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M. H. Ogilvie

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What is a Church by Law Established?

Abstract

This paper examines one narrow question which is raised tangentially by virtue of the Constitution Act 1867, section 93 and the Constitution Act 1982, section 29 as interpreted by the Supreme Court of Canada in the Reference Re An Act to Amend the Education Act: what is an established church? It argues that when a single church alone enjoys constitutionally entrenched state support for its schools to the exclusion of all other religious groups, the real legal question is not about the legal protection of that church as a religious minority, especially when the recipient of state support is the largest and most powerful religious group in Ontario and Canada. Rather, the real legal question is whether or not such exclusive support amounts to legal establishment of that privileged religious group. To determine the nature of "establishment" in legal theory, the author examines church establishments in England and Scotland, and in Canada prior to 1867, and concludes that the status of the Roman Catholic Church in Ontario today is probably that of a quasi-established church.

Keywords

Established churches; Constitutional law; Canada

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WHAT IS A CHURCH BY LAW ESTABLISHED?©

By M.H. Ogilvie*

This paper examines one narrow question which is raised tangentially by virtue of the *Constitution Act, 1867*, section 93 and the *Constitution Act, 1982*, section 29 as interpreted by the Supreme Court of Canada in the *Reference Re An Act to Amend the Education Act:* what is an established church? It argues that when a single church alone enjoys constitutionally entrenched state support for its schools to the exclusion of all other religious groups, the real legal question is not about the legal protection of that church as a religious minority, especially when the recipient of state support is the largest and most powerful religious group in Ontario and Canada. Rather, the real legal question is whether or not such exclusive support amounts to legal establishment of that privileged religious group. To determine the nature of "establishment" in legal theory, the author examines church establishments in England and Scotland, and in Canada prior to 1867, and concludes that the status of the Roman Catholic Church in Ontario today is probably that of a quasi-established church.

I. INTRODUCTION

A strict constitutional separation of church and state has never been achieved in Canada. Despite a widely-held perception to the contrary, Canada has not built Thomas Jefferson's "wall of separation between church and state"[1] – that uneasy separation enshrined in the First Amendment's religion clause that "Congress shall make no law respecting the establishment of religion, or

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* M.H. Ogilvie, Professor of Law, Carleton University, Ottawa.

[1] Thomas Jefferson to the Committee of the Danbury Baptist Association, 1 January 1802, reprinted in A. Koch & W. Peden, *The Life and Selected Writings of Thomas Jefferson* (New York: Modern Library, 1944) at 332-33.

prohibiting the free exercise thereof."[2] Nor, on the other hand, has Canada since 1867 enjoyed a legal church establishment similar to that of the Church of England in England or the Church of Scotland in Scotland. Although before 1867 the Roman Catholic Church in Canada East and the Church of England in New Brunswick, Nova Scotia, and Prince Edward Island were clearly churches established by law, in Canada West both the Church of England and the Church of Scotland (but not the Free Church of Scotland) asserted claims to establishment equally supportable by reference to their established positions in England and Scotland respectively.

Yet, the *Constitution Act, 1867* and the *Constitution Act, 1982* contain provisions which amount to the support of religion. Thus, while there is no single church by law established, nor complete separation of church and state, the Canadian constitutional settlement occupies a middle ground somewhere between these two extremes, possessing what Professor John Moir, the "dean" of Canadian church historians, has described as a "peculiarly Canadian" compromise of a "legally disestablished religiosity."[3]

But for the decision of the government of Ontario in 1984 to extend full state financial support to Roman Catholic schools in that province to the exclusion of all other religious groups and the stamp of the Supreme Court of Canada's imprimatur on that decision in *Reference Re an Act to Amend the Education Act*,[4] the question of what is a church by law established in Canada might best have been forgotten so as not to reopen the bitter sectarian strife which characterized nineteenth and early twentieth century Canadian history. Nevertheless, the question has been reopened. It has been widely asserted in the non-Roman Catholic religious

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[2] That American political practice has not reflected constitutional theory is attested to by the extensive volume of caselaw and scholarly writing on church-state relations in American law.

[3] J.S. Moir, *Church and State in Canada, 1627-1867* (Toronto: McClelland Stewart, 1967) at xiii [hereinafter *Church and State*].

[4] (1986), 25 D.L.R. (4th) 1 (Ont. C.A.); [1987] 1 S.C.R. 1148 [hereinafter *Education Act Reference*].

community, in non-religious circles, and in the popular press,[5] that the effect of the top court's decision is tantamount to the "establishment" of the Roman Catholic Church in Ontario. Thus, a scholarly re-examination of the legal meaning of church establishment is desirable, particularly in view of the fact that the Ontario Court of Appeal and especially the Supreme Court of Canada interpreted the reference as narrowly as possible so as not to consider the public policy ramifications of deciding that the Ontario government could validly enact changes in the *Ontario Education Act*. Indeed, both courts took great pains to stress that, in the words of Wilson J.:

