from the religious freedom not only to hold a belief, but also to disseminate a belief. The court held that there is no sedition without an incitement to violence, and since the religious literature in question, obnoxious as it was, did not intend to incite violence, the act of distributing them was not seditious. Justice Rand's declaration is worth repeating here :

Freedom in thought and speech and disagreement in ideas and beliefs on every conceivable subject, are the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality.¹⁷

Other religious groups were also involved in claiming non-interference from the state as well as freedom from coercion. The Salvation Army were given two conflicting decisions just before the turn of the century. In *City of Montreal v. Maddin*,¹⁸ charges against them for disturbing the peace in a public place in the course of their religious activities were dropped. On the other hand the court convicted a Salvationist in *Le Cribbin v. The City of Toronto*¹⁹ for violating a city by-law forbidding public preaching.

In matters of education, the court had held that the government had the prerogative to determine the educational needs of religious minorities. Thus, a Mennonite was charged and convicted for violating the provisions for

¹⁶[1951] S.C.R. 265.

¹⁷*ibid.*, 288.

¹⁸29 Lower Canada Jurist, 134.

¹⁹21 O.R. 325.

compulsory attendance by failing to send his daughter to a public school.²⁰ The Dukhobours did not fare very well either. In *Perepolkin v. Superintendent of Child Welfare* (1957),²¹ their opposition to the public school system on religious grounds resulted in the forceful detention of their children. The court ruled that a declaration by a religious group that certain things are part of their religion is not in itself sufficient to give those things a "religious colour" for legal purposes.

Finally there is the landmark case of *Henry Birks and Sons v. Montreal*²² where the majority of the judges held that the by-law requiring stores to close on certain holidays was *ultra vires* the provincial powers. The court was of the view that the by-law was of the character of "criminal law" and therefore not within the power of the provinces to legislate. Most legal scholars take it to mean that religious freedom is solely within the federal competence to deal with.²³ However, some scholars argue that the court was also making a statement to the effect that religious freedom is a right not to be interfered with by either Parliament or the legislatures

Provincial Bill of Rights

Apart from the judicial decisions on religious freedom, there were other attempts and means to guarantee freedom of religious worship and

²⁰ *Rex v. Hildebrand* (1919) 3 W.W.R. 286.

²¹ *Perepolkin v. Superintendent of Child Welfare* (No.2) (1957) 23 W.W.R. 592.

²² (1955) S.C.R. 799, 5 D.L.R. 321.

²³ See *Supra.*, 154.

practices. In 1946, the Alberta Legislature, for instance, passed the *Alberta Bill of Rights Act*,²⁴ Part I included the following rights :

It is hereby declared that every citizen of Alberta shall be free to hold and cherish his own religious conviction and to worship in accordance with the dictates of his own conscience.²⁵

Unfortunately this *Act* was never proclaimed to be in force because Part II of the *Act* which authorized the setting up of credit within the province was held by the Alberta Court of Appeal to be *ultra vires* , being legislation in relation to banking.²⁶ On appeal to the Privy Council the Lord Justice affirmed that Part II was *ultra vires* . They also ruled that Part I was also *ultra vires* !²⁷

In 1947 the *Saskatchewan Bill of Rights Acts* was passed.²⁸ S. 3 reads as follows :

Every person and every class of persons shall enjoy the right to freedom of conscience, opinion and belief, and freedom of religious association, teaching, practice and worship.²⁹

The *Act* also provided that any person who deprives, abridges, or restricts any other person or class of persons in the enjoyment of any right under the *Act* , or attempts to do so, is guilty of an offence punishable by summary conviction procedure. Clearly the penalty section is drafted to provide for criminal prosecution rather than civil action. There appears,

²⁴Stat. of Alta. 1946 c.11.

²⁵ *ibid.*, s.3

²⁶ *Ref. re. Alberta Bill of Rights Act* (1946) 3 W.W.R. 722.

²⁷ *A.G. for Alta v. A.G. for Canada* (1947) A.C. 503.

²⁸S.S. 1947 c.35.

²⁹ *ibid.*

however, to be no reported instance of prosecutions under this *Act*. But in two reported cases, the accused charged under the provisions of municipal by-law successfully made use of the *Act* and were acquitted. In *R. v Naish*,³⁰ the court acquitted the accused who had been distributing religious material alleged to be contrary to municipal by-law. In the judgement, the court cited several American cases involving the literature distribution activities of Jehovah's Witnesses in support of the accused's right to the free exercise of religion.

The pre-Confederation *Freedom of Worship Act*³¹ provided in s. 2 as follows :

The free exercise and enjoyment of religious profession and worship without discrimination or preference, provided the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province, are by the Constitution and laws of this Province allowed to all His Majesty's subjects living within the same.

F.R. Scott was of the opinion that the *Act* is a "Bill of Religious Rights" for Quebec and Ontario, "more precise than Mr. Diefenbaker's Bill and containing penalties for its breach".³² The *Act* was not used as a basis for decision by the Supreme Court until the *Saumur* case in 1953³³. There Justice Kerwin "broke the deadlock", so to speak, by ruling in favour of the Jehovah's Witnesses on the basis of this Act.

³⁰(1950) 1 W.W.R. 987. See also *R. ex rel Burns v. Skoretz* [1955] 114 C.C.C. 225.

³¹Applicable in Quebec R.S.Q. 1941 c.307 and Ontario Rectories Act, R.S.O. 1897 c.306.

³²"Bill of Rights and Quebec Law" (1959), 37 *Canadian Bar Review*, 141.

³³*Saumur v. City of Quebec* [1953] 2 S.C.R. 299.

Criminal Laws Pertaining to Religious Freedom

Parliament, in exercising its criminal law powers, has also provided some basic safeguards for religious freedom in two important sections of the *Criminal Code*.³⁴ As noted earlier, s. 172 of the *Code* makes it an indictable offence to obstruct unlawfully or prevent a clergyman from performing his religious function; or, when he is about to perform, on his way to perform, or is returning from the performance of a religious duty or function, to assault him or to arrest him upon a civil process. Subs. (2) makes it an offence to disturb or interrupt "an assemblage of persons met for religious worship".

The key word in subs. (1)(a) is "unlawfully" and the Manitoba Court of Appeal has held that,

[I]t is not every obstruction of a clergyman while celebrating divine service that is prohibited, but only such obstruction as is unlawful, that is to say, only such as is caused without legal authority or justification"³⁵

At the same time, the court made it clear that the minister or clergyman in question must have proper standing in the church at the time of the alleged offence. It ruled as follows :

To support a prosecution under that section the clergyman or minister obstructed must be shown to have been, at the time of the offence, either the lawful incumbent of the church, or to have been holding service with the permission of the lawful authorities of the church. A clergyman who is a mere trespasser or intruder in a church, the congregation of which does not accept his religious doctrines or tenets, may be treated as an ordinary trespasser.³⁶

³⁴R.S.C. 170 c.C-34 s.1. See *Supra* ., 190-192.

³⁵ *R. v. Wasyl Kapij* (1905) 9 C.C.C. 186, at 193.

³⁶ *ibid* . , 195-196.

Accordingly, the Court of Appeal held that the accused did not commit an offence under the *Code* in attempting to prevent the continuation in a Greek Catholic Church of a service which was being conducted by a priest of the Greek Independent Church.

In another case tried the same year, the accused was convicted of an offence under subs. (2). In *R. v. Gauthier*,³⁷ the accused entered a hall while a Salvation Army service was in progress. He shouted, "I am a French Roman Catholic. This is no place for us Roman Catholics. Leave". The court held that that amounted to disturbing or interrupting "an assemblage of persons met for religious worship" within the meaning of the *Code*.

We have also seen that in *Chaput v. Romain*³⁸ the action of the police officers was considered unlawful under s. 172 by the Supreme Court of Canada.³⁹

Blasphemous libel is also an offence under the *Criminal Code*. S. 260 states that it is a question of fact whether any published matter constitutes a blasphemous libel.⁴⁰ There is no definition of the offence in the *Code*. However, *R. v. Ramsay and Foote*⁴¹ ruled that if the decencies of controversy were observed, even the fundamentalists of religion could be attacked without the author being guilty of the offence of blasphemous libel. Coleridge L.C.J. adopted the following definition :

³⁷(1905) 11 C.C.C. 263, 14 Que.K.B. 530

³⁸(1955) S.C.R. 834, 1 D.L.R.(2d) 241, 114 C.C.C. 70.

³⁹See *Supra.*, 133ff. In awarding damages to the plaintiff who were Jehovah's Witnesses, Kerwin C.J.C., Taschereau, Rand, Kellock, Estey and Locke J.J. all mentioned that the respondent police officers' conduct was criminally unlawful.

⁴⁰Subs. (2).

⁴¹(1883) Cab. & El. 12b, 48 L.T. 733, 15 Cox C.C. 231.

The law visits not the honest errors but the malice of mankind. A willful intention to pervert, insult and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by willful misrepresentations or willful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt.⁴²

Clearly the test for blasphemous libel is a question of fact based on the absence of good faith and decent language. This is essentially the test in subs. (33) of s. 260 of the *Code*

No person shall be convicted of an offence under this Section for expressing in good faith and in decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion upon a religious subject.⁴³

Like all cases of defamation, a blasphemous libel may be spoken or written,⁴⁴ and the circumstances in which such alleged libel was published are relevant in determining whether the permitted limits have been exceeded.⁴⁵ Whether or not it is necessary that the Deity be directly attacked for the publication to constitute blasphemous libel is open to question. *R. v. Kinler*⁴⁶ which held that it is necessary has never been followed.

A Question of Jurisdiction

In light of the judicial decisions relating to provincial legislations for

⁴² *ibid.*, 236. This definition is found in *Starkie on Libel* (599, 4th ed).

⁴³ See *R. v. St Martin* (1933) 40 R. de. Jur. 411, *R. v. Rachard* [1955] 65 C.C.C. 344

⁴⁴ *R. v. Gott* (1922) 16 Cr. App. Rep. 87.

⁴⁵ *R. v. Boulter* (1908) 72 J.P. 188.

⁴⁶ (1925) 63 Que S.C. 483.

the protection of religious freedom and the *Criminal Code*, two sets of controversies arise and are debated by professors and practitioners of law alike. The first has to do with the issue of jurisdiction. This is an issue peculiar to the Canadian Constitution which distributes legislative powers under ss. 91 and 92 of the *British North America Act* of 1867. Much has been written about the theory and principle of distribution of legislative powers.⁴⁷ For our purposes we will concern ourselves only with the legislative jurisdiction with respect to religious freedom.

Following Dicey, Tarnopolsky submits that "political liberties result from inaction by governments ... the extent of these liberties is determined by what is not forbidden".⁴⁸ This, of course, is a common law principle which has been applied in Canada so that political liberties such as freedom of religion have not been guaranteed by any Bill of Rights, as such, but by the "common-law convictions".⁴⁹ Laskin, commenting on the status of political freedoms in Canada submits that

political liberties find their existence in the absence, in general, of any absolutely restricting legislation and in judicial interpretations of legislation that seek to achieve compatibility with such liberties, and they have their affirmative recognition in the availability of civil remedies such as damages for any unjustified invasion.⁵⁰

With regard to a Bill of Rights, the question is : Does legislative jurisdiction in relation to freedom of religion fall within provincial or within

⁴⁷See J.D. Whyte and W.R. Lederman, *Canadian Constitutional Law*, ch. 4; Peter Hogg, *Constitutional Law of Canada*, ch. 1.

⁴⁸Tarnopolsky, *The Canadian Bill of Rights*, 37.

⁴⁹Bora Laskin, "An Inquiry into the Diefenbaker Bill of Rights", 37 *The Canadian Bar Review* (1959), 77.

⁵⁰*ibid.*, 82.

federal competence, within both or within neither?

On precisely this question, the Joint Committee on Human Rights and Fundamental Freedoms with representatives from both Houses of Parliament was set up with the following frame of reference :

[T]o consider the question of human rights and fundamental freedoms, and the manner in which those obligations accepted by all members of the United Nations may best be implemented;

And, in particular, in the light of the provisions contained in the Charter of the United Nations, and the establishment by the Economic and Social Council thereof of a Commission on Human Rights, what is the legal and constitutional situation in Canada with respect to such rights, and what steps, if any, it would be advisable to take or to recommend for the purpose of preserving in Canada respect for the observance of human rights and fundamental freedoms;⁵¹

The Joint Committee paid special attention to the difficult and important constitutional question in a resolution passed on July 4th 1947. The resolution was as follows :

That the clerk of the Committee write to the Attorney-Generals of the provinces and to Heads of Law Schools requesting views and opinions on the question of the power of the Parliament of Canada to enact a comprehensive bill of rights applicable to all of Canada and that such written views be forwarded to the Minister of Justice.⁵²

In response, a number of attorney-generals and deans of law schools expressed their views. The Attorney-General of Prince Edward Island, for instance felt "doubtful whether such an *Act* could be drafted so as not to conflict with the provisions of the British North America Act".⁵³ Dean

⁵¹ 26 *Canadian Bar Review* (1948), 706.

⁵² *ibid.* , 707-708.

⁵³ *ibid.* , 708.

Vincent C. MacDonald of the Dalhousie Law School took the view that Parliament could not "enact a comprehensive bill of rights applicable to all Canada".⁵⁴

Several of the legal authorities responded at great length. The Deputy Minister of Justice to the Joint Committee, F.R. Varcoe, made a formal statement wherein he described fundamental freedoms as "an agglomeration or cluster of legal rights". As such, he made the point as follows :

Freedoms are comparative and not absolute. They are hedged about by necessary restrictions on the individual to protect other individuals against licence or abuse. If provincial legislation restricts or abolishes civil rights in the case of any class of citizen to the point where the union of the provinces is threatened, parliament might conceivably intervene.⁵⁵

He then concluded that such a bill has uncertain legal effects :

It is necessary to observe that the legal effect of a declaration guaranteeing any of these rights is uncertain since no legal consequences would seem to flow therefrom. So far as the provinces are concerned, such a declaration would not restrict their powers and of course such a declaration would not limit the exercise by parliament of its powers.⁵⁶

It is obvious that the Deputy Minister of Justice was of the view that a comprehensive Bill of Rights would mean that both Parliament and the legislatures would not have to surrender their supreme powers, since Canada has a constitution based on this principle. As long as Parliament retains its supremacy, the legal effects of such a bill remain uncertain.

Dean W.P.M. Kennedy of the Law School of the University of Toronto shared the view of the Deputy Minister of Justice and therefore did "not think

⁵⁴ *ibid.*

⁵⁵ *ibid.* , 701.

⁵⁶ *ibid.*

it would be possible to have a comprehensive bill of rights covering the whole of Canada".⁵⁷ Professor Louis-Philippe Pigeon, who was then professor of constitutional law at the Faculté de Droit, Université Laval, also concluded that the Dominion Parliament did not have the power of enacting a comprehensive Bill of Rights wherein human rights and fundamental freedoms are defined irrespective of the division of authority effected by the *British North America Act*. In his own words :

To the extent that a bill enacted by the Dominion Parliament would endeavour to secure human rights or fundamental freedoms from interference by provincial Legislatures, it would clearly amount to a curtailment of the powers to these Legislatures. In other words, while in the federal field the proposed bill would not differ from any other statute and would leave unrestricted the power of Parliament to alter the law at will, for the Provinces the enactment, if valid, would amount to a constitutional restriction of their legislative powers. The Dominion Parliament would thus assume the power which the B.N.A. Act (s. 92.1) confers upon the Provincial Legislatures of amending provincial constitutions. It would mean that the Provincial Legislatures would become subordinated to the Dominion Parliament, while it is axiomatic that they are 'mistresses in their own houses' just as the Dominion Parliament is in hers : *Persons case*, [1930] A.C. 124.⁵⁸

The Honourable L.D. Currie, the Attorney General of Nova Scotia concluded that because of the division of legislative powers in our Constitution and "because the Bill of Rights would doubtlessly affect both subject matters that belong to the Dominion and subject matters that belong to the Province",⁵⁹ it is not within the competence of Parliament to enact a comprehensive Bill of Rights applicable to the whole Dominion.

⁵⁷ *ibid.* , 711.

⁵⁸ *ibid.* , 714.

⁵⁹ *ibid.* , 708.

Interestingly enough, the Attorney-General of British Columbia, the Honourable G.S. Wismer, expressed his view of the matter as follows :

Most of the matters relating to human rights discussed by the Committee appear to fall within the exclusive legislative jurisdiction of the province over 'property and civil rights', and are for the most part dealt with and safeguarded by the common law which is part of the law of this province.⁶⁰

Not surprisingly, the Attorney-General of Saskatchewan, the Honourable J.W. Gorman, K.C., was wholeheartedly in favour of a federal Bill of Rights since the Saskatchewan legislature had already enacted a provincial Bill of Rights just a few months before. Specifically he thought that "the dominion could go much further than Saskatchewan did in the realm of criminal law."⁶¹

From the above survey, the answer is far from clear. The existence of the provincial *Bills of Rights* obviously supports the view that it is within provincial jurisdiction. On the other hand the *Criminal Code* provisions support the view that it is within the Dominion jurisdiction. The judicial discussions themselves support different views as different members of the courts have given different opinions on the matter. The cases giving rise to the judicial opinions were concerned not so much with the problem whether Parliament or legislature may give us our basic freedom, but rather which may take it away. Thus Justice Rand in *Saumur v. City of Quebec* said :

Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order. It is in

⁶⁰ *ibid.*

⁶¹ *ibid.* , 711.

the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that the positive law operates. What we realize is the residue inside that periphery. Their significant relation to our law lies in this, that under its principles to which there are only minor exceptions, there is no prior or antecedent restraint placed upon them : the penalties, civil or criminal, attach to results which their exercise may bring about, and apply as consequential incidents. So we have the civil rights against defamation, assault, false imprisonment and the like, and the punishments of the criminal law; but the sanctions of the latter lie within the exclusive jurisdiction of the dominion. Civil rights of the same nature arise also as protection against infringements of these freedoms.⁶²

In surveying the opinions of the court, Schmeiser listed six different views.⁶³ The older view based on ss. 92(13) and 92(16) is that provincial jurisdiction is unlimited with regard to basic freedoms. S. 92(16) categorizes power in relation to matters of a local or private nature in the province. Laskin is of the view that religious freedom is essentially a matter of "public order, concerning not individual relations but the fundamental relations of citizen and government in a parliamentary democracy".⁶⁴ As such it is difficult to see how the values embodied in such political freedoms can be brought within this subsection. If any doubt still remains on this point, Rand J.'s opinion should remove it altogether :

That legislation 'in relation' to religion and its profession is not a local or private matter would seem to me to be self-evident; the dimensions of this interest are nationwide; it is even today embodied in the highest level of the constitutionalism of Great Britain; it appertains to a boundless field of ideas, beliefs and faiths with the deepest roots and loyalties; a religious incident reverberates from one end of this country to the other, and there

⁶²[1953] S.C.R. 299, at 329.

⁶³D.A. Schmeiser, *Civil Liberties in Canada*, 13-16.

⁶⁴Laskin, *art. cit.*, 113.

is nothing to which the 'body politic of the dominion' is more sensitive.⁶⁵

Those who contend that religious freedom as a class of matter falls within property and civil rights powers under s. 92(13) assure that basic freedoms have an independent existence and a constitutional value of their own.⁶⁶ As such, religious freedom may properly be the subject matter of legislation separate and apart from any other subject matter.

The simple argument for the case revolves on the meaning of the phrase "civil rights". It is the view of its proponents that "civil rights" include religious freedom.⁶⁷ Kerwin J. states in *Saumur* case :

In my view that right to practise one's religion is a civil right in the Province under head (13) of S.92 of the British North America Act just as much as the right to strike or lock-out dealt with by the Judicial Committee in *Toronto Elec. Com'rs. v. Snider*, (1925) 2 D.L.R. 5, A.C. 396.⁶⁸

This broad definition of "civil rights", however, is disputed by no lesser constitutional authorities than Bora Laskin, Schmeiser and Tarnopolsky.⁶⁹ To understand the use of "civil rights" in the *British North America Act*, it is absolutely necessary to backtrack into the early history of Canada before Confederation. The phrase was first used in the *Quebec Act* of 1774. S. 8 reads :

And be it further enacted by the Authority aforesaid, That all His

⁶⁵ *Saumur v. Quebec*, (1953) 4 D.L.R. 641 at 670.

⁶⁶ Schmeiser, *op.cit.*, 13. Laskin, *art.cit.*, 120.

⁶⁷ Three judges of the Supreme Court, Rinfret C.J.C., Kerwin and Taschereau J.J., in *Saumur's* case appear to accept this view. Taschereau supported his argument with reference to the Bill of Rights enacted by the provinces of Saskatchewan and Alberta.

⁶⁸ 4 D.L.R. 641 at 664.

⁶⁹ Laskin, *art.cit.*, 114-120; Schmeiser, *op.cit.*, 74-78 and Tarnopolsky, *op.cit.*, 37-46.

Majesty's Canadian Subjects, within the Province of Quebec, the religious Orders and Communities only excepted, may also hold and enjoy their *Property and Possessions*, together with all Customs and Usages relative thereto, *and all other their Civil Rights*, in as large, ample, and beneficial Manner, as if the said Proclamation, Commissions, Ordinances, and other Acts and Instruments had not been made, and as may consist with their Allegiance to His Majesty, and Subjection to the Crown and Parliament of Great Britain; and that in all Matters of Controversy, relative to *Property and Civil Rights*, Resort shall be had to the Laws of Canada, as the Rule for the Decision of the same; and all Causes that shall hereafter be instituted in any of the Courts of Justice, to be appointed within and for the said Province, by His Majesty, His Heirs and Successors, shall, with respect to such *Property and Civil Rights*, be determined agreeably to the said Laws and Customs of Canada, until they shall be varied or altered by any Ordinances, that shall, from Time to Time, be passed in the said Province by the Governor, Lieutenant Governor, or commander in Chief, for the Time being, by and with the Advice and Consent of the Legislative Council of the same to be appointed in the Manner hereinafter mentioned.⁷⁰

S. 5 provided "for the more perfect Society and Ease of the Minds of the Inhabitants" by declaring :

That His Majesty's Subjects, professing the Religion of the Church of Rome of and in the said Province of Quebec, may have, hold, and enjoy, the free Exercise of the Religion of the Church of Rome, subject to the King's Supremacy, declared and established by an Act, made in the first year of the Reign of Queen Elizabeth, over all the Dominions and Countries which then did, or thereafter should belong, to the Imperial Crown of the said Church may hold, receive, and enjoy, their accustomed Dues and Rights, with respect to such persons only as shall profess the said Religion.

The British criminal law system was retained by s. 11. S. 12 authorized the Crown to appoint a council, with "power and authority to make ordinances for the peace, welfare and good government of the said Province ...". The

⁷⁰14 Geo. III c.83. Emphasis mine.

council's authority to legislate, however, is limited by s. 15 which provided that no ordinance touching religion would be effective without the Crown's consent.

Schmeiser made some sharp observations about the way the *Quebec Act* was drafted.⁷¹ He noted that if religious freedom fell within the definition of "civil rights", which were assured to the inhabitants of Quebec by s. 8, there would have been no need for s. 5 of the *Act*. Further, he noted that the distinction drawn between civil rights and criminal law suggests a narrow interpretation of the former. As well, he pointed out that s. 15 implies that the council could pass ordinances "touching religion" under its "peace, welfare and good government clause, which is almost identical to the "peace, order and good government power of Parliament today".

The argument that the phrase "civil rights" used in the *British North America Act* s. 91(13) is to be understood in the same sense as the *Quebec Act* is supported by the dictum in *Citizens Insurance Company v. Parsons* (1881-2) where Sir Montague Smith said :

It is to be observed that the same words, "civil rights" are employed in the Act of 14 Geo. 3. c.83, which made provision for the Government of the Province of Quebec. Section 8 of that Act enacted that His Majesty's Canadian subjects within the Province of Quebec should enjoy their property, usages, and other civil rights and that in matters of controversy resort should be had to the laws of Canada, and be determined agreeably to the said laws. In this statute the words "property" and "civil rights" are plainly used in their largest sense; and there is no reason for holding that in the statute under discussion they are used in different and narrower one.⁷²

Moreover, in the judgement of Rand J. in *Switzman v. Elbling and A.G. of*

⁷¹ *Schmeiser, op.cit.*, 76-77.

⁷²(1881) 7 App. Cas. 96 at 111.

Quebec [1957] makes the distinction between "freedom or civil liberty" and "civil right", holding that the latter as a source of provincial legislation does not comprehend the former. In the context of a ban on the propagation of communism, he said :

The ban is directed against the *freedom or civil liberty* of the actor; no *civil rights* of anyone is affected nor is any civil remedy created. The aim of the statute is, by means of penalties, to prevent what is considered a poisoning of men's minds, to shield the individual from exposure to dangerous ideas, to protect him, in short from his own thinking propensities. There is nothing of civil rights in this : it is to curtail or proscribe these freedoms which the majority so far consider to be the condition of social cohesion and its ultimate stabilizing force.⁷³

Laskin considers the distinction a valid one.⁷⁴ Arguing from the historical context, he submits that when the French speaking inhabitants of Quebec were given the assurance in the *Quebec Act*, that "in all matters of controversy relative to property and civil rights resort shall be had to the laws of Canada as the rule of the decision of the same", it was an assurance that the French civil law would govern private controversies between inhabitants arising in their dealings with one another.

This "private law" interpretation was also held by O'Connor in his *Report to the Senate*.⁷⁵ He concluded, after a thorough analysis, that the phrase "civil rights" refer to private laws as opposed to public laws. Accordingly, religious freedom could not have been included in this phrase since it is in essence of a public law nature.

S. 94 of the *British North America Act* provides that "[n]otwithstanding

⁷³[1957] S.C.R. 285 at 305. Emphasis mine.

⁷⁴Laskin, *art.cit.* , 115.

⁷⁵W.F. O'Connor, *Report to the Senate. passim.*

anything in this *Act*, the Parliament of Canada may make Provision for the Uniformity of all or any of the laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick ...". Quebec, however, is not included. This omission lends support to the "private-law" interpretation. As Laskin has noted,

it is hardly reasonable to believe that uniformity of laws relative to property and civil rights could be envisaged to include the political freedoms but with Quebec excluded from the area of uniformity.⁷⁶

The second view holds that unlimited jurisdiction falls within the Dominion under its power to make laws "for peace, order and good government of Canada". Specifically, this view holds that the Dominion has power to legislate on public law relating to freedom of religion under its criminal law power. Again the assumption is that freedom of religion has its own independent existence and constitutional value.

Estey J. directly held that legislative jurisdiction in relation to religious freedom resided in Parliament under its criminal power in the *Saumur* case.⁷⁷ Although his view was a solitary one, it has become more widely accepted since the decisions in *Henry Birks and Sons v. Montreal* (1955).⁷⁸ This case, as mentioned earlier, concerns the question whether a Quebec statute authorizing municipal by-laws for the closing of stores on Catholic holidays was *ultra vires* provincial powers. The Supreme Court by an unanimous decision struck down the statute. Rand, Kellock and Locke J.J. held that the statute was in the same category as the law of Sunday observance and that, in

⁷⁶Laskin, *art.cit.*, 115.

⁷⁷(1953) 2 S.C.R. 299 at 360.

⁷⁸(1955) S.C.R. 799; 5. D.L.R. 321.

addition, it was enacted in relation to religion and therefore was beyond provincial legislative authority. Effectively, this case held that Sunday observance cases are applicable to preclude as well any provincial legislation requiring compulsory observance of other holy days.

In his commentary Laskin said :

Compulsory recognition of religious values, at least through observance legislation, falls within exclusive federal competence - certainly as within the criminal law power and also, in the view of some members of the Supreme Court, as being in relation to religion, considered as a separate constitutional value which is beyond provincial legislative power.⁷⁹

The decision in Birk's case followed the 1903 Privy Council case in *A.G. for Ont. v. Hamilton Street Railway*⁸⁰ where the Privy Council upheld a federal *Lord's Day Act*, referring to "the criminal law in its widest sense that is reserved" by s. 91(27) of the *British North America Act*.⁸¹ As a matter of construction, the court had to determine whether the legislation and by-law were in relation to store closing hours or in relation to religious observance. If the former, it would have been within the jurisdiction of the provincial legislature. Since the court concluded that it was in relation to religious observance it found that only Parliament could so legislate, as the legislation in question was "in pith and substance" a religious and Sunday observance legislation.

The issue has arisen again in the application of the *Canadian Bill of Rights* in *Robertson and Rosetanni v. The Queen*.⁸² This case affirmed the

⁷⁹Albert S. Abel (ed.), *Laskin's Canadian Constitutional Law*, 846.

⁸⁰(1903) A.T. 524.

⁸¹*ibid.*, 529. S.91(27) reads : the Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the procedure in Criminal Matters.

⁸²[1963] S.C.R. 651; 41 D.L.R. (2d) 485.

view that religious freedom is a matter within Dominion powers and left "no doubt that freedom of religion as a subject matter of legislation is within federal jurisdiction".⁸³ The case also happens to be the only Supreme Court case directly on the freedom of religion question in the context of the *Bill of Rights*. It raises a host of questions with which we shall now deal.

Between these two views are four other views of interest to our discussion. First, there is a view that rejects the assumption that religious freedom is an independent constitutional entity. As such, it is not committed to either Parliament or the legislatures, and falls in some aspects within the field of criminal law, but in some other aspects, within the field of civil rights. This view was held by Cartwright and Fauteux J.J. in the *Saumur* case.⁸⁴

Laskin thought this concept "startling". He wrote :

While British North America Act contains no explicit reference to the political freedoms, this does not mean that they cannot be the "matter" of legislation in the constitutional sense. Streets and highways are likewise not explicitly mentioned and yet Cartwright J. (in whose views Fauteux J. concurred) had no difficulty in concluding that they could be the focus for legislative power. If the Cartwright-Fauteux view is correct, or if I understood it correctly, the political freedoms must find their vindication or limitation as parasitic appendages to legislation dealing with matters otherwise within the competence of the enacting legislature. Presumably, federal legislation may limit freedom of religion in a post office or on a railway or in a uranium mine. Provincial legislation may limit freedom of speech in a municipal park or in a retail store or in an automobile on a provincial highway. Legislation admits of no analysis for constitutional purposes which might show that its pith and substance is freedom of speech or freedom of religion; these are subordinate values whose constitutional significance depends only on their association with some higher value by which legislative

⁸³Tarnopolsky, *op.cit.*, 44.

⁸⁴(1953) 4 D.L.R. 641.

competence is measured.⁸⁵

His main criticism of the concept is the assertion that "there is no such thing (apart from ss. 94A and 95)⁸⁶ as overlapping *powers*. The crucial question *always* is, in respect of any piece of challenged legislation, what is its 'matter'".⁸⁷ As well, this "half-way house" view amounts to a denial of any independent dignity in the political freedoms in terms of the exercising of legislative powers. In any case, seven of the nine judges in *Saumur* case held that political freedoms do have independent constitutional value and may be independent "matter" of legislation. Once the "matter" is established, it cannot fall into the power of both Parliament and the legislatures. It has to fall only into one of them. "The test of legislative power, in relation to political liberties lies not in any enactments which recognize them for particular purposes ... but rather in legislation which compels obedience to them or which limits their exercise".⁸⁸

Second, there is an ingenuous line of reasoning which concludes that

⁸⁵Laskin, *art.cit.*, 118.

⁸⁶The two sections concern Old Age Pensions and Agriculture and Immigration, respectively.

S.94A reads : The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors, and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter.

S.95 reads : In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Province, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

⁸⁷Laskin, *art. cit.* , 119. Emphasis his.

⁸⁸*ibid.* , 120.

neither Parliament nor the legislatures may infringe on the fundamental freedom. The basis for such a conclusion is the doctrine of implied Bill of Rights entrenched in the preamble to the *British North America Act* and the reference to the British constitutional history. The preamble announces as follows :

Whereas the Province of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, *with a constitution similar in principle to that of the United Kingdom*.⁸⁹

In 1949 the British Columbia Court of Appeal resorted to the preamble in a criminal case to rule that a section in the *Criminal Code* providing for continuing custody of an acquitted person pending appeal was beyond the competence of Parliament to enact. This was remarkable since it is certainly within the legislative powers to enact on criminal laws and procedures under s. 91(27). O'Hallerton J.A. in *R. v. Hess* ruled as follows :

I conclude that the purported powers in S. 1025A to deny an acquitted person bail, to obstruct and delay his application therefore, and to detain him in custody for an offence of which the Court has acquitted him and when there is no offence charged against him are all contrary to the written constitution of the United Kingdom, as reflected in Magna Carta (1215), the Petition of Right (1628), the Bill of Rights (1689) and the Act of Settlement (1700-1). I conclude further that the opening paragraph of the preamble to the B.N.A. Act, 1867, which provided for a 'Constitution similar in Principle to that of the United Kingdom', thereby adopted the same constitutional principles, and hence S. 1025A is contrary to the Canadian Constitution, and beyond the competence of Parliament or any Provincial Legislature to enact as long as our Constitution remains in its present form of a constitutional democracy.⁹⁰

⁸⁹Emphasis mine.

⁹⁰(1949) 4 D.L.R. 199 at 208-209.

This view appears to find some support among some Supreme Court justices in cases involving the validity of provincial legislation. *In Reference Re Alberta Statutes* (1938),⁹¹ for instance, Cannon J. in his judgement referred to "the British system" where "freedom of discussion is essential to enlighten public opinion in a democratic state". Then he went on to refer to the preamble of the *British North America Act* to make the point that like the situation governing Great Britain, "the Province cannot interfere with his status as a Canadian citizen and his fundamental right to express freely his untrammelled opinion about government policies and discuss matters of public concern".⁹²

Objections to this view include the fact that this line of reasoning "completely disregards another basic principle of English constitutional law, namely, the doctrine of the supremacy of Parliament, under which Parliament can amend or repeal any statute as it sees fit".⁹³ In effect, O'Hallerton J.A's view deny to Parliament the right to deviate to any extent from the principles embodied in British Acts of Parliament. This makes our Parliament and legislatures impotent, to say the least.

Another view, similar to the view of an implied Bill of Rights, is one that is grounded in the notion of the preeminence of natural law. Thus, in *Chabot v. School Commissioners of Lamoraudière*,⁹⁴ the Quebec Court of Appeal held that a child of the Jehovah's Witnesses may be exempted from Catholic instruction in a Catholic school on grounds of natural law. In the

⁹¹[1938] S.C.R. 100.

⁹²*ibid.*, 146.

⁹³Schmeiser, *op.cit.*, 15.

⁹⁴(1957) 12 D.L.R. (2d) 796.

words of Casey J. :

If these rights find their source in positive law they can be taken away. But if, as they do, they find their existence in the very nature of man, then they cannot be taken away and they must prevail should they conflict with the provisions of positive law.⁹⁵

It appears that Abbot J. in *Switzman v. Elbling and A.G. Quebec*⁹⁶ also subscribed to this view when he ruled that neither Parliament nor the legislatures may abrogate the right of discussion and debate. Objections may be raised against this view similar to the ones raised against the "half-way house" view or the implied Bill of Rights view. Nonetheless, the preamble to the *Bill of Rights* appears to give support to the "natural law" view. It reads in part :

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law.⁹⁷

The foregoing survey of different views on the question of jurisdiction raises the essential question of the nature and problem of religious freedom as a political right. In one sense we come to a full circle with regard to the essential character of religious freedom. As we noted earlier, in the view of Rand J., freedom of religion is one of the "original freedoms". These freedoms "are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a

⁹⁵ *ibid.*, 807.

⁹⁶ (1957) S.C.R. 285.

⁹⁷ S.C. 1960 c.44, R.S.C. 1970. Appendix III.

legal order".⁹⁸ In the words of Lederman,

The concept of liberties or freedoms in a duly precise scheme of legal terminology is the concept of residual areas of option and opportunity for human activity free of *specific legal regulation*. In such area of conduct there are neither affirmative legal prescription nor legal prohibitions -- a man is at liberty to act or do nothing as he chooses, free of obligatory instruction by the law either way.⁹⁹

In that essential sense, religious freedom is a kind of natural right so that it is not dependent on positive law to grant it. Neither is it dependent on positive law to restrict it. Hence it is not altogether silly to suggest that in this area of conduct, neither Parliament nor legislatures should interfere with it, in the sense that one can worship where one pleases in a free and democratic country.

But that is not the whole picture. As Laskin pointed out, "crucial as any of these may be to the preservation of the nature of our polity, they are not absolutes".¹⁰⁰ Freedom of religion and conscience, for instance, will not justify the taking of human lives for the purpose of making a living sacrifice to a Deity. At the same time, freedom of association and assembly must be limited by a duty to keep the peace, so that a peaceful assembly of believers for religious worship ought not to be disturbed by a noisy gathering of nonbelievers for the purpose of disrupting the religious worship. In other words, to practice the right of religious freedom meaningfully, there is a need for its protection by law. Consequently such rights are dependent on the legal

⁹⁸ *Saumur v. City of Quebec* [1953] S.C.R. 299 at 329.

⁹⁹ W.R. Lederman, "The Nature and Problems of a Bill of Rights ", 37 *The Canadian Bar Review* (1959), 7. By "residual" he does not mean to disparage the areas of conduct. He considers them large and important areas in democratic country.

¹⁰⁰ Laskin, *art.cit.*, 80.

system. The law provides specific prohibitions to ensure a general state of public peace, order and good government through the law of crime and tort. In this way the areas of freedoms become meaningful areas of free choice. By the same token, the law forbids certain acts by defining the outside limits of the respective areas of freedoms making the actual peaceful coexistence of human beings possible within a diversity of beliefs and behaviour.

The bottom-line is simply that the Parliament or legislatures have to make laws both to define the limits of and to protect the meaningful exercise of religious freedom. In the words of Lederman,

To speak generally, this means that when you have defined the extent of specific legal regulation in terms of existing duties, *ipso facto* you have drawn the outside boundaries of the areas of liberty or freedom. To delineate the unregulated area you must first define the regulated area, to do which is strictly a legal matter. So, in this residual sense, the extent of liberty or freedom in some given respect is a matter of legal definition and properly has its place in the working concepts of the lawyer or jurist.¹⁰¹

It seems clear with the judgement in *Robertson and Rosetanni v. The Queen*¹⁰² affirming the view of Rand J. in *Saumur v. City of Quebec*,¹⁰³ the subject matter of freedom of religion is properly one for the Federal Parliament to enact. Even Professor Pigeon, who on his elevation to the bench was hardly a "federalist", admitted that the two decisions "make it practically certain that it is within federal legislation, so that no problem arises".¹⁰⁴ The *Canadian Bill of Rights* being a federal legislation is

¹⁰¹ Lederman, *art.cit.*, 8.

¹⁰² [1963] S.C.R. 651.

¹⁰³ [1953] 2 S.C.R. 299.

¹⁰⁴ Louis-Philippe Pigeon, "The Bill and the British North America Act", 37 *The Canadian Bar Review* (1959), 76.

therefore passed in accordance with this view.

A Question of Necessity

The settling of the question of jurisdiction does not settle the question of necessity, however. The question whether civil liberties or fundamental freedoms are better protected by a Bill of Rights or under the law of the land was hotly debated prior to the enactment of the *Canadian Bill of Rights*. In a symposium on the Bill of Rights published in 1959,¹⁰⁵ on the very eve of the enactment of the *Canadian Bill of Rights*, two leading constitutional authorities disagreed on the question of necessity in light of the proposed Bill.

W.R. Lederman recognized that the proposed Bill of Rights was to be an ordinary statute of the federal Parliament and so would enjoy no special constitutional status. As well, it would not limit the provincial legislatures or, indeed, preclude a later repeal by the federal Parliament itself. Nonetheless, he thought it well-worth doing as a comprehensive set of principles declaring "in words that denote concepts running at a high level of abstraction or generality"¹⁰⁶ the rights of the people. To the argument that general declarations are either unnecessary or useless when you have the necessary mass of detailed legal procedures and rules, he contended it is a positive advantage to have both. Particular detailed rules, in his view, cannot be properly understood or kept in their respective places as part of a reasonable system unless the general implications involved are pursued as far as the mind can reasonably reach. That is the only way order and purpose can be brought

¹⁰⁵ 37 *The Canadian Bar Review* (1959), *passim*.

¹⁰⁶ Lederman, *art.cit.*, 11.

to the mass of details in our laws. He summed up his argument as follows :

This reasoning affords the chief basis for my own view that the proposed Canadian Bill of Rights is well worth doing, even though it takes the form of an ordinary federal statute -- a relatively modest form for such a document. It would still be an authoritative expression by the Canadian Parliament of valid general standards, and as such would give leadership and promote education in these matters, though strictly speaking its application is confined to the federal part of Canadian legal system as defined in the British North America Act. Law is not primarily a matter of coercion and punishment at all, it is primarily a matter of setting standards for society that attract willing acceptance because they offer some measure of justice.¹⁰⁷

Laskin, on the other hand, took the view that the proposed Bill was unfortunate in its limited application to the federal level of government. His strong objection is jurisprudential in nature. The proposed Bill strongly suggested to him that in Canada civil liberties have no exclusive constitutional value but may exist or be treated separately and differently in the various provinces no less than on the federal level. In any case, the proposed Bill may fortify the courts in their common-law convictions, at best. It may also, in his view, equally buttress the received convention of legislative restraint where civil liberties are concerned. In short, it would not add much to the protection of civil liberties under the common law. He summed up his views as follows :

If the limited application of the proposed Bill of Rights is dictated not by doubt or conviction as to legislative power but by a deliberate choice of policy, then, in my submission, it is doubtful wisdom to propose a measure on so vital a range of objects without exhausting the full reach of power open to the enacting legislature. It would be better that no Bill be proposed so that the common-law tradition be maintained through the unifying force and position of the Supreme Court of Canada. And better too, in such case, to allow that court to continue unaided in developing constitutional doctrine which has already pointed to legal

¹⁰⁷ *ibid.*, 14.

limitations on legislative encroachment on civil liberties.¹⁰⁸

In the same symposium, Laskin is supported by W.F. Bowker, another leading professor of law. In his words :

Some critics of the Bill allege that it is too narrow. My criticism is quite different : if our federal law infringes fundamental rights in any particular, or if it omits to preserve them, appropriate legislation should be passed on the subject. Some people take the other view. They think that a list of our rights and freedoms must be collected together in one place. I am not able to disprove the argument that a separate Bill of Rights has some psychological value on the rest of the world or on immigrants. But surely no one is unaware of the secure position of fundamental rights in Britain, a country that has never enacted a "Declaration of the Rights of Man". Its few landmark statutes are practical and deal with particular matters and on many subjects British law protects fundamental right by remaining silent.¹⁰⁹

This view to the effect that British common law and legal tradition secures all the fundamental rights and freedoms we need in this country was in fact articulated by the Right Honourable Ian MacKenzie, the then Minister of Veteran Affairs in the Commons debate of 1947 :

Let us never forget that we already possess in this country the rights affirmed in the Magna Carta in the nineteenth day of June, 1215, the Declaration of Rights in 1628, the Habeas Corpus Act of 1679 and the great body, with sweep and scope of common law.¹¹⁰

As we have seen, this was also expressed by the Attorney General of British Columbia who was certain that these rights "are for the most part dealt with and safeguarded by the common law".¹¹¹ Dean Kennedy who had

¹⁰⁸Laskin, *art.cit.*, 78.

¹⁰⁹W.F. Bowker, "Basic Rights and Freedoms : What are They?" 37 *The Canadian Bar Review* (1959), 64.

¹¹⁰House of Commons Debate (1947), vol. 86, 3188.

¹¹¹*Supra.* 176.

expressed his view to the Joint Committee in 1947, also wrote that there was no necessity for such a Bill of Rights:

Although it is not therefore the question submitted to me, I do not believe that a bill of rights is really necessary. I think that our 'freedom' are well enough protected in the ordinary law and, if this is not so, it ought to be possible to change the law in the various jurisdictions to suit occasions.¹¹²

Against this view, Glen How, the lawyer for the Jehovah's Witnesses, argued his case for a Bill of Rights.¹¹³ With reference to the Joint Committee of 1947, he quoted the statement of the Deputy Minister of Justice to the Joint Committee wherein he declared that "[a]s regards religion there would seem to be no constitutional safeguard".¹¹⁴

How's line of reasoning sought to show that there was in fact no religious freedom in England, and therefore it was useless to find security in the common law of England to safeguard that which was non-existent. In his argument he traced the historical violations of religious freedom from the early seventeenth century where heretics were burnt at the stake. During the reign of Mary there were horrors of the inquisition and it was a crime even to read the Scriptures in the English language.

Referring to the laws in force at that time, he gave several pointed examples. The *Conventicle Act of Charles II*¹¹⁵ was notorious. Under the *Act*, it was an offence for more than five persons to meet for worship other than according to the ritual of the Church of England. *The Test Act of 1673* required all holders of temporal office the taking of the sacrament and

¹¹² 26 *Canadian Bar Review* (1948), 711.

¹¹³ *ibid.*, 759.

¹¹⁴ *ibid.*, 710.

¹¹⁵ 16 Charles II 1664 c.4.

rejection of the doctrine of trans-substantiation. *The Marriage Act of 1753* provided that marriages of all persons other than Quakers and Jews were required to be celebrated in the parish church according to the rites of the Church of England.

Quoting from Pollard,¹¹⁶ to the effect that "the British Constitution is a miscellaneous, uncollected, undigested mass of statutes, legal decisions and vague understandings or misunderstandings", How concluded as follows :

Freedoms resting on such insecure foundations are like a house built on shifting sand, liable to fall at any time. There is nothing to prevent any legislature, municipal council, magistrate or other public authority from denying fundamental freedoms, whether wittingly or unwittingly. There is no written guide from which one can discover what they really are.¹¹⁷

Other arguments for and against the need for a Bill of Rights are summarized by Tarnopolsky in his *The Canadian Bill of Rights*.¹¹⁸ The reasons against the proposed Bill included the following :

1. Fundamental rights and freedoms which are universal and immutable do not exist. History shows that they are subject to change.
2. Many of the countries which signed the *Universal Declaration of Human Rights* have not put them into effect and deny these very rights.
3. Experience shows that Bill of Rights are not as effective for safe-guarding these freedoms as the traditional methods which have been used.
4. A general definition of these values tends to limit them. They are better developed to meet the changing needs through our traditional methods of providing speedily available remedies.
5. The federal general power of disallowance provides all the protection we need against provincial encroachment, whereas

¹¹⁶ A.F. Pollard, *Factors in Modern History* (1932), 176.