> it is not the role of the Court to determine whether as a policy matter a publicly funded Roman Catholic school system is or is not desirable. That is for the legislature. The sole issue before us is whether Bill 30 is consistent with the Constitution of Canada.[6]

Judicial disinclination to become embroiled in church-state matters is readily understandable, but arguably indefensible in the light of the *Canadian Charter of Rights and Freedoms*, when one group is endowed by the state with rights and privileges to the exclusion of all other groups and individuals. Perhaps, this is especially so when that group is already the largest and richest single religious group in Ontario and in Canada. Thus, the legal question might fairly be asked whether the extension of special privileges – even if explicitly authorized by the written constitution – makes the recipient of those privileges a church by law established? Conversely, does the failure to extend identical rights and privileges to other groups amount to discrimination against them? Is religious inequality amongst various religious groups, whether Christian, Jewish, Moslem, or others, fundamental to the Canadian constitutional settlement in the late twentieth century?

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[5] Of the numerous press reports and analyses, perhaps the most articulate one asserting that the effect was the "establishment" of the Roman Catholic Church was by Professor Reginald Whitaker of York University, "Rash Act to Aid Roman Catholic Schools?" *The [Toronto] Globe and Mail* (11 April 1985) 7.

[6] *Supra*, note 4 at 1167-68; and for similar statements in the Court of Appeal, see *supra*, note 4 at 51, Zuber, Cory, and Tarnopolsky JJ.A.

This paper will not attempt to discuss the wider issues,[7] but will focus instead on the narrow question of what is an established church as defined in the common law tradition. "Establishment" in relation to Canadian church-state affairs was historically conditioned by concepts of "establishment" in Great Britain rather than in the United States. Therefore, a comparative and historical approach with Great Britain is adopted because it more readily facilitates and explicates the legal definition of "establishment" in Canada. At the outset, it should be stated that precise definition is extremely difficult. What, then, is a church by law established?

II. JUDICIAL VIEWS ON THE STATUS OF CHURCHES IN CANADA

The precise legal status of churches in Canada has not been subject to recent judicial consideration. Virtually all of the cases in which the matter has been considered were decided in the nineteenth century when the religious complexion of the country was very different from that today. Indeed, there are several cases, which have never been overruled, which unequivocally state that Christianity alone is part of the common law.[8] Thus, in *Pringle* v. *The Corporation of the Town of Napanee*, Harrison C.J., after an extensive discussion of earlier Anglo-Canadian caselaw, found a contract void for illegality which provided for the rental of a hall for giving lectures advertised as attacking Christianity and stated:

> The Empire to which we belong owes much of its greatness and influence among the nations of the earth to the profession, practice, and propagation of the religion of Jesus Christ. The many colonies of the Empire are growing into importance and power by reason of the love which they bear for Christ, and the high morality which He taught, and the blameless life which He led. It will require something more than mere general words in an Act of Parliament to compel a Court of Justice in any portion of the Empire to hold that the glory of the Empire is to be tarnished

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[7] The author is currently working on a series of papers exploring various aspects of church-state relations in Canada, thus this paper is confined to the initial issue of defining establishment.

[8] *Pringle* v. *The Corporation of the Town of Napanee* (1878), 43 U.C.Q.B. 285 (C.A.); *R.* v. *Dickout* (1894), 24 O.R. 250 at 253-54 (Q.B.D.), Armour C.J.; *Kinsey* v. *Kinsey* (1895), 26 O.R. 99 at 102-03 (Ch.), Meredith C.J.

> by the removal from its exalted position of Christianity as an integral part of the common law of the country.[9]

It would appear that the decision of the House of Lords in *Bowman* v. *Secular Society*,[10] which found that Christianity is not a part of the common law of England, has never been applied in Canada, nor is there a Canadian counterpart.

It might then be asked whether any one division or denomination of Christianity has been favoured in Canadian law? There are several nineteenth century cases from New Brunswick which assert that for that province the Church of England is the established church. Indeed, it may well still be the case that the Church of England is today the established church in New Brunswick[11] – and in Nova Scotia[12] and Prince Edward Island[13] – by virtue of legislation which has never been repealed. There are no later statutes disestablishing the Church of England in these provinces.[14] Thus, for example, in *Doe ex dem. St. George's Church* v. *Cougle and Mayes*,[15] Ritchie C.J. found that the Lieutenant-Governor had a right to collate and present an incumbent to a vacant rectory over the protests of the church wardens on behalf of the parish by virtue of the established status of the Church of England.[16]

Such cases are exceptional and of regional significance. The preponderance of judicial decision clearly states that there is no officially established church in Canada, however that notion may be

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[9] *Ibid.* at 304.

[10] (1917), [1917] A.C. 406 (H.L.). See also W.S. Holdsworth, "The State and Religious Nonconformity: An Historical Retrospect" (1920) 36 L.Q. Rev. 339.

[11] *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* (U.K.), 1786, 26 Geo. III, c. 4.

[12] (U.K.), 1758, 32 Geo. II, c. 5.