¹¹⁷ 26 *Canadian Bar Review* (1948), 794

¹¹⁸ Tarnopolsky, *op.cit*, 10.

- Parliament will not infringe these rights except in times of emergency, and then even a Bill of Rights will not help.
6. A Bill of Rights is a denial of the practical sovereignty of Parliament. Such a fundamental change is not justified.
 7. It would place in the hands of the judiciary the power of deciding grave issues of policy. This is not only harmful to the judiciary, but it is the transference of a power from the legislature which is better suited to use it.
 8. A Bill of Rights introduces rigidity into the constitution.

The reasons for the proposed Bill included the following:

1. In the refined legal systems of today there are certain fundamental rights and freedoms which are immutable. Individuals and minorities need special protection.
2. Protection of these rights is now an international doctrine of the United Nations and binding upon Canada as a signatory.
3. Experience has shown that Bill of Rights are effective in protecting the rights of individuals.
4. Many new Commonwealth countries, such as India, have seen fit to include provisions protecting certain fundamental rights and freedoms in their constitutions.
5. A clear and authoritative declaration of the general principles would be of value in attaining their recognition.

Clearly, those who felt the need for a Bill of Rights eventually prevailed resulting in the enactment of the *Canadian Bill of Rights* by Parliament which received Royal Assent on August 10, 1960. It was enacted as an ordinary statute by the Progressive Conservative Government under the leadership of Prime Minister Diefenbaker.

Indeed, as far as politicians and parliamentarians were concerned, the Co-operative Commonwealth Federation (C.C.F.) championed the need for a Bill of Rights way back in 1945, three years before the lawyer for the Jehovah's Witnesses wrote "The Case for the Canadian Bill of Rights".¹¹⁹ In introducing his motion Alistair Stewart spoke in the following terms :

That, in the opinion of this house, there should be incorporated in

¹¹⁹ *Supra*, 16.

the constitution a bill of rights protecting minority rights, civil and religious liberties, freedom of speech and freedom of assembly; establishing equal treatment before the law of all citizens, irrespective of race, nationality or religious or political beliefs; and providing the necessary democratic powers to eliminate racial discrimination in all its forms.¹²⁰

Nothing came out of this motion as it was withdrawn on the assurance by the government that a *Canadian Citizenship Bill* would shortly be introduced which would go at least part of the way in providing protection for these fundamental rights and freedoms.

In the campaigns during the general elections of 1957 and 1958 the Progressive Conservative Party promised, among other things, a Bill of Rights to protect fundamental rights and freedoms. Almost immediately upon being elected to power, Diefenbaker introduced *Bill C-60* for "the Recognition and Protection of Human Rights and Fundamental Freedoms". After the first reading it was withdrawn by agreement so that it would give sufficient time for interested parties to study the *Bill* and to submit comments and criticisms.¹²¹ The *Bill* was reintroduced as *Bill C-79* in 1960. At the end of the Parliamentary session, a House of Commons Special Committee to study the *Bill* and to receive representations on it was set up.¹²² A number of changes were made including the Preamble which was absent in the original *Bill*. As noted earlier the preamble appear to support a natural law premise for the protection of fundamental rights and freedoms.¹²³ On August 4, 1960 the *Bill* passed its third and final reading. It also passed the Senate on August 5, 1960 and given the Royal Assent on August 10, 1960.

¹²⁰ *House of Commons Debates*, 1945, 900.

¹²¹ *ibid.*, 1958, 4638-4639.

¹²² *ibid.*, 1960, 5950-5951.

¹²³ *Supra.*, 187ff.

The Application of the Bill of Rights

One of the obvious limits of the *Bill of Rights* is that it was made applicable only to federal laws. This is the view of most constitutional authorities on the interpretation of s. 2 together with s. 5(2). The relevant section reads as follows :

S.2. *Every law of Canada* shall, unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any rights or freedoms herein recognized or declared, and in particular, no *law of Canada* shall be construed or applied so as to¹²⁴

S.5(2) The expression "law of Canada" in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

Reading the two sections together leads to the conclusion that the *Bill* is only applicable to present and future federal legislation, and present but not future laws that are "subject to be repealed, abolished or altered by the Parliament of Canada". Pre-Confederation laws within federal legislative authority are covered together with common law in fields of concurrent federal legislative competence.¹²⁵ Although Gordon has suggested that s. 5(2) also covers provincial laws in fields of concurrent federal power,¹²⁶ Hogg is

¹²⁴ Emphasis mine.

¹²⁵ See Larry Taman, "The Adversary Process on Trial : Full Answer and Defence and the Right to Counsel" (1975), 13 *Osgoode Hall Law Journal* 251 at 276; and J.N. Lyon, "A Progress Report on the Canadian Bill of Rights" (1976), 3 *Dalhousie Law Journal* 39 at 41.

¹²⁶ Gordon, (1961) 4 *Canadian Bar Journal* 431 at 434.

of the contrary opinion.¹²⁷ Although such laws are subject to be rendered inoperative through the paramountcy doctrine it is not strictly speaking the result of a repeal, abolition or alteration.

Schmeiser, while agreeing that s. 5(2) applies to federal legislation, thinks that s. 5(3) might catch provincial laws.

S. 5(3) reads :

The provision of Part I shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada.

He asked the rhetorical question on the basis of a subtle distinction between federal legislation and federal legislative authority :

The first half of subsection 2, up to the word 'thereunder', means that the Bill applies to any federal Act, order, rule or regulation, present or future. The second half of subsection 2 is no doubt based on section 129 of the B.N.A. Act, and, accordingly, would refer to laws in force prior to Confederation. Whether the second half of the subsection was necessary is questionable, but if the section had ended here, it would not be too ambiguous. It goes on, however, in subsection 3 to extend the operation of the Bill to matters coming within federal *legislative authority*. In other words, under subsection 2 the Bill applies to federal legislation, whereas under subsection 3 the Bill applies to federal legislative authority. The distinction may easily be overlooked, but there is an important difference between legislation and legislative authority. We have already seen that legislative authority over certain matters overlaps, and there is a large body of provincial legislation that could also be enacted by Parliament under some aspect of section 91. Does subsection 3, which is patently in conflict with subsection 2, mean that the Bill of Rights extends to such provincial legislation?¹²⁸

The foregoing discussion is relevant for our purpose because it raises a

¹²⁷ Hogg, *op.cit.*, 432. n.2.

¹²⁸ Schmeiser, *op.cit.*, 40.

number of questions touching on the nature of fundamental rights and the effectiveness of the *Bill* in seeking to protect them. In restricting its application only to federal statutes, the government of Diefenbaker appeared to be rather unclear as to the real value or nature of the freedoms that it sought to protect. As Hogg puts it,

Apparently the government was reluctant to resort to the anachronistic procedure for amending the B.N.A. Act, and was convinced that the provinces would not agree to the adoption of a bill of rights which was applicable to them. However, the failure to entrench the Bill of Rights by amendment of the B.N.A. Act meant that it could be repealed at any time by the government and raised the question whether it could be effective at all. The failure to extend the Bill of Rights to the provinces (which would have required an amendment) meant that provincial violation of civil liberties were not covered at all.¹²⁹

Of course, civil liberties could still be covered by provincial legislations since the provincial legislatures are not affected by the *Bill of Rights*. The *Saskatchewan Bill of Rights Act, 1947*; ¹³⁰ the *Alberta Bill of Rights, 1972*; ¹³¹ the *Individual's Right Protection Act, 1972* (Alta)¹³² and the *Quebec Charter of Human Rights and Freedoms, 1975*¹³³ are still in force. The protection, however, is incomplete in that they probably do not have overriding effect on inconsistent legislation.¹³⁴

¹²⁹Hogg, *op.cit.*, 432.

¹³⁰1947, S.S. 1947 c.35, R.S.S. 1965, c.378 amended, S.S. 1970, c.56, S.S. 1972, c.104.

¹³¹S.A. 1972, c.1.

¹³²S.A. 1972, c.2.

¹³³S.Q. 1975, c.6.

¹³⁴O.E. Lang, "Case and Comment : The Saskatchewan Bill of Rights" (1959), 37 *Canadian Bar Review* 233.

The most significant problem raised by the *Bill's* limited application as far as understanding the nature of the rights protected is two-fold. In the first place it suggests that fundamental rights are rather vague and indistinct rights. The preamble which seems to suggest their foundation in some natural law principles may well support the paradox of its concrete reality in abstract natural rights foundations. Secondly, perhaps because of its vagueness of existence, the rights appear not to fall within the field of legislative competence of either the Parliament or the legislatures specifically. Hence both legislative powers are left to protect the rights as they see fit.

The late Prime Minister John Diefenbaker was pitching his proposed Bill of Rights with that understanding. In the Commons debate of 1958 he declared :

[W]e, proceeding in parliament to bring about the achievement of fundamental freedoms must scrupulously respect whatever provincial legislation exists in reference in whole or in part to this matter.¹³⁵

Mr. Diefenbaker also rejected proposals for a constitutional amendment which would bound both the Dominion and the provinces. In the same debate he admonished :

Let us clear our own doorstep first. In so far as a constitutional amendment would be concerned, the experience of 80 years indicate very clearly that the provinces, jealous of their jurisdiction, would not support a constitutional amendment applicable to themselves.¹³⁶

As we have seen, Professor Bora Laskin (as he then was) was most critical of this view of fundamental rights.¹³⁷ He was of the firm opinion that

¹³⁵ *House of Commons Debates*, September 5th 1958 at 4643.

¹³⁶ *ibid.*, 4642.

¹³⁷ *Supra.*, 184ff.

the Diefenbaker government "has chosen the worse of two impossible worlds"¹³⁸ The first impossible world is to grant to the provinces the right to legislate on fundamental freedoms such as religious freedom. In that event the *Bill of Rights* was certainly largely unconstitutional. The other impossible world is to deny any independent dignity to the political freedoms including the freedom of religion from the standpoint of exercise of legislative power. This is the position the government took in proposing the *Bill of Rights*. Laskin commented that "this would be quite a sad resting place for the political freedoms".¹³⁹

To sum up, Laskin is of the view that political rights ought to have an independent constitutional value and should be a "matter" that falls exclusively in the field of Dominion legislative powers. This view resolves a number of difficulties presented by the *Bill of Rights* as enacted. He concludes in these words :

[T]hen Parliament need not have any qualms about binding the provinces because they have no legislative power in relations to political liberties. Provincial legislation might have incidental effects, but any such legislation which, properly construed, was in relation to the political freedoms would be no encroachment on provincial legislatures as well as Parliament, because only Parliament would be surrounding any jurisdiction.¹⁴⁰

Some support for this position could well be found in the judgements of Rand, Kellock and Locke J.J. in *Henry Birks and Sons* case¹⁴¹ where the court held that provincial legislation requiring compulsory observance of

¹³⁸ Laskin, *art.cit.*, 120.

¹³⁹ *ibid.*

¹⁴⁰ *ibid.*,

¹⁴¹ [1955] S.C.R. 799.

religious holidays were *ultra vires* provincial powers. The justices' view that the impugned legislation was a matter in relation to religion certainly gives religion a separate constitutional value which is beyond legislative competence. Their opinions gave a direct "civil liberties" basis to questions of religious observance. Rand J., for instance, spoke in terms of the statute having been "enacted in relation to religion; it proscribes what is in essence a religious obligation".¹⁴²

The Effect on Religious Freedom

Three years after the coming into force of the *Bill of Rights*, the Supreme Court of Canada considered the effect of the opening paragraphs of ss. 1 and 2 for the first time. The case of *Robertson and Rosetanni v. The Queen* [1963]¹⁴³ is also the only case on religious freedom decided with reference to the *Bill of Rights*. Prior to that there were a number of criminal cases in the lower courts. The decisions were not always clear and sometimes contradictory. In any case, none of them concerned the question of religious freedom.¹⁴⁴

The facts in *Robertson and Rosetanni v. The Queen* are simple enough. The appellants were bowling alley operators who were convicted by the lower courts for operating their business on a Sunday contrary to s.4 of the *Lord's Day Act*.¹⁴⁵

¹⁴² *ibid.*, 813.

¹⁴³ [1963] S.C.R. 651. Also known as the *Sunday Bowling Alley* case.

¹⁴⁴ See Tarnopolsky, *op.cit.*, 132.

¹⁴⁵ R.S.C. 1952 c.171. Now R.S.C. 1970 c.L-13.

S. 4 reads :

It shall not be lawful for any person on the Lord's Day, except as provided herein, or in any provincial Act or law now or hereinafter in force, to sell or offer for sale or purchase any goods, chattels, or other personal property or any real estate, or to carry on or transact any business of his ordinary calling, or in connection with such calling, or for gain to do, or employ any other person to do, on that day, any work, business, or labour.

In their defence, the appellants argued that the *Dominion Act* was in conflict with the right to freedom of religion enumerated in s. 1(c) of the *Canadian Bill of Rights*. The section reads :

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion, or sex, the following human rights and fundamental freedoms, namely,
....
(c) freedom of religion.

With the exception of Cartwright J., the court ruled that s. 4 of the *Lord's Day Act* does not infringe on the freedom of religion, within the meaning of the words used in the *Canadian Bill of Rights*. The rationale for the decision was to be found in the majority's view to the effect that freedom of religion was not abridged by state support of particular religious tenets so long as there was no compelled observance thereof by others; and that these others were obliged to close their businesses on Sunday was purely a secular consequence.

Ritchie J., with Taschereau, Fauteux and Abbott J.J. concurring, noted that the *Canadian Bill of Rights* is not concerned with "human rights and fundamental freedoms" in any abstract sense, but rather with such "rights and freedoms" as they existed in Canada immediately before the statute was enacted. The basis for this view is s. 2 of the *Bill of Rights* where "[E]very law of Canada shall ... be so construed and applied as not to abrogate, abridge

or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared...".

In understanding the concept of religious freedom recognized in this country before the *Bill of Rights*, he referred to Taschereau J.'s famous judgement in *Chaput v. Romain* [1955]¹⁴⁶ where he declared that all religions are on equal footing and that they all enjoy the most complete liberty of thought. He also turned to Rand J.'s judgement in *Saumur v. The City of Quebec* [1953]¹⁴⁷ where he affirmed that from 1760 religious freedom has been recognized as a principle of fundamental character and that although there was no established church, the untrammelled affirmations of "religious belief" and its propagation retained, unquestionably the greatest constitutional significance throughout the Dominion.

From these two judgements, Ritchie J. concluded that religious freedom exists in Canada before the *Canadian Bill of Rights* notwithstanding the provisions of the *Lord's Day Act*. In reconciling the provisions of the *Lord's Day Act* and the existence of religious freedom, he said :

It is to be remembered that the human rights and fundamental freedoms recognized by the courts of Canada before the enactment of the Canadian Bill of Rights and guaranteed by that statute were the rights and freedoms of men living together in an organized system of law which imposed limitations on the absolute liberty of the individual.¹⁴⁸

In support of his view of the outer limits of religious freedom, he cited the dissenting judgement of Frankfurter J. in *Board of Education v. Barnett* (1943) in which he said :

¹⁴⁶[1955] S.C.R. 834 at 840. See *supra.*, 113,157.

¹⁴⁷[1953] 2 S.C.R. 299 at 327. See *supra.*, 111.

¹⁴⁸[1963] S.C.R. 651 at 655.

The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma.¹⁴⁹

With that he concluded with the following decision and dismissed the appeal :

My own view is that the *effect* of the Lord's Day Act rather than its *purpose* must be looked to in order to determine whether its application involves the abrogation, abridgement or infringement of religious freedom, and I can see nothing in that statute which in any way affects the liberty of religious thought and practice of any citizen of this country. Nor is the "untrammelled affirmations of religious belief and its propagation" in any way curtailed.

The practical result of this law on those whose religion requires them to observe a day of rest other than Sunday, is a purely secular and financial one in that they are required to refrain from carrying on or conducting their business on Sunday as well as on their own day of rest. In some cases there is no doubt a business inconvenience, but it is neither an abrogation nor an abridgement nor an infringement of religious freedom, and the fact that it has been brought about by reason of the existence of a statute enacted for the purpose of preserving the sanctity of Sunday, cannot, in my view, be construed as attaching some religious significance to an effect which is purely secular in so far as non-Christians are concerned.

As has been indicated, legislation for the preservation of sanctity of Sunday has existed in this country from the earliest times and has at least since 1903 been regarded as a part of the criminal law in its widest sense. Historically, such legislation has never been considered as an interference with the kind of "freedom of religion" guaranteed by the Canadian Bill of Rights.

I do not consider that any of the judges in the courts below have so construed and applied the Lord's Day Act as to abrogate, abridge, or infringe or authorize the abrogation, abridgement or

¹⁴⁹(1943) 319 U.S. 624 at 653.

infringement of "freedom of religion" as guaranteed by the Canadian Bill of Rights nor do I think that the Lord's Day Act lends itself to such a construction.¹⁵⁰

It is quite significant that the learned judge took 1903 as the starting point for his reasoning that since that time Sunday observance legislations have been regarded as part of the criminal power of Parliament. It would be relevant to trace the case law on Sunday observance to see his line of reasoning.

Sunday Observance Laws

Before 1903 it was generally accepted that the Lord's Day legislation fell within provincial competence in the division of legislative powers, being legislation in relation to civil rights¹⁵¹ or in relation to matters of a merely local or private nature in the province.¹⁵² The *Lord's Day Act* in question was not passed until 1906. Prior to that most provinces had some form of Sunday observance legislation in place.¹⁵³

In 1903 the Privy Council, in *A.G. for Ontario v. Hamilton Street Ry.*,¹⁵⁴ held that *An Act to Prevent the Profanation of the Lord's Day*¹⁵⁵ passed by the Ontario legislature was invalid as being legislation in relation to

¹⁵⁰ *Robertson and Rosetanni v. The Queen*, *op.cit.*, at 657-658.

¹⁵¹ *British North America Act*, s.92(13).

¹⁵² *ibid.*, s.92(16).

¹⁵³ See the judgement of Lord Blanesburgh in *Lord's Day Alliance of Canada v. A.G. for Manitoba* (1925) A.C. 384 at 390-391 for a brief history of such legislations.

¹⁵⁴ (1903) A.C. 524.

¹⁵⁵ R.S.O. 1897 c.246.

criminal law under s. 91(27) of the *British North America Act*. Their lordships were of the following opinion :

It is, therefore, the criminal law in its widest sense that is reserved, and it is impossible, notwithstanding the very protracted argument to which their Lordships have listened, to doubt that an infraction of the Act, which in its original form, without the amendment afterwards introduced, was in operation at the time of confederation, is an offence against the criminal law.¹⁵⁶

Although no substantive reason was given for the decision, it was soon followed by the Supreme Court of Canada in 1905. In *re Legislation Respecting Abstinence from Labour on Sunday*¹⁵⁷ the court amplified the privy council's decision as follows :

It appears to us that the day, commonly called Sunday, or the Sabbath, or the Lord's Day, is recognized in all Christian countries as an existing institution, and that legislation having for its object the compulsory observance of such day or the fixing of rules of conduct (with the usual sanctions) to be followed on that day, is legislation properly falling within the views expressed by the Judicial Committee in the Hamilton Street Railway reference being referred to and is within the jurisdiction of the Dominion Parliament.¹⁵⁸

It was in this context that the *Lord's Day Act* was passed by Parliament in 1906 as a prohibitory measure.¹⁵⁹ The main prohibitory sections contain an exceptive clause : "except as provided in any provincial act or law now or hereafter in force". The significance of this clause was soon understood when the courts dealt with the constitutional validity of this clause in two cases.

¹⁵⁶(1903) A.C. 524 at 592.

¹⁵⁷(1905) 35 S.C.R. 581.

¹⁵⁸*ibid.*, at 592.

¹⁵⁹See Waterman, "The Lord's Day Act in a Secular Society" (1965), 11 *Canadian Journal of Theology* 108 for a history of the statute.

The first was a Privy Council case of *Lord's Day Alliance of Canada v. A.G. for Manitoba*.¹⁶⁰ The Manitoba statute in question made it lawful to conduct Sunday excursions to resorts within the province. The privy council held that the legislation was not prohibitory in character. It was merely permissive. And since Sunday excursions had not been prohibited by English laws introduced into the province and since they were not prohibited by any Dominion legislation prior to the statute in question, the statute was valid.

In the other case of *Lord's Day Alliance of Canada v. A.G. for B.C.*,¹⁶¹ the impugned legislation was an amendment to the *Vancouver Charter* permitting sports for game on Sunday. The Supreme Court held that it was valid amendment because it was merely permissive and regulatory, not prohibitive. The early Privy Council decision was cited as authorities.

What is clear in these decisions is that the courts made a distinction between prohibitory statutes and permissive or regulatory statutes. The former is strictly and exclusively in the field of criminal law powers and therefore only within the Dominion competence¹⁶² The courts have struck down prohibitory statutes enacted by the legislatures when the statutes prohibited certain conduct only on Sunday.¹⁶³ On the other hand, the courts have upheld the validity of similar provincial statutes if the prohibition extended to other parts of the week as well.¹⁶⁴ As Schmeiser remarked :

¹⁶⁰(1925) A.C. 384, 1 D.L.R. (2d) 97.

¹⁶¹(1959) S.C.R. 497, 19 D.L.R. (2d) 97.

¹⁶²Cf. *St. Prosper v. Rodrique* (1917) 56 S.C.R. 157.

¹⁶³See *Ouimet v. Bazin* (1912) 3 D.L.R. 593, 46 S.C.R. 502; *St. Prosper v. Rodrique* (1917) 56 S.C.R. 157.

¹⁶⁴See *Re Fisher and Village of Carmen* (1905) 16 Man. R. 560; *O'Brien v. Royal George* (1921) 57 D.L.R. 301.

Dominion authority relates to the observance of Sunday in its moral and religious aspects, whereas provincial legislation must be in the nature of municipal or police ordinances of a local character regulating business or ensuring a reasonable degree of peace and quiet. The object of the legislation must be the determining factor, but often this is difficult to ascertain, and the decisions indicate a tendency to over-emphasize the wording of the legislation.¹⁶⁵

It is quite clear that much of the issue revolves around the object of the legislation. If the object relates to the religious or moral aspect, then it is more likely construed as a prohibitory statute and therefore exclusively within the competence of Parliament. If the object is secular, namely, to regulate commerce, sports or leisure, then it is permissive or regulatory and therefore within the legislative competence of the provinces. But it is often difficult to determine whether provincial regulatory legislation dealing with closing hours of public places, for example, and covering Sunday closing is not being directed to Sunday observance by the religious people of the community rather than to the "secular" object of regulating the conduct of certain businesses, and therefore invalid as being prohibitory and hence, criminal law.

This problem is curable by proper drafting so that the objects are unequivocally secular. The case in point is *Lieberman v. The Queen* (1963).¹⁶⁶ The Supreme Court in that case held that a provincial law which required the closing of pool rooms and bowling alleys between midnight and six a.m. on any weekday, and all day Sunday was valid. *Hamilton St. Ry.* and other Sunday observance cases were distinguished on the differences of objectives. Sunday observance cases were religiously motivated and prohibitory, whereas in *Lieberman*, the prohibition was regulatory being

¹⁶⁵Schmeiser, *op.cit.*, 102.

¹⁶⁶[1963] S.C.R. 643.

"primarily concerned ... with secular matters".¹⁶⁷

On this solution of curability through better drafting, Hogg criticized the judgement in *Lieberman* with the following comments :

Ritchie J., who wrote the opinion of the court in *Lieberman*, did not explain what could be the "secular" purpose of a prohibition of business on Sunday which did not apply to any day of the week. Nor did he explain how the dominant purpose of such a prohibition was to be ascertained. In referring to the Sunday observance cases he emphasized the religious connotations of the titles and preambles of the statutes in issue in those cases. But such formal criteria are not satisfactory grounds for rulings on constitutionality, because formal criteria can be satisfied simply by appropriate legislative drafting. If a province is careful to couch a Sunday observance law in secular language, within a statute which also imposes some rules on other days of the week, then *Lieberman* would appear to ensure its validity. Within these limits of secular language and format, the provinces have finally been given back the power they were denied in the *Hamilton Street Railway* case.¹⁶⁸

It ought to be noted too that Sunday observance cases have been held to be applicable to preclude as well any provincial legislation with a religious objective requiring compulsory observance of other religious or feast days. Thus in *Henry Birks and Sons (Montreal) Ltd. v. Montreal and A.G. of Quebec*[1955]¹⁶⁹ where a provincial statute authorized the municipal council to make by-laws ordering stores to be closed on religious holidays was held to be *ultra vires* provincial powers. Rand J. ruled that "the statute is enacted in relation to religion; it prescribes what is in essence a religious obligation".¹⁷⁰ Kellock J. held :

¹⁶⁷ *ibid.* , 649.

¹⁶⁸ Hogg, *op.cit.*, 286.

¹⁶⁹ [1955] S.C.R. 799.

¹⁷⁰ *ibid.* , 812.

The object of the legislation was not to provide additional holidays for persons engaged in the retail trade but, because of the religious significance of the days to large numbers of people in the Province, to compel by law their observance by all storekeepers to the extent at least of prohibiting the buying and selling of merchandise on the days mentioned.¹⁷¹

Although the exceptive clause in the *Lord's Day Act* is more or less satisfactorily resolved through the cases, the result does appear to be in conflict with an important constitutional rule against delegation of legislative authority. In *A.G. of N.S. v. A.G. of Canada*¹⁷², the Supreme Court dealt, on the occasion of a reference by the Lieutenant Governor in Council of the Province of Nova Scotia, with the question of the constitutional validity of a bill entitled *An Act respecting the delegation of jurisdiction from the Parliament of Canada to the legislature of Nova Scotia and vice versa*. The *Bill* provided for reciprocal powers to receive such authority from the federal Parliament in labour relations, and also in the important area of indirect taxation.

It was argued that ss. 91 and 92 of the *British North America Act* conferred "exclusive" law-making power which could not be made cumulative even by agreement. As well, delegation is explicitly authorized for a narrow purpose only in ss. 94 and 95, therefore cannot be implied in ss. 91 and 92. In favour of delegation, on the other hand, it was argued that delegation did not involve any infringement on the structure of ss. 91 and 92 because it merely conferred limited power on an "agent" with the principal authority under the *British North America Act* "retaining final power of review and reversal".¹⁷³

¹⁷¹ *ibid.*, 818.

¹⁷² [1951] S.C.R. 31.

¹⁷³ *ibid.*, 44.

A strong analogy of delegation to administrative agencies may be found in *Re Gray*¹⁷⁴ which accepted the analogy as valid in the widest terms.

The court ruled unanimously that there is no power of delegation because there is no right to abdicate their respective powers in ss. 91 and 92 of the *British North America Act*. Should that be otherwise, the court said, the delineated powers of the two legislative bodies would be significantly enlarged. As well it would convert the nature of federalism into a unitary state. Rinfret C.J. declared :

The constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled. It is part of that protection that Parliament can legislate only on the subject matters referred to it by s. 91 and that each Province can legislate exclusively on the subject matters referred to it by s. 92. The country is entitled to insist that legislation adopted under s. 91 should be passed exclusively by the Parliament of Canada in the same way as the people of each Province are entitled to insist that legislation concerning the matters enumerated in s. 92 should come exclusively from their respective Legislatures. In each case the Members elected to Parliament or to the Legislatures are the only ones entrusted with the power and the duty to legislate concerning the subjects exclusively distributed by the constitutional Act to each of them.¹⁷⁵

Prima facie, the exceptive clause in the *Lord's Day Act* allows Parliament to delegate its exclusive legislative authority to enact legislation in relation to the religious aspect of Sunday to the provincial legislatures. This view finds its support in a number of *dicta* where the judges expressly described the operation of the *Act* in terms of delegation. Thus in the *Lord's*

¹⁷⁴(1918), 57 S.C.R. 150.

¹⁷⁵ *ibid.* , Also *Citizen's Insurance v. Parson* (1880) 4 S.C.R. 215 at 317, 348.

Day Alliance of Canada v. A.G. for Manitoba,¹⁷⁶ Lord Blanesburgh stated that, in view of their finding, it was unnecessary to consider whether the provincial legislation could be "justified as being in effect Dominion legislation by delegation or reference".¹⁷⁷ The comment is most telling even though the issue was not one of justification by delegation, but rather, invalidation by delegation.

Davies J. in *Ouimet v. Bazin*¹⁷⁸ had "no doubt" that Parliament could "delegate its power" as it had done in the *Lord's Day Act*.¹⁷⁹ Martin J.A. of the Saskatchewan Court of Appeal also used the delegation terminology in *Clarke v. R.M. of Wanken*.¹⁸⁰ And in a Quebec case of *Spiliotopoulos v. R.*,¹⁸¹ Sir Horace Archambeault, C.J., upheld a Quebec statute allowing for sale of fruits, sweets and cigars on Sunday in these words :

There is no doubt that the Parliament of Canada can thus delegate the powers which appertain to it This power of delegation would include the delegation to a province of the right to legislate itself out of the operation of the federal Lord's Day Act.¹⁸²

Notwithstanding these *dicta*, it is the opinion of Laskin that the exceptive clause is not a delegation of power for that would be unconstitutional. He asserts :

Rather, it operates by way of conditional legislation, and

¹⁷⁶(1925) A.C. 384.

¹⁷⁷ *ibid.* , 394.

¹⁷⁸(1912) 3 D.L.R. 593.

¹⁷⁹ *ibid.* at 600.

¹⁸⁰(1930) 2 D.L.R. 596 at 601.

¹⁸¹(1917) 30 C.C.C. 123.

¹⁸² *ibid.* , at 126.

provincial enactments contemplated by the clause must be directed to some object or purpose competent to the province. Hence, prohibitory legislation respecting Sunday observance would be invalid On the other hand, provincial regulatory legislation which, standing alone, would be valid (though subject, of course, to be overridden or forestalled by Dominion legislation "occupying the field" -- as for example, unconditional Sunday observance legislation), may properly operate under excepting clause of the Dominion's Lord's Day Act.¹⁸³

The Question of Encroachment on Religious Freedom

The state of the law on Sunday observance is quite clear apart from the exceptive clause in the *Lord's Day Act* which raises some ambiguities insofar as its operation is concerned. It is not in dispute that the constitutional power of Parliament to pass the *Lord's Day Act* is found in the fact that it is enacted in relation to religion and prescribes what are in essence religious obligations. For this reason, it has been held that the legislative power to enact this *Act* falls within the criminal power head in s. 91(27) of the *British North America Act*. Conversely, it is clear that legislation affecting the conduct of people on Sunday but enacted solely with the object of promoting a secular goal having a relation to the religious character of the time is within the powers of provincial legislatures.

As we have seen, the interesting question posed by *Robertson* and *Rosetanni v. The Queen*¹⁸⁴ is whether or not such legislation on Sunday observance is an encroachment on religious freedom. The Supreme Court, with Cartwright J. dissenting, had held that it is not an encroachment.

¹⁸³ Abel, *op.cit.*, 846.

¹⁸⁴ [1963] S.C.R. 651. See *Supra.*, 203ff.

In delivering the majority judgement, Ritchie J. did not deny that the *Lord's Day Act* was enacted to safeguard the sanctity of Sunday in support of Christian religious tenets. What he denied was that the *Act* had the effect of abridging the freedom of religion of those who do not hold to the Christian tenets within the meaning of the *Bill of Rights*. He held that the effect, not the purpose, was relevant. This distinction between effect and purpose is tantamount to the distinction in the First Amendment of the American Constitution where there is a distinction between the establishment of religion and the free exercise of the same. It would appear, analogously, that the purpose of the *Act* establishes the Christian religion to the extent that the Lord's Day is held sacred. The judgement of the court suggests that freedom of religion under the *Bill of Rights* is understood only in terms of its free exercise or the effect it has on those who practice other religions to the extent federal legislation is *ultra vires* if its effect imposes religious observances on unwilling persons or restrains them from practicing their own religions.

The neat distinction between effect and purpose in itself is problematic. In constitutional cases, the courts have been concerned with both purpose and effect as a guide to constitutionality.¹⁸⁵ There is no clear line drawn between them in the conclusion of many cases, and if it has to be drawn, it has been more often drawn in support of "purpose" rather than effect.¹⁸⁶

In the case under critique, the purpose and effect are correlated. The purpose of the *Lord's Day Act* was to promote the sanctity of Sunday. The effect on non-Christians, under the sanction of law, surely must mean that they were compelled to treat it as a sanctified day. Hence it is surely untenable to say that the effect was any different when the nature of the legislation is taken

¹⁸⁵ Bora Laskin, "Comments", 42 *Canadian Bar Review* (1946), 155.

¹⁸⁶ *ibid.*, See *A.G. Alta. v. A.G. Canada* [1939] A.C. 117 at 130.

into account.

Even on his own terms, Justice Ritchie's effect test could be questioned. Did the majority of the court really look at the effect of the *Lord's Day Act*? Tarnopolsky contended that

[i]f the Supreme Court in fact looked at the effect and not the purpose it would have had to conclude that the *Lord's Day Act* is a major factor in inducing Jews and Moslems to work on their Sabbath because not to do so would mean closing their establishments for two days, and not just one as Christians may be.¹⁸⁷

Justice Ritchie's opening statement that the rights and freedoms which were the concern of the *Bill of Rights* were only those that existed in Canada at the date of the enactment of the *Bill* has been severely criticized. Tarnopolsky called this principle of interpretation "the frozen concepts".¹⁸⁸ He contended that probably no other factor has contributed as much to the lack of application of the *Bill of Rights* as the fact that these rights are frozen in time. Tracing a series of cases since the *Robertson and Rosetanni* case, he showed how the result of this "frozen concepts" interpretation made the *Bill of Rights* ineffective. In *Regina v. Burnshine*¹⁸⁹ for instance, Justice Martland carried the approach further by declaring that

The Bill did not purport to define any new rights and freedoms. What it did was to declare their existence in a statute, and, further, by s. 2, to protect them from infringement by federal statute.¹⁹⁰

¹⁸⁷ W.S. Tarnopolsky, *op.cit.*, 135.

¹⁸⁸ W.S. Tarnopolsky, "A Bill of Rights and Future Constitutional Change", 57 *Canadian Bar Review* (1979) 626 at 630

¹⁸⁹ [1975] 1 S.C.R. 693.

¹⁹⁰ *ibid.*, 702.

The ultimate progression of this approach is found in *Regina v. Miller and Cockriell*.¹⁹¹ In considering whether the death penalty provisions in the *Criminal Code* contravened the *Bill of Rights*, Justice Ritchie concluded that since, shortly after the coming into force of the *Bill of Rights*, the *Criminal Code* was amended several times with respect to capital punishment, and Parliament did not include the "non obstante" clause of s. 2 of the *Bill*, therefore Parliament did not assume that the death penalty provisions were contrary to s. 2(b), the "cruel and unusual treatment or punishment clause". Commented Tarnopolsky, "[t]he result of this decision is that if Parliament did include the 'non-obstante' clause, the *Bill of Rights* would *not* apply, but that also when it *does not* include the clause, the *Bill of Rights* would *not* apply".¹⁹²

The unhappy way the courts had approached the interpretation of the *Bill of Rights* is summarized by Le Dain J. In *R. v. Therens* where he declared as an evident fact of Canadian judicial history that

on the whole, with some notable exceptions, the courts have felt some uncertainty or ambivalence in the application of the *Canadian Bill of Rights* because it did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament.¹⁹³

In the same year, Wilson J. in *Singh v. Minister of Employment and Immigration* [1985] breathed new life into the Bill of Rights in a way that goes beyond the "*frozen concepts*". She concluded that the recent adoption of the *Charter* by Parliament and nine of the ten provinces as part of the

¹⁹¹[1976] 70 D.L.R. (3d) 324.

¹⁹²Tarnopolsky, "A Bill of Rights and Future Constitutional Change", 631. Emphasis his.

¹⁹³[1985] 1 S.C.R. 613 at 639.

Canadian framework has sent a clear message to the courts that the restrictive attitude which at times characterized their approach to the *Canadian Bill of Rights* ought to be reexamined.¹⁹⁴

No doubt Ritchie J. in the *Robertson and Rosetanni* case intended by his assertion to show that freedom of religion could be regarded as compatible and consistent with the *Lord's Day Act* since the *Act* was in existence at the time of the enactment of the *Bill of Rights*. Laskin pointed out that the learned Justice was subtly accommodating the *Bill of Rights* to existing Canadian legislation. He challenged this accommodation thus :

Yet, unless Section 1, in its grandiloquent declamation of rights that "have existed and shall continue to exist", is accepted as an unqualified statement of principle, whatever be the limitations that in practical application have to be placed on its terms under section 2, the Bill of Rights becomes even more pointless than the sceptics portended when it was enacted.¹⁹⁵

Justice Ritchie's statement that "[h]istorically, such legislation [as the *Lord's Day Act*] has never been considered as an interference with the kind of 'freedom of religion' guaranteed by the *Bill of Rights*"¹⁹⁶ appear to be a piece of circular reasoning. There was no allusion to any previous statutes. As well, the case at bar was the first in which the issue of religious freedom was raised. There was no in-depth analysis of the meaning of religious freedom within the meaning of the *Bill of Rights*. In any case the *Bill of Rights* was too "young" to lend itself to a historical analysis. What, then, was the basis of his conclusion? It was clearly a mere assertion that freedom of religion must be construed with due regard to the *Lord's Day Act* so that the

¹⁹⁴ [1985] 1 S.C.R. 177 at 209.

¹⁹⁵ Laskin, "An Inquiry ...", 152.

¹⁹⁶ 2 O.R. (1963), 41 D.L.R. (2d) 494.

Act, rather than the *Bill of Rights*, determines its meaning and significance. Hence, as Laskin sharply critiqued the circularity of the process, "the inescapable conclusion from this assertion can hardly be relied on subsequently as an expression of the reason for making it".¹⁹⁷

Cartwright J.'s dissenting judgement is worth examining. He agreed with the appellants in that case that since the purpose and effect of the *Lord's Day Act* are to compel, under the penal sanction of the Criminal Law, the observance of Sunday as a religious holy day by all inhabitants of Canada is an infringement of religious freedom. In his own words :

In my opinion a law which compels a course of conduct, whether positive or negative, for a purely religious purpose infringes the freedom of religion.

A law which, on solely religious grounds, forbids the pursuit on Sunday of an otherwise lawful activity differs in degree, perhaps, but not in kind from a law which demands a purely religious course of conduct on that day, such as for example, the attendance at least one at divine service in a specified church.

It was argued that, in any event in the case at bar the appeal must fail because there is no evidence that the appellants do not hold the religious belief that they are under no obligation to observe Sunday. In my view such evidence would be irrelevant. The task of the Court is to determine whether s. 4 of the Act infringes freedom of religion. This does not depend on the religious persuasion, if any, of the individual prosecuted but on the nature of the law. To give an extreme example, a law providing that every person in Canada should, on pain of fine or imprisonment, attend divine service in an Anglican church on at least one Sunday in every month would, in my opinion, infringe the religious freedom of every Anglican as well as that of every other citizen.

I have reached the conclusion that construed by the ordinary rules of construction s. 4 of the *Lord's Day Act* is clear and unambiguous and does infringe the freedom of religion

¹⁹⁷Laskin, "An Inquiry ...", 156.

contemplated by the Canadian Bill of Rights.

I cannot accept the argument that because the Lord's Day Act had been in force for more than half a century when the Canadian Bill of Rights was enacted, Parliament must be taken to have been of the view that the provisions of the Lord's Day Act do not infringe freedom of religion. To so hold would be to disregard the plain words of s. 5(2). [of the Canadian Bill of Rights]¹⁹⁸

Indeed Justice Cartwright's position was anticipated by Professor Laskin in his analysis of the proposed Bill of Rights in 1959. In commenting on the *Chabot* case where the Jehovah's Witnesses secured exemption from religious exercises in the school on an interesting and largely "natural law" construction of the school legislation,¹⁹⁹ he said :

It may be noticed here, however, that the strength of the "common law" conviction on freedom of religion has not deterred the Parliament of Canada from enacting and maintaining a Lord's Day Act which compels Sunday observance as a Christian religious holiday and which applies in its prohibitions to non-Christians and non-Sunday observing Christians whose religious principles and practices do not embrace the sanctity of Sunday.²⁰⁰

Again in commenting on *Birks* case, he said :

In the result, we have firm holdings that statutory compulsion to respect religious values may be imposed by Parliament but not by provincial legislatures. We have federal legislation in the Lord's Day Act which does just that. We now have a proposal for a federal Bill of Rights which announces among its protected values "freedom of religion". Is the Bill intended to repeal the Lord's Day Act which is a negation of the freedom of religion expressed in the Bill? There are sections of the Canadian community for whom Sunday has no religious value, yet the Lord's Day Act

¹⁹⁸ *Robertson and Rosetanni v. The Queen*, *op.cit.*, 660-661.

¹⁹⁹ (1957) 12 D.L.R. (2d) 769 (Que. C.A.)

²⁰⁰ Laskin, "An Inquiry ...", 89.

compels them to observe it as a day of religious significance.²⁰¹

Schmeiser has also anticipated similar questions in his work. He noted the fact that in *Birks* case²⁰² three of the judges held that the *Quebec Early Closing Law*²⁰³ compelled a religious observance of feast days and was therefore beyond the jurisdiction of the province. Rand J. spoke about the feast days in terms wholly applicable to the *Lord's Day Act*:

Their compelled observance by any means involves the acknowledgment of the authority of a church to ascribe to them their special character, and of a duty in relation to them. Being the creation of a church, under a secular legislature and in the circumstances here they possess no significance unless by positive legislative enactment; and such an enactment cannot be taken otherwise than as having that character and that duty as the reason and purpose for the enjoined observance.²⁰⁴

Schmeiser aptly commented as follows :

The conclusion that such a statute is an encroachment on religious freedom lends weighty support to the contention that the Lord's Day Act is a similar encroachment on Jews and Seventh Day Adventists who observe Saturday as the proper day of rest. These groups are prohibited from carrying on their regular business or work on a day which has no religious significance to them in exactly the same way that the storekeepers were forced to close their shops on both days, they would be in a precarious financial position, whereas there was no such problem in the *Birks* case.²⁰⁵

The last word on the *Robertson and Rosetanni* case is best left to Professor Laskin (as he then was) who later became one of Canada's most

²⁰¹ *ibid.* , 122.

²⁰² *Henry Birks & Sons v. Montreal and A.G. for Quebec* (1955) S.C.R. 799.

²⁰³ R.S.Q. 1941 c.239.

²⁰⁴ (1955) S.C.R. at 812.

²⁰⁵ Schmeiser, *op.cit.*, 108.

activist Chief Justices of the Supreme Court :

The case at bar was not an easy one to decide, even if regarded as raising merely an issue of statutory construction. But is [sic] has deeper implications because "freedom of religion" is not only an expression in the Canadian Bill of Rights, but also a matter, in the constitutional sense, falling within federal legislative power. It could be of signal importance for provincial and federal legislation touching religious matters whether the federal power is as narrow as Ritchie J.'s interpretation of "freedom of religion" in the Bill of Rights would suggest. It is clear that the Lord's Day Act if enacted by a provincial legislature would, in the present state of the law, fall because of invasion of exclusive federal power. Is there not something incongruous in a holding that it does not equally fall in the face of the guarantee of the Bill of Rights, assuming the latter to have at least suspended federal authority in the field? To deny this is to say that the Bill of Rights does not exhaust the range of federal power in relation to religion or, at least, of federal power to enforce conduct in espousal of a religious precept. It is to say that it embodies something less, something which would not be affronted even if the federal Parliament decided that we should have an established church.²⁰⁶

Blood Transfusion

There is one interesting criminal case involving the Jehovah's Witnesses where the judge commented on the *Bill of Rights*. In the case of *Regina v. Cyrenne, Cyrenne and Cramb*,²⁰⁷ the accused were charged with criminal negligence causing death contrary to s. 203 of the *Criminal Code* as a result of the death of a 12 year-old. Two of the accused were parents of the deceased child and the other was critically ill, from hospital when it became

²⁰⁶ Laskin, "An Inquiry ...", 156.

²⁰⁷ (1981) 62 C.C.C. (2d) 238.

known that the physicians intended to give her a blood transfusion.

The court acquitted the accused on the ground that the crown failed to prove beyond reasonable doubt that the conduct of the accused caused the death of the deceased. The fact that it was at least possible that the child's life would have been saved by the blood transfusion was not proof beyond a reasonable doubt.

It was the court's finding that the accused conduct was reckless though not amounting to criminal negligence. The rationale for the finding is of interest to us. Fitzgerald D.C.J. said,

Thus, I am led by the authorities, by which I am bound, to the conclusion that it is not what the accused in this case believed was the right treatment for Sara Cyrenne which is relevant. The relevant determination is whether what each accused did or omitted to do was reckless having regard to the information available to him or to her in light of the knowledge, background, training and experience which each accused was capable of applying to the evaluation of such data as were available at the time of decision.²⁰⁸

Even more significantly, in relation to the *Canadian Bill of Rights* s. 1(a), the learned judge said,

The right to life was a right which belonged to Sara Cyrenne. While I have great sympathy for persons who hold, as did these accused, honest and sincere beliefs that certain medical practices are abhorrent and ineffective, this does not give them the right to reject on behalf of a 12-year-old child a treatment which any reasonable parent, even with the adverse knowledge of these accused, would recognize as the only hope of preserving that life. To do so was in my opinion recklessly abandoning the sole but real hope of the child's recovery.²⁰⁹

He concluded that "life and death decisions of this nature go beyond the

²⁰⁸ *ibid.*, 251.

²⁰⁹ *ibid.*, 263.

interests of the family and enter the sphere of public interests".²¹⁰ In short, there is a state compelling interest to intervene in order to save a minor's life.²¹¹

Intra-Church Dispute and the Courts

Thus far, the concern in relation to religious freedom under the *Bill of Rights* has to do with the personal dimension of religious freedom. The Sunday observance issue is an illustration of this personal dimension. There is another dimension to the question which is collective in contradistinction to the personal dimension. This is the freedom within the religious community to govern themselves and deal with their own problems. When a group has an internal dispute, the question is to what extent should the civil courts interfere when the dispute is brought before it for adjudication.

Generally speaking, fundamentalistic churches tend to take the Pauline injunction in I Corinthians 6:1-8²¹² literally. Among those who do, some will avoid seeking legal redress in the courts of law. This is especially the case when the disputes turn on matters of doctrine. In interpretative matters

²¹⁰ *ibid.*

²¹¹ See cases under *Charter of Rights and Freedoms* (ch. V)

²¹² "When one of you has a grievance against a brother, does he dare go to law before the unrighteous instead of the saints? Do you not know that the saints will judge the world? And if the world is to be judged by you, are you incompetent to try trivial cases? Do you not know that we are to judge angels? How much more, matters pertaining to this life! If then you have such cases, why so you lay them before those who are least esteemed by the church? I say this to your shame. Can it be that there is no man among you wise enough to decide between members of the brotherhood, but brother goes to law against brother, and that before unbelievers? To have lawsuits at all with one another is defeat for you. Why not rather suffer wrong? Why not rather be defrauded? But you yourselves wrong and defraud, and that even your own brethen." (Revised Standard Version)

relating to doctrines, the courts will not consider themselves competent to adjudicate. However, doctrinal disputes tend to result in economic or financial burdens on one or both parties. In consequence, disputes that indirectly result in property rights are often brought before the courts. The conflict in the form of church-state relation arises when the court rules against the decision of the governing body of the church. It would be detrimental to the notion of religious freedom should the courts usurp the decision-making functions of the church's governing body. Thus, in *Watson v. Jones*, the court took a non-interference stance :

All who unite themselves to such a body [voluntary religious association], do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence to these religious unions, and of their rights to establish tribunals for the decision of questions arising among themselves that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.²¹³

It is obvious that for churches to be free to function, they need to be autonomous. In other words, internal autonomy of churches is an important function of religious freedom.

In the United States, the courts have developed the "neutral principles of law" analysis over a period of time. These principles uphold the authority of the ecclesiastical bodies to be self-determinative.²¹⁴ In matters relating to

²¹³ 80 U.S. (13 Wall) 679 at 729.

²¹⁴ See Barbara M. Norman, "Constitutional Laws : Limits on Constitutional Review of Hierarchical Church Decisions" (1976-1977), 45 *Fordham Law Review*, 992; Thomas W. Cunningham, "The Role of Civil Courts in Church Disputes", 7 *Winsconsin Law Review* (1977), 904 and "Judicial Resolution of Church Property Disputes", 31 *Alabama Law Review* (1980), 307.

property, the analysis seeks to determine formal title to the property by examining relevant contractual documents.²¹⁵ This approach avoids the issue of adjudicating on doctrinal differences or disagreements and focuses squarely on the strict legal rights to the property.²¹⁶

The Canadian courts have also developed a neutral non-interference approach. Two similar cases decided within a decade of each other are instructive. In both, there is the element of doctrinal shifts within the membership resulting in internal schism. Both cases concern community properties.

In *Hofer et al v. Hofer et al*,²¹⁷ the parties were members of the Hutterite Brethren. In the mid-60s, several members of the colony became involved with the Radio Church of God. The tenets of this church were incompatible with the Hutterite teachings. As a result of their affiliation and renunciation of the faith and practices of the Hutterite Church, the community was adversely affected. The majority who still kept to the Hutterite tradition made numerous attempts to persuade the "heretical" brethren to reconsider their position and return to the Hutterite teachings. When their efforts failed, they promptly excommunicated the "heretics".

The excommunicants were the plaintiffs who sought legal action to have the assets of the colony liquidated and distributed among the membership. They argued to the effect that the colony ought to be disbanded because peaceful coexistence between the two parties was not possible. The defendants

²¹⁵ See *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969).

²¹⁶ *Maryland and Virginia Eldership of the Churches of God v. The Church of God at Sharpsburg, Inc.* 393 U.S. 367 (1970) at 370.

²¹⁷ *Hofer v. Hofer* (1966) 59 D.L.R. (2d) 723; (1967) 65 D.L.R. (2d) 607; [1970] 13 D.L.R. (3d) 1; [1970] S.C.R. 958.

argued, on the other hand, that the plaintiffs were effectively excommunicated from the colony and were therefore not in any position to stake any claim on the property of the colony.

After a long legal battle, the matter was finally heard by the Supreme Court of Canada in 1970. The majority, with Justice Pigeon dissenting, held in favour of the Hutterite colony. It was an affirmation of the lower courts' decisions. The fact that the Hutterites signed the articles of association which governed their rights and duties as members of the colony was most significant. It was noted that all the members of the colony, under the articles, were to be communicants in the Hutterite Brethen Church. The lower court also noted that by the terms of the articles, there was no entitlement to the property should a person cease to be a member of the church.²¹⁸

In the Supreme Court, Justice Ritchie ruled that there was no individual rights of ownership in the colony. The property of the colony was held in trust for the community as a whole in accordance with the principle of community of property which was a fundamental notion of life together in Hutterite teachings. In any case, the plaintiff / appellants were validly expelled from the colony. The learned judge expressed his rationale at length as follows.

...in my view, adherence to the Hutterite faith was a prerequisite to membership in the Colony which by its very nature was required to be composed exclusively of Hutterian Brethen and their families. I am also of opinion that the decision as to whether or not any individual was a Hutterian Brethren so as to be entitled to continue as a member of the community was a decision which could only be made by the Hutterite Church. In the present case, as I have indicated, the decision to expel the appellants from the Colony was made by the church, but it had the effect of making the appellants ineligible for continued

²¹⁸ *ibid.*, (1966) 59 D.L.R. (2d) 723 at 724.

membership in the Colony.

There is no doubt that the Hutterian way of life is not that of the vast majority of Canadians, but it makes manifest a form of religious philosophy to which any Canadian can subscribe and it appears to me that if any individual either through birth within the community or by choice wishes to subscribe to such a rigid form of life and to subject himself to the harsh disciplines of the Hutterian Church, he is free to do so. I can see nothing contrary to public policy in the continued existence of these communities living as they do in accordance with their own rules and beliefs,...²¹⁹

Clearly, the learned judge took the view that membership is a *sine qua non* to collective property rights and that the court has no business to interfere with the authority of the church to determine who its members are at any given time. Since membership is inseparable from the subscription to the statement of doctrines, the position of the Manitoba Court of Appeal was affirmed by the Supreme Court. Justice Freedman of the Manitoba Court of Appeal had written,

Let it be said at once that it is no part of the function of the court to choose between conflicting religious doctrines and to put its stamp of approval on one and its mark of rejection on the other. This court has no desire to engage in any such exercise, nor is it qualified to do so. It recognizes the right to diversity of religious beliefs or opinion.²²⁰

In concurring with Justice Ritchie, Justice Cartright of the Supreme Court elaborated on the principle of freedom of religion. In response to the appellant's claim that the contractual relationship embodied in the articles of association was contrary to public policy in that the renunciation of all claims to private property in the colony reduced the appellants to the status of serfs, the learned judge said :

²¹⁹ *ibid.* , [1970] 13 D.L.R. (3d) 1 at 13.

²²⁰ *ibid.* , (1967) 65 D.L.R. (2d) 607 at 613.

...one of the liberties chiefly prized by a normal man is the liberty to bind himself. Unless the members are free to enter into contracts of the sort set out in the articles of association, it is difficult to see how the Hutterian Brethren could carry on the form of religious life which they believe to be the right one... The appellants,... remain free to change their religion but they have contracted that if they do so and leave the Colony, voluntarily or by expulsion, they will not demand any of its assets.²²¹

In this regard the Supreme Court simply affirmed the decision of the Appeal Court that such contractual relationship did not violate the principle of freedom of religion. It was a matter of free choice and commitment, and therefore each person so committed is subject to the discipline of his church. Justice Freedman of the Court of Appeal had said,

Outside the Hutterian Brethren Church and not members of the colony, they possessed (and still possess) the ordinary gifts of free citizens to follow any religious beliefs they might desire, or indeed no religious beliefs, if that should be their inclination. But within the colony they were Hutterites, pledged by solemn obligation and specific covenants to adhere to the religion of the Hutterian Brethren Church.²²²

The Supreme Court's ruling established two very important affirmations. Firstly, it affirmed that the court is not competent to interpret doctrines. And secondly it affirmed that in the matter of discipline and membership, the church reserves the sole authority to decide and execute according to the rules subscribed to by the members. In so deciding, the court did not interfere with the autonomy of the church in relation to internal government. Indeed the case was decided by reference to the church's own rules and thus uphold the freedom of religion of the Hutterites even though the

²²¹ *ibid.* , [1970] 13 D.L.R. (3d) 1 at 4.

²²² *ibid.* , (1967) 65 D.L.R. (2d) 607 at 613.

practical result appears to be quite harsh in economic terms for the dissenters.²²³

In *Dodd et al. v. Society of the Love of Jesus*,²²⁴ five plaintiffs involved in a schism within a Roman Catholic religious community wished to be named the only remaining members of the society having exclusive right and use of the community property. The society, on the other hand, disputed their claims and petitioned for a declaration that the plaintiffs were no longer members.²²⁵

Following *Hofer et al. v. Hofer et al.*²²⁶ the court followed the rules of the religious community in determining its membership and concluded that only the Roman Catholic Church could determine who was in fact a religious. Elaborating further, the learned judge accepted the church's contention that canon law is the law that governs the status of the religious in the church. In accepting expert evidence on this matter, Judge McKay said that "[f]oreign law is a matter of fact to be proved by the evidence of witnesses who are experts in the law".²²⁷

The court then disposed of the matter upon the evidence of the canon law expert :

Father Morrissey [sic] testified in clear and unequivocal terms

²²³ It was this harshness that formed the basis for Justice Pigeon's dissent. In his view the high cost of not having the rights to leave the colony without having to abandon everything effectively meant that the dissenters were deprived of the freedom of religion

²²⁴ (1975) 53 D.L.R. (3d) 532.

²²⁵ For the background to the unfortunate internal conflicts, see Jordon Hite, "The Disciple and dismissal of Religious as Seen by the Secular Courts in Canada", 11 *Studia Canonica* (1977), 130.

²²⁶ (1966) 59 D.L.R. (2d) 723; (1967) 65 D.L.R. (2d) 607; [1970] 13 D.L.R. (3d) 1; [1970] S.C.R. 958.

²²⁷ *Dodd et al v. Society of the Love of Jesus, op.cit.*, 561.

that all five plaintiff ceased to be Religious in the Roman Catholic Church immediately upon the communication of the Rescripts. He testified further that the grounds for dismissal were grounds recognized by canon law as sufficient for that serious step and that the procedure used in determining the matter was proper in canon law. He agreed that other procedural methods of dismissal could have been adopted but that does not detract from his evidence that the method employed was canonically correct. In my view that disposed of the whole matter. I have already stated that one must be a Religious in the Roman Catholic Church to be a member of the defendant secular society. It follows that when one is properly dismissed as a Religious she ceases to be a member of that secular society.²²⁸

Thus the court found in favour of the society by not interfering with the internal government of the religious community. In recognizing canon law the court allowed the religious society the freedom to conduct its affairs according to its own laws. In this manner the freedom of religion was carefully safeguarded in its most essential aspect, namely the collective right of religious groups to self-determination.

Conclusions

With the enactment of the *Canadian Bill of Rights* in 1960 and the cases leading up to it, there is very little doubt that with respect to religion it is a "matter" of legislation within federal legislative competence. While the late Prime Minister Mr. Diefenbaker may have not been cognizant of this in his promotion of the view, no less than six judges in the *Saumur* case expressed concurrence with this position as early as 1953.²²⁹ This view is also widely accepted by commentators including Professor Bora Laskin (as he then was),

²²⁸ *ibid.* , 562.

²²⁹ *Saumur v. City of Quebec* [1953] 2 S.C.R. 299.

Professor Louis-Philippe Pigeon (as he then was) and Professor F.R. Scott.

The only case in which religious freedom under the *Bill of Rights* has arisen is *Robertson and Rosetanni v. The Queen*.²³⁰ In reconciling the *Lord's Day Act* to the guarantee of "freedom of religion" in s. 1(c) of the *Bill of Rights*, the majority of the justices held that the Dominion statute prescribing Sunday as a day of rest did not violate the *Bill*. Ritchie J. for the majority said that he recognized that persons whose religion required observance of a day of rest other than Sunday would have to observe two days of rest. Nonetheless he held that such a result, although in some cases "a business inconvenience" was "purely secular and financial" and in no way an abrogation, abridgement or infringement of the right to religious freedom.²³¹ In effect the court found that the pith and substance of the legislation was not religion at all but rather the secular effects of the *Act* on businesses that had to close because of it.

This decision is very difficult to reconcile with the Sunday observance cases which held that the observance of days of religious significance is within federal legislative jurisdiction precisely because it is in relation to religion rather than the secular matter of business hours.²³² How is it possible to reconcile a judgement which says that a law which requires business houses to close on Sunday is "secular" and therefore not violative of the freedom of religious principle in the *Bill of Rights* with two judgements which say that a law requiring business houses to close on holy days (including Sunday) is religious and therefore in relation to criminal power? It would appear that

²³⁰ [1963] S.C.R. 651.

²³¹ *ibid.*, 657-658.

²³² *A.G. Ont. v. Hamilton St. Ry* [1903] A.C. 524, *Henry Birks & Sons v. Montreal* [1955] S.C.R. 799.

the court "blew hot and cold" in the same breath.

One possible way to reconcile the cases is to recognize that there are other concerns quite besides the concern for religious freedom which are operative in the mind of the court. In the *Robertson and Rosetanni* case, the court looked at the *effect* and found it to be secular and within provincial competence. In *Henry Birks* and *Hamilton St. Ry.* cases, the court looked at the *purpose* and found it to be religious and within federal jurisdiction. In both cases, it was not so much religious freedom as a principle that was upheld but the principle of "double override", or the analysis of the division of power. This was the cause for the judicial restraint so evident in the history of decisions of the Supreme Court arising from the *Bill of Rights* where out of thirty cases only in one did the court hold that a provision in a federal statute was rendered inoperative.²³³

Long before the *Bill of Rights*, there has been a historical obsession with the division of powers so peculiar to the *British North America Act*. It became, as Irwin Cotler put it, the "looking glass" for civil liberties.²³⁴ Whenever a federal or provincial statute appeared to offend against civil liberties, the central question asked by judges was : "Is the alleged denial of civil liberties within the legislative power of the offending government?" If the answer was in the affirmative, the matter rested there notwithstanding the denial of the civil liberties.

If the result of this analysis offended common sensibility, the judges would scan the heads of power under ss. 91 and 92 to see if the alleged denial

²³³ *The Queen v. Drybones* [1970] S.C.R. 282. The Supreme Court held that s.94(b) of the *Indian Act*, R.S.C. 1952 c.149 was rendered inoperative by reason that it abrogates, abridges or infringes the right of an individual Indian to equality before the law guaranteed by s.1(6) of the *Bill of Rights*.

²³⁴ Tarnopolsky and Beaudoin, "Freedom of Assembly, Association, Conscience and Religion" in *Canadian Charter of Rights and Freedoms*, 124.

of civil rights by the provincial legislature trespassed upon federal jurisdiction. If so, it would be *ultra vires* the provincial legislature. But ss. 91 and 92 were not meant to be instruments for the protection of civil rights, notwithstanding s. 92(13) where "civil rights in the Province" is mentioned.²³⁵

It is contended that the reason lies in the common law principle of parliamentary sovereignty. Parliamentary sovereignty gives rise to legal federalism. The two elements working together result in the double override. Parliamentary sovereignty is inferred from the Preamble to the *British North America Act* which states that it is a constitution "similar to that of the United kingdom". The doctrine imports the theory of exhaustive distribution of powers. And if there is any residual powers it resides with the Parliament. Parliament therefore can abolish any of the civil liberties. Legal federalism is a means of avoiding that by protecting civil liberties through the division of powers approach "as a form of judicial expedient to reach a desired result in a given situation".²³⁶

As Cotler puts it :

Legal federalism, then, or "the division of powers" approach, thus became the most appropriate - if not the only - means of reconciling parliamentary sovereignty with judicial invalidation of legislation denying fundamental freedoms. The courts, through the "double override", could both remain faithful to the principle of parliamentary sovereignty and protect the fundamental freedoms of Canadians from offending legislation by striking down such legislation -- not on the ground that it

²³⁵ *Supra.* , 180ff.

²³⁶ J.N. Lyon and A.G. Atkey (eds.), *Canadian Constitutional Law in a Modern Perspective*, 375.

In *R. v. Harold* (1971), 19 D.L.R. (3d) 471 (B.C.C.A.), a municipal anti-noise by-law was successfully employed to prevent members of the Hare Krishna sect from chanting in the streets of Vancouver. This is a related example of the applicability of "double override" in that as long as municipal limitations to freedom of assembly are enacted within the delegated competence of a provincial legislature, the limitations will be valid.

"trespassed" on fundamental freedom, but on the ground that it "trespassed" upon the "powers" of the "competent" legislative authority²³⁷

The problem of judicial restraint through the continued use of the double override by the judiciary in its interpretation of the *Bill of Rights* may well have been dictated by the unentrenched status of the *Bill*. On more than one occasion, the Supreme Court explicitly relied on the fact that the *Bill* was not an entrenched part of the Constitution to justify judicial restraint. The *Bill* was described as a "statutory" enactment in *Curt v. The Queen*²³⁸ and a "quasi-constitutional instrument" which is a "half-way house between a purely common law regime and a constitutional one" in *Hogan v. The Queen*.²³⁹

Cartwright J's. dissenting judgement in *Robertson and Rosetanni* was anticipated by Laskin and Schmeiser. It would appear that Taschereau J's. utterance in *Chaput v. Romain*²⁴⁰ quoted in part by Ritchie J. to introduce the concept of religious freedom recognized in the country before the enactment of the *Bill of Rights* was in effect contradicted by the decision in *Robertson and Rosetanni*. At this point, it is valuable to quote the learned judge again:

In our country there is no state religion. All religions are on equal footing, and Catholics as well as Protestants, Jews and other adherents of various religious denominations, enjoy the most complete liberty of thought. The conscience of each is a personal matter and the concern of nobody else. It would be distressing to think that a majority might impose its religious views upon a minority, and it would also be a shocking error to believe that one serves his country or his religion by denying in one province, to a minority, the same rights which one rightly claims for

²³⁷Tarnopolsky and Beaudoin, *op.cit.*, 127.

²³⁸[1972] S.C.R. 889.

²³⁹[1975] 2 S.C.R. 680.

²⁴⁰[1955] S.C.R. 834 at 840.

oneself in another province.²⁴¹

The decision in *Robertson and Rosetanni* upholding the *Lord's Day Act* which is Christian in purpose and effect, does not square with this brave proposition that "in our country, there is no state religion". Neither does it sit well within the bold declaration that "all religions are on an equal footing ...".

It may well be that the Christian religious tradition of Sunday observance is too deeply entrenched in the politico-cultural ethos of the country to breach. It may also be that the infringement of religious freedom on non-Christians may be too minute to strike down the *Lord's Day Act*. It would be interesting to see what impact the *Charter of Rights and Freedoms* has on issues such as this in an increasingly multicultural and multi-religious Canadian society. It would also be interesting to see if the entrenchment of the *Charter*, as opposed to a mere statutory enactment of the *Bill of Rights*, would make a difference in liberating the judicial from conservative restraints through the means of double override which encased legal federalism in parliamentary sovereignty.

One matter, however, is clear. Insofar as the internal government of the religious community is concerned, the courts have consciously avoided interfering. This is done by allowing the rulers of the community to take their own course in matters of membership and property rights. The reluctance of the courts to interfere is grounded in its incompetence to interpret matters of doctrine which are usually the reason behind the disputes in the first place.

²⁴¹ *ibid.*

CHAPTER V

RELIGIOUS FREEDOM UNDER THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Between February 5 and 7 of 1968, the first meeting of the Constitutional Conference was held in Ottawa under the leadership of the Right Honourable Lester B. Pearson, then Prime Minister of Canada. One of the four main items on the agenda was the issue of fundamental rights. At that meeting, Pierre E. Trudeau was the Minister of Justice and it fell upon him to introduce a policy paper entitled *A Canadian Charter of Human Rights*, which set out recommendations for an expanded Bill of Rights to be entrenched in the Constitution and made equally applicable to both orders of government.

In his introduction, Trudeau spoke about using the law properly in terms of preserving the traditions and the pursuit of ideals which the Canadian society cherished. For him, "the freedom and dignity of the individual" was the most basic of them. He said :

If we as individuals do not have the opportunity to stand erect, to retain our self respect, to move freely throughout our country unhindered by any artificial impediment, then we have not created in this land the political climate that we are capable of creating. We will not have made use of the law as we should.¹

It was the government's belief, then, that the proposed Charter was not only a good thing in itself, but that it formed the path for an orderly reform of the Constitution. In this regard he referred to the need for such an

¹ *Proceedings of the Constitutional Conference, First Meeting, February 5-7, 1968*, 269.

entrenched Charter and the inadequacy of the *Bill of Rights*.

In England, in France, in the United States - and since World War II in virtually dozens of countries - the representatives of the people have chosen to speak out in favour of the individual person and guarantee to him the essential ingredients which will give him the opportunity to live in freedom and dignity. In this country, in 1960, at the suggestion of Prime Minister Diefenbaker, Parliament gave unanimous approval to a Canadian Bill of Rights, which has paved the way for what we now propose : A Charter of Human Rights for Canadians which will act as a fetter on the unlimited exercise of power not only of parliament, but of the provincial legislature as well, and which by its place in the constitution will possess a measure of permanence not now attaching to the 1960 bill which is in the form of an ordinary statute, subject to repeal at will.²

By way of assurance given to the provincial governments represented at the conference, Trudeau appeared to have indicated that some rights ought to be entirely beyond the legislative competence of either level of government.

I wish to make it clear that in proposing this measure there is no suggestion that the federal government is seeking any power at the expense of the provinces. We are stating that we are willing to surrender some of our power to the people of Canada, and we are suggesting that the provincial governments surrender some of their power to the people in the respective provinces. It is because we are a federal state, with competence to legislate divided between provincial governments and the federal government, that we must all act in order effectively to protect all of the rights of all the people.³

A year later, at the second meeting, the Federal Government submitted another policy paper entitled *The Constitution and the People of Canada* which reiterated the proposal for a new Charter of Rights. It outlined in some detail suggestions for enhancing the effectiveness of the existing *Bill of*

²*ibid.*, 271.

³*ibid.*

Rights. By then Trudeau was the new Prime Minister. In his opening statement he insisted that a Charter of Human Rights should be an integral part of the Constitution, because those rights are equally important for all Canadians. His eloquent advocacy included the following attempts at reminding his premiers that Canada could not afford to ignore the rights and still remain civilized :

We want to revise our Constitution. We want to bring it up to date, to make it more in keeping with the realities of our time. However, our real purpose, our profound motivation, is first and above all to serve the citizen, to safeguard his interests, to ensure the protection of his rights and the realization of his hopes. This is our prime consideration, and it is common to all of us; the more so because all of us, together, represent and serve the same Canadians. Jurisdictions may well be divided among different levels of government, but the citizen remains one and indivisible.

What value can be more important, what possessions more precious to the citizen than the right to life and property, and the freedoms of opinion, speech and religion? Those are basic rights of the individual, inherent in the dignity of man, because they are fundamental, natural and, indeed, unalterable. Can these rights be ignored in the Constitution of a modern and civilized country which claims to be the defender of the dignity and liberty of man?⁴

Over a ten year period, the Trudeau government kept working on the ideal of constitutional renewal with a vision of offering "the advantage of having all Canadians participate in the same spirit and same ideal" and "to give this country a soul" by recognizing "once and for all the principles and ideals we share in common and which inspire us".⁵ Thus in 1978, the government submitted *Bill C-60, the Constitutional Amendment Bill*. Division III of

⁴ *Proceedings of the Constitutional Conference, Second Meeting, February 10-12, 1969*, 7.

⁵ *ibid.*, 8.

Part I made provision for the *Canadian Charter of Rights and Freedoms*. In its policy paper entitled *A Time for Action* published to introduce *Bill C-60*, the government underlined the importance of having the human rights entrenched in the new Constitution.

The proposal for a Charter of Rights and Freedoms appeared to have been well received. Both in 1972 and 1978 the Joint Parliamentary Committees of the House and Senate unanimously supported the Federal Government. In fact, the special joint committee of the Senate and the House of Commons on the Constitution recommended that a comprehensive Bill of Rights be entrenched in the Constitution. In 1978 the joint committee received *Bill C-60* and wholeheartedly endorsed the proposed Charter of Rights and Freedoms. As well, the Canadian Bar Association Committee on the Constitution endorsed the proposal in their publication entitled *Towards A New Canada* (1978). The Task Force on Canadian Unity published *A Future Together* (1979) wherein they recommended that any new constitutional changes include a comprehensive and entrenched Bill of Rights.

The Entrenchment Question

The question, then, was not whether there was a need for a Canadian Charter of Rights and Freedoms among jurists, lawyers and politicians. The question was about the best way to provide for the protection of fundamental rights and freedoms. Notwithstanding the general support for entrenching the Charter so as to restrict both Parliament and the legislatures from interfering with such rights, there were those who opposed it. R.A. Macdonald listed eight propositions representing "a distillation of several of the most cogent

counter-arguments advanced by *Charter* opponents".⁶

- I. An entrenched Charter is illusory as a guarantee of fundamental rights and freedoms. History has shown that entrenched Bill of Rights are unnecessary to secure civil liberties in most cases. Conversely, they are ineffective whenever governments wish to disregard them or whenever a society lacks the will to sustain liberal-democratic values.
- II. The idea of an entrenched Charter is foreign to the Canadian legal and constitutional tradition. British constitutional law is suspicious of abstract formulations of rights and rejects the notion of a written constitution. The enunciation of specific remedies, with known and effective consequences, and the process of organic evolution in constitutional practice are the preferred means for elaborating rights and freedoms.
- III. The doctrine of supremacy of Parliament cannot coexist with a constitutionally entrenched Charter. The liberal-democratic character of Canadian society rests on the unfettered right of elected Parliaments and legislatures to make law for the peace, order and good government of the country. Review of legislation on civil libertarian grounds by an appointed judiciary is necessarily anti-democratic.
- IV. The independence and impartiality of the courts will be compromised by Charter litigation. Courts are strictly adjudicative bodies that should not make policy or engage in the balancing of competing interests which interpretation and application of a Bill of Rights implies. The open-ended standards to be applied mean that judges cannot ground their decision in logical deduction alone and consequently must abandon their mask of impartiality.
- V. Any entrenched Charter necessarily discriminates between categories of fundamental rights. The inclusion or exclusion of certain rights often has no basis other than historical accidents or political expediency. Nevertheless, once a text has crystallized, it will inhibit the development, assertion and recognition of non-stipulated rights.
- VI. The deployment of entrenched Charter reinforces the ideology of legalism and further enhances the power of the

⁶R.A. Macdonald, "Postscript and Prelude - The Jurisprudence of the Charter : Eight Theses", 4 *Supreme Court Law Review* (1982), 324-325.

legal profession. The document tacitly delegates to lawyers the responsibility for protecting fundamental rights, thereby encouraging litigiousness and literalism in interpretation. Already lawyers have arrogated to themselves the definition of such rights without having to account either for the values selected or the interpretation placed on them.

- VII. Underlying the notion of an entrenched Charter is a political and economic theory that the minimal state is constitutionally desirable. In the guise of enhancing civil liberties through entrenching political and procedural rights, Bill of Rights establish substantial roadblocks to the attainment of economic rights. The massive state intervention necessary to achieve social and economic equality is impossible in a society dominated by the "purely procedural" right to due process as understood by lawyers.
- VIII. An entrenched Charter erects constitutional guarantees protecting fundamental freedoms from encroachment only by the government. The late twentieth century has seen the most grievous abuses of civil liberties not in the actions of the state, but in the exercise of private power. Doctrines of private property, freedom of contract and fault-based liability, the exercise of which is immune from the new constitutional guarantees, permit man's most important civil liberties to be freely eroded.

Macdonald himself appears to be rather cynical about the Charter. In his jurisprudential analysis, he expressed aloud without an explanation the concern as to "how a declaration of government morality and constitutional propriety was brought into being by arguably immoral and corrupt political practices". "Perhaps", he continued, "social psychiatrists may some day uncover why the government whose actions finally prompted thoughtful Canadians to ponder the need for an entrenched Charter should have been the one to foist such a document upon them".⁷ He also gives a piece of his mind to the enthusiasts of the Charter expressed in the following rather philosophical musing :

⁷ *ibid.*, 323.

A curious element of Hegelian evolutionism seems to have muted all but the most iconoclastic political scientists; it is as if the Charter represents the final synthesis in the inevitable progression (in respect of the protection of human rights) from customary origin, to contractual formulation, to judicial recognition, to legislative enunciation, to constitutional entrenchment. Once the ideal has become the actual, further dialectical speculation is otiose. Likewise, civil libertarian journalists (self-proclaimed midwives to the constitutional immaculate conception) have, in the manner of Descartes' God, now moved on to more satisfying endeavors; smug in the knowledge that their efforts have ensured forever the transmutation of the St. Lawrence into the River Styx, they leave to mere mortals wistful contemplation of the farther shore. Undeniably, the fact of patriation has bewitched those who would undertake theoretical assessment of the Charter, be they lawyers, philosophers, political scientists or journalists.⁸

Some of the concerns about entrenchment were also expressed at the Constitutional Conferences of 1968 and 1969 by the provincial premiers and their representatives. In the 1968 conference, the Honourable A.A. Wishart, Attorney-General of Ontario expressed the following cautious sentiments :

The common law extends to the individual virtually every right, unless it has been abridged by the law. Under the civil code system there are no inherent rights in the individual unless they are prescribed by law. The systems thus approach rights and duties on diametrically opposed paths. Different approaches : on one side all the rights are there unless abridged; on the other side the rights you enjoy are hereby protected. The systems are approached from different directions, but they may very well achieve the same results. The difficulty we face is in developing one system that will adequately serve both the civil code and the common law in their separate provinces. The resolution of this problem does indicate the advantages in permitting the provinces to deal with property and civil rights under their own special systems of jurisprudence.⁹

⁸ *ibid.*, 322-323.

⁹ *Proceedings of the Constitutional Conference, First Meeting, February 5-7, 1968*, 283.

In stronger terms, the premier of Quebec, the Honourable Daniel Johnson continued :

A third difficulty stems from Canada's federal character and the present distribution of powers. Property and civil rights in this country are the exclusive responsibility of the provinces. We are not prepared to waive this responsibility. As we have pointed out, we intend to incorporate into Quebec's constitution a charter of human rights. Preliminary work has been carried out to this effect and commented on not only in newspapers of our province but also in certain legal reviews. We were able to observe how very carefully these matters have to be handled.

Within a federative context, it is essential to specify clearly which authority will be responsible for ensuring that fundamental rights are respected. We mentioned earlier two possibilities which we rejected : first, that the federal government and federal courts be given exclusive powers in this field; second, at least as far as Quebec is concerned, that there be indirect encroachment on provincial jurisdiction as it relates to property and civil rights. Consequently, it seems wise for us for the moment to refrain from saying anything that might be construed as a preconceived attitude.¹⁰

It is clear that both Ontario and Quebec were jealously guarding their legislative powers under the *British North America Act*. It is most interesting that both the Attorney-General of Ontario and the Premier of Quebec spoke of "civil rights" under s. 92(13) as if they were equivalent to "civil liberties" when the courts had ruled otherwise.¹¹

The Honourable Stirling Lyon, the Attorney-General of Manitoba was most clearly opposed to entrenchment. Speaking on behalf of his government in 1969, he said :

To reiterate the freedom enjoyed in our present system is largely enshrined in our institutions of parliament and legislatures and an

¹⁰ *ibid.*, 295.

¹¹ *Supra.*, 178ff.

independent judiciary. It would seem to us much more important that we devote our energies to the preservation of liberties by keeping our institutions healthy rather than by declaratory codifications which might well erode the present premise of those familiar institutions.¹²

The Minister of Justice of Saskatchewan, Honourable D.V. Heald, notwithstanding the fact that his province was one of the first to legislate on human rights, expressed concern about extending such rights "beyond fundamental democratic rights". Quoting Schmeiser on the American situation where "urban renewal has been rendered almost impossible by the due process clause of the American Constitution", he warned against going as far as the Americans have gone.

If we allow ourselves to get into a situation similar to that of the United States, we think, we fear the result might be that the safety and well-being of the public may be subordinated to the so-called rights of individuals; whereas, of course, the great basis of law and order requires that the rights of individuals have to be curtailed for the common good. Sometimes I feel that it is overlooked that the Court in hearing a criminal charge is charged with the responsibility of determining whether or not an accused person is guilty, not whether ways can be found to prevent the real and truthful evidence of guilt being placed before the Court.¹³

Perhaps the most opposed to entrenchment was the Honourable L.B. Peterson, speaking on behalf of British Columbia. He thought that entrenchment would lead to a degree of uncertainty in the law in the sense that there are too many competing legislatures and any law that affects any of the rights referred to in the Constitution could come before the courts. That would increase litigation which in his view would not be in the interest of the

¹² *Proceedings of the Constitutional Conference, Second Meeting, February 10-12, 1969*, 274.

¹³ *ibid.*, 286.

public. His other concern has to do with the problem of the "frozen concepts". Entrenchment makes it very difficult to alter any of the rights in the Constitution. In his own words :

The question in my mind is simply this : whether the transient political preferences of today should be enshrined for all time in our Constitution. If you look back, as I say, even 20 years ago at the legislation then protecting human rights and compare it with the great amount today (sic) if you think of the improvements as far as the trial of an accused person is concerned in that same period of time, in less than 20 years; if we had been sitting down 20 years ago and discussing the question would we put in the Constitution the same rights we think people are entitled to today?¹⁴

These arguments and counter-arguments are reminiscent of the debate around whether there was a need for a Bill of Rights in the first place.¹⁵ When it came to the bottom line, it was clear that most Canadians were in favour of putting their rights and freedoms beyond the reach of both Parliament and the legislatures. These rights and freedoms were considered so fundamental that they should be made immutable. It was also felt that the courts would be the most impartial and stable institution to check on the power of the popular assemblies which are subject to the unpredictable vicissitude of the population. Thus the early attempt to place fundamental freedoms beyond the tampering powers of the elected politicians was embodied in the climactic Constitutional Conference held in Victoria June 14-16, 1971. Art. 2 reads :

No law of the Parliament of Canada or the legislatures of the provinces shall abrogate or abridge any of the fundamental freedoms herein recognized and declared.

As we have seen earlier, part of the need for an entrenched Charter was

¹⁴ *ibid.*, 290-291.

¹⁵ *Supra.* 191ff.

because the *Bill of Rights, 1960* was not entrenched. It was a mere statutory enactment which could be easily repealed by Parliament in the same way any ordinary legislation could be repealed. With the application of the "double override" and the conservative judicial restraint in evidence during the twenty-two years of the *Bill's* existence, the *Bill* was found wanting to the extent that it was almost never used to override legislative or administrative actions that were inconsistent with the fundamental rights and freedoms. With the exception of the *Drybones* case¹⁶ and the occasional *dicta* of individual justices of the Supreme Court to the effect that certain fundamental rights lay beyond the reach of the legislative competence of Parliament or legislatures,¹⁷ the courts had limited themselves to determine which level of government was competent to limit such rights. Legislations that violated fundamental freedoms had been declared *ultra vires* not on the basis that they interfered with fundamental rights but that they trespassed upon the powers of the competent legislative authority. This was the problem of legal federalism. As Professor Paul Weiler has noted :

Characterization of overly restrictive legislation in federalism categories at best approaches the substantive problem obliquely, in terms of which jurisdiction should have power to work the injustice, not whether the injustice should be prohibited completely.¹⁸

It would appear that entrenchment was viewed as the most effective means of overcoming the inadequacies of the *Bill of Rights*. But before the

¹⁶ *Regina v. Drybone*, [1970] S.C.R. 282.

¹⁷ See *supra* on the implied Bill of Rights theory, 91ff. See *dicta* of Duff C.J.C. in *Reference Re Alberta Legislation* [1938] S.C.R. 100 at 133; Abbott J. in *Switzman v. Elbling* [1957] S.C.R. 285, at 328 and Rand J. in *Saumur v. City of Quebec*, [1953] 2 S.C.R. (2d) 337.

¹⁸ Paul C. Weiler, "The Supreme Court and the Law of Canadian Federalism", 23 *University of Toronto Law Journal* (1973), 343-344.

proposed Charter could be entrenched, there was a severe problem to overcome. Prior to September 28, 1981 when the Supreme Court ruled on the Amendment question in *Reference Re Amendment of the Constitution of Canada* (No. 1,2,and 3) (1981),¹⁹ the amendment procedure was an obstacle to any possibility of entrenching fundamental rights and freedoms in the Constitution. The momentum quickly gathered after September 28, 1981 leading to the patriation of the Constitution and the passage of the *Canada Act, 1982*.

The Patriation Problem

The constitutional issues to which the Supreme Court of Canada addressed itself arose out of a peculiar constitutional situation. The *British North America Act of 1867* is an Act of the British Imperial Parliament. It is a federal Constitution that did not provide any domestic process for amending the basis of the Constitution in Canada. Consequently over the one hundred and fourteen years of constitutional history, all the necessary amendments were made by the British Parliament upon the request of the Canadian Government.

On the issue of amending the Constitution in order to entrench fundamental rights and freedoms, there were two basic principles involved in the issues brought before the court. Firstly, the British Parliament would not enact any basic amendments to the Canadian Constitution except at the request of both Houses of Parliament. Secondly, the Canadian Parliament would not request an amendment directly affecting federal-provincial relations without

¹⁹(1981) 125 D.L.R. 1.

prior consultation and agreement with the provinces"²⁰

The second principle was the biggest stumbling block in that the Federal Government did not succeed in obtaining provincial agreement. The Trudeau Government decided to go ahead unilaterally on the interpretation that the second principle was a mere precept of desirable political behaviour that did not have any binding force for the governments concerned. It tabled a resolution for an address to the Queen requesting that the British Parliament enact a basic constitutional change to entrench the Charter of Rights and Freedoms.

As was to be expected, the Progressive Conservative Party in opposition made political mileage by objecting strenuously to this unilateralism. Six of the provinces decided to take the Federal Government to court by alleging that the unilateral procedure being followed was unconstitutional in the legal and conventional sense. The Resolution before the house was tabled to await the decision of the Supreme Court and the Federal Government agreed to abide by that decision when it came.

The matter before the Supreme Court was at once basic and complex. In the result, the court was divided into two majority decisions and two minority decisions on four different positions.

The judges forming Majority I ruled that, as a matter of law, there was no requirement for any provincial consent to be obtained before the Parliament of Canada could properly request amendments directly affecting federal-provincial relationships from the British Parliament.²¹ This was a strict constitutional law position holding that a unilateral request to

²⁰Canada, Department of Justice, *The Amendment of the Constitution of Canada*, 15.

²¹The judgement was given by Chief Justice Laskin, with Justice Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer concurring. *Reference re Amendment of the Constitution of Canada* (Nos. 1,2 and 3), 12ff.

Westminster by the Government and Parliament of Canada was legal. The judges taking this position asserted that legal rules requiring provincial agreement must be directly expressed in formal authoritative documentary sources such as relevant British statutes, judicial decisions either British or Canadian.²² They held that no such source can be found giving a legal amending process for Canada that requires a measure of provincial consent, or any provincial consent at all, in relation to the legal power of the Parliament of Canada to ask what it wishes of the British Parliament by way of joint address. It also held that the British Parliament could do whatever it pleases about the requested amendment from Canada without any legal requirements to limit it.²³

Minority I dissented, taking the view that in the circumstances, the strict law of the Constitution required provincial consent.²⁴ In their view, the unilateral approach was illegal. They did not rule, however, on the question whether the consent of all the provinces had to be obtained, or whether some lesser, but still substantial measure of provincial consent would suffice as a matter of law.

The Majority II position was that as a matter of established constitutional convention apart from law, the Canadian Constitution had come to require that the Canadian Parliament not request an amendment directly affecting federal provincial relationships without prior consultation and agreement with the provinces.²⁵ They also ruled that a substantial measure of

²² *ibid.*, 29.

²³ *ibid.*, 47.

²⁴ Justice Martland and Ritchie formed this group. *ibid.*, 49.

²⁵ The judgement was given by Justice Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer. *ibid.*, 79ff.

provincial consent would suffice to satisfy the convention, thus holding that the terms of the convention did not require an unanimous consent of all provinces. They held, moreover, that such a convention could be identified, defined and authoritatively declared as obligatory rules by the court, even though they were not legal rules and the court could do nothing to enforce them if the political actors refused to comply. In support of their position they looked to the writing of the British constitutional authority, Sir Ivor Jennings. In his classic work *The Law and the Constitution* he laid down the following tests :

We have to ask ourselves three questions : first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish a rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.²⁶

The dissenting position of Minority II concluded that an established convention had not developed requiring provincial consent in the circumstances, so that conventionally as well as legally, the planned unilateralism of the Federal Government and the Parliament of Canada was constitutional.²⁷

The net result of the decision is summarized by Lederman:

Legally, the Parliament of Canada can pass any Resolution it pleases on any subject whatever, and address it to any person in the world. But as a matter of constitutional convention, it would clearly be unconstitutional for it to pass a joint address intended to procure amendments from the British Parliament "directly affecting federal-provincial relationships without prior

²⁶Sir Ivor Jennings, *The Law and the Constitution*, 136.

²⁷Chief Justice Laskin, and Justice Estey and McIntyre belonged to this group. *ibid.*, 107ff.

consultation and agreement with the provinces."²⁸

Indeed it was this convention that impelled the politicians to find "a substantial measure of provincial consent" resulting in the *Constitutional Accord* of November 1981 where only Quebec refused to consent. This crucial substitution of a substantial measure of consent for an unanimous consent that made the *Accord* and the subsequent patriation of the Constitution and entrenchment of the *Charter of Rights and Freedoms* possible was expressed by Justice Martland as follows :

It would not be appropriate for the Court to devise in the abstract a specific formula which would indicate in positive terms what measure of provincial agreement is required for the convention to be complied with. Conventions by their nature develop in the political field and it will be for the political actors, not this court, to determine the degree of provincial consent required.

It is sufficient for the court to decide that at least a substantial measure of provincial consent is required and to decide further whether the situation before the court meets with this requirement. The situation is one where Ontario and New Brunswick agree with the proposed amendments, whereas eight other provinces oppose it. By no conceivable standard could this situation be thought to pass muster. It clearly does not disclose a sufficient measure of provincial agreement.²⁹

The Charter and the Bill : Similarities and Differences

The *Canadian Charter of Rights and Freedoms* became part of the Constitution of Canada on April 17, 1982 when the new *Constitution Act*,

²⁸ W.R. Lederman, "The Supreme Court of Canada and Basic Constitutional Amendment" in Keith Banting and Richard Simion (eds.), *And No One cheered : Federalism, Democracy and the Constitution Act*, 185-186.

²⁹ *Reference re Amendment of the Constitution of Canada. op.cit.*, 103.

1982³⁰ was formally proclaimed by the Queen on the lawn of Parliament Hill. The *Constitution Act, 1982*, includes as a schedule a table of all statutes amended or repealed by the *Act*. As the *Canadian Bill of Rights*³¹ is not listed therein, it would appear that both instruments are concurrently in force. This is supported by s. 26 of the *Charter* which states that "The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada".

Perhaps the key difference between the *Charter* and the *Bill* is the fact that the former is entrenched in the sense that it cannot be repealed or amended except in compliance with the amending procedure prescribed by Part V of the *Constitution Act, 1982*. This is so because s. 52(3) constitutes a restriction on the competence of the Federal Parliament and provincial legislatures from which they are powerless to escape. S. 52(3) provides that "Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada". As defined in s. 52(2), the Constitution includes "this act". Part I of "this act" is, of course, the *Charter*. Consequently the *Charter* can only be amended in accordance with the procedure in s. 38(1). The amending procedure requires resolutions of the Federal Parliament and the legislatures of at least two-thirds of the provinces having a total of at least 50% of the population.

Unlike the *Charter* the *Bill* was enacted by the Federal Parliament and can be repealed or amended in the same way it was enacted. It can be undone by another Act of Parliament.

In another sense, the *Charter* is entrenched because it is supreme in the sense that any law enacted by the Federal Parliament or a provincial

³⁰1982, c.11 (U.K.)

³¹S.C. 1960 c.44; R.S.C. 1970, Appendix III.

legislature which is inconsistent with the *Constitution Act of 1982* is of no force or effect. This is made clear by s. 52(1) which asserts that "the Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Since the *Charter* is part of the Constitution, it is part of the supreme law of Canada. As well, s. 52(1) cannot be repealed or amended except in compliance with the stringent amending procedures prescribed by Part V of the *Constitution Act of 1982*. This is the explicit overriding force over all other laws passed by Parliament as well as the legislatures which were in conflict with the *Charter* provisions.

In contrast, the wording of the *Bill* in ss. 1 and 2 are much weaker. As we have seen, the words "recognized and declared" in s. 1 had been interpreted by the court in such a way that the rights were practically "frozen".³² At the same time the words "construed and applied" in s. 2 gave rise to a number of inconsistent interpretations. It is not clear from its terms whether the *Bill* was to be merely a canon of interpretation (very much like a statute of interpretation) or whether it was to have an overriding force over inconsistent federal statutes. The latter understanding raises the question whether Parliament could bind itself in this way by an enactment of an ordinary statute.

As noted earlier, judicial restraint has resulted only in one case where the offensive provision of the *Indian Act*³³ was rendered inoperative. *R. v. Drybones* did establish that the *Bill* has overriding effect on an inconsistent federal statute.³⁴ But it did not quite settle the question whether the *Bill* has

³² *Supra.*, 217.

³³ R.S.C. 1970 c.I-6.

³⁴ [1970] S.C.R. 282.

overriding force on subsequent federal statutes since the *Indian Act* was prior in time to the *Bill*. As such, it was liable to be repealed or modified by a later statute, anyway.

There are, however, many *dicta* to the effect that the *Bill* does have overriding force over subsequent inconsistent federal statutes.³⁵ One way to reconcile such a view in light of the doctrine of parliamentary supremacy is to treat the *Bill* as "imposing a 'manner and form' requirement for the enactment of certain kinds of legislation, and that such a requirement, until changed, is applicable whether one accepts the doctrine of Parliamentary sovereignty or not".³⁶

In *Singh v. Minister of Employment and Immigration* [1985],³⁷ Beetz J. ruled that the *Bill of Rights* rendered offending provisions of the federal *Immigration Act, 1976*³⁸ inoperative. He described the *Bill of Rights* as a constitutional or quasi-constitutional instruments and because they are drafted differently, "they are susceptible of producing cumulative effects for the better protection of rights and freedoms".³⁹ He also considered that the *Bill of Rights* complement the *Charter of Rights and Freedoms* particularly where it

³⁵See *Carr v. The Queen* [1972] S.C.R. 889 at 893; *A.G. Can. v. Lavell* [1974] S.C.R. 1349 at 1388; and *R. v. Miller and Cockerell* (1976) 70 D.L.R. (3d) 324 at 329.

³⁶Walter S. Tarnopolsky, *The Canadian Bill of Rights*, 141.

³⁷[1985] 1 S.C.R. 177.

³⁸1976-1979 (Can.) c. 52.

³⁹[1985] 1 S.C.R. 224.

In *Insurance Corp. of B.C. v. Heerspink* [1982] 2 S.C.R. 145, Lamer J. held that the *Human Rights Code of British Columbia* superceded the provincial *Insurance Act*, R.S.B.C. 1960, c. 197 because the latter was in conflict with it. At p.158 he declared, "Indeed the *Human Rights Code*, when in conflict with 'particular and specific legislation' is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law".

contain provisions not to be found in the *Charter*. And in the case at bar, the learned judge found that the right to a fair hearing in accordance with the principles of fundamental justice under s. 2(e) of the *Bill of Rights* fully applies in favour of the appellant. Hence the overriding force of the *Bill* is to be found in its constitutional quasi-constitutional character.

Another difference is that the *Charter* applies to both levels of government according to s. 32(1) although the actual meaning of the words in the section are open to judicial interpretation. The *Bill* is quite clear that it does not apply to provincial legislatures or governments. It is clear, however, that it can be applied to "every law in Canada" as defined in s. 5(2) of the *Bill*.⁴⁰

The limitation clause in s. 1 provides as follows:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This section enables the Parliament or a legislature to enact a law which has the effect of limiting one or more of the guaranteed rights or freedoms provided that the law can be shown to be "reasonable" and "demonstrably justified in a free and democratic society". On the application of s. 1 the Supreme Court had ruled that while this section permits limits on the rights and freedoms set out in the *Charter*, it cannot legitimize laws that collide directly with those rights and freedoms or that purport to create exceptions to the *Charter* guarantees. The court in *Attorney-General of Quebec v. Quebec Association of Protestant School Board et al* (1984)⁴¹ also ruled that the

⁴⁰ *Supra.*, 198ff.

⁴¹ 10 D.L.R. (4th) 321 (S.C.C.)

section cannot be used to justify laws that in effect constitute amendments to the provisions of the *Charter*. Such laws must be declared of no force or effect without the necessity of considering this section.

This is further clarified in *Ford v. Quebec* [1988]⁴² where the court ruled that apart from the rare case of a truly complete denial of a guaranteed right or freedom, the negation of a right or freedom and a limitation of it is not a sound basis for denying the application of s. 1. In the words of the court,

Many, if not most, legislative qualifications of a right or freedom in a particular area of its potential exercise will amount to a denial of the right or freedom to that limited extent. If this effect were to mean that s. 1 could have no application in such a case, the section could have little application in practice. On the other hand, the distinction between a limit that permits no exercise of a guaranteed right or freedom in a limited area of its potential exercise and one that permits a qualified exercise of it may be relevant to the application of the test of proportionality under s. 1.

The recent case of *Regina v. Oakes* [1986]⁴³ held that this section has two functions. Firstly, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and secondly, it states explicitly the exclusive justificatory criteria against which limitations on those rights and freedoms must be measured. Accordingly, any inquiry under this section is based on an understanding that the impugned limit violates the constitutional rights and freedoms which are part of the Constitution of Canada.⁴⁴ The court also held that the words "free and democratic society" indicate that in applying the s. 1, the courts must be guided by the values and principles essential to a

⁴²[1988] 2 S.C.R. 712 at 773.

⁴³[1986] 1 S.C.R. 103, at 135.

⁴⁴*ibid.*

free and democratic society, such as respect for the inherent dignity of the human person, commitment to social justice and equality; accommodation of a wide variety of beliefs; respect for cultural group and identity; and faith in social and political institutions which enhance the participation of individuals and groups in society.⁴⁵

On the question of criteria under this justificatory section, the same court has held that two central criteria must be satisfied. First, the objective which the measures responsible for a limit on the *Charter of Rights and Freedoms* are designed to serve must be of sufficient importance to warrant overriding a constitutionally protected right or freedoms, and secondly, the party involving this section must show that the means chosen are reasonable and demonstrably justified. The first criterion requires at a minimum that an objective relate to concerns which are pressing and substantial in a free and democratic society. The second requirement involves a form of proportionality test and while the nature of this test will vary, depending on the circumstances, in each case the courts will be required to balance the interests of society with those of individuals and groups.⁴⁶

The proportionality test is made up of three components. First, the measures adopted must be carefully designed to achieve the objective in question. The measures must not be arbitrary, unfair or based on irrational considerations but rather must be rationally connected to the objective. Second, the means, even if rationally connected to the objective, should impair as little as possible the right or freedom in question. Finally, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter of Rights and Freedoms* and the objective which has been

⁴⁵ *ibid.*, 136.

⁴⁶ *ibid.*, 139.

identified as of sufficient importance. It was held that the more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.⁴⁷

On the question of burden of proof, the court ruled that the onus is on the party seeking to uphold the limitation. While this standard of proof under this section is the civil standard, the test must be applied rigorously and when evidence is required in order to prove the constituent elements of an inquiry under this section, the evidence must be cogent and persuasive and made clear to the court the consequences of imposing a limit.⁴⁸ The court will also need to know what alternative measures for implementing the objective were available to the legislature when they made their decisions.⁴⁹

These are very fundamental principles enunciated by the Supreme Court of Canada and they form the *grundnorm* of subsequent *Charter* cases.

It should be noted that in an earlier case of *Regina v. Big M. Drug Mart Ltd.* [1985],⁵⁰ which challenged the validity of the *Lord's Day Act*⁵¹ and will be analyzed at great length below, the court held that in seeking to justify legislation within the meaning of this section, it is not open to the government to rely on a purpose in a matter which is outside its legislative jurisdiction. Thus, in the case of the impugned statute, Parliament's jurisdiction under the division of powers to enact such legislation depended on

⁴⁷ *ibid.*, 140.

⁴⁸ *ibid.*, 138.

⁴⁹ *ibid.*

⁵⁰ [1985] 1 S.C.R. 295.

⁵¹ R.S.C. 1970, c.L-13.

its characterization as legislation directed to the preservation of the sanctity of the Christian Sabbath. As such it fell within the criminal law powers in s. 91(27) of the *Constitution Act, 1867*,⁵² being directed towards the maintenance of public order and public morals. It was therefore not open to the government to attempt to justify the legislation under this section, despite its contravention of the guarantee of religion in s. 2(a), on the basis that the legislation's true purpose was a secular one.⁵³

In contrast, the *Bill* does not contain a limitation clause comparable to s. 1 of the *Charter*. Most of the rights and freedoms, especially political rights, are expressed in unqualified terms. But, as we have seen, these rights are not absolutes, and they had been interpreted with qualifications by the courts in recognition of the fact that there are competing shared values in society.⁵⁴ Under the *Bill*, the court had used expressions such as "reasonable classification" and "valid federal objective" to delimit the rights in question.⁵⁵

It may also be noted that s. 1 of the *Bill* and in particular the phrase "have existed and shall continue to exist" had been construed narrowly so that only rights in existence at the time of the enactment of the *Bill* were guaranteed. This "frozen concept" theory is a form of limitation imposed by the interpretation of the courts.⁵⁶

In both the *Charter* and the *Bill*, there is an exemption clause. S. 33 of

⁵²The renamed *British North America Act of 1867*.

⁵³*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 353.

⁵⁴*Supra.*, 129 ff; 132 ff.

⁵⁵See *MacKay v. The Queen* [1980] 2 S.C.R. 370 at 375. See also Peter W. Hogg, *Constitutional Law of Canada and Canada Act 1928 Annotated*, 440-442; Tarnopolsky, *op.cit.*, ch. 13 and Herbert Marx, "Entrenchment, Limitations and Non-Onstante" in Tarnopolsky and Beaudoin (eds.), *Canadian Charter of Rights and Freedoms*, 61-74.

⁵⁶*Supra.*, 217.

the *Charter* expressly permits the Federal Parliament or a provincial legislature to exempt a statute from compliance with certain provisions of the *Charter*. The section, in part, provides as follows :

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
- (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
- (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
- (4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

This exemption clause, or exceptive clause, has also been described as an override clause in the sense that an Act may be exempted from the provisions of the *Charter* by a specific declaration to that effect.⁵⁷ It is to be noted that it is not an opting out clause. The existence of this clause means that the government, whether Dominion or provincial, can enact a law which limits a guaranteed right or freedom without having to justify it as reasonable or demonstrably justifiable under s. 1. However, there are a number of important qualifications.

⁵⁷ *Alliance des Professeurs de Montréal v. Procureur Général du Québec* [1985 CA. 376. This need for expressed declaration referring specifically to the provisions of the *Charter* is overturned in *Ford v. Quebec (AG)* [1988] 2 S.C.R. 712 at 741. "With great respect for the contrary view, this Court is of the opinion that a s. 33 declaration is sufficiently express if it refers to the number of the section, subsection or paragraph of the *Charter* which contains the provision or provisions to be overridden."

First of all, the declaration must be specific as to the *Act* which is thereby exempted from the provisions of the *Charter*. Second, the exemption power applies only to ss. 2 and 7 to 15. The democratic rights of ss. 3 to 5, the "mobility rights" of ss. 16 to 22 and the "minority language educational rights" of s. 23 are among the provisions which cannot be overridden. Third, the express declaration must refer specifically to the provision of the *Charter* which is to be overridden.

It should also be noted that the exemption power has a time limit. This is the "sunset clause" in subs. 3 which makes the declaration automatically expired after five years. Although subs. 4 permits the expired legislation to be reenacted, it would have forced the political powers to reconsider the issue by virtue of the automatic time limit.

The exemption clause is a political compromise that broke the constitutional deadlock, which, in turn, made the entrenchment of the *Charter* a reality. Comments Mr. Alan Borovoy, legal counsel for the Canadian Civil Liberties Association :

The "notwithstanding" clause will be a red flag for opposition parties and the press That will make it politically difficult for a government to override the Charter. Political difficulty is a reasonable safeguard for the Charter By making it legally possible but politically difficult to override the Charter, they have married the two notions The result is a strong Charter with an escape valve for the legislatures.⁵⁸

Comparing with the *Bill* where s. 2 spells out the exemption clause, it will be observed that the power is more general than that of the *Charter*. S. 2 provides that "... unless it is expressly declared by an Act of the Parliament of Canada it shall operate notwithstanding the *Canadian Bill of Rights* ...". Not

⁵⁸Calgary Herald, Nov. 7, 1981. Quoted in *The Charter of Rights and Freedoms : A Guide For Canadians*, 35.

only is this a general clause, there is also no need to be specific as to the particular guarantees which are being exempted. There is also no time limit to the exemption.

Clearly the *Charter* exemption is more refined than that of the *Bill*. It may well be that the political compromise was necessary before the *Charter* could be entrenched. But the entrenchment of the rights itself makes such an override exemption clause, which is itself entrenched, somewhat anomalous. What can one make out of the interplay of rights which are constitutionally protected and an equally entrenched provision giving the legislatures the power to take it away, albeit temporarily? It is like giving with one hand and taking it away with another. And it is to be noted that freedom of religion and conscience are among those that could be taken away. It is certainly an indication of its inferiority as a value compared to other rights in ss. 3 to 6 and 16 to 22. It is difficult to see how "mobility rights" which are described by Macdonald as a "semantic barbarism"⁵⁹ could be of more value compared to the right to "freedom of religion and conscience" when the latter had been described by Trudeau among others, as one of the "basic rights of the individual, inherent in the dignity of man, because they are fundamental, rational and indeed, unalterable."⁶⁰

In the year that the *Charter* was enacted, a number of constitutional scholars had commented that the exemption clause in the *Charter* represents a compromise between the entrenchment of fundamental rights and the fundamental principle of the supremacy of Parliament.⁶¹ On this view the

⁵⁹Macdonald, *art. cit.*, p. 323.

⁶⁰ *Proceedings of the Constitutional Conference, Second Meeting, February 10-12, 1969*, 7

⁶¹See Marx, "Entrenchment, Limitations and Non-Obstante" in Tarnopolsky and Beaudoin, *op.cit.*, 71; Scott, "Entrenchment by Executive Action : A Partial Solution to

Parliament and legislatures have the "last word" in spite of the entrenchment of certain rights while the Constitution has the "last word" on certain other rights.

Assuming that this view of the exemption clause is a fair one, it is natural to ask what the point of entrenchment is. As pointed out above, there is the anomaly of protecting some rights without exception and only partially protecting other rights. For example, the right to exercise the vote in s. 3 is entrenched and protected without exception while the right to exercise an informed vote through the normal democratic means of political activities may be subject to government curtailment. The point is simply that s. 2 to which the exception clause applies is concerned with most of the means of political activities which include "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication, freedom of peaceful assembly and freedom of association", not to mention "freedom of conscience and religion".

Moreover, as Arbess pointed out,

if the fact of entrenchment has any significance at all, it is in representing a movement away from the model of parliamentary supremacy in which rights and freedoms represent the residue of unrestricted activity toward a "right-oriented" model in which legislative competence is limited by the protection of fundamental rights and freedoms. Under such a model it is the courts, not the legislatures, which must ultimately determine the balance between individual rights and freedoms and majority will.⁶²

There is, in s. 15 of the *Charter*, an equal protection clause which reads:

Legislative Override" 4 *Supreme Court Law Review* (1982), 303; and Lyon, "The Teleological Mandate of the Fundamental Freedom Guarantee: What to do with Vague but Meaningful Generality", 4 *Supreme Court Law Review* (1982), 57 at 73.

⁶²Daniel J. Arbess, "Limitations on Legislative Override Under the Canadian Charter of Rights and Freedoms: A Matter of Balancing Values", 21 *Osgoode Hall Law Journal* (1983), 113 at 117.

- (1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The immediate relevance to us is the issue of discrimination on account of religion. Indeed, the *Bill* was also concerned about this so that s. 1(b) provides :

It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely
b) the right of the individual to equality before the law and protection of the law.

Comparing and contrasting the two equal protection clauses, it is immediately obvious that the *Charter* version is more elaborated and sweeping than that of the *Bill*. While the *Bill* speaks only of "equality before the law" the *Charter* speaks of "equal before and under the law", "equal protection" and "equal benefit of the law". It would be of great interest to see how the court deals with non-Christian religions whose practices are so visibly different as to invite discrimination in terms of dress code that are religion-based.⁶³

And it should be noted that the *Charter* protects "freedom of

⁶³See *Re Hothi and the Queen* (1985) 14 C.R.R. 86. Indeed the provision was drafted specifically to overcome the narrowing construction which the courts had placed on the *Bill of Rights*' equality guarantee. See Tarnopolsky, "The Equality Rights" in Tarnopolsky and Beaudoin (eds), *op. cit.* 395ff

conscience and religion"⁶⁴ while the *Bill* only guarantees "freedom of religion".⁶⁵ The question that arises is whether the phrase should be read conjunctively or disjunctively. In other words, is freedom of conscience separate and different from freedom of religion or are they one and the same thing?

It is to be noted that freedom of conscience and /or freedom of religion is not defined in any of the statutes. The courts in their pre-*Charter* dealings with these matters have also not seen fit to provide a definition of religion. Most of the cases concerned the scope of the freedom rather than the nature of the freedom.⁶⁶ It may be that with the element of conscience in the provision, the relationship of religion and conscience could be such that conscience gives "life and substance" to religion, so that conscience becomes "the matrix and religion the emanation".⁶⁷

Judicial Interpretation of the Charter

Before analyzing the *Charter* cases, it would be helpful to appreciate the general approach the courts have taken in the interpretation of the *Charter*. The Supreme Court of Canada held, in *Hunter v. Southam Inc.* [1984],⁶⁸ that *Charter* cases are to be analyzed in two distinct stages. It is the onus of the party challenging the legislation by invoking the protection of the *Charter* to

⁶⁴S.2(a).

⁶⁵S.1(c).

⁶⁶cf. *Donald v. Hamilton Board of Education* [1945] O.R. 518 (C.A.).

⁶⁷Milton R. Konvitz, *Religious Liberty and Conscience*, 106.

⁶⁸[1984] 2 S.C.R. 145; 11 D.L.R. (4th) 641 (S.C.C.).

show that the guaranteed right or freedom has been violated. The onus will then shift to the government if the challenger succeeds in discharging the burden. At this second stage, the government has to show that the infringement is justified under s. 1 of the *Charter*.

Following *Hunter v. Southam Inc.*, the Supreme Court in *R. v. Big M. Drug Mart Ltd.* [1985]⁶⁹ articulated the "purposive approach" in the following words of Dickson J. :

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgement in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.⁷⁰

The historical contexts, in regard to freedom of conscience and religion, are particularly helpful in arriving at the meaning of the freedom. Once that meaning is ascertained, the court will examine *both* the purpose and effect of the impugned legislation to determine whether an infringement has occurred, because *both* the purpose and effect are relevant in determining constitutionality in that either an unconstitutional purpose or an

⁶⁹[1985] 1 S.C.R. 295.

⁷⁰*ibid.*, 344.

unconstitutional effect can invalidate a legislation. Dickson J. gave his reasons for this approach which include the fact that "[a]ll legislation is animated by an object the legislature intends to achieve". He continued :

This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity.⁷¹

Interestingly enough the judge cited two American cases and only one Canadian case to support his view.⁷²

It is, however, the court's view that the purpose must be scrutinized first. If the purpose is in violation of the *Charter* guarantees, the legislation is unconstitutional whatever may be its effect. This approach "will provide more ready and more vigorous protection of constitutional rights by obviating the individual litigant's need to prove effects violative of *Charter of Rights*".⁷³ At the same time the courts can dispose of cases when the object is clearly improper without regard to its effect. The effect will be analyzed only if the object or purpose is not violative. The second stage of analysis begins only when the effect on examination, proves to be an infringement of the entrenched rights or freedoms.

This second stage analysis under s. 1 of the *Charter* is discussed in depth by the court in *R. v. Oakes*[1986].⁷⁴ The onus of proving that a limit

⁷¹ *ibid.*, 331.

⁷² *McFowan v. Maryland*, 366 U.S. 420 (1961), *Braunfeld v. Brown* 366 U.S. 599 (1961) and *A.G. of Quebec v. Quebec Association of Protestant School Boards* [1984] 2 S.C.R. 66.

⁷³ *ibid.*, 332.

⁷⁴ [1986] 1 S.C.R. 103.

on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the impugned legislation. Two essential criteria must be satisfied in order to establish that a limit is reasonable and demonstrably justified in a free and democratic society.⁷⁵ Firstly, the object of the impugned legislation must relate to concerns which are "pressing and substantial". It must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom".⁷⁶ Secondly, once a sufficiently important objective is identified, the means chosen must be reasonable and justifiable. This involves "a form of proportionality test"⁷⁷ with three components as follows :

- (a) the measures adopted must be rationally connected to the objective;
- (b) these measures must impair as little as possible the right or freedom in question and
- (c) even if (a) and (b) are satisfied the deleterious effect of the measures must not be so severe that they cannot be justified.

In relation to the objective, the Chief Justice said, "the more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society".⁷⁸

The court, however, is not completely in agreement in all aspects of the general criteria outlined above. In a number of cases, some members of the court did not strictly apply the test.⁷⁹

⁷⁵ *ibid.*, 138-139.

⁷⁶ *R. v. Big M. Drug Mart Ltd.*, *op.cit.*, 352.

⁷⁷ *ibid.*,

⁷⁸ *R. v. Oakes* [1986] 1 S.C.R. 103 at 140.

⁷⁹ See *R. v. Jones*, [1986] 2 S.C.R. 284 (S.C.C.); *Edwards Books and Arts Ltd. et al*

Analyses of Religious Freedom Cases

Within a very short period of six years, some two dozen cases touching on freedom of conscience and religion came before the courts. Indeed within four months of the coming into force of the *Charter* the *Child Welfare Act of Alberta*⁸⁰ was challenged on the ground that it violated s. 2(a) of the *Charter*'s guarantee on freedom of conscience and religion.⁸¹ The main issues dealt with in these cases include the nature and scope of religious freedom, the nature of the infringement of religious freedom and the nature of the reasonable limits on religious freedom.

Although the cases dealt with a host of subjects from the wearing of religious symbols in court⁸² to the rights of remand inmates,⁸³ the bulk of the cases were concerned with Sunday observance legislation, medical care and public education.

Sunday Observance Legislation

As we have seen, the *Lord's Day Act* was enacted in 1906 as a federal statute.⁸⁴ Although it was challenged from time to time in the courts,⁸⁵ the

⁸⁰R.S.A. 1980 c.C-8.

⁸¹*Re Davis* (August 15, 1982 Alta. Prov. Ct (Fam. Div.) Catonio Prov. Ct. J.) *Infra.*, 410.

⁸²*Re Hothi and the Queen* (1985) 14 C.R.R. 86.

⁸³*Maltby and A.G. of Saskatchewan* (1982) 143 D.L.R. (3d) 649, 4 C.R.R. 348.

⁸⁴*Supra.*, 207.

⁸⁵*Boardwalk Machandise Mact Ltd. v. The Queen* [1973] 1 W.W.R. 190.

courts were not really confronted with the problem of reconciling Sunday observance legislation with the notion of religious freedom except in *Robertson and Rosetanni v. The Queen* [1963].⁸⁶ There the Supreme Court of Canada by a four to one majority rejected the argument that the effect of the *Canadian Bill of Rights*, in particular s. 1(c) recognizing and declaring freedom of religion was to repeal the *Lord's Day Act* or to render it inoperative. Their grounds were (1) that the freedoms specified in the *Bill* were those existing immediately before the statute was enacted and complete liberty of religious thought and untrammelled affirmation of religious belief existed before the *Bill*, notwithstanding the *Lord's Day Act*; and (2) the practical effect of the *Act* on those whose religion required them to observe a day of rest other than Sunday was a purely secular and financial one in having to abstain from doing business on Sunday. Indeed the court recognized that the *Lord's Day Act* was "enacted for the purpose of preserving the sanctity of Sunday" which is "a Christian holy day." Still, on the grounds mentioned, the court held that the *Act* has never been, and cannot be, considered as an interference with the kind of "freedom of religion" guaranteed by the *Bill of Rights*.

In 1985, the *Lord's Day Act* was again challenged in the Supreme Court. The facts in *R. v. Big M Drug Mart Ltd.*⁸⁷ were simple enough. The accused corporation was charged in Calgary, Alberta on May 20, 1982, just about a month after the *Charter of Rights and Freedoms* came into force, with unlawfully being open for business on a Sunday contrary to the *Lord's Day Act*. The accused admitted the facts but argued for acquittal on the

⁸⁶[1963] S.C.R. 651.

⁸⁷[1985] 1 S.C.R. 395; (1985) 18 D.L.R. (4th) 321 (S.C.C.).

ground that the *Act* infringed on freedom of conscience and religion guaranteed by s. 2(a) of the *Charter*, and was therefore of no force or effect. The trial judge accepted the accused's arguments. On appeal, however, the majority of the Alberta Court of Appeal reversed the lower court's decision.

The Supreme Court held that the *Lord's Day Act* did indeed infringe s. 2(a) of the *Charter* and it could not be saved by the justificatory clause of s.

1. Accordingly the court ruled that the *Act* was of no force or effect.

By way of preliminary ruling, the entire court agreed that an accused whether corporate or individual has standing to challenge the constitutionality of the *Act* under which he is charged. To the government's argument that freedom of religion is a personal freedom and that a corporation, being a statutory creation, cannot be said to have a conscience or hold a religious belief, the court said :

The argument that the respondent, by reason of being a corporation, is incapable of holding religious belief and therefore incapable of claiming rights under s. 2(a) of the *Charter*, confuses the nature of this appeal. A law which itself infringes religious freedom is, by that reason alone, inconsistent with s. 2(a) of the *Charter* and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation. It is the nature of the law, not the status of the accused, that is in issue.⁸⁸

It is to be noted that the ruling was based on the accused's submission that the *purpose* of the *Act*, rather than the effect infringed s. 2(a). Mr. Justice Dickson (as he then was) made it clear that if the legislation under review had a secular purpose and the accused was claiming that its *effect* interfered with his religious freedom, then "the status and nature of his belief might be relevant : it is one thing to claim that the legislation is itself

⁸⁸ *ibid.*, 314.

unconstitutional, it is quite another to claim a 'constitutional exemption' from otherwise valid legislation, which offends one's religious tenets".⁸⁹

In arriving at the purpose of the impugned *Act* the court reviewed the history of Sunday observance legislations from as far back as early Saxon times and noted that the federal *Act* embodied the basic framework and much of the language of the English *Sunday Observance Act* of 1677 which is religious in purpose. Tracing through Canadian and American case histories, Mr. Justice Dickson concluded :

A finding that the *Lord's Day Act* has a secular purpose is, on the authorities, simply not possible. The religious purpose, in compelling sabbatical observance, has been long-established and consistently maintained by the courts of this country.⁹⁰

In his finding, Justice Dickson said that the purpose of the *Act* was to compel non-believers to observe Sunday in a manner consistent with Christian understanding of the sanctity of Sunday as the Lord's Day. The *Act* made it unlawful for non-Christians to engage in activities on Sunday which on any other day of the week were perfectly lawful.

The Attorney-General conceded that the *Act* was religious in purpose but contended, following *Robertson and Rosetanni*⁹¹ that it is not the purpose but the effect alone which must be assessed in determining whether legislation violates a constitutional guarantee of freedom of religion. To this, the learned judge disagreed, holding that "both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation." He concluded on the

⁸⁹ *ibid.*, 315.

⁹⁰ *ibid.*, 331.

⁹¹ *Supra.*, 205ff.

question of purpose and effect thus :

In short, I agree with the respondent that the legislation's purpose is the initial test of constitutional validity and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test. If the legislation fails the purpose test, there is no need to consider further its effects, since it has already been demonstrated to be invalid. Thus, if a law with a valid purpose interferes by its impact, with rights and freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity. In short, the effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose.⁹²

In an ingenious attempt to neutralize the purposive approach of the court, the attorney general resorted to the "shifting purpose" argument. He submitted that even if the *Act*'s purpose had originally been religious, it had now shifted and become secular in nature. Hence, the modern purpose, notwithstanding its religious origin and terminology, was to secure a common pause day. This argument was rejected by the court.

In reply Justice Dickson raised a number of objections. Firstly, it could effectively terminate the doctrine of *stare decisis* which would create uncertainty in the law. Secondly, it would redefine the notion of "parliamentary intention". He pointed out that the "[p]urpose is a function of the intent of those who drafted and enacted the legislation at the true, and not of any shifting variable." He then concluded :

While the effect of such legislation as the *Lord's Day Act* may be more secular today than it was in 1677 or in 1906, such a finding cannot justify a conclusion that its purpose has similarly changed. In the result, therefore, the *Lord's Day Act* must be characterized as it has always been, a law the primary purpose of which is the compulsion of sabbatical observance.⁹³

⁹² *R. v. Big M. Drug Mart. Ltd.*, *op.cit.*, 334.

⁹³ *ibid.*, 336.

One of the helpful aspects of this case is the lengthy discussion on the nature and scope of religious freedom under the *Charter*. After affirming that freedom must surely be founded in respect for the interest, dignity and the inviolable rights of the human person, Mr. Justice Dickson then defined religious freedom in these terms.

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.⁹⁴

He further elaborated to the effect that freedom in a broad sense is the absence of coercion and constraint, and the right to manifest beliefs and practices. In terms of limitations, he said that freedom means that subject to the limitations as are necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his belief or his conscience. This compulsion included "non-action" as in compelling individuals to abstain from doing things on Sunday. At the minimum, s. 2(a) must mean that "government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose".⁹⁵

With that broad and expanded definition, Mr. Justice Dickson found that the *Lord's Day Act* "works a form of coercion inimical to the spirit of the *Charter* and the dignity of all non-Christians".⁹⁶ And he went on to identify the practical effects of the *Act* in terms of its being an instrument of

⁹⁴*ibid.*

⁹⁵ *ibid.*, 347.

⁹⁶ *ibid.*, 337.

Christianity :

In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and , using the force of the state, translates them into a positive law binding on believers and non-believers alike. The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture.⁹⁷

Referring to s. 27, the learned judge agreed with the respondent that to accept that Parliament retains the right to compel universal observance of the day of rest preferred by one religion is not consistent with the preservation and enhancement of the multicultural heritage of Canadians. Earlier he had affirmed that "the *Charter* safeguards religious minorities from the threat of 'the tyranny of the majority'"⁹⁸

It is also significant that the Attorney-General's submission that the protection afforded by s. 2(a) of the *Charter* extended only to the "free exercise" of religion was rejected by the court. Mr. Justice Dickson was of the view that "recourse to categories from the American jurisprudence is not particularly [sic] helpful in defining the meaning of freedom of conscience and religion under the *Charter*", as the applicability of the *Charter* in this matter "does not depend on the presence or absence of an 'anti-establishment principle' in the Canadian Constitution, a principle which can only further obfuscate an already difficult area of law".⁹⁹

In his reference to *Robertson and Rosetanni* and the *Canadian Bill of*

⁹⁷ *ibid.*

⁹⁸ *ibid.*

⁹⁹ *ibid.*, 341.

Rights, the learned judge ruled that the reasoning in that case cannot be easily transferred to a constitutional document like the *Charter* because in that case the meaning of "freedom of religion" under the *Bill* depended on the majority's view of "the distinctive nature and status of the document". He continued :

It is not necessary to reopen the issue of the meaning of freedom of religion under the *Canadian Bill of Rights*, because whatever the situation under that document, it is certain that the *Canadian Charter of Rights and Freedoms* does not simply "recognize and declare" existing rights as they were circumscribed by legislation current at the time of the *Charter's* entrenchment. The language of the *Charter* is imperative.¹⁰⁰

As well, unlike the *Bill* as interpreted by the court in *Robertson and Rosetanni*, the *Charter* "set a standard upon which present as well as future legislation is to be tested". Accordingly *Robertson and Rosetanni* cannot be determinative of the meaning of "freedom of conscience and religion" under the *Charter*. The learned judge advised that "we must look, rather, to the distinctive principle of constitutional interpretation appropriate to expounding the supreme law of Canada".¹⁰¹

Again in contrast to the interpretation of the unentrenched *Bill*, the court took the view that the interpretation of the *Charter* should be "a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection".¹⁰²

It is clear that the entrenched nature of the *Charter* made all the

¹⁰⁰ *ibid.*, 343.

¹⁰¹ *ibid.*, 344.

¹⁰² *ibid.*

difference. "With the entrenchment of the *Charter* ", Mr. Justice Dickson pointed out, "the definition of freedom of conscience and religion is no longer vulnerable to legislative incursion".¹⁰³

Having determined the meaning of s. 2(a) and the purpose of the impugned federal statute, the learned judge concluded :

Once the purpose has been classified as offensive, then the legislation cannot be saved by permissible effect. As a result it is unnecessary to determine whether the secular effect here in issue is sufficient, or whether a secular effect could ever be relevant, once a finding has been made that the legislation is invalid by reason of an impermissible purpose.¹⁰⁴

Turning to s. 1 of the *Charter*, the court held that the statute cannot be saved. Said Mr. Justice Dickson on behalf of the majority :

It seems disingenuous to say that the legislation is valid criminal law and offends s. 2(a) because it compels the observance of a Christian religious duty, yet is still a reasonable limit demonstrably justifiable because it achieves the secular objective the legislators did not primarily intend. The appellant can no more assert under s.1 a secular objective to validate legislation which in pith and substance involves a religious matter than it could assert a secular objective as the basis for the argument that the legislation does not offend s. 2(a). While there is no authority on this point, it seems clear that Parliament cannot rely upon an *ultra vires* purpose under s. 1 of the *Charter*. This use of s. 1 would invite colourability, allowing Parliament to do indirectly what it could not do directly.¹⁰⁵

In Madame Justice Wilson's concurring judgement, she differed with her colleagues by "placing the analytic focus on the effect of legislation impugned under the *Charter* rather than on its purpose". Her view was that

¹⁰³ *ibid.*, 349.

¹⁰⁴ *ibid.*, 349-350.

¹⁰⁵ *ibid.*, 353.

"so long as a statute has such an actual or potential effect on the entrenched right, it does not matter what the purpose behind the entrenchment was".¹⁰⁶ In the event, she did hold that the effect of the *Lord's Day Act* was such that it infringed freedom of conscience and religion and could not be saved by s. 1 of the *Charter*.

There are a number of observations about this case which may become more significant as the years go by in the *Charter* interpretation. Here, for the first time, the court did not speak with one voice in the interpretation of the *Charter*. There was a clear difference in method between Madame Justice Wilson and the rest of her colleagues. Although in this case they did not lead to differing results but may do so in future cases. Dickson J. on behalf of the majority took the purpose-effects approach while Wilson J. took the effects-purpose approach. It may be argued that it makes no difference because either way both the purpose and effects are considered. It is, however, not so simple, for where the court starts may determine its destination more crucially than the case under review.

Because the purposive interpretation governed in *Charter* interpretation, the "frozen concept" applied by the court in *Robertson and Rosetanni* was found to be inapposite to the new constitutional *Charter*. The purpose of the *Charter* guarantee was to be understood "in light of the interests it was meant to protect".¹⁰⁷ The interests embodied "the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestations".¹⁰⁸ In other words

¹⁰⁶ *ibid.*, 361.

¹⁰⁷ *ibid.*, 344.

¹⁰⁸ *ibid.*, 346.

the court, in light of this interpretation, conveys the assurance that the *Charter* is most fundamentally concerned not with the ends of government so much as the appropriateness of the means by which they are pursued. For the court, the ends do not justify the means. This is confirmed in the following philosophical statement of Dickson J. :

It should also be noted, however, that an emphasis on individual conscience and individual judgement also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine que non* of the political tradition underlying the *Charter*.¹⁰⁹

This is a much more liberal tradition of understanding religious freedom than that pursued by *Robertson and Rosetanni*. Indeed it is akin to "the marketplace of ideas underlying freedom of speech" in *Saumur*.¹¹⁰ By giving the *Charter of Rights* "a generous rather than a legalistic"¹¹¹ interpretation, the court attempts to ensure an open and free market place of beliefs and non-beliefs. Such freedoms ensure the integrity of Canadian democratic values :

The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his

¹⁰⁹ *ibid.*

¹¹⁰ *Rand J. in Saumur v. City of Quebec* [1953] 4 D.L.R. 641 at 671.

¹¹¹ *R. v. Big M Drug Mart Ltd., op.cit.*, 344.

or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion.¹¹²

One of the criticisms of the purposive approach is that it proposes too restrictive a definition by placing too much emphasis on religious freedom in terms of government action and its underlying purpose. It may be argued that legislation which lacks an explicit religious purpose and is neutral in intent may escape the test laid out by Dickson J. even though the effect infringes religious freedoms. This argument is not tenable because a test of statutory coercion does not necessarily import an intent to coerce. The test allows that coercion may be measured by effects as well although the purpose test should be up front simply because legislations are always purposive.

What is significant in the approach is that the traditional concept of freedom of religion is expanded from freedom to practice without governmental interference to freedom from coercion to conform with religious practice to which he does not adhere. In comparison to *Robertson* and *Rosetti* the freedom of religion is now complete in that it is understood to mean both freedom for religion and freedom from religion. The former is "the right to manifest beliefs and practices" while the latter is "the absence of coercion and constraint".¹¹³ This is indeed part of the growth of rights and freedoms under the *Charter* "prophesied" by Laycraft J.A. of the Appeals

¹¹² *ibid.*, 346-347.

¹¹³ *ibid.*, 377.

Court from which the case under review was appealed :

The *Charter* avoided the declaratory language which produced this interpretation [i.e. the frozen concept of religious freedom allowing historical restriction to determine its parameters] of the *Canadian Bill of Rights*. Section 1 "guarantees the rights and freedoms set out"; S. 2 states that "everyone has the ... fundamental freedoms". This language does not require that the definition of either the right or protection of the rights be limited by the law when it was enacted. The *Canadian Charter of Rights and Freedoms* will grow with Canada; it will survive and flourish with changing perceptions and a changing society.¹¹⁴

In many ways *R. v. Big M Drug Mart Ltd.* was anticipated by *R. v. W.H. Smith* (1983).¹¹⁵ The Provincial Court held that the addition of the word "conscience" is intended to provide scope for including as protected certain codes or systems of belief which are as fundamentally important and vital to their adherents as are more "orthodox" religions but which do not include the concept of theistic centre among the cardinal principles of belief. The accused in this case was prosecuted under the *Lord's Day Act* for doing acts which were wholesome aside from the prohibitory dictate of the statute. The court took cognizance that the main purpose of the *Act* was to enforce Sunday observance for the benefit of Christians or some denominations of Christians. Having regard to the *Charter* as a whole, and placing on it that full, ample and liberal interpretation, the court held that the accused could successfully argue that there was an infringement of freedom of conscience and religion within the meaning of s. 2 of the *Charter*.

That the *Lord's Day Act* was declared inoperative is not at all surprising. The Law Reform Commission of Canada had recommended its

¹¹⁴ *R. v. Big M Drug Mart Ltd.*, [1984] 1 W.W.R. 625 at 646.

¹¹⁵ Alberta Provincial Court, May 27, 1983, Jones, P.C.J.

repeal in 1976.¹¹⁶ The reasons were given in four major anomalies. The fourth anomaly was that "[t]he concepts of freedom of religion and religious tolerance have not been satisfactorily reconciled with existing Sunday observance legislation although such concepts do not appear to be constitutional impediments to effective legislative change at either the federal or provincial level".¹¹⁷

Of course the biggest paradox of this decision is simply this: Because of the peculiarity of the *British North America Act*,¹¹⁸ the division of powers sustained the *Lord's Day Act* precisely because it was religious in purpose. If it had been otherwise, the basis for a federal jurisdiction would have been questionable. If it were rationalized as a day of rest or labour legislation, rather than a statute with a religious purpose, it would probably fall under s. 93(13) of the *British North America Act*, which gives the provinces jurisdiction over property and civil rights legislation. And it is primarily because of its religious purpose that it has been struck down under the *Charter*. As well, the Supreme Court refused to separate the purpose from the effect as it did in *Robertson and Rosetanni* so that under the *Bill of Rights* it was sustained on the basis that the effect is said to be entirely secular. Under the *Charter* the religious purpose has such a bearing that the effect was not able to save it even if it was secular.

Again, unlike the *Robertson and Rosetanni* case where Justice Ritchie maintained that the statute had never been thought to be an "interference with the *kind* of 'freedom of religion' guaranteed by the *Bill of Rights*",¹¹⁹ the

¹¹⁶ *Report on Sunday Observance*.

¹¹⁷ *ibid.*, 3.

¹¹⁸ 30 Vict. c.3 1867. Now renamed *Constitution Act*, 1867.

¹¹⁹ *Robertson and Rosetanni v. The Queen* [1963] 41 D.L.R. (2d) 485 at 494.

"kind" of religious freedom under the *Charter* is obviously quite different from that under the *Bill*. Jerome A. Barrow is probably accurate in describing the definitional content of "religious freedom" under the *Bill* as being "developed on the basis of a rather anemic and limited American conception of "free exercise".¹²⁰ The Supreme Court's denial notwithstanding, the decision in *Big M Drug Mart Ltd.* certainly defined the freedom to include "non-establishment" of religion as well.¹²¹ This, it is to be noted, was certainly the understanding of Justice Cartwright who dissented in the *Robertson and Rosetanni* case. At that time he was a lone voice who cried in the judicial wilderness :

[A] law which compels a course of conduct, whether positive or negative, for a purely religious purpose infringes the freedom of religion. A law which, on solely religious grounds, forbids the pursuit on Sunday of an otherwise lawful activity differs in degree, perhaps, but not in kind from a law which commands a purely religious course of conduct on that day, such as for example, the attendance at least once at divine service in a specific church.¹²²

On December 18 1986, the Supreme Court of Canada handed down its decision in *R. v. Edwards Books and Art Ltd. et al.*¹²³ Unlike *R. v. Big M Drug Mart Ltd.*,¹²⁴ this case dealt with an Ontario legislation, the *Retail Business Holidays Act*.¹²⁵ The *Act* defined a "holiday" to include Sunday,
(Emphasis added)

¹²⁰Jerome A. Barrow, "Sunday in North America", 79 *Harvard Law Review* (1965), 42 at 47.

¹²¹ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

¹²² *Robertson and Rosetanni v. The Queen*, *op.cit.*, at 488.

¹²³[1986] 2 S.C.R. 713.

¹²⁴[1985] 1 S.C.R. 295.

¹²⁵R.S.O. 1980 c.453.

several traditionally Christian holidays and also several obviously secular holidays including New Year's Day, Victoria Day and "any other public holiday declared by proclamation of the Lieutenant Governor to be a holiday for the purposes of this Act".¹²⁶ Ss. 2 and 7 made it an offence to carry on retail business activities on a holiday, punishable by a maximum \$10,000 fine. S. 3(4) was the controversial exemption provision. It was applicable to businesses which, on Sundays, have seven or fewer employees engaged in the service of the public and less than 5,000 square feet used for such service. Its effect was to exempt these businesses from having to close on Sunday if they closed on the previous Saturday. The subsection provides as follows :

- 3(4) Section 2 does not apply in respect of the carrying on of a retail business in a retail business establishment on a Sunday where,
 - (a) the retail business establishment was closed to the public and no goods or services were sold or offered for sale therein during a period of Twenty-four consecutive hours in the period of thirty-two hours immediately preceding the Sunday; and
 - (b) the number of persons engaged in the service of the public in the establishment on the Sunday does not at any time exceed seven; and
 - (c) the total area used for serving the public or for selling or displaying to the public in the establishment of the Sunday is less than 5,000 square feet.

The facts were that four retailers were charged under the provincial *Act*. Three of them admitted that their stores were open on both the Saturday and the Sunday previous to their being charged. The fourth retailer, Nortown Fords Ltd., had been closed on the preceding Saturday, nine

¹²⁶ *ibid.*, s.1.

employees were found to be working on the premises on the Sunday in question. The Ontario Court of Appeal upheld the convictions of the first three retailers, but had granted exemption to Nortown Foods in the case of *Re Regina and Vidioflicks Ltd* (1984).¹²⁷

The issue before the Supreme Court of Canada, as it was before the lower courts, was whether the provincial *Act* infringed on their freedom of conscience and religion under the *Charter*. The appellants submitted that the legislature's real purpose was to compel religious observance and the practical effect was to force Saturday observers to work and to shop on Saturday rather than on Sunday.

As it turned out, the decision of the Supreme Court of Canada is much more complex in this case than in *Big M Drug Mart Ltd*. There is no clear-cut *ratio decidendi* that emerges out of the four separate written judgements. The court, however was clear on several crucial points. Firstly, all the seven judges agreed that the definition of religion enunciated by Dickson J. (as he then was) in *Big M Drug Mart Ltd*.¹²⁸ should be adopted as a working definition.¹²⁹ Freedom in that case was characterized by the absence of coercion or constraint. The Chief Justice (Mr. Justice Dickson himself) stressed that

Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others.¹³⁰

¹²⁷ (1984) 14 D.L.R. (4th) 10 (on the. C.A.); 9 C.R.R. 193. Some of the *dicta* of Mr. Justice Tarnopolsky will be discussed below.

¹²⁸ [1985] 1 S.C.R. 295 at 336-337.

¹²⁹ *R. v. Edwards Books and Art Ltd.*, *op.cit.*, 757-758.

¹³⁰ *ibid.*, 758.

Secondly, the court also agreed, following *Big M Drug Mart Ltd.*, that both the purposes and effects of legislation are relevant in determining its constitutionality. "Even if a law has a valid purpose", said the Chief Justice, "it is still open to a litigant to argue that it interferes by its effects with a right or freedom guaranteed by the *Charter*".¹³¹ Consequently, the court looked at the impact of the challenged legislation in some detail.

Third, the court similarly agreed that the legislative purpose of the *Retail Business Holidays Act* was simply to confer holidays on retail workers in common with the holidays enjoyed by other members of the community. Referring to the findings of the Court of Appeal on this point, Dickson C.J. said :

I agree with Tarnopolsky J.A. that the *Retail Business Holidays Act* was enacted with the intent of providing uniform holidays to retail workers. I am unable to conclude that the Act was a surreptitious attempt to encourage religious worship. The title and text of the Act, the legislative debates and the Ontario Law Reform Commission's Report on the *Sunday Observance Legislation* (1970), all point to the secular purposes underlying the Act.¹³²

Of all the documents cited above, the court relied extensively on the *Report on Sunday Observance Legislation* (1970)¹³³ of the *Ontario Law Reform Commission* for their findings. It noted the *Report's* conclusion that Sunday was the best choice for a common pause day for secular reasons.¹³⁴ These included the fact that Sunday was decreasing in significance as a day of

¹³¹ *ibid.*, 752.

¹³² *ibid.*, 744.

¹³³ Toronto : Department of Justice, 1970.

¹³⁴ *ibid.*, 268-269.

religious observance in Ontario. However, it remained, according to the *Report*, a significant pause day because of the high degree of social interaction and leisure activities among families and friends. The *Report* also cited precedents around the world for the legislative choice of Sunday as a uniform pause day for secular rather than religious purposes. The court then pointed out that

The Report concedes at p. 269 that the selection of Sunday as a pause day would have the incidental effect of benefiting a substantial minority of the population that attends church on Sundays. I am satisfied, however, that the acknowledgement of the religious effects of a Sunday pause day is precisely that : a frank acknowledgement of *effects* rather than an expression of concealed *purpose*.¹³⁵

In the result, the court made a crucial distinction between the *Lord's Day Act* and the *Retail Business Holidays Act* in that the latter was clearly secular in purpose. In response to the appellants' contention that some fifty-five of the sixty "holidays" listed were traditionally Christian days of rest and worship, the court held that they in themselves do not determine the legislative purpose.

Having dealt with the purpose, the court moved on to look at the effects. On this point there was no consensus on what impact the *Act* has on s. 2(a) of the *Charter*. The Chief Justice observed that the *Act* has a different impact on persons with different religious beliefs. He identified four classes of persons who might be differently impacted. The first group were the non-observers of religious days of rest. The impact on these was "generally secular in nature and do not impair or abridge their freedom of conscience or religion, at least in the absence of convincing evidence that the desire to

¹³⁵ *R. v. Edwards Books and Art, op.cit.*, 747. Emphases are the court's.

remain open is motivated by dissentient religious purposes rather than purely business considerations".¹³⁶

As for Sunday observers, the Chief Justice considered that they were favourably impacted. He noted that the legislation actually relieved them of a loss of market share to retailers who would have been open for business on Sunday in the absence of the *Act*. In that regard the cost of Sunday observers actually decreased.

The third group, namely Saturday observers, were the most affected. He classified them into retailers and consumers. This group were members of the Jewish community and the Seventh-day Adventists. As retailers, he concluded as follows:

[T]he *Retail Business Holidays Act* has the effect of leaving the Saturday observer at the same natural disadvantage relative to the non-observer and adding the new, purely statutory disadvantage of being closed an extra day relative to the Sunday observer. Just as the *Act* makes it less costly for Sunday observers to practise their religious beliefs, it thereby makes it more expensive for some Jewish and Seventh-day Adventist retailers to practise theirs.¹³⁷

Taking all things into consideration, the Chief Justice did not think that the competitive pressure on non-exempt retailers to abandon their Saturday observance was insubstantial. He therefore concluded that the *Act* infringed their freedom of religion. As well, in light of s. 3(4) those Saturday observers who complied with the provision can do business seven days a week. Hence the impact of the provincial *Act*, "far from producing a systematic discriminatory burden on all retailers of a particular faith, is to benefit some

¹³⁶ *ibid.*, 763.

¹³⁷ *ibid.*, 765.

while burdening others".¹³⁸

The Saturday-observing consumers, in the opinion of the Chief Justice, were also substantially burdened. This was especially true of Jewish consumers who relied on Nortown Foods Ltd. to supply them *kosher* foods in conformity with the dietary laws of their religion. Consequently there was an abridgement of their religious freedom.

The fourth group were members of other faiths who observed another day of the week for religious purposes. Because of insufficient evidence before the court the issue was not dealt with *vis-a-vis* the practitioners and the effect of the *Act*.

Mr. Justice Beetz with McIntyre J. concurring took a very different view on this matter. In his opinion, the impugned legislation did not violate s. 2(a) of the *Charter*. Taking note of the economic harm suffered by Saturday observers and the argument that this was the direct effect of the impugned legislation, the learned judge contended that the result was independent from the *Act* because it resulted from the deliberate choice of the Saturday observers who gave priority to the tenets of their religion over their financial benefits. He concluded that it is erroneous to suggest that the effect of the *Act* was to induce a Saturday observer to choose between his religion and the requirements of business competition. In his own words :

In my respectful opinion, this reasoning is flawed as it postulates that the economic burden imposed upon Saturday observers is the effect of the impugned legislation. That this is not the case is made clear when one looks at the situation which would prevail should all Sunday observance laws be repealed. A devout Saturday observer would close shop on Saturdays whereas most of his competitors would remain open all week. A Saturday observer would have to face the same dilemma in the absence of

¹³⁸ *ibid.*, 766.

any Sunday observance law : he would have to choose between the observance of his religion and the opening of his business in order to meet competition.¹³⁹

In the result he cited with approval the comments of Professor Petter and ruled that any economic harm suffered by the retailers was not caused by the *Act* but rather by the religion itself.¹⁴⁰ The *Act*, however, might bestow an advantage on Sunday observers. In that case, the judge suggested that any challenge would have to be based on s. 15 of the *Charter* which was not in force when the charges were laid.

The remaining five judges agreed that any burden on religious practice however imposed could violate s. 2(a) of the *Charter*. The manner in which the burden was imposed and the degree of its impact were not commonly agreed. However, they noted that the impact on Saturday observers varied because of the exemption clause in s. 3(4) of the *Act*. While owners of the smaller stores could remain open on Sundays and suffered no loss, the bigger stores had to close and did suffer. Thus the proprietors of bigger stores were forced to choose between their business and their religion. In this respect, there was an infringement of s. 2(a) of the *Charter*.

As to whether the infringement is justified under s. 1 of the *Charter*, the five judges agreed that the *Act* was "prescribed by law" and had a secular purpose of providing retail workers with a common day of rest and thus meeting a "pressing and substantial concern". These judges, however, disagreed on whether the means chosen by the legislature were reasonable and

¹³⁹ *ibid.*, 789.

¹⁴⁰ *ibid.*, 790. Professor A. Petter's article is a comment on the judgement of the Court of Appeal and is entitled, "Not 'Never on a Sunday' *R. v. VideoFlicks Ltd. et.al.*", 49 *Saskatchewan Law Review* (1984-85), 96 at 98 and 99 he wrote :

Where the Court errs is in its assumption that the financial burden incurred by those who observe a Sabbath other than Sunday is an effect of the legislation. It is not the legislation which causes the financial burden : it is the religion itself.

justifiable.

With regard to the smaller stores, the Chief Justice with Chouinard and Le Dain J.J. concurring held that the means chosen were reasonable in that the infringement was not disproportionate to the legislature's objectives. He recognized that "a serious effort has been made to accommodate the freedom of religion of Saturday observers, in so far as that is possible without undue damage to the scope and quality of the pause day objective".¹⁴¹ On the exemption clause and its effectiveness, the Chief Justice compared the situation with the American cases in these words :

In discussing the possibility of a Sabbatharian exemption as a means of reducing the burdens of Sunday closing laws on religious freedom, the majority of the United States Supreme Court had occasion to express concern about state-conducted inquiries into religious beliefs. The striking advantage of the Ontario Act is that it makes available an exemption to the small and mid-size retailer without the indignity of having to submit to such an inquiry. In my view, state-sponsored inquiries into any person's religion should be avoided wherever reasonably possible, since they expose an individual's most personal and private beliefs to public airing and testing in a judicial or quasi-judicial setting. The inquiry is all the worse when it is demanded only of members of a non-majoritarian faith, who may have good reason for reluctance about so exposing and articulating their non-conformity.¹⁴²

Although the larger stores are not exempted, the Chief Justice had no difficulty in holding that the legislature had properly weighed the interests of the owner against the interests of the larger number of employees before deciding which stores could remain open on Sunday. After citing extensively a series of American case laws reflecting the United States Supreme Court's

¹⁴¹ *ibid.*, 783.

¹⁴² *ibid.*, 779.

concern about the balancing of indirect burden on the religious freedom of a retail store owner against the interests of his sometimes numerous employees, the Chief Justice analyzed the situation at hand:

The economic position of these employees affords them few choices in respect of their conditions of employment. It would ignore the realities faced by these workers to suggest that they stand up to their employer or seek a job elsewhere if they wish to enjoy a common day of rest with their families and friends. Although I have acknowledged that the legislation under review burdens the freedoms of Saturday-observing retailers, it must also be recognized that larger retailers have available to them options flowing from the resources at their disposal which are foreclosed to their employees.... In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons. When the interests of more than seven vulnerable employees in securing a Sunday holiday are weighed against the interests of their employer in transacting business on a Sunday, I cannot fault the Legislature for determining that the protection of the employees ought to prevail.¹⁴³

Mr. Justice La Forest, for one, felt he required "evidence to warrant the conclusion that the burden on Saturday-observing retailers is sufficiently substantial as to constitute an abridgement of their religious freedom".¹⁴⁴ In this regard he appeared to apply a true "balance of interests" test, namely the balance between means and ends. He said,

[H]aving accepted the importance of the legislative objective, one must in the present context recognize that if the legislative goal is to be achieved, it will inevitably be achieved to the detriment of some. Moreover, attempts to protect the rights of one group will also inevitably impose burdens on the rights of other groups.

¹⁴³ *ibid.*, 778-779.

¹⁴⁴ *ibid.*, 792.

There is no perfect scenario in which the rights of all can be equally protected.¹⁴⁵

Citing the *Ontario Law Reform Commission's Report* and a number of American authorities on the problem of balancing conflicting interests and pressures he concluded that the legislative choice is best left to the legislature and that the legislature should be given considerable flexibility in making these choices. He did not think that judges were the best people with the specific information necessary "to decide where the line is to be drawn".¹⁴⁶ With reference to the justificatory clause he wrote :

In seeking to achieve a goal that is demonstrably justified in a free and democratic society, therefore, a legislature must be given reasonable room to manoeuvre to meet these conflicting pressures. Of course, what is reasonable will vary with the context. Regard must be had to the nature of the interest infringed and to the legislative scheme sought to be implemented. In a case like the present, it seems to me, the Legislature is caught between having to let the legislation place a burden on people who observe a day of worship other than Sunday or create exemptions which in their practical workings may substantially interfere with the goal the Legislature seeks to advance and which themselves result in imposing burdens on Sunday observers and possibly on others as well. That being so, it seems to me that the choice of having or not having an exemption for those who observe a day other than Sunday must remain, in essence, a legislative choice. That, barring equality considerations, is true as well of the compromises that must be made in creating religious exemptions. These choices require an in-depth knowledge of all the circumstances. They are choices a court is not in a position to make.¹⁴⁷

Thus La Forest J. held that the *Act* could have been saved by s. 1 of the *Charter* even without the exemption clause in s. 3(4). In his opinion, the

¹⁴⁵ *ibid.*, 795.

¹⁴⁶ *ibid.*, 801.

¹⁴⁷ *ibid.*, 795-796.

means which the legislature chose to adopt should, within reasonable limits, be left to the discretion of the legislature which was better equipped than the court to deal with the complex issues of means and ends. Although the burden imposed on the Sunday observers was substantial enough to violate their freedom of religion, the *Act* is reasonable and demonstrably justified in a free and democratic society.

The only dissenting judge, Madame Justice Wilson, held that it was not open to the government to provide exemptions for some Saturday observers and not for others of the same group. In other words, s. 3(4) of the *Retail Business Holidays Act* was bad law on the ground that it is discriminatory. In trying to effect a compromise between the government's objective of a common pause day and the freedom of religion of those who close on Saturday for religious reasons, the legislature effected "a compromised scheme of justice".¹⁴⁸ Quoting Dworkin, Madame Justice Wilson contended that the legislature did not legislate on the basis of principle on an issue on which people held widely divergent views:

If there must be a compromise because people are divided about justice, then the compromise must be external, not internal; it must be a compromise about which scheme of justice to adopt rather than a compromised scheme of justice.¹⁴⁹

In her own words she concluded in a lone dissenting note:

It seems to me that s. 3(4) of the *Retail Business Holidays Act* purport to recognize a group right, namely the right of those who close on Saturdays on religious grounds to stay open on Sundays because otherwise their s. 2(a) right would be violated. But it does not recognize the group right of all members of the group, only of some. Accordingly, the violation of the s. 2(a) right of

¹⁴⁸ *ibid.*, 809-810.

¹⁴⁹ *ibid.* Ronald Dworkin, "Integrity", *Law's Empire*, 178ff.

the others has legislative sanction. Yet it seems to me that when the *Charter* protects group rights such as freedom of religion, it protects the rights of all members of the group. It does not make fish of some and fowl of the others. For, quite apart from considerations of equality, to do so is to introduce an invidious distinction into the group and sever the religious and cultural tie that binds them together. It is, in my opinion, an interpretation of the *Charter* expressly precluded by s. 27 which requires the *Charter* to be interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians". Can it then be a reasonable limit under s. 1? In my opinion, it can not.¹⁵⁰

The result of the judgements in this case was that the provincial *Retail Business Holidays Act* was upheld in its original form for different reasons. Unlike the *Lord's Day Act*, the purpose was explicitly secular. Consequently the issue revolved around its effects. On the whole the majority ruled that with regard to Saturday observers, the effects infringed their right to freedom of religion under s. 2(a) of the *Charter*. But the effects were ameliorated by the exemption clause in s. 3(4) of the *Act*. Since the effects were linked to the factual question whether overall the *Act* was reasonable and justifiable in a free and democratic society, the whole question of balancing the legislative objective of the government and the means it employed to achieve the objective was analyzed in some detail.

In sum, two justices found that in fact there was no infringement of s. 2(a) of the *Charter*, three members held that the exemptions provided in s. 3(4) of the *Act* could be justified without the notwithstanding clause, and one decided that she would strike down the size and employee restrictions contained in the exemption clause because the clause is discriminatory in nature.

Edwards Books and Art Ltd. dealt with the Ontario *Retail Business*

¹⁵⁰ *ibid.*, 808-809.

Holidays Act. There are other provincial legislations with similar provisions for common pause days based on secular as opposed to religious motivations. In New Brunswick, the *Day of Rest Act, 1985*¹⁵¹ was challenged in *R. v. Sobeys Stores Ltd. (1986)*.¹⁵² The *Act* was similar to the *Ontario Act* and it also named Sunday as a "weekly day of rest". The applicant argued that this new legislation did nothing more than fill "the void left by the impugned *Lord's Day Act* by mischievously adding a few secular holidays to give the impression and appearance of a secular legislative purpose". In the result, it was submitted that it was of no force or effect in that it infringed ss. 2(a), 7 and 15 of the *Charter*.

The court dismissed the arguments and upheld the *Act*. It ruled that the declaration and definition in the *Days of Rest Act* of "Sunday" as the "weekly day of rest", taken in the context of the whole *Act*, does not clearly and apparently colour the *Act* coercively religious and thus in conflict with the *Charter*. The court took the "balance of interest" approach and declared that in a society a balancing of people's rights and freedoms must be struck, such as in the *Act* where the legislature purported to balance the rights of the applicant to be open and do business, the people's desire to shop, with the desires of other people to have a right to a moment, to pause, to be together, away from work.

An interesting feature of the *Act* is found in s. 7 which provides for hearings by an appointed board to determine application for exemption from the provisions of the *Act* on the grounds of "conscience and religion". This section effectively allowed the tribunal to rule on the sincerity of the applicant's beliefs. Notwithstanding this provision, the court upheld the *Act*

¹⁵¹ S.N.B. 1985, c.D-4.2.

¹⁵² (1986) 177 A.P.R. 246 (N.B. Queen's Bench); 8 C.R.D. 525. 90-02.

because it has the appearance of being non-religious or secular in tone with its purpose and objective to secure for the general populace certain days of rest throughout the year.

On the purposive approach, the Quebec Superior Court also upheld the constitutional validity of the *Act Respecting Commercial Establishing Business Hours* which again was very similar to the Ontario *Act*. The rationale in *L'assoc. Des Détaillants en Alimentation du Québec v. La Ferme Carnaval Inc.* (1986)¹⁵³ was two-fold. Firstly, it was held that the impugned *Act* has a secular purpose. The *Act* did not contain any reference whatsoever to a religious element, and nowhere did it manifest a religious character. All it did was to prescribe hours and days of rest for certain businesses. There were exceptions for those who wish to close their operations on Saturdays and open on Sundays.

Secondly, the court ruled that there could well be an indirect effect at the economic level resulting from the overlap of the prescriptions in the *Act* and the prescriptions to which certain persons subscribe. This in itself did not make the law partake of a religious character or that in itself it had an effect on religious freedom. At the very most it is opened to those so affected to claim a constitutional exemption. The court noted, however, that the defendants in the case have no religious character and religion played no part in their existence. Accordingly they could not claim to be affected as to any religious freedom whatsoever.

In two 1987 cases, Sunday observance legislations were also unsuccessfully challenged. The court in Newfoundland discussed the contention that the *Shop Closing Act (Newfoundland)* was invalid being contrary to s. 2 of the *Charter*. It held that although the *Act* might have the

¹⁵³(1986) 9 C.R.D. 525. 90-05.

incidental effect of preventing those who celebrate a religious holiday on a day other than Sunday from having a common holiday, such incidental breach is supportable under s. 1 of the *Charter*.¹⁵⁴

*London Drugs Ltd. v. Red Deer (City)*¹⁵⁵ ruled in the same year that a city by-law prohibiting the conduct of business on a Sunday, unless during any period of twenty-four hours in the six days immediately following the Sunday the premises are closed to the public and no goods or services are sold to the public, did not infringe s. 2(a) of the *Charter*. It held that the effect of the by-law was to permit a business to pick any day of the week on which to close. Sunday was merely used as a starting point for the seven-day cycle. Consequently, the by-law treated all religions equally and no economic burden was imposed on any religious group. More importantly, the court held that, given that an individual may select any day of the week to close his business the choice of Sunday as the starting point cannot be said to amount to an indirect psychological attempt to influence people to conform to majority Christian views.

In three other different contexts, however, the Provincial Courts of Nova Scotia, Newfoundland and Saskatchewan found that the challenged legislations violated freedom of conscience and religion and struck them down. In *Regina v. Quinlan*(1983)¹⁵⁶ the appellant was convicted of setting or hauling a lobster trap on a Sunday in a lobster fishing district other than a district specifically exempted under the relevant federal *Lobster Fishery*

¹⁵⁴ *R. v. Town and Country Grocery and Convenience Ltd.*, (1987) 10 C.R.D. 525. 90-04.

¹⁵⁵ [1987] 6 W.W.R. 588; 81 A.R. 87 (Q.B.).

¹⁵⁶ (1983) 128 A.P.R. 224 (N.S.C.C.); 12 C.R.R. (1983) 81.

Regulations.¹⁵⁷ The provision prohibited lobster fishing on a Sunday in any lobster fishing district, other than named districts. On appeal, the appellant challenged the *Regulations* on the ground, *inter alia*, that it violated the right of freedom of conscience and religion under s. 2(a) of the *Charter*. Essentially the argument was that the ban discriminated against persons whose religious faith did not call for the observance of the Sabbath on Sunday.

On the evidence the court found that the ban on Sunday fishing was made pursuant to a vote of the fishermen in that district and that the ban was not founded on conservation consideration as contended by the Crown. It held that the ban prescribed what in essence was a religious obligation and was basically a ban serving the religious conscience of the majority in the district. The *Charter of Rights and Freedoms* was therefore violated and s. 7(3) was declared unconstitutional and inoperative.

Related to the *Quinlan* case is *R. v Peddle and Rice* (1986)¹⁵⁸ where the Crown appealed from the acquittals in respect of charges of violating paragraph 17.1(1)(a) of the *Wildlife Act* involving a breach of s. 37 of the *Regulations* which provided that no person shall hunt, take or kill any big game on a Sunday.

The Supreme Court of Newfoundland held that the *Regulation* violated s. 2(a) of the *Charter*. The defect of the *Regulation*, ruled the court, lay in what was presumed to be the reason for its purpose, the accommodation of a religious group. That reason was inconsistent with the *Charter* because it spawned the *Regulation* which had as its purpose a ban on Sunday of acts which were harmless (in the legal sense) in themselves but accommodated one religious group at the expense of others. The court said that the purpose, or

¹⁵⁷C.R.C. 1978 c.817 (as amended).

¹⁵⁸(1986) 17 W.C.B. 259 (Nfld. S.C.T.D.); 9 C.R.D. 525. 90-02.

more precisely, the underlying reason for the purpose, was of paramount importance. If the underlying reason was unrelated to the procurement of an end that was designed to accommodate a religious belief, then the law could not be impugned on the ground that it impinged upon freedom of conscience and religion. The fact that it might have an incidental appeal to one area of the spectrum of religious thought but not to all was of no significance. If, on the other hand, the underlying reason was the procurement of an end that was designed to accommodate one area of that spectrum and the resultant law prevented or required an act which those outside that area were otherwise free to do or abstain from doing, the law offended the *Charter*.

A more recent case of *R. v. Westfair Foods Ltd. and Canada Safeway Ltd.* (1987)¹⁵⁹ dealt with the Sunday closing provisions of the *Urban Municipality Act*, 1984 and the *Store Hours By-law*. The Saskatchewan Queen's Bench said that it would be an act of judicial blindness not to recognize that there were in that city persons of Jewish and Seventh-Day Adventist faiths whose religious day of rest was Saturday. Therefore, they concluded, the Sunday closing laws impacted adversely on such Saturday observers. The court also held that the impugned laws were not saved by s. 1 of the *Charter* because unlike the Ontario *Retail Business Holidays Act*, there was nothing in the *Urban Municipality Act* or the *Store Hours By-law* to alleviate their effects on Saturday observers, and that omission was fatal to the legislations.

Clearly, what emerges from the cases referred to is that the definition of freedom of religion has been significantly broadened under the *Charter* by virtue of the inclusion of "conscience" in the phrase. It now includes the right to practice one's belief according to one's conscience. Generally, any

¹⁵⁹(1987) 11 C.R.D. 525. 90-01.

legislation on Sunday observance with a religious purpose would be struck down because it would favour a religion against the practice of other religions. However, if the purpose is secular, and the effects burdened some religious practitioners, the court will look to see if the government had made any real effort to accommodate the other minority religions. It would appear that if the court finds the government had made sincere attempts in that direction, the legislation might be upheld even though it does impact on minority religious practice. Notwithstanding the *dicta* of the Chief Justice in *R. v. Edwards Books and Art Ltd.* about the indignity of state-sponsored inquiry into a person's religion, it appears that the "religious character" of a person is significant in certain circumstances. More significantly, the notion of freedom of religion is now extended to include freedom of irreligion.

Education and Religious Freedom

In Canada, since Confederation, it has generally been accepted that public education has two aspects to it. S. 93 of the *British North America Act* gives the provincial legislatures jurisdiction over public education. However, this jurisdiction is not absolute as it is subject to the rights of denominational schools. In practice, the dual-aspect of public education permits private schools to include religion in their curriculum provided the schools' minimum standards are set by the public educational authorities of the provinces. The way this is typically done is for the provinces to require that private schools be certified by the school boards to ensure the maintenance of minimum standards of efficiency. As well, all school-aged children are required to register with the school board. In many cases, parents are also permitted to

educate their children at home provided the minimum standards set by the public school authorities are maintained. Since the coming into force of the *Charter*, requirements of this nature have been challenged on grounds that such demands violated the rights guaranteed in s. 2(a).

The first case of its kind heard in the Supreme Court of Canada was *Jones v. The Queen*[1986]¹⁶⁰. The accused was a fundamentalist pastor who educated his own and twenty or more other children in the basement of his church. He called his school the "Western Baptist Academy". It was his belief that his authority over the children and his duty to educate them came from God and that it would be sinful for him to request permission from the state to carry out his God-given duty. In accordance to his conscience and belief he refused to send his children to public school. He also refused to apply for government approval for his academy and for exemption from public school attendance for his children. The three-fold refusal constituted three separate offences under the *Alberta School Act*¹⁶¹. Consequently, he was charged on March 8, 1983 with three counts of truancy on the part of his three children. The relevant sections of the *Act* reads as follows :

S. 142 (1) Every child who has attained the age of 6 years at school opening date and who has not attained the age of 16 years is a pupil for the purposes of this Act and unless excused for any of the reasons mentioned in section 143 shall attend a school over which a board has control.

S. 143 (1) A pupil is excused from attendance at school if
(a) a Department of Education inspector or a superintendent of schools (whether appointed by a board or the Department of Education) certifies in

¹⁶⁰[1986] 2 S.C.R. 284.

¹⁶¹R.S.A., 1980, c.S-3.

writing that the pupil is under efficient instruction at home or elsewhere,

....
(e) he is attending a private school approved under the *Department of Education Act*

S. 180 (1) A parent whose child contravenes any of the provisions of this Act relating to school attendance is guilty of an offence and liable to a fine ... and in default of payment to imprisonment for a term not exceeding 60 days

In his defence, the accused put forward three principal arguments. First, the compulsory attendance provisions, taken as a whole, offended the freedom of conscience and religion guaranteed to him by s. 2(a) of the *Charter*. Second, s. 143(1)(a) and (e) in particular offended those freedoms since application for approval of a private school or for certification of efficient instruction offended his religious convictions, as would refusal of such applications. And third, s. 143(1)(a) by limiting evidence of efficient instruction to a certificate thus described deprived him of his liberty contrary to the principles of fundamental justice guaranteed by s. 7 of the *Charter*. This evidentiary limitations, according to this line of defence, prevented him from making a full answer and defence to the charge.

The Supreme Court implicitly adopted the definition of freedom of religion articulated in *Big M Drug Mart Ltd.*¹⁶² Madame Justice Wilson quoted the definition of Dickson J. (as he then was)¹⁶³.

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly without fear of hindrance or

¹⁶² [1985] 1 S.C.R. 295 at 336.

¹⁶³ *Jones v. The Queen*, [1986] 2 S.C.R. 284 (S.C.C.) at 310-11.

reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.

In light of that understanding, the court unanimously agreed that the purpose of the impugned *Act* was secular in nature. Mr. Justice La Forest, with Dickson C.J. concurring, said :

The *Alberta School Act*, as the name implies, was enacted to regulate the education of the young people in the school of the province. That is purely a secular goal. It does not have a religious purpose.¹⁶⁴

The court also agreed that while the sincerity of the appellant's beliefs could be examined, the validity of his beliefs could not be questioned. This distinction is a significant one as it has an important relation to the question of the impact of the *Act* on his beliefs. Again, La Forest put it succinctly :

Assuming the *sincerity* of his convictions, I would agree that the effect of the *School Act* does constitute some interference with the appellant's freedom of religion. For a court is in no position to question the *validity* of a religious belief, notwithstanding that few share that belief. But a court is not precluded from examining into the sincerity of a religious belief when a person claims exemption from the operation of a valid law on that basis. Indeed it has a duty to do so.¹⁶⁵

The point made by the learned judge recalls the approach of the Quebec Supreme Court in *L'Assoc. Des Détaillants en Alimentation du Québec v. La Ferme Carnaval Inc.* (1986)¹⁶⁶ The court ruled that to claim a constitutional exemption it was necessary that the claimant manifest a "religious character" and that religion plays a part in his existence.¹⁶⁷

¹⁶⁴ *ibid.*, 294.

¹⁶⁵ *ibid.*, 295.

¹⁶⁶ (1986) 9 C.R.D. 525. 90-05.

¹⁶⁷ *ibid.*

On the question of the effect of the impugned *Act* on the appellant, the court ceased to maintain consensus. The court was divided into two groups holding two conflicting opinions. La Forest J., with the Chief Justice and Lamer J. concurring, held that on the assumption that the appellant sincerely believed that applying for the certificate was tantamount to acknowledging that the state rather than God had the final authority over the education of his children, then the impact of the *Act* was such that it interfered with the appellant's freedom of religion.

On the other hand, Madame Justice Wilson, with Beetz, Le Dain and McIntyre J.J. concurring, found that the *School Act* did not infringe on the freedom of conscience and religion of the appellant. Madame Justice Wilson spoke eloquently :

In my view, the *School Act* does not offend religious freedom; it accommodates it. It envisages the education of pupils at public schools, private schools, at home or elsewhere. The legislation permits the existence of schools such as the appellant's which have a religious orientation. It is a flexible piece of legislation which seeks to ensure one thing -- that all children receive an adequate education. The appellant agrees with the need for an adequate education and that this includes instruction in subjects such as English, mathematics, social studies and science. Indeed, at trial he called a secular expert to prove that such instruction was being provided in his school. There is no conflict between what the legislation requires and what the appellant feels it is his duty to provide. True, he wishes to provide more, specifically religious guidance, but the legislation does not prohibit that.¹⁶⁸

It was conceded by the appellant that the content of the *Act* did not infringe on s. 2(a) of the *Charter*, but it was contended that the required act of conformity with it did. To this argument, Madame Justice Wilson responded just as incisively :

¹⁶⁸ *ibid.*, 312.

It does not, in my view, offend the appellant's freedom of religion that he is required under the statute to recognize a secular role for the school authorities. And this is what it is. It would be strange indeed if, just because a school had a religious approach to education, it was free from inspection by those whose responsibility it was to ensure that the standards of secular education set by the Province were being met. This, however, is not really the appellant's position. He acknowledges the Board's interest; he simply states that to apply to it for an exemption offends his s. 2(a) right. I think he has failed to establish this. There are many institutions in our society which have both a civil and a religious aspect, e.g. marriage. A person's belief in the religious aspect does not free him of his obligation to comply with the civil aspect. No one is asking the appellant to replace God with the School Board as the source of his right and his duty to educate his children. They are merely asking him to have the quality of his instruction approved by the secular authorities so that minimum standards may be maintained in all educational establishments in the Province..¹⁶⁹

Indeed, the majority of the judges looked upon the *Act* as a standard-setting legislation for the general education of children rather than a controlling legislation for the exclusive education of children. There was enough flexibility for parents to educate their children in public or private schools, or even at home. In fact, it encouraged adequate education, which need the appellant obviously recognized, hence his attempt to educate the children in his academy. The court did not think that the *Act* attempted to substitute the state for God as the source of his right and duty to educate the children. In any event, even if the requirements proved a burden on the appellant it was too trivial to be considered an infringement of s. 2(a) of the *Act*.

On the question of justification, the first group of judges who held that the *Act* infringed s. 2(a) of the *Charter*, relied on the principle of the state's "compelling interest" as the justification for the validity of the provisions.

¹⁶⁹ *ibid.*, 312-313.

Said La Forest J. :

[T]he province, and indeed the nation, has a compelling interest in the "efficient instruction" of the young. A requirement that a person who gives instruction at home or elsewhere have that instruction certified as being efficient is, in my view, demonstrably justified in a free and democratic society. So too, I would think, is a subsidiary requirement that those who wish to give such instruction make application to the appropriate authorities for certification that such instruction complies with provincial standards of efficiency. Such a requirement constitutes a minimal, or as the trial judge put it, peripheral intrusion on religion. To permit anyone to ignore it on the basis of religious conviction would create an unwarranted burden on the operation of a legitimate legislative scheme to assure a reasonable standard of education.¹⁷⁰

It is noteworthy that the importance of education and its relation to the state making it a "compelling interest" was based on the *dictum* of an American Supreme Court case so that "[n]o proof is required to show the importance of education in our society or its significance to government".¹⁷¹ What the Supreme Court of the United States said in *Brown v. Board of Education of Topeka* was both applicable and self-evident :

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures of education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument is [sic] awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in

¹⁷⁰ *ibid.*, 299.

¹⁷¹ *ibid.*

life if he is denied the opportunity of an education.¹⁷²

The very significant observation in the approach of La Forest J. is that he deviated from the approach to s. 1 analysis outlined in *R. v. Oakes* [1986]¹⁷³. The burden of proof enunciated in that case lay squarely on the government to adduce evidence in order to justify the legislation that infringes on fundamental rights and freedoms. The evidence must show that the object of the impugned legislation relates to concerns which are "pressing or substantial". Once the object is shown to be sufficiently important, the means chosen to carry out the object must be "reasonable and justifiable in a free and democratic society". This involves the application of a "proportionality test". The government must show that the means it chooses must be rationally connected to the objective and in reading the objective, it must impair as little as possible the right or freedom in question. And even if those two components are satisfied the deleterious effect of the measure must not be so severe that they cannot be justified.

In this case the government adduced no evidence at all in discharging this onus. The judge did not seem to worry at all for he simply took judicial notice of the compelling interest of the state and concluded that "[t]he obvious way to administer it is by requiring those who seek exemptions from the general scheme to make application for the purpose."¹⁷⁴ What the judge had done was to convert an onus into a presumption.

This deviation did not go unnoticed, however. Madame Justice Wilson

¹⁷² 347 U.S. 483 (1954) at 493 quoted in *ibid.*, 297. Other American cases cited included *Sheridan Road Baptist Church v. Dept. of Education*, 348 N.W. 2d 263 (1984) and *New Jersey State Board of Education v. Board of Directors of Sheldan College*, 448 A. 2d. 988.

¹⁷³ [1986] 1 S.C.R. 103.

¹⁷⁴ *Jones v. The Queen*, *op.cit.*, 299-300.

pointed out that if an infringement had been found, the failure of the government to adduce evidence to justify the infringement in accordance to the *Oakes* test should have been fatal to its claim to justification under the *Charter*. Although her conclusion was that the *Act* did not violate s. 2(a) of the *Charter* and therefore it was not necessary for her to consider the application of s. 1, she made the following remarks obviously with reference to Justice La Forest's deviation from the *Oakes* test.

[U]nlike my colleague, I do not believe that the *School Act* can be saved by s. 1 if it does in fact violate s. 2(a). While there can be no doubt that the province has a compelling interest in education, more than this is required under s. 1. There has to be a form of proportionality between the means employed and the end sought to be achieved. In particular, the means employed must impair as little as possible the right or freedom in issue: *R. v. Oakes*, [1986] 1 S.C.R. 103. The government adduced no evidence to establish that having the parent apply for a certificate was the least drastic means of ensuring that their children were receiving efficient instruction. The legislature, for example, could clearly have given the education authorities the power to inspect on their own initiative. I do not believe, therefore, that the government has discharged its burden under s. 1.¹⁷⁵

The appellant's defence also included the submission that by being subjected to penal sanctions for failing to send his children to a school under the control of the Board, he was being deprived of his liberty under s. 7 of the *Charter*. There were two ways, the appellant argued, whereby his liberty was deprived, which were not in accordance with fundamental justice. The relevant one for our discussion is the deprivation of his right to bring up his children in a manner he saw fit. La Forest J. and the majority held that even assuming that the word "liberty" used in s. 7 did include the right of parents to educate their children as they see fit, he had not been deprived of that liberty

¹⁷⁵ *ibid.*, 315.

in a manner that violates s. 7 of the *Charter*. His reasons are briefly stated as follows :

The provision under which the appellant is charged is one dealing with truancy generally. It does not *per se* violate the claimed liberty. It does so only if those charged with its administration use it as a device for unduly infringing on such liberty. If this occurred, the *Charter* defence would come into play. That, however, is not the case here.¹⁷⁶

In her dissenting judgement on this point, Madame Justice Wilson cited many Canadian and American authorities as well as J.S. Mill's seminal work, *On Liberty*.¹⁷⁷ She carefully dealt with the issue by analyzing it in two parts, which she put into two key questions. First, are parental rights encompassed by the word "liberty" in s. 7? Second, whether s. 143(1) of the *School Act* impaired the appellant's s. 7 right and if so, did it do so in accordance with the principles of fundamental justice?

To the first question, she opted for a liberal and generous interpretation of the *Charter* :

I believe that the framers of the Constitution in guaranteeing "liberty" as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric -- to be, in to-day's parlance, "his own person" and accountable as such. John Stuart Mill described it as "pursuing our own good in our own way". This, he believed, we should be free to do "so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it".¹⁷⁸

In accordance with this interpretation she held that liberty included the

¹⁷⁶ *ibid.*, 307-308.

¹⁷⁷ Edited by David Spitz.

¹⁷⁸ *ibid.*, 318.

right to raise one's children "in accordance with his conscientious belief".¹⁷⁹ She did not think, however, that that right included the right to educate as the appellant thought fit because that would be going too far.

On the second question she noted that two distinct consequences flowed from the failure to obtain a certificate from the authorities. The first and main consequence was that the appellant lost the right to educate his children in accordance with his conscientious belief. The second was that he could be charged under the *Act* and on conviction could lose his physical liberty for non-payment of fines.

Having reviewed the meaning of the phrase "principles of fundamental justice", she concluded that it embraced the notion of procedural fairness.¹⁸⁰ This notion was clearly articulated in *Duke v. The Queen* [1972] by Fauteux, C.J., to mean, generally, "that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity to adequately state his case".¹⁸¹

On this basis, she held that since proof of efficient instruction was restricted by the legislation to the production of the certificate, the appellant, on a charge under s. 180(1), was prevented from introducing evidence relevant to the issue before the court. He was therefore deprived of the right to make a full answer and defence which violated s. 7 of the *Charter* being not in accordance with the principles of fundamental justice. Madame Justice Wilson also held that the violation was not reasonable or justifiable under s. 1 of the *Charter* because the government had not discharged its burden in

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid.*, 322.

¹⁸¹ [1972] S.C.R. 9.7 at 923.

accordance with the "stringent standard of justification" outlined in Oakes.¹⁸²

The significance of this case to the issue of freedom of religion is centred in the majority's view of state compelling interest. It would appear that when the government has a compelling interest, the interest of the state would prevail against the interest of the citizen. Yet it is precisely to curtail the state from exercising its overwhelming power that certain fundamental rights and freedoms are constitutionally protected so that the ordinary citizen's interests may have a chance to prevail against the power of the state. In reality the courts have to play an arbitrating role in balancing such conflicting interests. Under the *Charter*, the role of the courts is manifestly enhanced.

It is also significant that the court distinguished between sincerity of beliefs and validity of beliefs. It decided that the latter is not their business to examine though they maintain the right to question the former. The principle seems to be that as long as a belief is sincerely held, it is recognized for legal purposes and therefore is practically valid. On the other hand a valid set of beliefs may be legally invalidated because it is deemed insincerely held. Since the question of sincerity is difficult to determine, the court has to rely on extrinsic and circumstantial evidence to pass a judgement. In the result the sincerity of religious belief, which is essentially a personal and internalized value system, is dependent on external manifestations. The problem is that some religious beliefs may have very little external manifestations though sincerely held as a personal matter.

Perhaps it is also a significant observation that in determining the relationship between religion and public schools, the court tended to look to the American cases for guidance. It also relied quite heavily on American jurisprudence for determining the meaning of "liberty" in s. 7 of the *Charter*.

¹⁸² *Jones v. The Queen. op.cit.*, 322.

Out of ten cases cited by Justice La Forest, six of them were American. The four Canadian cases dealt with general principles of judicial interpretation whereas the American cases dealt with substantive law. The same can be said of Madame Justice Wilson who cited twenty-five cases, out of which fourteen were American. It would appear that American jurisprudence does have a greater influence under the *Charter* than under the *Bill*.

In the area of education, it would appear that because the government does have compelling interest, legislations which appear reasonable will not be vigorously scrutinized. Even before the *Jones* case, the courts had upheld educational legislations even though certain religious points of view may be constrained by them. Thus in *R. v. Bienert* (1985)¹⁸³ the Alberta Provincial Court held that, there being a valid public interest in universal education, the state may intervene to exercise control of what, if anything, was being taught.

The facts of the case involved another fundamentalist pastor who was responsible for the "educational ministry" of his church. That ministry offered children between the ages of 6 and 16 instruction from a Christian perspective in mathematics and other subjects normally taught in school operated by a board under the *School Act*.¹⁸⁴ Again like the *Jones* case, the church school was unregistered on the similar ground that applying for approval from state authorities amounted to admitting that the government and not God had dominion over their church.

One of the defences on the charge of operating a private school that was not approved by the Minister of Education, contrary to s. 10(3) of the *Department of Education Act*, 1980¹⁸⁵, was the common law right of parents

¹⁸³ (1985) 18 C.R.R. 285; 6 C.R.D. 525. 90-05.

¹⁸⁴ R.S.A. 1980 c.S-8. (as amended).

¹⁸⁵ R.S.A. 1980 c.D-17. (as amended).

to educate their children. In the old English case of *Re Meade* (1871),¹⁸⁶ Lord O'Hagon stated this principle at common law.

The authority of the father to guide and govern the education of his child is a very sacred thing, bestowed by the Almighty, and to be sustained to the uttermost by human law. It is not to be abrogated or abridged without the most coercive reasons.¹⁸⁷

On that ancient authority the church challenged s. 10 of the *Department of Education Act* on the ground that it infringed the fundamental freedom of religion guaranteed in the *Alberta Bill of Rights*¹⁸⁸ and the *Charter*. On the *Charter* issue, the court held that the impugned legislation was secular in purpose as there was "no reference, expressed or implied to the religious views of the applicants for such schools".¹⁸⁹ However, the court found that its effect did violate s. 2 (a) of the *Charter* in that the religious freedom had to be understood "in broad and compelling terms" as enumerated by the Chief Justice in *Big M Drug Mart Ltd.*¹⁹⁰ The legislation, however, was saved by s. 1 of the *Charter* on the ground that what was sought by the Department of Education was not onerous. They merely sought to have the defendant apply for private school status. The court concluded with reference to the potential conflict between a fundamental right under the *Charter* and s. 93 of the *British North American Act*.¹⁹¹ :

¹⁸⁶(1871) L.R. 5 Ir.Eq. 98.

¹⁸⁷ *ibid.*, 103.

¹⁸⁸R.S.A. 1980 c.A-16.

¹⁸⁹ *R. v. Bienert* (1985) 18 C.R.R. 285 at 294.

¹⁹⁰ *Supra.*, 275ff.

¹⁹¹ It was the defendant's point that the provincial legislature had no business to make laws in relation to education.

Historically, education was initially a church concern in Canada. Commencing with a Jesuit college founded in Quebec in 1635, numerous ecclesiastical seminaries and schools were established in New France by 1700. However, by 1800 grammar schools had been established and in 1816 these were assisted in Upper Canada by a grant of public funds. (McGinnis, *Canada, A Political and Social History*.) Since that time governments have been continuously and deeply involved in matters of establishment, funding and control of schools. Some of our deepest political crises have arisen from the exercise (or refusal to exercise) this power, such as the Manitoba school crises of 1890. The point of this paragraph is to emphasize that, contrary to the defendant's view, Caesar's image is deeply engraved upon education in Canada.

No reasonable person could deny the right of the defendant and adherents of his church to instruct their children in their own religious beliefs, morals and philosophies. However, in my view, they must defer to a reasonable direction of the instruction of secular subjects from the authorized jurisdiction of the Minister of Education.¹⁹²

In *R. v. Corcoran and Corcoran* (1985)¹⁹³ the Newfoundland District Court held that s. 6(2) of the *School Attendance Act, 1978* (Nfld),¹⁹⁴ which requires any person who takes up residence in the province and who has care of a child to present that child for enrollment at a school within two weeks after taking up residence, was not inconsistent with s. 2(a) or s. 7 of the *Charter*. The *Act* provided an exemption clause to which the accused could apply after enrollment. Since the accused did not enrol and apply for exemption, the issue under the *Charter* did not arise because only in the event of non-approval of a program of house instruction could an issue under the *Charter* for adjudication arise.

¹⁹² *R. v. Bienert, op.cit.*, 297-298.

¹⁹³ 52 Nfld and P.E.I.R. 308.

¹⁹⁴ c.78 (as amended).

The Alberta Provincial Court also dealt with the issue of compulsory school attendance under the *School Act*¹⁹⁵ in *R v. Powell* (1985).¹⁹⁶ In that case the accused who were not qualified school teachers were teaching their two children at home on a home studies programme described by the court as "mere puffery and is in reality a smokescreen for teaching *only* religious philosophy and hardly anything else".¹⁹⁷ On the charge of truancy under the *School Act*, the accused challenged it on grounds that the legislation infringed ss. 2 (a) and 7 of the *Charter*. The court dismissed the *Charter* arguments and upheld the convictions of the accused. In the course of the judgements certain *dicta* of Litsky J. are noteworthy.

In the "unsettled seas of constitutional issues dealing with the elements of state education, and freedom of religion with their ultimate impact on children in today's society", the learned judge declared that "it is not every expression of religious conviction, however deeply and sincerely held, which is constitutionally protected".¹⁹⁸ It would appear that the court's primary concern for the educational needs of children led it to protect the Powell's children from a religious conviction that resulted in "a kind of academic anarchy within the Province of Alberta without form or substance". The real reason was thus elaborated :

In essence the Powells are practising intellectual nihilism which is antithetical to any organized educational system. The Court cannot allow a proliferation and acceleration of unapproved sub-standard home study espoused by splintered factions".¹⁹⁹

¹⁹⁵ R.S.A. 1980 c.S-3.

¹⁹⁶ 39 Alta L.R. (2d) 122 (Prov. Ct.); 19 C.R.R. 113.

¹⁹⁷ *ibid.*, 122.

¹⁹⁸ *ibid.*, 121.

¹⁹⁹ *ibid.*, 122.

Clearly, sincerity of belief was not enough. Unlike the court in *the Jonescase*, the learned judge in this case examined and questioned the validity of beliefs because he felt that such beliefs were detrimental to the educational needs of the children. The judge cited *Re M (L and K)* (1978)²⁰⁰ in support of the state's compelling interest over the children's welfare :

Mr. Field argued on the right of the individual for religious freedom and the non-intervention of the state in personal affairs. I do not in any way reject the right of religion with respect to these movements.... *Freedom does not, however, include absolute freedom, especially when it comes to the rights of children, their best interests or welfare. Certainly the religious concern of each person is a personal matter, but the concern for the children's upbringing is also society's major concern, and it has to be predicated by the court's interpretation. The Alpha and Omega Order has a right to an untrammelled religious belief, but it steps over its bounds when it creates an atmosphere which is not conducive to allowing a child to reach his potential on an individual basis. It cannot be stated too often that it is the child's interests that are at stake, and it should be remembered by members of the legal profession that the rule in neglect cases must be utilized as a protection of the child and not necessarily as a bulwark for the rights of parenthood.*²⁰¹

The cases analyzed so far deal with the compelling interest of the state in relation to the right of the parents. Nothing is said about the right of the children. The first school opening exercise case under the *Charter* was dealt with in *Re Zylberberg and Director of Education* (1986).²⁰² This was followed by *The Corp of the Canadian Civil Liberties Association*, and

²⁰⁰(1978) 6 R.F.L. (2d) 297.

²⁰¹ *ibid.*, 321. (emphasis his)

²⁰² The full title is *Re Zylberberg et al. and Director of Education of Sudbury Board of Education; League for Human Rights of B'Nai Brith Canada et al, Intervenors* (1986), 29 D.L.R. (4th) 709 (Ont. H.C. Div. Cl.).

Others v. The Minister of Education (1987).²⁰³ Both these cases concern s. 28 of Reg. 262²⁰⁴ made under the Ontario *Education Act*²⁰⁵. The results of the two decisions were similar, though based on differing *rationale*. Our analysis will attempt to understand how the different *rationale* could lead to similar conclusions.

*Re Zylberberg*²⁰⁶ concerned an application for judicial review of the jurisdiction of the Sudbury Board of Education to hold religious exercises in its schools and to require the recitation of the Lord's Prayer in those exercises. It also sought a declaration that s. 28(1) of Reg. 262 under the *Education Act*²⁰⁷ was of no force and effect because it violated ss. 2(a) and 15(1) of the *Charter*. The relevant parts of s. 28(1) of Reg. 262 read as follows :

- 28(1) A public school shall be opened or closed each school day with religious exercises consisting of the reading of the Scriptures or other suitable readings and the repeating of the Lord's Prayer or other suitable prayers.
- (2) The readings and prayers that form part of the religious exercises referred to in subsection (1) shall be chosen from a list of selections approved for such purpose by the board that operates the school where the board approves such a list and, where the board does not approve such a list, the principal of the school shall select the readings and prayers after notifying the board of the principal's intention to do so, but this selection is

²⁰³ Unreported. The case was heard on June 29 and 30, 1987 and the *Reasons for Judgement* released on March 28, 1988. The page references are from this *Reason for Judgement*.

²⁰⁴ R.R.O. 1980 Reg. 262.

²⁰⁵ R.S.O. 1980 c.129.

²⁰⁶ (1986) 26 D.L.R. (4th) 709.

²⁰⁷ R.S.O. 1980 c.129.

subject to revision by the board at any time.

- (3) The religious exercises under subsection (1) may include the singing of one or more hymns.
- (10) No pupil shall be required to take part in any religious exercises ... where a parent of the pupil , or the pupil where the pupil is an adult, applies to the principal of the school that the pupil attends for exemption of the pupil therefrom.
- (11) In public schools without suitable waiting rooms or other similar accommodation, if the parent of a pupil or, where the pupil is an adult, the pupil applies to the principal of the school for the exemption of the pupil from attendance while religious exercises are being held ... such request shall be granted.
- (12) Where a parent of a pupil, or the pupil where the pupil is an adult, objects to the pupil's taking part in religious exercises ... but request that the pupil remain in the classroom during the time devoted to religious exercises ... the principal of the school that the pupil attends shall permit the pupil to do so, if the pupil maintains decorous behaviour.
- (13) If, because of the right to be absent from religious exercises ... any pupil is not present in the classroom during the periods specified for religious exercises ... the absence shall not be considered a contravention of the rules of the school.

The applicants were parents of the children who were attending or soon to attend public elementary school in Sudbury. They were of different faiths but had a common objection to the religious exercises. One parent of Jewish ancestry objected strongly to the Lord's Prayer. She reasoned that it was a prayer accepted only in Christian practice as a form of supplication and therefore ought not to be repeated in the school exercises. She also objected to the fact that the Scripture readings used in the religious exercises were of Christian origin only. Another applicant felt strongly that the religious

exercises were discriminatory of non-believers in that they required a religious component to public education. Although her daughter was exempted from participation, she had to remain in the classroom during the exercises. This, she contended, was not in her interest in that she was thus singled out from her peers.

Another applicant of Jewish ancestry and who adhered to the faith objected on the grounds that such practice discriminated both against non-Christians and non-believers and contravened her daughter's right to freedom of religion.

One of the applicants was a non-practising Christian. He did not make his objection known to the board nor had he asked that his children be excused from religious exercises because he did not want them singled out from their peers on the basis of their beliefs. For the same reasons, the applicant of Islamic faith did not make his objections known to the board.

The legal arguments of the applicants in the class action were as follows:

- A. That the requirement that parents or pupils who object to the pupils' participation in the religious exercises prescribed by s. 28(1) must ask to be exempted therefrom and that the pupils must then in fact exempt themselves therefrom, thus to pressure or coerce the pupils into participating in the religious exercises, thereby infringing their right to freedom of conscience and religion.
- B. That s. 28(1) contemplates and, as implemented by the Board, provides Christian religious exercises only, thereby discriminating against non-Christians contrary to s. 15(1) of the *Charter*.²⁰⁸

In his introductory remarks O'Leary J. of the Ontario High Court made three interesting observations. Contrasting the Canadian constitutional

²⁰⁸ *Re Zylberberg, op.cit.*, 715-716.

situation with the American, he noted that in the absence of a similar non-establishment clause of the First Amendment, the *Charter* " does not prohibit governments in Canada from supporting the teaching of religion or the holding of religious exercises"²⁰⁹ provided that in doing so ss. 2(a) and 15(1) of the *Charter* were not violated.

He further observed from the preamble and s. 27 of the *Charter* that the Canadian Constitution

is based on the existence of a supreme being - God, and provides that multiculturalism is to be allowed to flourish. The recognition in the constitution of the existence of God and that our society is multicultural in nature cannot, of course, excuse a violation of Ss. 2(a) 15(1) of the *Charter* but must be kept in mind when such violations are alleged.²¹⁰

Dealing with the alleged violation of s. 2(a) of the *Charter*, the learned judge accepted that the holding of religious exercises in the school might constitute some pressure on students to conform rather than to disclose to teachers and fellow-students that their conscience or religious beliefs dictated they should not participate. However, he ruled that such pressure did not constitute "coercion" within the meaning of Dickson J.'s definition of religious freedom in *Big M Drug Mart Ltd.* where he declared that "[f]reedom can primarily be characterized by the absence of coercion or constraint".²¹¹ Unlike the provisions of the *Lord's Day Act*, s. 28(1) of the *Regulation* " does not, of course, require anyone to participate in or be present at religious exercises".²¹²

²⁰⁹ *ibid.*, 716.

²¹⁰ *ibid.*

²¹¹ [1985] 1 S.C.R. 295 at 336.

²¹² *ibid.*, 717.

On the question of how substantial the pressure was on the student to conform, the learned judge concluded from the reports of several psychologists that the pressure was not substantial. This conclusion was reached even though one of the psychologists expressed the view that the pressure might be harmful to the children.²¹³

As well, it was ruled that the degree of pressure to conform must be determined with reference to the need to preserve and enhance the multicultural heritage of Canada. Said the learned judge :

Difference is to be worn with pride, not hidden. It is obvious in speech, dress, personal appearance and mannerisms. Being different from the majority, especially in the large metropolitan areas of the province, is common-place.²¹⁴

Indeed, the learned judge appeared to suggest that s. 28(1) actually helped the pupils not to hide the differences which he implied was a good thing. The fact that the parents or pupils need not justify in any way the decision not to participate was also cited by the judge to support his ruling that s. 28(1) did not constitute coercion to such an extent as to infringe the right of freedom of conscience and religion.

In any event, if s. 28(1) created sufficient pressure to infringe the freedom of conscience and religion, the judge held that it was justified under s. 1 of the *Charter*. This conclusion is based on his view that religious exercises were a means of teaching morality and that the schools "have an obligation to teach morality". It is his view that "few would deny that in the minds of most persons morality and religion are intertwined and that to

²¹³ Dr. Edward Bassis' affidavit quoted in *ibid.*, 718 contrasted with the affidavits of Drs. D.R. Kennedy and R.L. Phillip, *ibid.*, 718-719.

²¹⁴ *ibid.*, 719.

associate God and morality is an effective way of teaching morality".²¹⁵

The most significant statement, however, is to be found in his exposition of the preamble. He seemed to have meshed the notion of the supremacy of God, the dwindling church attendance and morality into one neat paragraph in defence of the existence of school opening exercises :

In a country whose constitution is founded on the supremacy of God, but where regular church attendance is the exception rather than the rule, care must be taken not to put unnecessary obstacles in the way of the schools bringing our children into touch with God in prayer, reflection and meditation as a means of instilling in them the morality required for social order and individual happiness.²¹⁶

This paragraph appears to have established the Christian religion of monotheism as a basis for morality without which "social order and individual happiness" would have been impossible to attain! In the paragraphs following, however, the learned judge removed this impression by holding that s. 28(1) "do not ... have to be Christian oriented and can be adapted by the school boards and teachers as suits the particular makeup of any classroom".²¹⁷ He then made reference to the *Readings and Prayers : For Use in Toronto Schools*²¹⁸ where the selection ranges from Eastern religions to secular humanism. "Even non-believers", he wrote, "will have difficulty claiming discrimination for the book contains eight pages contributed by those who espouse Secular Humanism".²¹⁹ With that he held that s. 28(1) did not

²¹⁵ *ibid.*, 720.

²¹⁶ *ibid.*, 721.

²¹⁷ *ibid.*

²¹⁸ Published by the Board of Education for the City of Toronto, 1985.

²¹⁹ *Re Zylberberg, op.cit.*, 723.

infringe s. 15(1) of the *Charter*. Even if it did, in that the holding of religious exercises gave believers an opportunity to reinforce their beliefs that was not afforded non-believers, the judge held that it constituted a reasonable limit or infringement under s. 1 of the *Charter*. His reasoning for this proposition is found in the following curious statement :

Where a country is founded on the principle of the supremacy of God there is no obligation on the schools to spend the same effort reinforcing the belief of non-believers that God does not exist as in teaching believers about the nature of God. Religious exercises for those who wish to take part, in the absence of any attempt to support the proposition God does not exist, is no more than a reasonable limit, prescribed by law, reasonably justified in a free and democratic society, on the right of a non-believer to equal educational benefits.²²⁰

The concurring judgement of Anderson J. was based on precedents to the effect that offensive interference with religious freedom were the elements of compulsion, coercion and restraint. He noted that these imperative concepts were capable of enforcement by penal sanctions. In the result, he held that "the attack on the constitutional validity of the impugned regulations ..., based on s. 2(a) of the *Charter*, fails for the simple reason that it does not, either in purpose or effect, compel, coerce or constrain anyone".²²¹ The learned judge pointed out that s. 28(10) of the *Regulation* contained "a complete and unconditional provision that no pupil shall be required to take part in any religious exercise".²²²

It is significant to note that Anderson J. did not find decisions on the issue from the United States helpful in that the First Amendment to the

²²⁰ *ibid.*

²²¹ *ibid.*, 739.

²²² *ibid.*

Constitution of the United States deals with freedom of religion in a manner quite different from that in the Canadian Constitution. On the authority of Professor Hogg, he noted that the establishment clause has no counterpart in s. 2(a) of the *Charter*. It "was intended to prohibit the establishment of an official church or religion, but it has been expanded by judicial interpretation to preclude most forms of state aid to denominational schools and even to preclude voluntary prayers or Bible readings in public schools".²²³

Because of the fundamental constitutional differences, the learned judge cautioned against the use of American cases. He contrasted the differences of approach in the two jurisdictions. In the celebrated American case of *Everson v. Board of Education*, the learned judge declared :

Neither a state nor the Federal Government "can pass laws which aid one religion, aid all religions, or prefer one religion over another ...". In the words of Jefferson, the clause against establishment of religion was intended to erect "a wall of separation between Church and State".²²⁴

In contrast, the Canadian case of *McBurney v. The Queen* declared otherwise.

It is apparent, then, that both the advancement of education and the advancement of religion are firmly and favourably rooted in the public policy of our law. Moreover, it is not stretching matters to say that even in the modern, secular age the advancement of religion is rooted in our law and in our Constitution. That policy is readily discernible in the declaratory preambles to the *Canadian Bill of Rights*, R.S.C. 1970, Appendix III and the *Canadian Charter of Rights and Freedoms* which both affirm that Canada "is founded upon principles that" acknowledge and recognize "the supremacy of God", and "the rule of law".

²²³ *ibid.*, 741. Quoted from Hogg, *op.cit.*, 712.

²²⁴ 330 U.S. at 15-16. [Quoted in *ibid.*, 741].

The legal and constitutional recognition of God necessarily imports and involves a polity which leans in favour of belief, or faith -- that is, the profession of religion among our people. Just as that same polity (it must be emphasized) also secures the rights and freedoms of those who profess no religion.²²⁵

Two other reasons were given by the learned judge for finding American decisions unhelpful. The first lies in deciding which judgements turned on "anti-establishment" clause and which turned on "the free exercise" clause. Clearly if the judgement turned on "anti-establishment", it would, on his view, not be applicable at all. He found that the applicants' reliance on *School District v. Schmepp*²²⁶, where Brennan J. ruled that "[t]he right to be excused from class or to be exempted from participating while remaining in the classroom, does not overcome the chilling effect of religious exercise on the free exercise of religion and conscience"²²⁷, was misplaced because "clearly the 'establishment' clause was the primary object of consideration and free exercise secondary".²²⁸ This conclusion he came to from looking at the rationale for the judgement as a whole.

The other reason has to do with the issue of compulsion, coercion or constraint. It is a question of fact and upon such question, the learned judge maintained that judgements made elsewhere upon different evidence were of little help.

This view of the American decisions is quite different from that taken by some justices of the Supreme Court of Canada. As noted earlier, Madame

²²⁵ (1984), 84 D.T.C. 6494 at 6496-6497; [1984] C.T.C. 466 (reversed upon grounds who do not bear on this statement, 85 D.T.C. 5453, [1985] 2 C.T.C. 214.) [Quoted in *ibid.*, 741].

²²⁶ (1962) 374 US 203.

²²⁷ *ibid.*, 289.

²²⁸ *Re Zylberberg, op.cit.*, 741.

Justice Wilson in *Jones v. The Queen* relied quite heavily on American decisions in her dissenting judgement.²²⁹

The dissenting judgement of Reid J. concluded that s. 28 of the *Regulation* did impose religious exercises on public school children. His decision was based on the historical approach in determining the purpose of the legislature. Citing excerpts from several reports on public education, he observed :

From Egerton Ryerson in 1846 to the Mackay Committee in 1969, every person, commission or committee appointed to study the question and advise the Ontario government expressed the same view; religious exercises are an essential component of public school curriculum.²³⁰

S. 28(1), in his view, expressed a conviction that religious exercises were desirable and should be the rule or standard. The opting out clause in s. 28(10) did not change the mandatory tone of s. 28(1) in that it did not provide truly alternative choices. In his own words :

There is a difference between imposing a rule in mandatory terms and providing for exceptions, on the one hand, and providing truly alternative choices on the other. Had the object been to provide real freedom of choice, it could easily have been achieved. All that was required was to provide that there would be a time during the day when those who wished could take part in religious exercises and those who did not, need not. While such a provision might possibly have been effected in some schools so as to make those who wished not to participate feel "different" or "left out" in the hope that they would join the participating group, the provision on its face would not be objectionable under the *Charter*. But that is not what was done, for that would not have achieved the result that the commissions and committees uniformly thought should be achieved.²³¹

²²⁹ *Supra.*, 321ff.

²³⁰ *Re Zylberberg. op.cit.*, 728.

²³¹ *ibid.*

His conclusion on the purpose is that the *Regulation* disclosed a purpose contrary to the *Charter* because the purpose interferes with religious freedom. The effect of the *Regulation* was also detrimental to the parents and the pupils. The learned judge based his conclusion on the undisputed fact that some coercion existed in that "coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others".²³² It was his view that the non-conforming minorities of the other faiths or of no-faith were forced to suffer the consequences to their feelings and convictions. Following Dickson J. (as he then was) in *Big M Drug Mart Ltd.* where the Supreme Court judge pronounced that "the *Charter* safeguards religious minorities from the threat of the 'tyranny of the majority'"²³³, Reid J. concluded that the effect of s. 28 was contrary to s. 2(a) and s. 15 of the *Charter* on grounds of inequality :

I cannot think how freedom can exist without equality in this matter. The argument I am having trouble with appears to accept some inequality, but says it is not much. But I think that amounts to an Orwellian equality : some are more equal than others. The complaint is made in this case by those who are less equal.

....

It is my profound conviction that the quality of freedom of any society is measured by the way it treats its minorities.... It is thus simply not acceptable for the majority to say, you minorities cannot expect to enjoy freedom we do because freedom cannot be perfect, when, for us the majority in this matter, it is. With respect, I consider that to be contrary to ethical principle but, more importantly for this case, contrary to the *Charter*.²³⁴

²³² *ibid.* Quoting from *Big M Drug Mart Ltd.* [1985] 1 S.C.R. at 336-337.

²³³ *ibid.*

²³⁴ *Re Zylberberg, op.cit.*, 730-731.

On the question whether s. 28 of the *Regulation* could be saved by s. 1 of the *Charter*, the dissenting judge agreed that there was a need to encourage morality but argued that religious exercises were not necessary for its teaching. In any case it was his view that s. 1 was not intended to be applied so as to justify an interference with the religious freedom of some but not of others. That, he said, would make the *Charter* contradict itself. Interference, if at all allowable, must be interference not with the right of some to religious freedom, but with the right of all. On this view he ruled that the *Regulation* cannot be saved by s. 1 of the *Charter*. This piece of reasoning is reminiscent of the dissenting judgement of Madame Justice Wilson in *R. v. Edwards Books and Art Ltd.*²³⁵

The dissenting judgement was applauded by the Jewish Community Council of Ottawa who were strongly against religion in any form in the public school system because they felt that it was philosophically incorrect and problematic for children of minority religions.²³⁶ Pressure groups such as the Jewish Community Council continued to lobby for changes to s. 28 of the *Regulation*. On June 29 and 30, 1987, the Supreme Court of Ontario dealt with the same issue, this time it was an application for judicial review brought by the Corporation of the Canadian Civil Liberties Association and others. The respondents were the Minister of Education and the Elgin County Board of Education.²³⁷

²³⁵ *Supra.*, 296ff.

²³⁶ *A brief Submitted to the Carleton Board of Education by the Jewish Community Council of Ottawa in Respect to the Opening Exercises and Pastoral Care Counselling in the Schools of the Carleton Board of Education. September 8, 1986.* 48.

²³⁷ *The Corp. of Canadian Civil Liberties Assoc, and others v. The Minister of Education, and others.* (Unreported, the reason for judgement were released on March 28, 1988. Citations are from this reasons for judgement.)

In this application for judicial review, the applicants sought

- (a) a declaration that section 28 of Regulation 262, R.R.O. 1980, as amended, to be of no force or effect in consequence of its alleged infringement or denial of certain rights or freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*;
- (b) a declaration that the curriculum of religious studies prescribed by the Respondent Elgin County Board of Education, denies certain rights or freedoms guaranteed by the *Charter*; and
- (c) an injunction that the Respondent Elgin County Board of Education cease from continuing to require or permit its curriculum of religious studies to be offered in its schools.

At the outset, it was noted by Watt J. that, over the years, the *Regulation* governing religious exercises and instruction in the Province of Ontario had undergone some important changes. Since 1944, under the new *Regulation* entitled "*Religious Exercises and Religious Education in the Public Schools*", a number of material changes were effected. For one thing, it was provided by paragraph 13 (2)(a) that religious *education* would be given in the public schools. This is a change from the pre-1944 *Regulation* which permitted religious *instructions* by members of the clergy outside regular school hours. Another significant change is that religious education was made mandatory. It was to be taught twice weekly during school hours in defined periods of time. It is also significant that the new *Regulation* required teachers to provide the religious education and not clergymen. Furthermore, the content of the education was as "authorized for the purpose by the Department" and that it was mandatory to avoid "issues of a controversial or sectarian nature".

The court also noted the rights of the pupils and teachers to claim and be guaranteed exemption from both the participation in religious exercises as well as religious education.

The case at bar challenges *inter alia* Reg. 28(6) which is essentially similar to the 1944 *Regulation*. It reads :

Instructions in religious education shall be given by the teacher and issues of controversial or sectarian nature shall be avoided.²³⁸

Mr. Justice Watt approached the matter by reviewing the *Charter* cases decided by the Supreme Court.²³⁹ On the legal authorities he reiterated that "either an unconstitutional purpose or an unconstitutional effect may invalidate legislation under the *Charter*".²⁴⁰ The intent, however, is to be determined at the time of its enactment, not at the time of the constitutional challenge. In other words, the doctrine of "shifting purpose" was rejected as "to so hold would render pronouncements upon constitutionality of the quintessence of ephemerality and but encourage re-litigation upon the slightest scent of social change".²⁴¹

The learned judge then dealt with the substantial question whether in fact the *Regulation* violated the standard set by s. 2(a) of the *Charter*. In approaching the question, he surveyed the cases on the substance of the guarantee.²⁴² He noted that the enabling legislation embodied in s. 50 of the *Education Act* was not challenged. The section reads :

²³⁸ O. Reg. 704/78.

Reg. 13 (2)(c) of the O. Reg. 30/44 includes the words italicized : "Instruction in Religious Education shall be given by the teacher *in accordance with the course of study authorized for that purpose by the Department*, and issues of a controversial or sectarian nature shall be avoided".

²³⁹ *Hunter et. al. v. Southam Inc.* [1984] 2 S.C.R. 145, and *R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295.

²⁴⁰ *The Corp. of the Canadian Civil Liberties Association, and others v. The Minister of Education and others* [1988], 109.

²⁴¹ *ibid.*, 110.

²⁴² *R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295; *Jones v. The Queen* [1986] 2 S.C.R. 284; *Edwards Books and Art Ltd. v. The Queen* [1986] 2 S.C.R. 713 and *Zylberberg et al* (1986) 55 O.R. (2d) 749

- 50(1) Subject to the regulations, a pupil shall be allowed to receive such religious instruction as his parent or guardian desires or, where the pupil is an adult, as he desires.
- (2) No pupil in a public school shall be required to read or study in or from a religious book, or to join in an exercise of devotion or religion, objected to by his parent or guardian, or by the pupil, where he is an adult.²⁴³

On this observation, the learned judge concluded :

The position taken by the applicants that neither s. 50 nor paragraph 10(1) 18 of the *Act* is constitutionally deficient would seem necessarily to entail that it is not constitutionally impermissible for the Legislature to provide for instruction in religious education in the public schools, nor to enact its provision in terms which imply that it shall be given and received to the extent a parent, guardian or pupil desires, and subject to exemption of any participant in the giving or receipt of such instruction. In other words, it is not impermissible to legislate a scheme of provision to the extent of desire subject to exemption. To put the matter in somewhat different language, it is a valid exercise of provincial legislative authority, not only to enact a program of instruction in religious education in public schools, but to do so in terms which make it mandatory, but subject to exemption. Such a scheme or program is not constitutionally invalid in either purpose or effect according to the concession of the applicants.²⁴⁴

Turning to the issue of the *Regulation*, the essence of the applicants' challenge was that the purpose and effect of the subsections was the impermissible *indoctrination* of public elementary school pupils in the religious beliefs and precepts of the Christian majority, rather than the constitutionally-permissible *instruction* in religious education. In rejecting

²⁴³ R.S.O. 1980, c.129.

²⁴⁴ *The Corp of the Canadian Civil Liberties Association, and Others v. The Minister of Education*, *op.cit.*, 163-164.

the applicants' contention by holding that the purpose of s. 28 of the *Regulation* was not enacted in order to indoctrinate public elementary school pupils in majoritarian Christian religious beliefs, the learned judge gave the following reasons.

Firstly, because the applicants did not impugn the integrity of the enabling authority contained in s. 50 of the *Education Act*, it would logically follow that the enabling legislation was enacted for a constitutionally-admissible purpose. The judge determined that the purpose is secular in nature, namely to introduce a moral element into the education of public elementary school pupils so that, together with intellectual instruction, they may become adequately equipped to the task of the work of life.

Secondly, the existence of the "provision-exemption dichotomy" provided for the mechanics of implementation. Indeed, the mere fact of exemption is antithetical to the assertions of indoctrinal purpose. Said the judge :

If the true purpose of the section were indoctrinal, there would scarcely be provision made for exemption, *a fortiori*, unqualified exemption. A purely doctrinal purpose, as it seems to me, would brook no excuse but would, rather, seek to imbue *all* constituents with the self-same dogma.²⁴⁵

Thirdly, the learned judge noted that s. 28 (1) provided that "issues of controversial or sectarian nature be avoided". In his view such provision as to the *matter* of instruction was designed for education and not for indoctrination. Such inclusion underscored the secular purpose of the *Regulation*.

And fourthly, the *manner* in which the religious education was to be given supported the secular purpose of the *Regulation*. Under s. 28(6) of the

²⁴⁵ *ibid.*, 181. (Emphasis his)

Regulation, the instruction was *prima facie* by the school teacher, reading that with the *matter* of education, the clear object was to have a non-sectarian teacher teaching non-sectarian subject matter. The fact that under certain exceptional circumstances a clergyman may be asked to teach did not, in the judge's view, detract from the content limitation. The potential presence of a sectarian instructor was not indicative of a sectarian purpose.

Having found that s. 28 of the *Regulation* was secular in purpose, the learned judge looked to the effect of the legislation. He ruled that the scheme was not obnoxious in its effects to the guarantee of religious freedom under s. 2(a) of the *Charter* for the following reasons.

Firstly, the effects of the *Regulation* did not prevent anyone from either holding, declaring or practising their beliefs. There was nothing in the *Regulation* to prevent anyone from taking the instructions on account of his belief. Neither does the *Regulation* coerce anyone to take the instructions because of his beliefs. In his own words, the learned judge said :

To provide for instruction in religious education for a particular constituency, pupils in public elementary school, and, at the same time, to guarantee unqualified exemption therefrom is scarcely inimical to religious freedom. It permits the constituents to work out for themselves, not only their own religious beliefs, if any, but to what extent, if at all, they wish to declare them openly in the context of instruction in religious education in the public elementary schools which they attend, should it be there given.²⁴⁶

Secondly, unlike the *Lord's Day Act*²⁴⁷ in *Big M Drug Mart Ltd.*,²⁴⁸ the *Regulation* did not take religious values rooted in Christian morality and translate them into positive law that was binding on Christian's and non-

²⁴⁶ *ibid*, 189.

²⁴⁷ R.S.C. 1970 C.L.13.

²⁴⁸ *Supra.*, 322ff.

Christian's alike. In other words, there was no coercion on anyone to act in a way contrary to his beliefs or conscience. As well, the *Regulation* in its effect was not a protection of any religion. Neither was there a concomitant non-protection of any religion. The element of unconditional exemption militated against any idea of coercion. Indeed, in its openness, the provisions "preserve and enhance the multicultural heritage of Canadians, rather than impair religious freedom, an obvious component of it".²⁴⁹

And thirdly, the court held that the effects of the subsection did not impose substantial, non-trivial costs or burdens which interfere with religious beliefs or practices. Citing Wilson J. in *Jones v. Queen*²⁵⁰ the court reiterated that s. 2(a) of the *Charter* does not require the legislature to refrain from imposing any burdens on the practice of religion. Legislation or administrative action whose effect on religion is trivial or insubstantial was held not to be in breach of freedom of religion. In conclusion the court ruled as follows :

The section, read as a whole, has no substantial impact on religious freedom. It does not purport to force public school children to take instruction in religious education. It allows pupils, in the most unqualified of terms and free of sanction, to be absent from such instruction. It defers to the individual beliefs and self-determination of the pupils, their parents or guardians. Instruction in religious education is only compulsory for those who desire it. Such instruction in no case shall exceed their desires and, at all events, shall not contain any sectarian or controversial matter. The impact of the statutory machinery constructed by the section on the applicant's religious freedom is, at bottom, a formalistic and technical one : an exemption must be sought by the applicants. It may be observed that, once sought, the exemption is given without question or qualification. There

²⁴⁹ *The Corp of the Canadian Civil Liberties Association, op.cit.*, 191.

²⁵⁰ [1986] 2 S.C.R. 284 at 313-314.

is, accordingly, in my respective view, no s-s. 2(a) infringement.²⁵¹

On the issue whether the *Regulation* infringed equality rights under s. 15(1) of the *Charter*, the court analyzed a series of cases and followed a three-step analysis in arriving at its conclusion that there was no infringement.²⁵² S. 15(1) of the *Charter* reads :

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It was the applicants' contention that the *Regulation*, in purpose and effect, discriminates in favour of Christians and against others, whether non-Christians or non-believers. In so doing equal protection and benefit of the law without discrimination based on religious freedom guaranteed by s. 15(1) of the *Charter* was infringed. It was also argued that the necessity of applying for exemption in itself was discriminatory in that it forced those who did not accept the particular Christian beliefs of the teacher to take a positive step to apply for exemption which was not required of adherents to Christianity. Seen in this light the requirement of exemption was overtly discriminatory in distinguishing between groups on religious grounds. Furthermore it also extracted a penalty from religious minorities that adherents to the Christian majority did not pay.

²⁵¹ *The Corp of the Canadian Civil Liberties Association, op.cit.*, 194-195

²⁵² *Re McDonald and the Queen* (1985), 51 O.R. (2d) 745; *R. v. R.L.* (1986) 26 C.C.C. (3d) 417; *Reference re Act to Amend Education Act* (1986), 53 O.R. (2d) 513, *Re Blainey and Ontario Hockey Association et al* (1986), 54 O.R. (2d) 513; *Bregman et al v. A.G. Canada* (1986), 57 O.R. (2d) 409; *R. v. Century 21 Ramos Realty Inc. and Ramos* (1987), 58 O.R. (2d) 737; *Her Majesty the Queen v. Joseph Ertel* (Unreported decision of the Ontario Court of Appeal released June 3, 1987); and *Re McKinney and Board of Governors of University of Guelph et al and Seven Other Applicants* (1986), 57 O.R. (2d) 1.

By way of preliminary observation, the court recalled that the *Regulation* did not have any expressed or implied reference to any particular religion, its tenets and precepts. Further, it was noted that, barring school or class exemption, instruction in religious education was available to all pupils in public elementary schools, irrespective of the existence or nature of their religious beliefs. It was also a fact that pupillary exemption was unqualified and mandatory. No reason was required for application for exemption. As well, exemption from instruction in religious education attracted no penalty or sanction.

The court then applied the three-step analysis, namely the identification of the classes, the question whether the classes were similarly situated and the nature of the treatment of the classes. The issue of equality is of an essentially relational nature and invites comparison between or amongst classes of persons who, similarly situated, are said to be treated differently by legislative enactment. In the case at bar, the *Regulation*, read as a whole, separated two classes of students. There were pupils who received religious instructions and pupils who did not. The court noted that while it was the legislation that created such classes, it was the self-determination of the pupil that decides in which category or class he will belong. Even if the classes in effect were divided into those who entertained Christian religious beliefs and those who did not, the court observed that it was not s. 28 of the *Regulation* which introduced the distinguishing characteristics. The distinction based on religion existed independently of s. 28 of the *Regulation*.

On the second step whether those in similar situation were similarly treated, the court affirmed that it was the obligation of the state to treat those who were similarly situated similarly. It follows that if the classes were not similarly situated there was no constitutional obligation of equal or similar

treatment. Due to the fact that all the members of the two classes were pupils in the public elementary school system, the court ruled that there was a unity or nexus between the classes.

Having determined that the classes were similarly situated, the court then dealt with the all important question whether in fact the two classes were unequally treated and therefore violated s. 15(1) of the *Charter*. On the nature of the treatment, the court pointed out as follows :

At bottom, the applicants must demonstrate that pupils who do not receive instruction in religious education or pupils who do not entertain or hold Christian religious beliefs are at an inherent disadvantage in comparison with those who do so. Further, the distinction must be so unfair as to be discriminatory on the asserted basis, having regard to the purpose and effect of the section.²⁵³

It was incumbent on the applicants to show unfairness or irrationality to succeed under the s. 15(1) application.

In ruling that there was no unequal or discriminatory treatment within the meaning of the *Charter*, the court noted that there was, by definition, a disadvantage inherent in the process of exemption. When a pupil applied for exemption, she was disadvantaged in the sense that she did not benefit from the religious education she sought to be exempted from. It was noted, however, that the exemption was not automatic. It was applied for in that the legislation provided a choice. Therefore the disadvantage, if at all, was self-chosen, a direct consequence of the pupil's self-determination. Consequently, the court was of the view that it was difficult to describe a treatment as irrational or unfair when it arose in consequence of the very act of the pupil who asserted such irrationality or unfairness. On the contrary, the court considered the exemption mechanism as a facilitator of individual choice and self-

²⁵³ *The Corp of the Canadian Civil Liberties Association, op.cit.*, 212-213.

determination and therefore an exemplification of fairness and not its antithesis!

If the court's argument is interesting thus far, it is even more fascinating as the court analyzed the issue from the point of view of the non-Christian pupil :

Religious belief, *a fortiori* Christian religious belief, is neither a condition precedent to the reception of instruction in religious education nor statutorily relevant to exemption therefrom. Instruction in religious education is available to all public elementary school pupils, not only to such pupils who hold Christian religious beliefs. Exemption from instruction in religious education is available to all public elementary school pupils as equally to those who do not hold Christian religious beliefs as to those who do. Neither reception nor exemption is contingent upon the existence or nature of religious beliefs on the part of the pupil. Christians are as free to claim exemption as non-Christians are to attend. The right of self-determination is available equally to all. The reasons which underlie its exercise lies in the breast of the pupil and need never be disclosed. There is neither inherent disadvantage to the non-Christian pupil nor unfair or irrational treatment of him or her based upon religious belief.²⁵⁴

With regard to the constitutionality of the curriculum of the respondent board, it was argued that the curriculum in purpose and effect, infringed or denied the applicants' religious freedom and/or equality rights. As well, it was further argued that because of such violation, the curriculum should not continue to be offered in schools.

The court ruled that there was no point in pronouncing upon the constitutionality of a curriculum of instruction in religion which was no longer followed. However, the court felt it was helpful to determine the constitutionality of the proposed curriculum.²⁵⁵ On the same reasonings with

²⁵⁴ *ibid.*, 215-216.

²⁵⁵ The new curriculum is embodied in *Readings and Prayers for use in Toronto*

regard to the *Regulation* in relation to s. 2(a) of the *Charter* the court ruled that the proposed curriculum was constitutionally sustainable.²⁵⁶

On the fact that the teachings of Christianity predominated the proposed curriculum of instruction in religious education, the court did not view the imbalance as demonstrative of a constitutionally-impermissible purpose of indoctrination. It arrived at that conclusion on a number of grounds. First of all, the proposed curriculum was the consequence of the consultative processes of the board resulting in the inclusion of religious traditions other than Christianity. Secondly, the right of unqualified exemption remained. Thirdly, the instruction was to be given by the board's teachers and finally, "there is no warrant in the premises for a submission that the Board, in its proposed curriculum, is doing otherwise then following the legislative injunction against teachings of sectarian or controversial issues".²⁵⁷

The final issue dealt with by the court was whether the curriculum denied the applicants their rights to equality guaranteed by s. 15(1) of the *Charter*. On the issue, the court recognized that Christian religious beliefs predominated the curriculum. Nonetheless, the court held that

The curriculum, however, reflects cognizance of our multi-cultural heritage and encompasses discussion of other systems of religious beliefs. Equal time for all is not a requisite of s-s. 15(1), provided the treatment is not unfair or unreasonable. It is not so here. Public meetings have solicited the views of

Schools published by the Board of Education for the City of Toronto (1984). The readings and prayers span twelve specific "religious traditions". It is interesting that "secular humanism" is included in the twelve.

²⁵⁶ Essentially the three-fold reason was (1) that the purpose and effects of the curriculum did not prevent pupils from holding to or declaring or manifesting their own religious beliefs; (2) the curriculum, neither in purpose nor effect, coerced anyone to affirm, hold or manifest a specific belief and (3) the effects of the curriculum did not impose substantial, non-trivial costs or burdens which interfere with religious beliefs or purposes.

²⁵⁷ *The Corp of the Canadian Civil Liberties Association, op.cit.*, 244.

constituents. There is no evidence that the respondent Board has failed to include materials on any religion upon request therefore. Whatever may have been the case in respect of earlier curricula, in my respective view, it cannot be said of that which is proposed that discriminatory inequality arises on account of the composition of the proposed curriculum.²⁵⁸

Elsewhere the court said that the *Charter*, while guaranteeing religious freedom, does not guarantee that "where instruction is offered in religious education, equal time must be afforded to the precepts of each and every of the world's religions, irrespective of the number of locations of its adherents".²⁵⁹

In his dissenting judgement, Austin J. took the historical approach to determine the purpose of the legislation and found that s. 28(4) of the *Regulation* was being used for the indoctrination of public school children with a particular religious point of view, namely Christianity, and therefore offended the *Charter*'s guarantee of freedom of conscience and religion. He relied heavily on the *Mackay Report* issued in 1969 which assessed the religious education situation to be "definitely Christian and Protestant in content" and "a vehicle leading to religious commitment rather than true education".²⁶⁰ As such, the report concluded that "[t]he course invades the integrity of public education and is, therefore, basically wrong".²⁶¹ It recommended a "totally new approach to the problem" which was not adopted by the Provincial Government.

It was the dissenting judge's view that the curriculum was

²⁵⁸ *ibid.*, 247.

²⁵⁹ *ibid.*, 243.

²⁶⁰ *ibid.*, 268.

²⁶¹ *ibid.*, 271.

exclusively Christian, Protestant, fundamentalist and evangelical. As such, it would be offensive to some non-Christians and to a good many Christians as well. From the content and from the layout of the material, it is a fair inference that it was used or to be used for indoctrination rather than education.²⁶²

In support of his view, the learned judge found that the enabling legislation and the *Regulation* suggested "indoctrination" rather than "education". Thus the expression "religious exercises" in s. 10(1)(18) "suggests something" other than teaching in the ordinary sense of that expression".²⁶³ He also found that exemptions for pupils and teachers were meaningless unless the object was indoctrination. He further held that the fact that pupils were not marked on the course and that the course did not appear on report cards suggests that there was something "different" about religious education as taught in Ontario.

On the question of the effects of the *Regulation*, the learned judge referred to the conflicting reports of the psychologists as well as the applicants' testimonies. He considered the evidence of the parents as direct and the conflicting psychologists' reports as indirect. Citing the dissenting judgement of Reid J. in *Zylberberg* that "[n]o one has suggested that the feelings expressed by the applicants are not real, or that they do not run deep"²⁶⁴, he concluded thus :

I believe I must find that there is an appreciable degree of coercion or pressure on the personal applicants in this case. There is an inequality of situation by virtue of the nature of this program. Accordingly, I am unable to agree with counsel for the Board and for the Minister that the exemption provisions constitute a complete answer to any suggestion of inequality or

²⁶² *ibid.*, 271-272.

²⁶³ *ibid.*, 275.

²⁶⁴ *ibid.*, 291. Quoting from *Re Zylberberg, op.cit.*, 729.

coercion.²⁶⁵

Having held that the *Regulation* infringed s. 2(a) and 15(1) of the *Charter*, the dissenting judge held that it was not saved by s. 1 of the *Charter*. He cited Dickson J.'s *dicta* about the "tyranny of the majority" in *R. v. Big M Drug Mart Ltd.*²⁶⁶ and adopted once again the dissenting view of Reid J. in *Zylberberg* where the learned judge said :

To divide us into two groups; those who have to put up with restriction of their religious freedom and those who do not, is to deny the freedom of religion that the *Charter* guarantees.²⁶⁷

It is very fascinating that in the above two related cases, the dissenting judges approached the purpose test from an exclusively historical angle. They reviewed the history of the legislation to arrive at the determination of its purpose. In contrast, the majority judges in the two cases dealt with the purpose of the legislation in an inductive manner. It may be asked whether the differences in approach, the inductive over against the deductive, determined the differences in destination.

More interestingly, both Reid J. in *Zylberberg* and Austin J in *CCLA v. Minister of Education* cited the *Mackay Report* in support of their dissenting judgements. Reid J. cited the *Report* on opening exercises to show that the *purpose* of the legislation was religious in nature.²⁶⁸ So did Reid J. when he cited the *Report* to show that religious indoctrination was the *effect* of the legislation on religious education.²⁶⁹ It is to be noted that the *Report*

²⁶⁵ *ibid.*

²⁶⁶ *ibid.*, 299. Quoting from *R. v. Big M Drug Mart Ltd* (1985), 18 D.L.R. 321 at 354.

²⁶⁷ *Re Zylberberg, op.cit.*, 730.

²⁶⁸ *ibid.*, 727-728.

²⁶⁹ *The Corp of the Canadian Civil Liberties Association, op.cit.*, 268ff.

did have a problem with religious indoctrination but did *not* have a problem with opening exercises. On the latter, the relevant part of the Report as cited by Reid J. reads :

It was also brought forcibly to the Committee's attention, as previously noted, that to eliminate opening exercises would suggest that religion is not an integral part of the life of the people of this province. It is the Committee's view that religion does indeed play a vital part in our life and that the holding of opening exercises therefore exposes the child to a valuable learning experience in relation to the whole community in which he lives.

The Committee therefore recommends that opening exercises consisting of the singing of the National Anthem and a prayer, either of universal character appealing to God for help in the day's activities, or the Lord's Prayer, be held in the home rooms each morning in the elementary schools of Ontario.²⁷⁰

On the issue of the effects of the legislation, the majority of the courts took an objective view and appeared to have almost completely disregarded the direct testimonies of the applicants. For instance, in spite of the unchallenged testimony of Andrea Millington, the 7-year old daughter of one of the applicants in *CCLA v. Minister of Education*²⁷¹ to the effect that the teaching of religion in her school caused her to have recurring frightful nightmares in which she was pursued by the devil and felt she was burning in Hell, the court appeared to have disregarded that effect altogether. The question is, how is the effect of the legislation on religious feelings to be adduced? To what extent should individual sensitivity or vulnerability to religious ideas be considered? Should the court disregard subjective effects altogether in such matters as religious effects which are more often

²⁷⁰ *Re Zylberberg, op.cit.*, 727.

²⁷¹ *The Corp of the Canadian Civil Liberties Association, op.cit.*, 74.

subjectively felt than objectively verified? It is noted that the court's approach in this case was very different from that of *Donald v. The Board of Education for the City of Hamilton*²⁷²

It is also noteworthy that the expert witnesses on the effects of religious exercises and education on the pupils were diametrically opposite.²⁷³ Indeed when psychologists trained in the special field cannot agree on the impact of the *Regulation* on children who are in the minority religions and are under pressure to conform, how is it possible for judges trained in law to assess the impact? This problem certainly compounds the already difficult area of human experience in conflict with the law.

It would appear that the cases were decided on the basis of the compelling interest of the state in the moral education of the pupils. Like the old rationale of upholding legislation on religions under the criminal law powers of Parliament where the compelling interest was in upholding public morality, so also the rationale for upholding opening exercises and religious education laws is to be found in the compelling interest to inculcate morality in school children. In this manner, religion is not treated as an end in itself. It is merely a means to an end. It may be argued that if freedom of religion is in the category of morality, then the court is quite correct in not striking down the *Regulation* in question because, in promoting morality through religious exercises and education, it ultimately promotes the morality of religious freedom!

Child Welfare Cases

Religion, to be meaningful, must not only be a conviction to be held in

²⁷²[1945] O.R. 518. *Supra.*, 120ff

²⁷³ *Re Zylberberg. op.cit.*, 718-719.

the mind and heart, it must also be a conviction to be lived by. This latter is often expressed in actions that go beyond just "religious practices". While freedom of conscience and religion seems to include the parent's rights to expose or not expose his children to religious influence in and out of school, this right is not absolute. Where the health and welfare of the child is threatened by some actions based on religious convictions, be it mental or physical, the question is whether such actions can be justifiable under the *Charter* 's guarantee of freedom of conscience and religion. Since the coming into force of the *Charter*, a number of cases have come before the courts under a variety of circumstances.

In *Fougere v. Fougere*²⁷⁴, and *Brown v. Brown*²⁷⁵, marriages turned sour and ended in divorce because of irreconcilable religious differences. In *Fougere*, the husband joined the Jehovah's Witnesses while the wife remained Catholic. The wife was granted custody of the children. She subsequently applied for an order prohibiting the husband from taking the children with him when he canvassed door to door for his religious organization. The husband argued against the order on the ground that s. 2(a) of the *Charter* guaranteed freedom of conscience and religion. His argument failed to persuade the court not to grant the order to his wife. The court found that having to deal with the two competing religions was most confusing to the children, and it was undermining the mother's effort to raise the children properly. The court also held, in the circumstances, that the husband's religious activities were deemed detrimental to the best interest of the children.

In a similarly reasoned case of *Brown*, the court granted the order

²⁷⁴(1986), 179 A.P.R. 57 (N.B.Q.B.)

²⁷⁵(1983), 3 D.L.R. (4th) 283 (Sask. C.A.).

applied for by the wife to bar the husband from taking their children in her custody to the "Exclusive Brethren" service. The court found that the particular religious sect avoided social interaction with non-believers. On the facts, it found that the doctrines of the sect, if adopted by the children, necessarily implied the rejection of their mother and maternal grandparents. Again in the interest of the children, the court rejected the s. 2(a) arguments of the father. Brownbridge J.A., cited an old Supreme Court case of *De Laurier v. Jackson*[1934] where Crockett J. said :

If the general welfare of the child requires that the father's rights in respect of the religious faith in which his offspring is to be reared, should be suspended or superseded, the courts in the exercise of their equitable jurisdiction have undoubted power to override them, as they have the power to override all other parental rights, though in doing so they must act cautiously.²⁷⁶

Religious beliefs, especially relating to the doctrine of faith-healing, have a direct effect on the physical well-being of those who hold those beliefs. In cases involving children, the courts have to balance the protection of the children and the freedom of adults to hold such beliefs. In *Regina v. Tutton and Tutton*²⁷⁷, the Ontario Court of Appeal was faced with precisely such a problem.

The accused, parents of a five-year-old boy who had been diagnosed as a diabetic and who required insulin daily, were members of a religious sect which believed in faith healing. The accused mother stopped providing insulin to the boy after she received a vision from God telling her that her son was healed and that there was no need to continue with the insulin treatment. During the instructions to the jury, the trial judge stated in part as follows :

²⁷⁶[1934] S.C.R. 149 at 153. Cited on *ibid.*, 219.

²⁷⁷(1985) 14 C.R.R. 314.

It is not lawful excuse for a person to have religious beliefs that say it is wrong to give insulin or that God had told them that it is not necessary to give insulin to a child. The law of this country is paramount and must be obeyed by everyone without exception.²⁷⁸

On that instruction the jury convicted both the accused of manslaughter. On appeal, it was argued that the accused's freedom of conscience and religion guaranteed by s. 2(a) of the *Charter* were denied.

Dubin J.A., conceded that the accused were both sincere in their beliefs in regard to faith healing. In regard to the specific case of their own son, the defence urged at the trial that the accused honestly believed that because of the intervention of God the son was cured of his diabetes and was therefore no longer in need of the administration of insulin.

In dismissing the appeal the learned judge said :

With respect, I find no merit in this argument. The duty imposed by statute to provide necessities of life is applicable to all parents. It is not a lawful excuse for a parent who, knowing that a child is in need of medical assistance, refuses to obtain such assistance because to do so would be contrary to the tenet of their own particular faith. The guarantee of freedom of conscience and religion as enshrined in the *Charter* has nothing to do with this issue.²⁷⁹

It is submitted that the reasoning of the learned judge ignored the fact that if the accused sincerely and honestly believed that the child was cured, they could not have known that the child was still in need of insulin. Furthermore, they could not have willfully refused to obtain medical assistance if they sincerely believed that such assistance was unnecessary.

Another curious observation is found in the statement that "[t]he guarantee of freedom of conscience and religion as enshrined in the *Charter*

²⁷⁸ *ibid.*, 318.

²⁷⁹ *ibid.*

has nothing to do with this issue".²⁸⁰ This statement appears to be contradicted by his statement immediately following :

Reading the charge as a whole, I cannot help but conclude that the jury may have convicted the appellants of manslaughter without being satisfied beyond a reasonable doubt that they had the blameworthy state of mind which I think is an essential ingredient of the charge of manslaughter as laid.²⁸¹

Surely, if in fact they did not have the "blameworthy state of mind", it was because of their religious belief. And if so, how could it be said that "the guarantee of freedom of conscience and religion as enshrined in the *Charter* had nothing to do with this issue"?

A series of blood transfusion cases demonstrate that the compelling state interest to ensure the health and welfare of children overrides the religious freedom of parents. *Re Davis*²⁸², *Re Pendergast*²⁸³ and *Re McTavish et al and Director, Child Welfare Act et al.*²⁸⁴, all involved Jehovah's Witnesses who refused to consent, on religious grounds, to blood transfusions for their children. In each case it was not in dispute that the respective child's life was in danger and that blood transfusion was necessary to save the lives.

In *Re Davis*, the court held that s. 9(1) of the *Child Welfare Act*²⁸⁵ providing that a child welfare authority may authorize medical treatment, including blood transfusions for a neglected child within the definition of the *Act*, did not offend s. 2(a) of the *Charter*. The court ruled that the legislation

²⁸⁰ *ibid*.

²⁸¹ *ibid*.

²⁸² (1982) 22 Alta. L.R. (2d) 228.

²⁸³ (1985) 6 C.R.D. 525 90-04 (B.C. Prov. Ct.).

²⁸⁴ (1986) 32 D.L.R. (4th) 394 (Alta Q.B.).

²⁸⁵ R.S.A. 1980 c.C-8.

is in relation not to religion but to child welfare and public health. Further, and more importantly, it held that as to the state's right to safeguard the health and welfare of children and the rights of parents to freely practise their religion, the former must prevail.

In *Re Pendergast* the child in need of blood transfusion has been apprehended by the superintendent of Family and Child Service. It was argued that the apprehension offended the parent's rights under s. 2(a) of the *Charter*. The court rejected the parents' arguments. It held that the rights of the parents and the right to freedom of religion are subject to reasonable limit prescribed by law as can be demonstrably justified. Protection of children is such a reasonable limit. It further held that even if the protection of children was not such a reasonable limit, the *Charter* provides that everyone has the right to life and that laws may exist that do not comply with the *Charter* if the law has as its object the amelioration of conditions of disadvantaged individuals including those that are disadvantaged because of age. The infant in this case was disadvantaged.

The recent case of *Re McTavish* confirms that the courts do not consider religious freedom an absolute, notwithstanding its fundamental character. It was not in dispute that s. 20(2) to (5) of the *Child Welfare Act*²⁸⁶ did confer jurisdiction on the court to authorize medical treatment of a child, notwithstanding the refusal of the child's guardian to consent to the treatment. Nevertheless, it was held that where the court is satisfied that the treatment is in the best interests of the child, the need to protect the health of the child may result in the parents being required to act in a way that is contrary to their religion. Thus the court upheld the *Act* under s. 1 of the *Charter* in that under certain circumstances, it was justifiable to infringe on

²⁸⁶ 1984 (Alt) c.C-81.

the parents' right to direct the treatment of the child in accordance with their religious beliefs.

In yet another more recent case, the court said that one of the oldest principles of the law which predates the *Magna Carta* and the equitable jurisdiction in the Courts of Chancery, is that the rights of the parent in respect of the life of the child are not absolute. On that principle, the court in *Re Killins*²⁸⁷ held that in awarding the state the temporary guardianship of the infant for the purpose of obtaining a blood transfusion which the parents, for religious reasons, refused to authorize, the religious rights of the parents as enunciated in the *Charter* had not been infringed.

Two contrasting cases remain to be commented upon. In *Re L.D.K.; Children's Aid Society of Metropolitan Toronto v. K. and K.*,²⁸⁸ another 12-year-old and her parents refused chemotherapy treatment which would necessitate blood transfusion on religious grounds. The parents intended to place the child in a hospital where she would receive mega-vitamin treatment. The Children's Aid Society applied to have the child declared in need of protection under the *Child Welfare Act*²⁸⁹ so that chemotherapy treatment could be implemented. The court dismissed the application on the ground that the Society failed to discharge the onus of proving the child was in need of protection.

The judge arrived at that decision primarily on the basis of the child's interests. He found, from the child's evidence, the emotional trauma she would experience as a result of any attempt at transfusion would have a

²⁸⁷(1987) 10 C.R.D. 425 10-01.

²⁸⁸(1985), 48 R.F.L. (2d) 164.

²⁸⁹R.S.O. 1980 c.66.

negative effect on any treatment. He also found that the treatment of the disease by the hospital only addressed the problem in a physical sense and failed to address the child's emotional needs and her religious beliefs. Moreover, the parents had an alternative plan for medical treatment and the child was entitled to the opportunity of dealing with the disease with dignity.

The judge also held that because she was given one transfusion without the consent of the child or the parents, she had been discriminated against on the basis of her religion and her age pursuant to s. 15(1) of the *Charter of Rights and Freedoms*. As well, her right to the security of the person pursuant to s. 7 was also infringed.

In the case of Daniel Kennett, a 16-year old died as a result of internal hemorrhaging after he and his parents refused blood transfusion. The Court in this case did not determine whether blood transfusion should be done against the wishes of the boy and his parents because he died shortly after the hearing was convened on the apprehension order issued by the Director of Child and Family Services.

At the inquest presided over by the Chief Provincial Court Judge Harold Gyles,²⁹⁰ the learned judge notes that:

It is quite clear, therefore, that the community has an interest in having the best medical procedure available for a child, even where such medical procedure is repugnant to the religion of the parent. This community interest is in fact a public duty which is reposed in the child caring agency.²⁹¹

In distinguishing the Daniel Kenneth case from the case of *L.D.K., Children's Aid Society of Metropolitan Toronto v. K. and K.* discussed

²⁹⁰ Harold Gyled, "Report on the Inquest into the Death of Daniel Kenneth" (1986), 7 *Health Law in Canada* 52.

²⁹¹ *ibid.* 57.

above, the judge noted that the prognosis in the latter case was very poor and the painful and other side effects of the chemotherapy treatment would perhaps override any benefit. He also disagreed with Judge Main in the latter case for holding that the administration of medical treatment would have been a violation of the patient's *Charter* rights.

Judge Gyle's conclusion on the delicate balance between the individual's rights and the state's interest is summed up in his own words.

While people have the right guaranteed by our Charter to freely practice their religion, the State has a responsibility to safeguard the welfare of children, and the rights of parents to withhold necessary medical treatment from their children must be subjugated to the responsibilities of the State.²⁹²

He is also of the view that before adulthood is attained, a parent should not be permitted to withhold lifesaving medical or surgical treatment, even where the child appears to be in compliance with such parental wishes.

To quote Professor Ferguson in his paper presented to the Third Canadian Psychosocial Oncology Conference in Saskatoon in 1987,

It is obvious from these two cases that Canadian courts are uncertain whether the *Canadian Charter of Rights and Freedoms* has the effect of extending the right to refuse necessary medical treatment to minors who are old enough to understand the nature and effects of the treatment and the consequences of refusing it.²⁹³

It is, however, clear that in weighing and balancing the competing interests of the parents in their religious beliefs and practice, and the state in the obligation to protect the health and welfare of the child, the latter more often prevails. Another way of looking at it is to say that the parents' freedom of religion is not paramount to the child's right to life or the quality of life.

²⁹² *ibid.* 56.

²⁹³ Gerry Ferguson, "The Canadian Charter of Rights and Individual Choice in Treatment" (1988), 8 *Health Law in Canada* 69-70.

Any curtailment of religious freedom is deemed reasonable and demonstrably justifiable in a free and democratic society if such curtailment is in the interest of the health and welfare of the child.

Land Use Control

S. 2(a) of the *Charter* has also been invoked in a variety of non-traditional religious situations. In most of these, the impugned legislations had been upheld by the Courts. In *R. v. Gagnon* (1986)²⁹⁴ the appellant argued that the zoning regulations, which prohibited the use of a building along a highway as a church, infringed his freedom of conscience and religion guaranteed under s. 2(a) of the *Charter*. The Newfoundland District Court rejected the argument and held that land use planning was a legitimate government concern and that all land-use was subject to control.

The fact that the limitation applied to all persons of every religious persuasion and that it did not bear upon any one denomination in particular was relevant to the validity of the legislation. Besides, it was also a fact that there were many other areas of land in and near every community in the province where a religious centre could be located.

Mandatory Seat Belt Legislation

The British Columbia Court of Appeal also denied the accused leave to appeal when he argued that the mandatory seat belt legislation under which he

²⁹⁴ 8 C.R.D. 525-90-01 (Nfld Dist. Ct.)

had been charged violated his freedom of religion. The argument in *R. v. Thompson* (1986)²⁹⁵ was certainly ingenious in that he attempted to persuade the court that such mandatory legislation symbolized a systemic victimization inconsistent with his belief in the free will. Anderson J.A. doubted whether such a philosophy constituted a religion at all, and held that even if it did, the alleged infringement was too trivial to constitute a violation of s. 2(a).

Cultivation and Use of Marijuana

One of the more sensational cases concerned the cultivation and use of marijuana, contrary to the *Narcotics Control Act*²⁹⁶. The defence in *R. v. Kerr* (1986)²⁹⁷ was the guarantee of freedom of conscience and religion. But the Supreme Court of Nova Scotia (Appeal Division) had no difficulty at all in rejecting the s. 2(a) arguments. The three-person court unanimously decided that the appellant failed to establish a religious foundation for his actions, and that even if his rights were infringed under s. 2(a), such an infringement would have constituted a reasonable limit under s. 1 of the *Charter*.

In *Assembly of the Church of the Universe v. The Queen*²⁹⁸ the plaintiff church involved the freedom of religious guarantee to attack federal marijuana laws on the ground that the use of marijuana was a basic tenet of the plaintiff church. The Federal Court held that the plaintiff, as an incorporated body, may have rights but by its nature can neither have a conscience nor a

²⁹⁵ 41 M.V.R. 158 (B.C.C.A.)

²⁹⁶ R.S.C. 1970 c.N-1.

²⁹⁷ 17 W.C.B. 285 (N.S.C.A.).

²⁹⁸ (1986) 7 G.R.D. 525 90-03.

religion. An incorporated body, in the court's view, cannot think, believe or hold an opinion. Since the freedoms sought to be enforced in the action were associated with the concepts of belief and religion, the plaintiff had no cause of action.

These cases may be contrasted with *People v. Woody* (1964)²⁹⁹, a celebrated case where the California Supreme Court reversed the convictions of the trial court to hold that the use of peyote played a central theological role for members of the Native American Church. The drug which induces a state of hallucination was used as a sacrament. The court accepted the evidence that those who used it ceremonially claimed that it acted as a "teacher" because it induced a feeling of brotherhood one with another and enabled the user to experience God. It also accepted the evidence that members of the church considered the non-religious use of the peyote sacrilegious. Indeed, the court was persuaded that peyote was more than a sacrament, since prayers were directed to it as they were directed to the Holy Spirit. As a result the court held that a ban on peyote was a violation of religious liberty!

Prisoner's Religious Rights

In 1983 remand prisoners in Saskatchewan complained that their condition of incarceration had resulted in an infringement of their right of freedom of religion as guaranteed by the *Charter*. Thus is *Maltby et al. v. A.G. of Saskatchewan et al.*³⁰⁰, one applicant complained that his repeated

²⁹⁹ 394 p. 2d 813 (1964).

³⁰⁰ 143 D.L.R. (3d) 649 (Sask Q.B.).

requests to attend weekly chapel services at the provincial correctional centre had been denied him. Another, a Roman Catholic, complained that he was only allowed to see a priest of his faith only after six days of continuous requests. Yet another claimed that he had been repeatedly denied his requests to see a Protestant chaplain. One native prisoner said that he was an active adherent to native religious practice. He claimed that though he was allowed to have access to native elder on an irregular basis for the purpose of conducting religious ceremonies in the remand games room, the facilities were inadequate for the proper practice of his religion.

The court held that the lack of access to chaplains was due mainly to the shortage of such people in the community. The reason why remand prisoners were refused rights to chapel services was strictly for security reasons. While the court conceded that the religious programs at the correction centre was not perfect, it held that it did allow for freedom of conscience and religion within such limits as are feasible under the circumstances.

In contrast, the Queen's Bench (Alberta) ruled against the prison authorities in *R. v. Phillip Bearshirt* (1987)³⁰¹. The applicant, an inmate, asked that a prayer bundle consisting of leather thongs, an animal tooth and clothes, used by the applicant in his religion be kept by him in his cell at the Remand Centre. The Crown opposed the application on the ground that the contents of the prayer bundle could be used to injure the applicant himself, the guards and other inmates. The evidence showed that the applicant was held in a single cell.

The court held that depriving the applicant of his prayer bundle offended s. 2(a) of the *Charter*. The Crown, it was further held, failed to discharge the onus to show that the prohibition was a reasonable limit

³⁰¹(1987) 11 C.R.D. 525 90-02.

prescribed by law under s. 1. The fact that the inmate was in a single cell defeated the Crown's argument based on security reasons.

Religious Ceremonial Dress

In *Re Hothi and the Queen* (1985)³⁰² the applicants challenged the ruling of the provincial judge in excluding kirpans from the courtroom where he was presiding at the trial of the applicants on a charge of assault under s. 245 of the *Criminal Code* ³⁰³. The issue was whether the kirpan, an instrument consisting of a hilt and a three and a half to four inch blade, carried by persons who are baptized members of the Sikh religion, could be worn in the court. The learned trial judge refused to permit them in his court on the grounds as follows :

... in my opinion, it represents the same thing as a dagger ... and a dagger is a weapon for stabbing, and to me no matter what the religious beliefs are, I can't allow this type of thing in a court of law in Canada.

....

I just take that position that they are, could be tantamount to a weapon.

These gentlemen before me are facing charges of acts of violence and I don't want any weapons in the courtroom that I consider to be a weapon.³⁰⁴

On appeal, Dewar C.J.Q.B., agreed with the trial judge that his ruling

³⁰² 3 W.W.R. 256 (Man. Q.B.); 14 C.R.R. 86.

³⁰³ R.S.C. 1970 c.C-34.

³⁰⁴ *Re Hothi and the Queen*, (1985) 14 C.R.R. 86 at 86-87.

served as a transcending public interest in that justice ought to be administered in an environment free from any influence which may tend to thwart the process. Possession in the courtroom of weapons, or articles capable of use as such, was, in the justices view, one such influence. He also agreed that "[a] weapon does not cease to be a weapon because it is a religious symbol subject to strictures of the faith regarding use".³⁰⁵

With regard to the applicant's claims that the kirpan was a ceremonial and religious item and that disallowing baptized sikhs to wear them would be denying their freedom of religion, the court agreed that there was violation of his religious rights under the *Charter* but held that this was justified in accordance with s. 1. The manner in which the court dealt with the issue is of some interest here.

First of all, "freedom of religion" was defined as set out in *Black's Law Dictionary*. It reads as follows :

freedom of religion -- embraces the concept of freedom to believe and freedom to act, the first of it is absolute, but the second of which remains subject to regulation for the protection of society.³⁰⁶

The court then cited article 18(3) of the *International Covenant on Civil and Political Rights* to which Canada is one of the signatories :

18(3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedom of others.

Reference was made to the dictum of Lord Diplock in *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council*

³⁰⁵ *ibid.*, 88.

³⁰⁶ *ibid.* quoted on 89.

[1977] :

My Lords, in public law "unreasonable" as descriptive of the way in which a public authority has purported to exercise a discretion vested in it by statute has become a term of legal act. To fall within this expression it must be conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.³⁰⁷

The Appeal Court ruled that the trial judge's order was a discretionary one made in the exercise of a jurisdiction recognized by law to maintain order and security in the courtroom, in the light of prevailing circumstances. Consequently, he held that the ruling was within the expression "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The true basis was that the public interest of security in the circumstances prevailing in the courtroom must take precedence when in conflict with freedom of religion. The other significant distinction is that belief and action are clearly distinguished. While the former is an absolute, the latter, though rooted in the former, is not.

Privileged Communications

Akin to the *Hothi* case above, the Ontario High Court had held that there is no absolute privilege which attaches to communication between a religious authority and an adherent of the same faith. Generally the communication between an adherent and his religious authority is privileged communication³⁰⁸ but in certain circumstances disclosure is required. In *Re*

³⁰⁷ A.C. 1014 at 1014

³⁰⁸ See Schmeiser, *Civil Liberties in Canada*, 95-101. This is another broad area of religious freedom deserving a study in and of itself.

Church of Scientology and the Queen (No. 2),³⁰⁹ the court held that while the preaching of religion is of no concern to the state, religious practices may conflict with a valid law, and accordingly, in appropriate cases, a search warrant will be issued and communications relating to such practices seized.

This decision is best understood in the context of fraud charges against the church, specifically relating to the representations concerning the qualities of certain courses offered by the church, and certain instruments. Whatever spiritual benefits these courses and instruments might have conferred to the adherents, it was the Crown's contention that the material benefits received were not represented or were not worth the monies paid for them. It was therefore necessary to search and seize these artifacts to adduce fraud, if at all. It is only after the evidence are adduced that it may become a matter of defence to argue that the artifacts sold and used in a religious context produced spiritual benefits that cannot be measured in dollars and cents. Hence it was not possible to say that the evidence potentially furnished by these articles might not tend to prove the perpetration of frauds until the evidence were allowed to be seized and examined.

Divorce

In *Baxter v. Baxter*³¹⁰ an application was made to dismiss a notice of desire to show cause why a decree should not be made absolute. The notice was filed after a decree *nisi* had been obtained on an uncontested basis. The ground specified in the notice was that to grant the decree absolute would

³⁰⁹(1984) 10 D.L.R. (4th) 312 (Ont. H.C.).

³¹⁰(1983) 6 D.L.R. (4th) 557 (Ont. H.C.); 6 C.R.R. 165.

operate to infringe on the respondent husband's right to exercise freely his religion and opinions as these rights are guaranteed by s. 2 of the *Charter*.

Pennell J. of the Ontario High Court thought that the respondent husband took a "stand on grounds that are extraordinary in the extreme".³¹¹ The respondent husband's objections to making the decree absolute stated that "the marriage vows were until death do us part according to God's Word". He also asserted that the moral obligations so contracted could never die and that he was conscience bound to follow the admonitions of Scriptures to the effect that "what God hath join together, let no men put asunder"³¹² and "for the woman which hath a husband is bound by law to her husband so long as he liveth"³¹³. In brief, the husband contended that to terminate the marriage by law would have resulted in infringing his freedom to practise his religious belief through the continuation of his marriage.

Dealing with the technical aspect of the motion, the court ruled that the notice of desire to show cause was defective in that the ground set forth did not come within the scope of s. 13(3) of the *Divorce Act*³¹⁴ or of the *Ontario Rules of Practice*.³¹⁵ Under these provisions, a notice could be filed if the decree *nisi* was obtained by collusion, or if the parties had reconciled or by reason "of any other material facts". The court held that, applying the *ejusdem generis* rule of construction to "any other material facts", the phrase was not broad enough to include the *Charter* argument put forward by the

³¹¹ *ibid.*, 166.

³¹² Gospel of Mark 10:7-9 and Romans 7:2.

³¹³ Romans 7:2.

³¹⁴ R.S.C. 1970 c.C-8.

³¹⁵ Rule 809.

respondent.

On the substantive aspect of the arguments, the court paraphrased the opinion of Mr. Justice Douglas in *Sherbert v. Verner*³¹⁶ to the effect that "the *Charter* is written in terms of what the state cannot do to the individual, not in terms of what the individual can exact from the state".³¹⁷ In other words, the fact that the state cannot exact from the individual a surrender of the smallest part of his religious scruples does not mean that he can demand of the state exclusion of his marriage from the provisions of the *Divorce Act*, the better to exercise his religious beliefs. Consequently, he ruled that the *Divorce Act* is not discriminatory against religion as such and that granting the decree absolute would not be violative of the *Charter*.

In the course of his judgement, Pennell J. made the statements on the perennial question of how to reconcile apparent conflict of interest between the state and the individual in relation to matters of conscience :

This motion rings the perennial question: how to reconcile the individual's right to follow conscience and the right of the government to do what society thinks necessary for a matter of public concern? In this troubled area, one does not find utopia. Nor will a single principle resolve all of the complexities that spring out of this dilemma, the more so when a new legal institution, the Charter, is born.

No one questions that the respondent is actuated by conscientious scruples. And, of course, the law should not be construed in a manner hostile to religion or other principles of moral and ethical conduct in marriage relationships. However, charity and candour make it appropriate to note the legal peculiarities of the marriage contract.

Marriage, like divorce, is of concern not merely to the immediate

³¹⁶ 374 U.S. 398 (1963) at 416.

³¹⁷ *Baxter v Baxter*, (1983) 6 C.R.R. 165 at 168.

parties. It affects personal rights of the deepest significance. It also touches basic interests of society. Public policy has fixed the status of the marriage transaction as a civil contract. The parties may choose to enter into a marriage contract in the manner directed by their religious scruples or the canons of their church, but as a civil contract, the legal effect may not be altered by private agreement of the parties or their religious tenets. Out of marriage spring social relations and duties with which government is necessarily required to deal.³¹⁸

Once again the conflict was resolved through a compelling state interest in social relations and duties arising therefrom.

Employment

A recent case affecting the employment situation was heard in Newfoundland. In *Walsh and Newfoundland Teachers' Association v. Newfoundland (Treasury Board) and Federation of School Boards of Newfoundland* (1986)³¹⁹, a teacher was dismissed by a Roman Catholic School Board because he converted and joined the Salvation Army. An arbitration board upheld the Board's view that by his own conduct, he had eliminated his occupational qualifications, hence he was not wrongly dismissed. On appeal to the Supreme Court of Newfoundland, it was held that the teacher's right to freedom of conscience and religion was not violated by the dismissal. The court took the view that because he was hired to teach as a Roman Catholic teacher in a Roman Catholic School, he had, by his conversion out of Roman Catholicism, disqualified himself. Accordingly the appeal was dismissed. The question of discrimination under s. 15 of the *Charter* was not raised. It is an

³¹⁸ *ibid.*, 167-168.

³¹⁹ 178 A.P.R. 129 (Nfld) S.C.T.D.).

interesting question whether the board's action violated s. 15 as well as s. 27 of the *Charter*.

Public Peace and Nuisance

In two cases involving the work of a dissenting Jehovah's Witness, the court also ruled on the s. 2(a) argument. The first case dealt with a municipal by-law which required persons wishing to use a bull horn within city limits to apply for a permit. In *R. v. Reed* (1984)³²⁰, the court held that it did not apply to a dissenting Jehovah's Witness who used such a device to address Jehovah's Witnesses as they arrived at their meeting hall. Boyle C.C.J. decided that such by-laws could result in the balkanization of the right of freedom of religious expression in Canada. He held that the municipality could not restrict an individual's right to express his religious views although reasonable limits could be imposed by the Federal Government using the *Criminal Code*.³²¹

This rationale in this decision hinged entirely on the existence of the *Charter*. The judge noted that without the *Charter*, *R. v. Harrold* (1971)³²² would have been fatal to the appellant's case. Because of the *Charter*, a more stringent value must be given to democratic rights than before. On the notion of balkanization, the court elaborated as follows:

If, to take the extreme, each municipality fathered a by-law

³²⁰ 51 B.C.L.R. 264; 4 C.R.D. 525,90-01.

³²¹ R.S.C. 1970 c.C-4. S.172(2) makes it an offence to obviously or interrupt an assemblage of persons met for religious worship.

³²² 3 W.W.R. 365.

incidentally having a regulatory effect upon religious expression, then the overall consequence would be a far cry from a homogeneous right to freedom of religion and freedom of expression in various parts of Canada. Each such by-law might be found valid upon an individual test but, when seen in a total cross-Canada perspective, the consequence might be a real and unreasonable erosion of fundamental freedom. Freedom must mean the same thing everywhere. This is a different exercise of constitutional analysis than that which arises from the familiar question: Is it s. 91 or is it s. 92? It is not a question of "pith and substance" nor of "necessarily incidental". It is a matter of applying the supreme law of Canada to this issue. Is one private citizen's right to express an impassioned and deeply held belief to be hobbled by the necessity of municipal approval? The reply contra is: we are talking about a bull horn, not a religious message. But, to the appellant, the two are inextricably connected to his missionary pursuit.³²³

In the result the court concluded that the *Charter* was not proclaimed to ensure our comfort or peace and quiet. Implicit in the guarantee of certain rights was the recognition that, sometimes in the exercise of those rights, it will be contrary to popular wishes. Again the court made the point that the qualifying words of s. 1 did not simply entrench a majority right to rule, but a minority right to dissent.

Subsequent to the above case, the dissenting Jehovah's Witness was charged and convicted under s. 172(2) of the *Criminal Code*³²⁴ for entering a Kingdom Hall of the Jehovah's Witnesses, carrying placards which voiced his opposition to the teachings of the Witnesses. At his trial on the charge of assault and causing disturbance in a public place, the court dismissed his *Charter* arguments. It held that the *Charter* did not give one person the right to insist on his freedoms to the unreasonable detriment of others. The court said that it was nonsense to suggest that the accused's actions constituted

³²³ (1984) 4 C.R.D. 525.90-01.

³²⁴ *ibid.*

an exercise of his freedom of religion or speech. The content of the accused's protest was not at issue, the nature of it was. The *Criminal Code* limited the nature of such a protest and that limitation was a reasonable limit on freedom of religion³²⁵

It is noteworthy that at the County Court, Hyde C.C.J., said that "[t]he right of the individual to freedom of expression must be balanced by the right of society to peaceful enjoyment of public places, the latter being a substantial interest in furtherance of which the state should be able to legislate".³²⁶

He requested leave to appeal on the ground that his conviction should be overruled because s. 172(2) of the *Criminal Code* infringed his freedom of conscience and religion under s. 2(a) of the *Charter*. Leave to appeal was denied by the British Columbia Court of Appeal which held that freedom of religion had not been infringed by s. 172(2) of the *Criminal Code*.³²⁷

Non-Payment of Income Tax

In two separate decisions in the same year, the Federal Court of Canada rejected *Charter* arguments seeking to justify non-payment of income tax for various reasons. In *Prior v. Minister of National Revenue* (1987)³²⁸ the appellant deducted 10.5% of her tax payable and deposited it to the credit of the Peace Tax Fund of Victoria, B.C. The basis for the deduction was that 10.5% of the 1982 budget was used for military purposes. As a pacifist, the

³²⁵(1984) 5 C.R.D. 525.90-03.

³²⁶(1983) 3 C.R.D. 525.90-02.

³²⁷R.S.C. 1970 c.C-54.

³²⁸(1987) 9 C.R.D. 525-90-07.

appellant contended the payment of tax for military purposes infringed her freedom of conscience and religion.

The court, however, held that even if the tax assessment were objectively and in reality an infringement upon the appellant's freedom of conscience and religion, the Canada tax system in its responsibility to collect money for the needs of the nation, including its defence needs, would be a reasonable limit which must be imposed in a free and democratic society pursuant to s. 1 of the *Charter*.

The other case dealt with s. 60(b) of the *Income Tax Act*,³²⁹ *Hodson v. The Queen*³³⁰ was an appeal from a judgement of the Tax Court of Canada dismissing the plaintiff's appeal from the assessment of his income tax. He contended that certain amounts were paid as separation allowance. The minister relied on s. 60(6) of the *Income Tax Act* which provided that there must be a court order requiring such payments, or else there must be a "court agreement" requiring them. It was the plaintiff's view that this provision violated his freedom of religion because his wife was a Roman Catholic who was educated in a Roman Catholic school and believed that separation was contrary to the doctrines of the church. On this ground she refused to sign the separation agreement and consequently he could not produce any written document to this effect. He also claimed, in the alternative, that the provision requiring such documents discriminated against him under s. 15 of the *Charter*.

The court noted that it was not claimed in any way that the purpose of the provision interfered with the religious views or practices of Roman Catholics. It was also held that the deleterious effects of the provision on

³²⁹R.S.C. 970 c.15.

³³⁰(1987) 10 C.R.D. 525-90-02.

religious freedom must be substantial for the plaintiff to succeed. Such effects were not proven. In its conclusion the court said :

It may well be that in a proper case judicial notice could be taken of such matters, but the court is not prepared to accept without clear evidence to that effect, the rather unflattering view that the Roman Catholic faith permits separation of spouses and the payment of separation allowances so long as nothing is committed to writing.³³¹

On those bases, the *Charter* arguments failed.

Abortion

With regard to the controversial issue of abortion, there was a challenge in the Court of Appeal on the constitutional validity of the abortion legislation. In *R. v. Mongentaler* (1985),³³² the court did not see any aspect of s. 251 of the *Criminal Code*³³³ dealing with abortion as infringing that right. The court took judicial notice that there is no religion that has, as part of its tenets or creed, the absolute right to an abortion. It further said that the freedom of religion and conscience clause in the *Charter* was not designed to protect a denomination's policy position on a secular issue merely because the underpinnings of that position could be linked to the tenet of the religious group. Parliament, in the court's view, has attempted to balance the interests of the pregnant women and potential life, and if there was any incidental infringement on freedom of conscience, such infringement was demonstrably

³³¹ *ibid.*

³³² (1985) 7 C.R.D. 50-01.

³³³ R.S.C. 1970 c.C-54.

justified in a free and democratic society. In any case, the court had difficulty in seeing how the freedom of conscience was infringed. In the result, the court rejected the s. 2(a) argument.

It is now well-known that on appeal to the Supreme Court of Canada the appeal was allowed. The majority of the judges decided that s. 251 of the *Criminal Code* infringed s. 7 of the *Charter*. Madame Justice Wilson also held that it infringed s. 2(a) in that the freedom of conscience of the woman was violated.³³⁴

Freedom of Conscience

Almost all the cases dealt with thus far focused on the freedom of religion component of s. 2(a) of the *Charter*. Freedom of conscience, as we had noted, is a relatively new right which was conspicuously absent in the *Canadian Bill of Rights* (1960)³³⁵ To date only less than a handful of cases dealt with freedom of conscience in any substantial way.

In *A.G.B.C. and Board of Trustees of School District No. 65 (Cowichan)*, (1985)³³⁶, a school board challenged s. 14(2) of the *Education Finance Act*³³⁷ which authorized the Minister of Education to issue directives imposing budget ceilings. The basis for the challenge was that the directives violated the board members freedom of conscience guaranteed by s. 2(a) of the *Charter*. The argument was rejected by McKay J. on the narrow

³³⁴ *Infra.*, 376ff.

³³⁵ R.S.C. 1960 c.44

³³⁶ 19 D.L.R. (4th) 166 (B.C.S.C.).

³³⁷ R.S.B.C. 1982 c.2.

construction of the parameters of the *Charter* guarantee of freedom of conscience. Freedom of conscience was confined to "matters of religion".³³⁸

The Manitoba Court of Appeal handed down a decision giving a broader definition to freedom of conscience in the same year. The applicants in *Re MacKay et al. and Government of Manitoba*³³⁹ challenged various sections of the *Manitoba Election Finance Act*³⁴⁰. The *Act* entitled candidates who received at least ten percent of the popular vote in their constituency to be reimbursed to the extent of fifty percent of their authorized expenditures if they did not exceed a maximum expenditure limit.

In coming to a 2-1 decision, Twaddle J.A., with Philip J.A. concurring, based their definition of "conscience" on the Oxford English Dictionary.

They concluded that conscience referred to

self-judgement on the moral quality of one's conduct or lack of it. Disapproval of the thoughts or conduct of another person is not a matter of conscience.³⁴¹

In the result the majority of the three judges held that the impugned sections of the *Act* did not force the applicants to agree with the ideas espoused by the subsidized candidates. They further held that the applicants were not restricted by the *Act* from expressing their own views and spending their own monies for such purposes. Twaddle J.A. declared that the Constitution does not guarantee that the state will not act inimically to a citizen's standards of proper conduct. That being so, a citizen cannot claim

³³⁸ *A.G.B.C. and Board of Trustees of School District No. 65 (Cowichan)*, (1985) 19 D.L.R. (4th) 166 (B.C.S.C.) at 171.

³³⁹ (1985), 24 D.L.R. (4th) 587 (Man. C.A.).

³⁴⁰ C.C.S.M. c.E-32.

³⁴¹ *Re MacKay et al. and Government of Manitoba*, (1985) 24 D.L.R. (4th) 587 (Man. C.A.) at 594.

that his freedom of conscience was breached if he disagreed with the way the government spends general tax revenues.

Husband J.A. dissenting held that the freedom of conscience guaranteed in s. 2(a) of the *Charter* barred the government from becoming involved in the financing of political propaganda. The use of tax revenues for such purpose, according to him, breached the freedom of conscience guaranteed to those members of the society who disagreed with the main political parties, and discriminated against the candidates and supporters of fringe parties.

The third case decided in the same year with regard to the meaning and scope of freedom of conscience was *R. v. Morgentaler*³⁴². The facts of the celebrated case involved Dr. Morgentaler, a crusader of legalized abortion, and others, who were charged with unlawfully conspiring to procure an abortion contrary to s. 251 of the *Criminal Code*³⁴³

At the trial the defence called a professor of comparative religion to show that some groups believed that the decision to have an abortion is a matter of informed conscience for each individual woman. The gist of the argument suggested that conscience and religion were closely related. The trial judge held that freedom of conscience could not be relied upon to protect the freedom to do anything as long as it was compatible with a person's conscience.

In the Court of Appeal, religion and conscience were dealt with in a similar fashion. Deciding that no religion had as part of its tenets or creed the absolute right to an abortion, the court held that there was no infringement of freedom of religion. The court, in the course of the judgement, pronounced that it was not

³⁴²(1985) 22 D.L.R. (4th) 641 (Ont.C.A.).

³⁴³R.S.C. 1970 c.C-34.

... established that there was a set of beliefs that bound one's conscience in a way that required there be complete freedom at the instance of one individual, without more, to choose abortion.

Hence, freedom of conscience was held not to be violated. However, the above statement leads one to speculate on the consequences had such a belief been established. If conscience is not so closely tied to religion, it would be a plausible argument that the pro-choice movement do adhere to the requisite beliefs alluded by the court.

On appeal to the Supreme Court of Canada³⁴⁴, the majority held that s. 251 of the *Criminal Code* violated, *inter alia*, s. 7 of the *Charter*. It was the view of the court that state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitutes a breach of the security of the person. The court said that forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she met certain criteria unrelated to her own priorities and aspirations, was a profound interference with a woman's physical and bodily integrity. As well, the psychological integrity of the woman was violated as a result of the delay in obtaining therapeutic abortions caused by the mandatory procedures of the impugned section of the *Criminal Code* in that she had to face a higher probability of complications and greater risk.

In her concurring judgement, Madame Justice Wilson held that the deprivation of the s. 7 right in this case also offended freedom of conscience guaranteed in s. 2(a). Her connecting s. 7 to s. 2(a) was based on the notion that the decision whether or not to terminate a pregnancy was essentially a "moral decision". Citing Dickson C.J. in *R. v. Big M Drug Mart Ltd.*³⁴⁵ as a

³⁴⁴ *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 32.

³⁴⁵ [1985] 1 S.C.R. 295.

backdrop to the place of decision-making in a free and democratic society, she made the point that "[t]he *Charter* and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity".³⁴⁶ Dickson C.J. said :

It should also be noted, however, that an emphasis on individual conscience and individual judgement also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Bill of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.³⁴⁷

Elaborating on the relation between human dignity and the right to choose, Wilson J. noted :

The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of good life.³⁴⁸

Further, the right to make fundamental personal decisions without interference from the state is a critical component of the right to liberty. It is

³⁴⁶ *R. v. Morgentaler*, *op.cit.*, 164.

³⁴⁷ *ibid.*, 165 fr. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 346.

³⁴⁸ *R. v. Morgentaler*, *op.cit.*, 166.

a right that grants individuals a degree of autonomy in making decisions of fundamental personal importance. This view was expressed in an earlier judgement in *R. v. Jones* where she understood "liberty" in terms of "the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric ...".³⁴⁹ She then declared as follows :

Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them³⁵⁰

Before turning to the American cases for support on the legal understanding of liberty, she agreed with Estey J's observation in *Law society of Upper Canada v. Skapinker*

With the *Constitution Act*, 1982 comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the constitution, remains to be interpreted and applied by the Court.

The courts in the United States have had almost two hundred years experience at this task and it is of more than passing interest to those concerned with these new developments in Canada to study the experience of the United States courts.³⁵¹

This reference to the line of authorities in American jurisprudence on the non-interference of the state in personal decisions on matters of fundamental personal competence is itself remarkable in light of the fundamental differences between the two constitutional documents. Tracing

³⁴⁹ [1986] 2 S.C.R. 284 at 318.

³⁵⁰ *R. v. Morgentaler*, *op.cit.*, 167.

³⁵¹ *ibid.* Cited from [1984] 1 S.C.R. 357 at 366-367.

the American decisions since the 1920s³⁵², she concluded that "the respect for individual decision-making in matters of fundamental personal importance reflected in the American jurisprudence also informs the Canadian *Charter* ... and therefore ... the right to liberty contained in s. 7 guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives".³⁵³

Having set the stage where certain kinds of decision-making is tied to the dignity of the person which in turn is tied to the freedom of choice not to be interfered by the state, she then held that the decision of a woman to terminate her pregnancy falls within this class of protected decisions. In her own words :

The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert *her* dignity and worth as a human being.³⁵⁴

Turning to s. 251 of the *Criminal Code* she concluded that the purpose of the section was to take the decision away from the woman and give it to the committee.

The fact that the decision whether a woman will be allowed to terminate her pregnancy is in the hands of a committee is just as great a violation of the woman's right to personal autonomy in decisions of an intimate and private nature as it would be if a committee were established to decide whether a woman should be allowed to continue her pregnancy. Both these arrangements violate the woman's right to liberty by deciding for her

³⁵² *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Loving v. Virginia*, 388 U.S. 1 (1967); *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973).

³⁵³ *R. v. Morgentaler*, *op.cit.*, 171.

³⁵⁴ *ibid.*, 172.

something that she has the right to decide for herself.³⁵⁵

It is obvious that Madame J. Wilson's comprehensive commentary on the scope of conscience in s. 2(a) shows clearly that conscience is a function of decision-making of a fundamentally personal kind. It is not necessarily tied to religion though the decision itself may be described as a "moral decision". The key to the relation between conscience and decision-making appears to lie in the fact that terminating a pregnancy affects the woman's dignity as a person and is strictly a private matter between her and her own conscience. No doubt a woman's religious beliefs have some influence on her conscience but the two are not co-extensive.

Conclusions

Since 1982, the term "freedom of religion" has been significantly expanded. For one thing it does include freedom of conscience in the freedom of religion guarantee. Traditionally conscience had been associated with religious scruples. Under the *Charter*, case law appears to suggest a wider ambit for conscience. Taking conscience and religion together, the courts had indicated in some situations that religion goes beyond the traditional Christian religion. As well it includes not only the right to believe, worship and proselytize, but also the right to be free from coercion and restraint in the exercise of religious practices. Notwithstanding some of the case law to the contrary, the practical interpretation appears to follow very much the American concept of freedom of free-exercise and freedom from establishing a state religion in the sense of coercing a particular set of beliefs and practices.

³⁵⁵ *ibid.*

Thus it is quite clear that any burden imposed on religion whether intentionally or otherwise, whether direct or indirect, can constitute a potential infringement of s. 2(a) of the *Charter*.

It is also evident that the court will review both the purpose and effect of the impugned legislation to determine its constitutional validity. Should the court find the purpose of the legislation inconsistent with the freedom of conscience and religion guaranteed by s. 2(a), the court will strike down the law without having to proceed to the analysis of the justificatory s. 1. The fact that the challenger does not hold any religious beliefs, or is incapable of holding such beliefs, is irrelevant. The remedy provided by the court is to declare the law of no force or effect pursuant to the power vested in it by s. 52 of the *Charter of Rights and Freedoms*.

Should the court find the purpose of the legislation legitimate, the court will have to address the question of the effect of the legislation. Evaluating the impact of the law on religious freedom is a much more difficult task. It is here that the onus lays on the Crown to show that the limit on freedom of religion caused by the impact of the impugned law is reasonable and is demonstrably justified in free and democratic society. If the Crown fails to discharge this onus, the law will be struck down accordingly.

In the event that neither the purpose nor the effect of the law is found to infringe on religious freedom, or if the effect resulting in limiting religious freedom is justifiable under s. 1, the law is constitutionally valid and will be upheld. However, it is possible that such a generally valid law, may nonetheless adversely affect an individual's freedom of religion to such an extent as to entitle him to an exemption from the legislation.

On the question of the validity of a claimant's belief, it has been held that it is beyond judicial scrutiny. However, if the challenger of the impugned

legislation submits that an otherwise valid law infringes his individual religious freedom, the sincerity of this belief will be examined by the court. As is only when the law's impact on the individual's right to freedom of religion is too severe to be saved by s. 1 of the *Charter* that the challenger will be entitled to an exemption from the otherwise valid law.

Notwithstanding the fact that the scope of freedom of religion has been enlarged since the *Charter* came into force, the courts had been rather cautious and conservative in striking down impugned legislations. Thus far only those legislations that were clearly religious in purpose had been struck down. The celebrated case of *Mongentaler*³⁵⁶ was struck down primarily because the abortion procedure prescribed by the impugned legislation violated the individual's right to "life, liberty and security of the person" embodied in s. 7 of the *Charter*. The ingenious manner in which Madame Justice Wilson linked s. 7 violation to the freedom of conscience guarantee has been dealt with above.³⁵⁷ Strictly speaking the impugned legislation was not struck down primarily because of the violation of s. 2(a).

In most cases, the court, when the purpose of the legislation was not clearly religious, preferred to give the government the benefit of the doubt by according a secular purpose to the impugned legislation. The cases also reveal that few challengers were able to prove to the satisfaction of the court that an otherwise valid legislation nevertheless infringed on their freedom of religion.³⁵⁸ And when the court was satisfied that there was infringement,

³⁵⁶ [1988] 1 S.C.R. 30.

³⁵⁷ *Supra.*, 376ff.

³⁵⁸ On the doctrine of the presumption of constitutionality, see Joseph Magnet, "Indoctrinational Fact, Constitutional Fact, and the presumption of Constitutionality" (1980), 11 *Manitoba Law Journal* 21.

and the onus shifted to the government to justify the infringement, the court, more often than not, was persuaded that the limit was reasonable and demonstrably justified in accordance to s. 1 of the *Charter*. Part of the reason is that the Oakes test³⁵⁹ which calls for a preponderance of probability was not always vigorously applied in all cases.

The cases also show very clearly that the state's compelling interest often overrides the right to freedom of religion. In areas where it is felt the government has a legitimate interest and efforts have been made to accommodate minority views on the part of the government, the impact on s. 2(a) rights is usually adjudged incidental or reasonable. Where children's physical or mental well-being is at stake, the parental arguments based on their right to religious freedom are often not persuasive. These s. 2(a) arguments are usually rejected on the ground of the state's compelling interest in the welfare of the children. Some of the compelling state interest vis-a-vis children include the educational needs of children, their health and welfare and their need to be protected from religious confusion in situations where their parents are in conflict because of deep religious differences.

The state's compelling interest, of course, extends beyond protecting the children. It also includes state interest in taxation, defence, moral education, prevention of drug abuse and a common pause day for family recreation.

Insofar as freedom of conscience is concerned, the courts have interpreted it disjunctively from freedom of religion. The courts have widened it to mean a self-judgement having to do with moral choice or decision. As such, freedom of conscience includes the freedom to choose religions and philosophies of life. It is certainly broader than religious freedom though it does inform the religious question as well. It goes beyond

³⁵⁹[1988] 1 S.C.R. 1.3.

religion since the freedom to choose in accordance with one's conscience includes a choice of irreligion or anti-religion.

In view of Dickson C.J.'s *dictum* in *Hunter v. Southam Inc.* that the *Charter* "is intended to constrain governmental action inconsistent with those rights and freedoms [enshrined within it]; it is not in itself an authorization for governmental action"³⁶⁰, the *Charter*'s rights are aimed at protecting individuals from state interference and control. It seems that the notion of state compelling interests has become "an authorization for governmental action" in religious freedom cases so that they override the entrenched interests in the *Charter*. This leads to the crucial question of whether the *Charter* has supplanted parliamentary supremacy by judicial supremacy in that judicial understanding of compelling state interest is allowed to override the legislature's understanding of fundamental rights.

Thus far the impact of the *Charter* on religious freedom has been confined to striking down unambiguous religiously motivated legislations and upholding legislations that infringe religious freedom on grounds that they are justified because of the state's compelling interest. These decisions often show the conservatism of the judges in their judicial review. The role of the judges and the potential impact on religious freedom will depend on how "multi-cultural" the bench will be over the years and how significant the changes will be in the religious scene in Canada in the years ahead.

³⁶⁰[1984] 2 S.C.R. 145 at 156.

Summary and Conclusion

Summary

Historical Review

Historically, the struggle for freedom of religion gave rise to many of the civil liberties as we know them today. In time it became part of the civil liberties that are hallmarks of any free and democratic society. Unlike most civil liberties, however, religious freedom is more difficult to define or determine. This vagueness is due to the complex relationships involving the individual, the religious body, the community at large and the state.

Generally, the courts have been reluctant to define religion in terms of its content of beliefs. They have been content to concern themselves with the scope of religion. In Canada, in particular, the courts were primarily concerned with its scope in relation to the enumerated heads of legislative powers under the *Constitution*. In the United States, the courts tended to define religion in an open-ended manner. The broad definition tended to include intensely-held beliefs which were purely ethical and moral in both nature and content. The British Courts, on the other hand, tended to exclude humanistic philosophies in their definition of religion. With few exceptions, the idea of a transcendent being was held to be an essential factor in the religious equation.

While the courts shunned the attempt to define the substance of freedom of religion, the components of freedom of religion became self-evident. They include freedom of worship, freedom of association, freedom of propaganda, freedom from civil disability, freedom from discrimination against any religion and freedom of the church from state interference. As a consequence freedom of religion became a fundamental freedom and has become entrenched in international human rights legislations.

In Canada, freedom of religion originally derived its existence from the absence of both positive law and government action in accordance with the British tradition. Subsequently, through a series of legislations, freedom of religion has become entrenched as a fundamental civil right in the *Canadian Charter of Rights and Freedoms*.

The entrenchment of religious freedom in Canada has been long and difficult. Beginning with the founding of New France in 1608, religion had played a very significant role in molding Canadian society. In the early days New France, for a brief period, was practically a theocracy under the rule of a quasi-established Roman Catholic Church. There was no freedom from religion as the influence of the Catholic Church was so comprehensive that no aspect of life in New France was untouched by it.

With the British Conquest in 1760 and the signing of the *Treaty of Paris* in 1763, the special status of the Catholic Church was temporarily removed. Reading this *Treaty* in light of the *Royal Proclamation* of 1763, the Roman Catholic Church was merely tolerated while the English Church was beginning to establish a privileged status. The process of assimilating the French Canadian into an Anglo-Canadian lifestyle was about to begin. That this intention was not accomplished was attributed to the effective influences of the colonial governors. Both James Murray and Guy Carleton were opposed to the policy of assimilation and counselled for full recognition of the existing French institution in Quebec. In light of the growing rebellion of the thirteen Colonies to the south, the British Imperial Government changed its policy. As a result, the *British North America (Quebec) Act*, better known as the *Quebec Act*, was passed in 1774.

The *Quebec Act* granted free exercise to the Catholic religion and fully recognized the status of the Catholic clergy. The payment of tithes by the faithful to the church was enforceable by civil law and religious church authorities were

not to suffer civil liabilities. In practice, though not legally, the Roman Catholic Church was reestablished. In 1839, the *Parish and Fabrique Act* confirmed the quasi-established status of the Roman Catholic Church.

Outside of Quebec, the Church of England was established in Nova Scotia in 1758 and in New Brunswick in 1786. These establishments were shortlived, however, and by the mid 1800s the Church of England was effectively disestablished in these two colonies.

As a consequence of the successful American Revolution in 1776, tensions arose in Quebec due to the influx of Loyalists. These Loyalists were a political mixed-bag and Protestant in their outlook. They began to agitate for the annulments of the *Quebec Act*. The *Constitution Act* of 1791 was enacted to address this problem. As a result, the Province of Quebec was divided into two separate provinces, with Upper Canada mostly settled by the Loyalists and Lower Canada by the French Catholics. The *Act* caused many long-standing controversies because in its provisions it intended to establish the Church of England in Upper Canada through a system of church tithes and land reserves for Protestant clergy, which included endowment of the rectories and parsonages with land. The rights of endowment of rectories and the collection of tithes lasted for several decades. The clergy reserves, however, remained a thorny issue and became a focal point of bitter controversy between the churches and state authorities for many years to come.

The clergy reserves issue involved not only the Anglican Church and the state, it also involved other Protestant denominations because the term "Protestant clergy" was not defined in the *Act*. As well, anti-establishment reformers were militating against all religious establishments. To compound the problem even further, the clergy reserves were an obstacle to land development in the pioneering of settlements, and thus became a source of irritation to

politicians and businessmen alike. Eventually, the *Clergy Reserve Act* was passed in 1854. This *Act* climaxed a number of similar legislations which proved to be unsatisfactory in the resolution of this problem. This *Act* enabled the lands to be sold and monies distributed for the benefit of the municipalities. As well, some of the monies were also distributed as capital endowments to the main contending denominations within the Christian church.

The controversies surrounding the clergy reserves led to a long and painful struggle for religious equality among the Christian denominations. There is no doubt that the clergy reserves were an attempt to establish the Anglican Church in Upper Canada. Owing to a combination of various factors, including the growing dissension against the established Church of England in the United Kingdom, the principle of voluntaryism prevailed. Hence, the principle of religious equality was truly and ironically the fruit of an opposite principle, namely, that of religious establishment.

History reveals an uneasy relation between church and state in early Canada. While the Anglican Church was tacitly established in Upper Canada, she had to give way eventually to voluntaryism and religious equality. In Lower Canada, the Roman Catholic Church, while least legally established, was in fact the most practically and effectively established. This is largely due to its cultural and religious homogeneity compared to the heterogeneity in Protestant denominationalism.

It was through the process of protests and compromises that the peculiarly Canadian principle of disestablishments was put into practice in pre-Confederation Canada. The principle of disestablishment was a recognition that it was not possible to transplant the parochial system to the colonies from the United Kingdom. The rise of Protestant pluralism militated against duplicating British religious institutions overseas. As well, the *Quebec Act* and the *Parish*

and Fabrique Act effectively confirmed the status of a distinct religio-cultural society in Quebec. Indeed, the enactment of the *Freedom of Worship Act* in 1851 carved the principle of disestablishment in legislative stone. This statute made the prospect of legally establishing a state church highly unlikely.

The case laws during this pre-Confederation era confirm that the Church of England was not an established church. However, in Lower Canada, the Roman Catholic Church, though not legally established had enough political clout to attempt to temper with the effect of a Privy Council decision granting the appellant the right to be buried in the consecrated ground of the church. Insofar as Lower Canada was concerned, freedom of religion and equality of religion before the law was not yet free from political interference because of what church historian Moir describes as legally disestablished religiosity.

The British North America Act and Religious Freedom

By 1867 the colonies of Upper and Lower Canada, Nova Scotia and New Brunswick were ready to come together as a confederation through an act of the Imperial Parliament. The *British North America Act*, 1867 reflected a continuity with the past, namely, it did not intend to sever its connection with British parliamentary tradition, conventions, customs and usages. In regard to traditional civil liberties, including freedom of religion, the *Constitution* left it to the implicit safeguards under the rule of law and parliamentary sovereignty rather than to positive law or governmental action. These safeguards were to be found in the British democratic tradition, the common law and the independence of the judiciary. The essence of these safeguards was in the notion of the rule of law.

Regarding a specific civil liberty of freedom of religion, the most celebrated case in which the rule of law was effectively applied was the case of *Roncarelli v. Duplessis*. The success of the Jehovah's Witness in that case confirmed the inclusion of the safeguards for religious freedom in the constitution notwithstanding the fact that the *Constitution* itself was silent on this particular civil liberty.

It has been argued that there is an implied *Bill of Rights* in the *Constitution* itself. This view is supported by several Supreme Court cases including *Saumur v. City of Quebec* of Quebec which again involved the religious activities of Jehovah's Witness. However, the *Dupond* case collapses the implied *Bill of Rights* theory. Quite opposed to this view is the "exhaustive distribution of powers" view. On this view, the issue is whether the particular suppression or enlargement is competent to the Dominion or to the Province. It is tied to the notion of the sovereignty of Parliament.

Landmark Litigations

Consequently, during the 1950s, religious rights and freedom became one of the most litigious issues in Quebec. These originated mainly from the religious activities of the Jehovah's Witnesses which upset the religious *status quo* of the Catholic population in that province. Through a series of judicial decisions from the middle of the twentieth century, the parameters of religious freedom were determined, clarified and expanded. The main protection afforded to the religionists, whose rights were perceived to have been infringed, was through the process of civil litigations.

One of the most celebrated cases in 1951 was focused on the definition of seditious libel. In *Boucher v. The King*, the question whether there was

sedition libel was in turn revolved around the issue of "illegal intention". In terms of religious freedom, the fact that the intent of the Jehovah's Witnesses was the promotion of their religion and therefore not an illegal intent was the most significant factor taken into account by the court. The court also held that the negative effect on the population was irrelevant. What is even more significant is that the court was evidently influenced in its decision by the sincerity of the religious conviction of the religionists.

In 1953, the Supreme Court in *Saumur v. City of Quebec* dealt with the question as to whether civil rights under s. 92 (13) of the *British North American Act, 1867* included religious freedom. The full court was divided. Three judges held that civil rights included religious freedom, four dissented and two did not deal with the question. On the issue whether the municipal by-law that prohibited the Jehovah's Witnesses from their religious activities was *ultra vires* the provincial power, four held that it was *ultra vires* while five held to the contrary. However, one of the five also held that it violated the *Freedom of Worship Act*. In the result the Jehovah's Witnesses were acquitted although the by-law remained in the books!

Under the Duplessis administration the Jehovah's Witnesses continued to score judicial victories in spite of the provinces attempt to amend the *Freedom of Worship Act*. In fact the *Act* was amended so as to make distribution of literature or public speeches that were construed as an attack on the majority religion in Quebec an offence and therefore not protected by the *Constitution*.

The case of *Chaput v. Romain* decided in 1955 is an example of the extent Quebec police were prepared to go in harassing the Jehovah's Witnesses. The Supreme Court found that the police officers acted unlawfully in violating the rights of the Jehovah's Witnesses to the free exercise of his or her religion. Taschereau J.'s remark most surely stands as a landmark in church-state relations

when he declared that there was no state religion in Canada and that all religions were on equal footing so that the majority religion could not impose its religious views on the minority.

In the *Roncarelli Affair*, the battle for religious freedom reached its climax. The attempted intervention of the Quebec Premier and Attorney-General in denying the Jehovah's Witnesses their rights was, in the words of one of the judges, the beginning of the disintegration of the rule of law as a fundamental postulate of the constitutional structure. The case was decided in favour of the Jehovah's Witnesses in 1959 and, as a result, it galvanized the public into pressing for a Bill of Rights to prevent a repeat of such administrative high-handedness.

In public education and religious freedom, the Jehovah's Witnesses succeeded in contending that the school exercises infringed their religious freedom. Thus in *Donald v. Hamilton Board of Education* (1945) the Court of Appeal gave the Jehovah's Witnesses some constitutional protection against the school authorities in relation to mandatory participation in patriotic exercises. The case is significant in that it followed American jurisprudence in declaring that the court was not competent to declare that the school exercises had no religious or devotional significance.

The Court of Appeal in *Chabot v. School Commissions of Lamourandière* (1957) strengthened the Jehovah's Witnesses' contention for religious freedom when it recognized the natural rights of the parents to determine the education of the children.

On the issue of medical care, the Jehovah's Witnesses were less successful. Several blood transfusion cases were held against the Witnesses who argued that blood transfusion was against the teaching of their faith. The health and welfare of the child was held to be a compelling interest of the state and thus enforced medical care was seen as a justifiable limit to the individual freedom of religion.

As far as conscientious objection to military service is concerned, the Canadian Courts generally ruled against the Jehovah's Witnesses. A compromise solution was found in the *Alternative Service Regulation*. But Jehovah's Witnesses, Hutterites and Mennonites, in their uncompromising stance paid the price of their pacifistic faith by being incarcerated. The laws governing war time were certainly harsher than those governing peace time.

Apart from the Jehovah's Witnesses, several other religious communities were also at odds with the law. The Salvation Army were in fact trail-blazers in their attempt to practice their faith publicly. In two late nineteenth century cases they were charged with disturbing the peace in public places. In *City of Montreal v. Madden* (1884) the charge was dropped because the Crown conceded that the defendants did not act willfully. In *Le Cribbin v. The City of Toronto* (1891), however, the plaintiffs were convicted of breaching the public peace contrary to a city by-law.

The Mennonites and the Doukhobors also found themselves in conflict with the law. These two religious communities had one thing in common, both were opposed to public education. Consequently, both faith communities found themselves on the wrong side of the law when they did not send their children to public schools. In the case of the Doukhobors, their opposition to public education became violent when the more radical Sons of Freedom challenged the laws of the land by turning to anarchy in the thirties and forties. The matter became a public concern and at least two public inquiries were conducted by the British Columbia Government to resolve the "Doukhobor problem".

In *Perepolkin v. Superintendent of Child Welfare* (No.2) (1957), the court ruled to the effect that a declaration by a group that certain actions were part of their religion were not in themselves sufficient to give these actions a "religious colour" within the legal definition. Such a ruling appears to give little weight to

the self-expression of religious group, especially when that self-expression conflicts with the ethos of the society. The plausible rationale is simply that the compelling interest of the state in public universal education prevails over a minority religious ethos. Like the cases involving conscientious objectors to military service and medical care for children, this case once again illustrates the relativity of religious freedom.

Henry Birks and Sons (Montreal) Ltd. v. City of Montreal and Attorney-General of Quebec (1955) is a landmark case on religious freedom in the context of the "exhaustive distribution of powers" theory. This case traced the origin of "Blue Sunday" laws and held that on the question of legislation in relation to Sunday observance and other religious days, the powers are vested in Parliaments and not in the legislatures to prohibit certain activities on religious grounds. This position before the coming into force of the *Bill of Rights, 1960* is based on the criminal law powers of Parliament.

It is also noteworthy that the *Criminal Code* also gives protection to the free exercise of religion in that obstructing, disturbing or interrupting a public religious worship is considered a criminal offence. It is also an offence under the *Code* for parents to deny blood transfusion to their children deemed in need by medical authorities. Blasphemous libel is also a criminal offence although *Boucher v. The King* protects the widest range of public discussion and controversy provided it is done in good faith and for religious purposes.

The Emergence of the Bill

The religious situation just before the coming into force of the *Bill of Rights* in 1960 appears to be one in which the state generally left the religious individuals or community to practice their religion without state influence. The

exceptions were when the state had a compelling interest in the matter, or when the matter came within the criminal law powers of Parliament as a Sunday observance case under the *Criminal Code*. Indeed freedom of religion was both freedom to practice their religion and freedom from coercion to practise that which is against their religion as in the school exercise cases. The freedom from coercion is more limited because of the principle of the state's compelling interest.

The theory of "exhaustive distribution of power" in the context of religious freedom raised the question of jurisdiction. The question with regard to a Bill of Rights is whether legislative jurisdiction in relation to freedom of religion falls within provincial or Dominion powers. Among lawyers, jurists, politicians and academics, it was generally conceded that the matter of religious freedom as a civil liberty was a matter within Dominion powers.

The beginning of this important debate and discussion may be traced to the year 1948 when the Joint Committee on Human Rights and Fundamental Freedoms was established with representatives from both Houses of Parliament. Deans of law schools and attorney-generals of different provinces expressed a variety of views. Judicial opinions on the question were also diverse. Some judges concluded that ss. 92(13) and 92(16) of the *British North America Act, 1867* give the provinces limited jurisdiction with regard to basic freedoms. Others argued that "civil rights" under s.92(13) gives basic freedoms an independent existence and therefore a constitutional value of their own. These views were, however, discredited by jurists who traced the use of the phrase "civil rights" in other legislations including the *Quebec Act* to refer to private rather than public rights.

Several minor views included one rejecting the assumption that religious freedom is an independent entity and therefore is not committed to either

Parliament or the legislatures. Another concluded that neither Parliament or the legislatures may infringe on fundamental freedom on the reasoning that there is either an implied Bill of Rights or a natural right to fundamental freedoms.

In the final analysis the view that the Dominion has jurisdiction to make laws "for peace, order and good government" prevailed. Specifically, this view holds that the Dominion has power to legislate on public law relating to freedom of religion under its criminal law powers.

Criminal law generally provides specific prohibitions to ensure a general state of public peace, order and good government. Since religious freedom is not absolute and is in the area of free choice, the law in relation to freedom of religion is necessary to forbid certain acts by defining the outside limits of religious freedoms. The necessity lies in the need for peaceful coexistence of human beings within a diversity of religious beliefs and behaviour. Consequently, it was held that freedom of religion is properly a matter for the Parliament to enact in order to protect the meaningful exercise of religion. Accordingly, the *Bill of Rights* was passed in 1960 in accordance to this view.

As to whether there was a necessity to enact such a *Bill of Rights*, the legal community was equally divided. In a symposium published in 1959, academics were divided in the same way the Joint Committee on Human Rights and Fundamental Freedoms were divided in 1948. Among those who strongly argued for the Bill of Rights was Glen How, the lawyer for the Jehovah's Witnesses. Indeed, the Cooperative Commonwealth Federation (C.C.F.) championed its enactment back in 1945.

On April 10, 1960, the *Bill of Rights* came into force as an ordinary statute of Parliament. In addition to the strong voices urging for its enactment, the fact that the United Nation and many newly independent commonwealth countries had enacted laws to protect fundamental human rights had great

persuasive influence. The *Roncarelli Affair* in Quebec also accentuated the need for the protection of minorities and their religious and other civil liberties.

The limitations of the federal statute became evident soon after its enactment. Apart from the fact that as an ordinary piece of legislation, it can be repealed by Parliament, the *Bill*'s limited application is two-fold. In the first place, it suggests that the fundamental rights are rather vague and indistinct, and secondly that the rights appear not to fall within the field of legislative competence of either Parliament or the legislatures specifically. In practice the courts had confined themselves to determining which level of government were competent to limit such rights. It was a problem of legal federalism. Legislations that violated fundamental freedoms had been declared *ultra vires* not on the basis that they interfered with fundamental rights but that they were not within the legislative competence of one or the other levels of government.

Sunday Observance and the Bill

The effect of the *Bill* on religious freedom was considered in *Robertson and Rosetanni v. The Queen* which was decided three years after it came into force. This is the only case of religious freedom under the *Bill* and it had to do with Sunday observance under the *Lord's Day Act*. The court ruled that the *Act* did not infringe on the freedom of religion within the meaning of the *Bill* on the ground that freedom of religion was not abridged by state support of particular religious tenets so long as there was no compulsory observance thereof by others. The court held that the fact that these others were obliged to close their businesses on Sunday was purely a secular consequence.

Significantly, three of the judges held that the *Bill* was not concerned with "human rights and fundamental freedoms" in any abstract sense. They ruled that

such "rights and freedoms" the *Bill* was concerned about were those that existed in Canada immediately before the statute was enacted. Referring to *Chaput v. Romain* and *Saumur v. The City of Quebec*, the court concluded that religious freedom existed in Canada before the *Bill*, notwithstanding the provision of the *Lord's Day Act*.

Also significant is the court's analysis based on the effect rather than the purpose of the *Lord's Day Act* to determine whether its application involved the abrogation, abridgement or infringement of religious freedom. The effect, the court concluded, was purely secular and financial but in no way was it an abrogation, abridgement or infringement of religious freedom.

The history of Sunday observance cases demonstrates that as a prohibitive measure, only the federal Parliament had the competence to enact Sunday observance laws. The provinces, however, may enact laws that were merely permissive as opposed to prohibitive. It was the reasoning of the courts that prohibitory statutes were strictly and exclusively in the field of criminal law powers and therefore only within Dominion competence.

In making the distinction between prohibitory legislation and permissive legislation, the objective of the statute was of vital importance. Sunday observance legislations were religiously motivated and were therefore prohibitory. If the statute was primarily concerned with secular matters, it was merely permissive. Clearly then, the intent of the legislation was crucial to the analysis. It is therefore curious that the court in *Robertson and Rosetanni* looked only to the effects without regard for the purpose. This distinction between effect and purpose became and continues to be problematic.

The judgement of the court suggests that freedom of religion under the *Bill* is understood only in terms of the effect it has on those who practice other religions. To that extent, a legislation is *ultra vires* if its effect imposes religious

observance on unwilling persons or restrains them from practicing their own religion. But the effect and purpose are so correlated so that a law that has as its purpose the sanctification of a Christian holy day means that non-Christians are to treat it as a sanctified day against their own faith. Hence it is untenable to disregard the purpose of the legislation in arriving at the conclusion in the way the court did.

On the *dictum* that the *Bill* was only concerned with rights that existed in Canada at the time of the *Bill*'s enactment, this interpretation has been branded "the frozen concepts" view. This "frozen concepts" view of the *Bill* probably made it less effective than it could have been.

Although *Robertson and Rosetanni* was the only case on religious freedom under the *Bill of Rights*, there were a number of cases during the same period which are relevant to the issue. These were not *Bill of Rights* cases but they illustrate the court's attitude toward intra-church disputes. In such matters, the courts had developed a non-interference approach because the dispute had to do with doctrinal disputes and the rights to the property of the religious community resulting from such doctrinal shifts. In two separate cases involving the Hutterite community and the Catholic community, the courts affirmed two important principles. Firstly, they affirmed their incompetence to interpret doctrines, and secondly, they affirmed that in matters of disciplines and membership, the churches reserve the sole authority to decide and execute according to the rules subscribed to by the members. In effect, freedom of religion in its collective aspect was safeguarded in its most essential sense. The collective right of religious groups to self-determination without state interference is an inviolable element of religious freedom.

The Emergence of the Charter

In the late sixties, the effectiveness of the *Bill of Rights* was seriously questioned in the context of constitutional reform. The issue was about the most effective way to protect fundamental rights and freedoms. There was a general support for entrenching a Charter of Rights and Freedom so as to restrict both the Parliament and the legislatures from interfering with such fundamental rights. The debate and discussion was strenuously pursued at the two Constitutional Conference in 1968 and 1969.

Under the leadership of Prime Minister Pierre Trudeau, the constitutional reform gathered momentum. The amendment procedure necessary to entrench the proposed *Charter of Rights and Freedoms* was dealt with by the Supreme Court of Canada in *Reference Re Amendment of the Constitution of Canada (No. 1, 2, and 3) (1981)*. The technicalities of overcoming the need to request the patriation of the *Constitution* by both Houses of Parliament and the need to have prior consultation and agreement with the provinces, because the proposed amendment directly affected federal-provincial relations, was dealt with at the political level.

The ruling of the Supreme Court to the effect that convention requires a substantial measure of provincial consent led to the signing of the *Constitutional Accord* of November 1981. Notwithstanding the refusal of Quebec to consent, the *Accord* was substantial enough for the patriation of the *Constitution*. Consequently, on April 17, 1982, the *Canadian Charter of Rights and Freedoms* became part of the *Constitution Act, 1982*.

There are a number of differences between the *Charter of Rights and Freedoms* and the *Bill of Rights*. The most important is the entrenched status of the *Charter*. As such, it can only be amended in accordance with a

cumbersome procedure. The amending formula requires the resolutions of the Parliament and the legislatures with at least two-thirds of the provinces having a total of at least 50% of the population of Canada. As an entrenched constitutional document, it is supreme in the sense that any law enacted by the Parliament or legislature, before and after the coming into effect of the *Charter*, is of no force or effect, if it is inconsistent with its provisions.

As part of the supreme law of the land, the *Charter* is applicable to both levels of government. Its supremacy has been clarified by the Supreme Court of Canada in *Attorney-General of Quebec v. Quebec Association of Protestant School Board et al (1984)*. On its interpretation of s.1 which enables the Parliament or a legislature to enact a law which has the effect of limiting one or more of the guaranteed rights, the court ruled that it does not legitimize laws that collide directly with those rights and freedoms. Further, it does not create exceptions to the *Charter* guarantees. And, more importantly, the section cannot be used to justify laws that in effect constitute amendment to the provisions of the *Charter*.

General Impact of the Charter

In *Regina v. Oake* (1986) the Supreme Court of Canada expounded on the meaning of "free and democratic society" in the justificatory section. It indicated that in applying s.1, the courts must be guided by the values and principles essential to a free and democratic society; accommodation of a wide variety of beliefs; respect for cultural group and identity; and faith in social and political institutions which enhance the participation of individuals and groups in society.

The court also laid down two criteria in its application. First, the objective for the limitation must relate to concerns which are pressing and substantial. Second, the means chosen must be reasonable and demonstrably justified. The second criterion is a form of proportionality test and is made up of three components. Firstly, the measures must be rationally connected to the objective in question. Secondly, it should impair as little as possible the right and freedom in question, and thirdly, there must be a proportionality between the effects and the objective.

Another significant difference between the *Charter* and the *Bill* in relation to religious freedom is that the *Charter* protects both "freedom of conscience and religion". Freedom of conscience is not found in the *Bill*, and is unique to the *Charter*.

On the impact of the *Charter* on religious freedom, the Supreme Court of Canada articulated a "purposive approach" in analyzing the cases before it. The *dictum* of Dickson J. (as he then was), in *R. v. Big M Drug Mart Ltd.* make it clear that the historical contexts, in regard to freedom of conscience and religion, are particularly helpful in arriving at the meaning of the freedom. Once the meaning is ascertained, the court will examine *both* the purpose and effect of the impugned legislation to determine whether an infringement has occurred. This is because *both* the purpose and the effect are relevant for the purpose of determining its constitutionality in that *either* an unconstitutional purpose *or* an unconstitutional effect can invalidate a legislation. As the learned judge said, "the purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked".

The practical approach, then is for the court to scrutinize the purpose first. If the purpose is violative of the *Charter* guarantees the legislation is unconstitutional regardless of its effect. The effect will be analyzed only if the

purpose is not violative. This is in stark contrast to the approach taken by the Supreme Court of Canada in *Robertson and Rosetanni v. The Queen*. Not surprisingly, the court in *Big M Drug Mart Ltd.* held that the *Lord's Day Act* was *ultra vires* the *Charter* because the purpose was religious and cannot be demonstrably justified in a free and democratic society.

Another significant impact of the *Charter* in its analytical approach is that even when a piece of legislation is held to be in violation of the fundamental rights, whether because of the purpose or the effect, it can be upheld if it can be shown to be a reasonable limit and demonstrably justified in a free and democratic society in accordance with the criteria laid down in *R v. Oakes*. In contrast, the *Bill of Rights* does not have anything comparable to s. 1 of the *Charter*. Instead, the courts had attempted to justify violative legislation by means of "reasonable classification" and "valid federal objective". These expressions are rather vague when contrasted with what the court has declared under the *Charter*.

Following *Hunter v. Southam Inc.* (1984), the Supreme Court also emphasized that a generous rather than a legalistic interpretation should be placed on the guaranteed rights. According to the judge in *Big M Drug Mart Ltd.*, this is aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. Again this is a contrast to the approach under the *Bill*, where the "frozen concept" of s.1 had been construed so narrowly so that only rights in existence at the time of the enactment of the *Bill* were guaranteed.

The definition of religious freedom is also considerably broadened and expanded. Indeed Mr. Justice Dickson gave a very comprehensive definition which encompassed both the right to manifest beliefs and practices, and the right to be free from coercion and constraint. The latter includes "non-action" as in

compelling individuals to abstain from doing things on Sunday. It includes freedom of religion and freedom from religion.

It is clear that the entrenched status of the *Charter* made all the difference. The learned judge pointed out that the definition of the freedom of religion is no longer vulnerable to legislative incursion. What in effect took place is that freedom of religion under the *Charter* has become more akin to the American understanding which includes both "free exercise" and "non-establishment".

The definition also clarifies the meaning of conscience in the context of freedom of religion. It is disjunctive in that it goes beyond religion though it may be linked to religion. Conscience is also related to beliefs about human worth and dignity. Thus, humanism and morality would constitute rights within the ambit of freedom of conscience.

Even more important is the court's reference to s. 27 of the *Charter* which, in its interpretation, does away at once with the preferred status of Christianity as a dominant religious culture by its recognizing the reality of the multicultural heritage of Canadians and affirming the rights of the religious minorities.

In contrast to *Big M Drug Mart Ltd.*, the Supreme Court of Canada in *R. v. Edwards Books and Art Ltd.*, (1986) held that the *Retail Business Holiday Act* was not *ultra vires* the provincial legislature because it was enacted with a secular purpose rather than a religious purpose. Although its effect created a burden on Saturday observers, the court held that the exemption clause ameliorated. and justifiable.

Analyzing the two cases side by side reveals a very interesting observation. Prior to the *Charter*, the notion of legal federalism enabled the courts to determine whether a legislation was *ultra vires* its powers. Hence, in cases involving Sunday observance, the courts decided that prohibitory legislation were

within the jurisdiction of the Parliament under its criminal law powers. The legislatures could only enact laws that were permissive. Permissive laws were deemed secular in purpose while prohibitory laws religious.

The impact of the *Charter* in this regard is to eliminate this traditional understanding of the division of legislative powers. Sunday observance legislation with a religious purpose is now *ultra vires* even the Parliament while legislation with a secular purpose is *intra vires* even when it is prohibitive. This principle is borne out of a good number of subsequent cases decided all the way from Newfoundland to Alberta.

Conscience and the Charter

It would appear that part of the reason for the impact of the *Charter* is the inclusion of "conscience" in the phrase "freedom of conscience and religion". It now includes the right to practice one's belief according to one's conscience. Generally any legislation on Sunday observance with a religious purpose would be struck down because it would favour one religion against another. If the purpose is secular, and the effects burdened some religionists, the court will look to see if the government had made any real effort to accommodate them. If some real efforts had been made to ameliorate the effects, the impugned legislation would be upheld notwithstanding the hardship it caused on the minority religionists. It is also noteworthy that the "religious character" of the party is significant in spite of the indignity of a state-sponsored inquiry into a person's religion. After all, how could the court determine the burden of the legislation on the religionists if it has no knowledge of the religionist's religious character?

Education and the Charter

This last question was also raised in the public education cases. In *Jones v. The Queen* (1986), the Supreme Court of Canada had to decide whether a Christian pastor, who refused to comply with the requirements of the *Alberta School Act* on the ground that the *Act* as a whole violated his freedom of conscience and religion, was not guilty of an offence. The court, in the course of the judgement, made a distinction between the *sincerity* of the appellant's beliefs and the *validity* of his beliefs. It held that the former could be examined but the latter could not be questioned. This is consistent with the court's refusal to deliberate on the matter of doctrines. However, in *R. v. Powell* (1985), the learned judge examined and questioned the validity of the defendant's beliefs because he felt that such beliefs were detrimental to the education need of the child. Here the compelling interest of the state was given an inordinate weight under the *Charter*, so that sincerity in and of itself was not sufficient. Therefore, in *R. v. Tutton and Tutton*, honest and sincere beliefs were not sufficient defence under the *Charter*. These are in contrast to the pre-*Charter* case of *Donald v. Hamilton Board of Education* where the Court of Appeal declared its incompetence to determine the religious question. More analogously, these intra-family disputes over religious differences are similar to intra-church disputes except in the latter the pre-*Charter* judiciary affirmed its incompetence to interpret doctrines.

What is significant in the *Jones'* case in respect to religious freedom is the court's rationale for upholding the *Alberta School Act*. It held against the appellant because of the state's compelling interest in ensuring that citizens are adequately schooled to the educational standards set by the state. Yet it is precisely to curtail the state from exercising its overwhelming power that certain

fundamental rights are entrenched. The entrenchment is to make it possible for the individual's right to prevail against the power of the state. With the entrenchment the conflicting interests of both the state and the individuals are pitted against one another. It would appear that the arbitrating role of the courts in balancing such conflicting interests is manifestly increased. In light of the entrenched rights what was a compelling interest of the state is not necessarily a compelling interest under the *Charter*. A case in point is the prohibitive Sunday observance laws. Under the *Charter* it is no longer a compelling interest of the Federal Parliament to maintain public morality by enforcing the sanctity of the Lord's Day under the criminal law powers because the religious ethos reflected in the *Charter* has shifted from a Christian dominated society to a multi-cultural and multi-religious society.

It is therefore not surprising that the Ontario *Education Act* and its *Regulation* providing for school opening exercises were challenged. Historically the recitation of the *Lord's Prayer* and the reading of the Christian Scriptures were part of the opening exercises in public schools. In 1986, some parents in Sudbury challenged the *Education Act* and the *Regulation*. In *Re Zylberberg and Director of Education* (1986) the plaintiffs sought a declaration that the school opening exercises required by the *Regulation* were of no force and effect because it violated the *Charter* provisions. The plaintiffs' grounds were that the exercises were of Christian origin and discriminated against non-Christians.

The judgement of the Ontario High Court reveals some interesting insights into how the learned judge read the *Charter*. Judge O'Leary thought that the absence of a non-establishment clause means that the *Charter* does not prohibit the school from supporting the teaching of religion or the holding of religious exercises. His comments on the preamble relating to the existence of God and

multiculturalism is an interesting attempt to balance the reality of monotheism and pluralism.

In ruling that school exercises did not violate the *Charter*, the learned judge took the view that since exemption from the exercises was available to the pupils and that no justification for non-participation was necessary, there was no coercion to such an extent as to infringe the right of freedom of conscience and religion. In any event if there was infringement, the judge held that such infringement was justified under s.1 of the *Charter*. His grounds for the decision were that the schools had an obligation to teach morality and that morality and religion are intertwined. What is extraordinary is his enmeshing of the notion of supremacy of God, the dwindling church attendance and morality in defending the constitutionality of school opening exercises. The line of reasoning appears to be a promotion of Christian theism and Christian morality. However, he quickly qualified it with reference to the choice of non-Christian readings in the *Readings and Prayers : For Use in the Toronto Schools*.

Mr. Justice Anderson concurred with the judgement and provided an interesting contrast between the American and the Canadian jurisprudence on this matter. Citing authorities from both jurisdictions, he noted that unlike the anti-establishment of religion situation in the United States, the advancement of education and religion are firmly and favourably rooted in the public policy of Canadian law. Consequently, he cautioned against the use of American cases in determining the state of Canadian law in respect of freedom of religion.

The Ontario Supreme Court also reviewed the *Education Act* and *Regulation*. This was initiated by the Corporation of the Canadian Civil Liberties in 1987. The facts were similar to that of the *Zylberberg*'s case. The majority decision upheld the constitutionality of the *Act* and the *Regulation* by taking the purpose and effect approach. It rejected the applicant's contention that

purpose of the *Regulation* was enacted in order to indoctrinate public elementary school pupils in majoritarian Christian religious beliefs.

Among the reasons given, the learned judge pointed out that unlike the *Lord's Day Act* the *Regulation* did not take religious values rooted in Christian morality and translate them into positive law that was binding on Christians and non-Christians alike. In other words, there was no coercion on anyone to act in a way contrary to his belief or conscience. He also ruled that there was no protection of any religion or a concomitant non-protection of any religion. The fact of unconditional exemption also militated against any notion of coercion. He further noted that religious freedom is an obvious element of multiculturalism and the openness of the *Regulation* preserved and enhanced the multicultural heritage of Canada.

On the question of discrimination, the court held that religious belief was neither a condition precedent to the reception of instruction in religious education nor relevant to the exemption from the instruction. Both the instruction and the exemption were available to the Christian and non-Christian pupils alike. The right of self-determination was available equally to all.

That both the *Zylberberg's* case and the *Canadian Civil Liberties* case arrived at the same conclusion via different routes is a commentary on the broadness of the base upon which the structure of freedom of religion is constructed under the *Charter*. What is significant in terms of differences of rationale is that the former based its judgement on the link between public education and morality while the latter based it on the lack of connection between the two. It is also to be observed that little is made of the compelling interest argument in these cases on the part of the province to provide such education.

American Jurisprudence and the Charter

The caution against the application of American cases in *Zylberberg* is an exception to the general enthusiasm of the court in their citation of American authorities. Indeed, a case may be made out that the *Charter*, in its pluralistic undergirding, draws the Canadian constitutional situation much closer to that of the American in relation to religious freedom. In the three major cases of *Big M Drug Mart Ltd. v. R.*, *Edwards Books and Art Ltd. v. R.* and *Jones v. The Queen*, the Supreme Court of Canada consistently made references to the American cases.

In *Jones v. The Queen*, it is observed that in determining the relationship between religion and public schools, the court tended to look to the American cases for guidance. It also relied quite heavily on American jurisprudence in the determination of the meaning of liberty in s. 7 of the *Charter*. Out of the ten cases cited by the Justice La Forest, six of them were American. Besides, the Canadian cases dealt with general principles of judicial interpretation whereas the American case dealt with substantive law. Madame Justice Wilson cited twenty-five cases out of which fourteen were American. It is very noteworthy that in *Jones v. The Queen*, La Forest J. took judicial notice of the compelling interest of the state in public education on the *dictum* of an American case law. In so doing, he deviated from the approach to s. 1 analysis laid down by *R. v. Oakes*.

Child Welfare and the Charter

In the child welfare cases, the courts appear to decide against the parties arguing for the custody of children in situations where marriages had broken down on the basis of the state's compelling interest for the welfare of the children. Thus in *Fougere v. Fougere* (1986), the court awarded the custody of

the child to the Catholic wife because the Jehovah's Witness husband's religious activities were deemed detrimental to the best interest of the children. In like manner, the court denied the "Exclusive Brethren" father the custody of the child in *Brown v. Brown* (1983) because his religion avoid social interaction with non-believers.

In *Regina v. Tutton and Tutton* (1985), the sincere belief of faith-healing on the part of the parents did not exonerate them from responsibility for the death of their child. It is submitted that in this case the compelling interests of the state prevailed against the honest and sincere faith of the parents. The same is true in blood-transfusion cases involving Jehovah's Witnesses. In all the cases, the courts clearly did not consider religious freedom an absolute, notwithstanding its fundamental character. The courts have also held that protection of the children come within the reasonable limit prescribed by law as can be demonstrably justified.

Miscellaneous cases

The *Charter* has also generated a number of other religious cases of which *Re Hothi* and *The Queen* (1985) is most important. It was held in his case that the transcending public interest in that justice ought to be administered in an environment free from any influence which may thwart the process has to prevail against any religious interest. Consequently, the applications who were on a charge for assault was not allowed to wear their ceremonial *kirpan* in the court. If ever there was a case illustrating the essential element of religion in a multicultural society, this was it. Yet public interest of safety was to prevail against multicultural religiosity. This case certainly illustrates the distinction

between freedom to believe and freedom to act on that belief. Only the former is absolute while the latter, though rooted in the former, is not.

In a rather unique case where the husband objected to making a divorce decree *nisi* absolute on the ground that marriage was meant to be permanent under God's law, the Ontario High Court rejected the argument that the *Divorce Act* discriminated against his religion. Thus in *Baxter v. Baxter* (1983), the court paraphrased the opinion of Mr. Justice Douglas in the American case of *Sherbert v. Verner*. He said that "the *Charter* is written in terms of what the state cannot do to the individual, not in terms of what the individual can exact from the state". This neat statement of Mr. Justice Pennell puts the brakes on the unrealistic expectations placed by many on the *Charter* protection of rights and freedoms.

The *Charter* has also been invoked to deal with intra-religious disputes. In *R. v. Reed* (1984) the court held that the municipal by-law requiring the user of bull-horns within city limits to apply for a permit was not applicable to a dissenting Jehovah's Witnesses. Boyle C.J. ruled that such requirement could result in the balkanization of the right of freedom of religious expression in Canada. From the judgement, it would appear that the existence of the *Charter* impacted on the decision because without it, on the authority of *R. v. Harrold*, the case for the dissenter would have been fatal. The *Charter* clearly imposes a more stringent value on democratic rights in that s. 1 did not entrench a majority right to rule but a minority right to dissent. However, this view is to be qualified by the ruling at his trial in the Criminal Court that the *Charter* did not give one person the right to insist on his freedom to the unreasonable detriment of others.

On the issue of abortion, the most obvious impact of the *Charter* is the decriminalization of the act of aborting. The relevant ground in relation to freedom of conscience and religion was that the procedure for abortion under the

Criminal Code infringed s. 7 of the *Charter* in that *inter alia*, it infringed s. 2(a) of the *Charter*. Madame Justice Wilson of the Supreme Court in *R. v. Morgentaler* (1985) held that the decision about abortion was a moral decision. Citing Dickson C.J. in *Big M Drug Mart Ltd.*, the learned justice applied the notion of freedom of conscience in relation to basic beliefs about human worth and dignity. It is to be noted that she was a lone voice on this s. 2(a) question.

Conclusions

There is little doubt that the *Charter of Rights and Freedoms* has impacted on the important issue of religious freedom in Canada. The extent of its impact, however is open to debate. At the minimum, religious freedom is no longer a fundamental right without its fundamental constitutional rootage. As an entrenched right it is rooted securely in the supreme law of the land. No longer is it possible to remove it by a simple Act of Parliament. It is now an authentic fundamental right both *de facto* and *de jure*. It is no longer vulnerable to legislative incursion.

Freedom of religion is no longer confined to traditional religious practices. Historically the issue in the Canadas was equality among Christian denominations. With the much broadened definition of religion in the context of a multicultural society, the clamour is now for equality among all religious traditions. Notwithstanding the preamble where monotheism is presupposed, religion is no longer to be understood in terms of the worship of a Supreme Being. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses. The element of free choice impacts upon any attempt at establishing a state religion.

The question of free choice is also correlated to the notion of conscience. Traditionally conscience had been associated with religious scruples. With the addition of the notion of conscience in the phrase "freedom of conscience and religion" the Supreme Court had held that conscience is a function of decision-making of a fundamental kind. It is not necessarily tied to religion though a conscientious decision is a moral decision. There is no doubt that one's choice may be informed by one's religious beliefs but conscience and religion are not co-extensive.

The disjunctive reading of the phrase "freedom of conscience and religion" means that conscientious choice may include one that has no religious content. Hence choice is not confined to the subject-matter of religion. It includes choosing a philosophy of life that is purely secular or humanistic. Taking into consideration the context of the *Charter*, traditional understanding of freedom of religion is now extended to freedom of irreligion. Freedom is no longer limited to freedom of, it also encompasses freedom from religion.

That this a clear impact of the *Charter* is confirmed by the Supreme Court's definition of freedom of religion in *R. v. Big M Drug Mart Ltd.*. The concept, the learned judge said, means more than the traditional right to entertain such belief as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, the right to manifest religious belief by worship and practice or by teaching and dissemination. Under the *Charter*, freedom is primarily to be characterized by the absence of coercion or constraint. The *Charter* protects from compulsion or restraint so that no one is to be forced to act in a way contrary to his beliefs or his conscience.

A direct consequence of this broadened view of freedom is the abandoning of the *Lord's Day Act* and the decriminalization of the act of abortion. The *Lord's Day Act* has been a symbol of Christian-based nations from time

immemorial. Historically, the observation of the Sabbath was a religious duty and in some *dicta* Christianity was considered a part of the common law so that a law which forbade any interference with that observance was, in its nature, criminal. Hence both under the *Bill of Rights* and throughout the history of Canada, the *Lord's Day Act* has always been upheld as a valid federal legislation under its criminal law powers. Under the *Charter*, it is not at all surprising that this view of the law is no longer sustainable. It was considered by the court to be a legislative incursion of freedom of religion which cannot be justified since freedom includes freedom from compulsory observance.

As the court has declared, the *Lord's Day Act* worked a form of coercion inimical to the spirit of the *Charter* and the dignity of all non-Christians. The *Act* proclaimed the standards of the Christian faith, was rooted in Christian morality and therefore discriminated against those of other faiths. Indeed it alienated non-Christians from the dominant religious culture and should not be tolerated because the *Charter* safeguards religious minorities from the threat of the "tyranny of the majority". The tyranny was just as real even though it was non-action that was decreed in the *Act*.

The implication of abandoning the *Lord's Day Act* are manifold. At the simplest level, it means that Canada is legally declared a non-Christian nation notwithstanding its Christian roots and its preamble to the *Charter*. More importantly, and some case laws notwithstanding, the legal situation appears to be closer to the American concept of free-exercise of all religions and freedom from establishing a state religion. But perhaps the more significant impact is that the *Charter* opens the door for the possible "tyranny of the minority" as the courts bend backwards to avoid discrimination against minority religions by accommodating them to the inconvenience of the majority.

In addition to protecting minority religions, there is also the freedom from beliefs. The practical impact of this is simply that non-belief is coopted into the field of the religious so that it constitutes a form of belief that must not be discriminated against. In effect, freedom of conscience and religion can be and is taken to include freedom of belief, unbelief and even anti-belief.

Though abortion was traditionally a matter of religious concern, the Supreme Court has now removed it from the sole influence of religious teachings and shifted it into the realm of "moral decision" as enlightened by the conscience. Having removed it from the religious understanding of the sanctity of life, the court still rooted it in the dignity of the human person. One of the impacts of this move is to affirm the ultimate worth of the human person without regard to any source outside the human person itself. In this manner, human autonomy and free-choice become the ultimate source and the 'Ultimate other' is no longer a key element in moral responsibility. This view of freedom of conscience and religion is more "secular" than "religious".

This proclivity for the secular rather than the religious is also much evident in the Supreme Court's approach in reviewing both the purpose and effect of the impugned legislation. In regard to the *Lord's Day Act* this approach is radically different from the pre-*Charter* approach where the court determined the constitutional validity of the law by looking at the effect rather than the purpose. The court struck down the *Act* because the purpose was clearly religious and therefore inconsistent with the freedom of conscience and religion. On the other hand, the Supreme Court upheld the *Retail Business Holiday Act* because it was secular in purpose.

By employing the principle of the state's compelling interest, the courts have been able to deflect many and varied challenges to legislations that appeared to infringe the freedom of conscience and religion of the applicants. Clearly the

state's compelling interest, which is generally secular in nature, often overrode the religious interest of the applicants.

In view of Dickson C.J.'s *dictum* in *Hunter v. Southam Inc.* that the *Charter* is intended to constrain governmental action rather than an authorization of governmental action, it appears paradoxically that the compelling interest of the state often becomes a pretext for state interference and control. It is submitted that the *Charter* has in some ways supplanted the supremacy of Parliament by the supremacy of the judiciary in that the judicial understanding of the needs of the secular society is allowed to override the religious needs of some individuals and communities notwithstanding the fact that freedom of religion is an entrenched right in the *Charter*.

The truth is that the *Charter* has impacted on the religious scene by opening the door to an enlarged dependence on the judiciary to determine the nature and extent of freedom of conscience and religion. To paraphrase Estey J. in *Law Society of Upper Canada v. Skapiner*, there is a new dimension or yardstick of reconciliation between the respective rights of the religious individual and the secular community. The role of the bench is greatly enlarged as the judges interpret and apply the law according to their understanding of where society is at a given point in time. This need to interpret includes the attempt to interpret the state of mind of the religious person when the sincerity of his belief becomes examinable because an otherwise valid legislation is alleged to infringe his religious freedom. This is a tall order indeed for if it is difficult in practice to determine the validity of a belief, it is equally if not more difficult to determine the sincerity of a believer. In some situations the courts actually presumed to interpret both the validity and the sincerity of a religious belief.

With few exceptions, the decisions thus far reflect the conservatism of the judges. The role of the judges in judicial review will certainly have a greater

impact on our society in religious and non-religious terms should the bench reflect a more liberal or multicultural ethos. The American experiment reflected that liberal ethos during the sixties under a more liberal administration. The decriminalization of abortion in *Morgentaler* may be one step closer to aligning our situation with that of the American in *Roe v. Wade*, which is based on a trimester system, although at the time of writing the court refused to rule on that in *Borowski v. Can. (A.G.)* [S.C.C.]¹ because the matter was rendered moot since prior to the hearing of the appeal, the Supreme Court of Canada had struck down all of s. 251 of the *Criminal Code* which permitted therapeutic abortions. Moreover, the court held that circumstances did not warrant a decision on merits and that the appellant lacked standing to continue the appeal.

The impact of the *Charter* as interpreted by an increasingly liberal judiciary may well lead to the reversal of the marijuana case of *Assembly of the Church of the Universe v. The Queen* to align it with the American counterpart in *People v. Woody*. As well, both *Zylberberg* and the *CCCL v. The Minister of Education* may be reversed upon appeal to align them with the American case of *Abington Township School District v. Schempp* (1963).² In the latter the court ruled that the recitation of the Lord's Prayer and/or the reading of ten verses from the Bible as part of the daily opening exercises in the public school was unconstitutional as it violated the establishment clause in the First Amendment.³ It is submitted that the impact of the *Charter* on religious freedom in terms of the liberalizing influence of American jurisprudence is more

¹[1989] 3 W.W.R. 97.

²374 U.S. 203 (1963) The case is being reviewed by the United States Supreme Court.

³At the time of writing the Ontario Court of Appeal in fact reversed the decision in *Zylberberg* holding that the recitation of the Lord's Prayer violated s.2(a) of the Charter of Rights and freedoms. See *Zylberberg v. Sudbury Board of Education* (Ont. C.A.) Unreported in Ontario Judgements: [1988] O.J. No. 1488, C.A. No. 567/88.

far-reaching than the possible impact of the Free Trade Agreement on Canadian culture.

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