[13] (U.K.), 1802, 43 Geo. III, c. 6.

[14] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 129 provides that all provincial acts remain in force until repealed.

[15] (1870), 13 N.B.R. 96 (S.C.).

[16] Applied in *Bliss* v. *The Rector, Churchwardens and Vestry of Christ Church, in the Parish of Fredericton* (1887), Tru. 314 (Eq.).

defined. Thus, in *Dunnet* v. *Forneri* in the context of a dispute in which the plaintiff sought to restrain the defendant Church of England minister from refraining to allow him to partake of the Lord's Supper, and in which the court declined jurisdiction because a civil right had not been involved, Proudfoot V.-C. reviewed Upper Canada legislation about the clergy reserves and held:

> The effect of these enactments is to place all religious bodies upon a footing of equality before the law - that no one denomination shall have any preference over another - that no test shall be required to qualify for any office or trust; and thus renders impossible any such close relation between civil government and Church polity and discipline as exists in England - and greatly restricts if it does not forbid interference by the law, not merely with individual faith, but with the external and internal affairs of Church organization, including Christian discipline.
>
> All religious bodies are here considered as voluntary associations; the law recognizes their existence, and protects them in their enjoyment of property, but unless civil rights are in question it does not interfere with their organization or with questions of religious faith. When these rights come into question, however, it may often be necessary to investigate what tenets are held, and whether fundamental rules of the Church have been involved. Numerous cases have arisen in our Courts from disputes as to the rights of property caused by the division in the Presbyterian Church in 1844, and more recently from the union of the different Presbyterian bodies in 1875. But the inquiry has been confined to the matter of fact, not as to whether one body is more truly the Church than another.[17]

Thus, all churches are on an equal footing and all are regarded as voluntary associations of individuals. Indeed, even in *St. George's Church* and *Bliss* the courts stated that while the Church of England might be the church established by law in New Brunswick, in matters of freedom of doctrine, worship, and discipline all other churches are on an equal footing with it.[18] This equality

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[17] (1877), 25 Gr. 199 at 205-06 (Ch.). See also, *Lyster* v. *Kirkpatrick et al.* (1866), 26 U.C.Q.B. 217 at 225 (C.A.), Draper C.J.; and *Johnson* v. *Glen* (1879), 26 Gr. 162 at 181 (Ch.), Proudfoot V.-C.: "The Church of England in this country has no connection with the state." See also the *Freedom of Worship Act (U.K.) 1850-51*, 14 & 15 Vict., c. 175, s. 1:

> 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.

[18] See *St. George's Church*, *supra*, note 15 at 116-17, Ritchie C.J.; and *Bliss*, *supra*, note 16 at 317-20, Palmer J.

had been frequently asserted both by Canadian courts[19] and by the Privy Council in appeals from other colonies in which the same issue arose.[20] Thus, in *Long* v. *The Bishop of Capetown*, Lord Kingsdown stated:

> The Church of England, in places where there is no Church established by law, is in the same situation with any other religious body - in no better, but in no worse position; and the members may adopt, as members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them.[21]

Finally, the nature and legal significance of churches as voluntary, self-supporting associations of individuals organized on the basis of commonly accepted religious beliefs has been asserted frequently, perhaps best by Proudfoot V.-C. in *Johnson* v. *Glen:*

> To a great extent ... the church depends for the maintenance of its clergy and the ordinances of religion upon the voluntary obligations of the people. The lay element is recognized as a constituent in its Supreme Church Courts. And the rules adopted for its appointment of ministers and other purposes, derive their force only from the voluntary assent of the members of the church. They are matters of mutual contract, entered into by, and for the benefit of, those who choose to become members. They have not the force of laws imposed by the power of the State, and binding all who come within their influence, whether they assent to them or not. The rules for their interpretation are to be found in the law of contracts, not in that of statutes. The parties affected by them are contracting parties, and can only be held to have surrendered their freedom of action as far as their mutual agreement binds them.[22]

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[19] See *Dickout, supra*, note 8 at 254, Armour C.J.; *Dunnet, supra*, note 17 at 209, Proudfoot V.-C.; and *Pringle, supra*, note 8 at 304, Harrison C.J.

[20] *Long* v. *The Bishop of Capetown* (1863), 1 Moo. P.C.C.N.S. 411; 15 E.R. 756; *In re Bishop of Natal* (1864), 3 Moo. P.C.C.N.S. 115; 15 E.R. 43; *Murray* v. *Burgeis* (1866), 4 Moo. P.C.C.N.S. 250; 16 E.R. 311; *Bishop of Natal* v. *Gladstone* (1867), L.R. 3 Eq. 1 (P.C.); *The Bishop of Capetown* v. *Natal* (1869), 6 Moo. P.C.C.N.S. 203; 16 E.R. 702.

[21] *Ibid.* at 461 [cited to Moo. P.C.C.N.S.]

[22] *Supra*, note 17 at 181. See also *Dunnet, supra*, note 17; *Itter* v. *Howe* (1896), 23 O.A.R. 256. The most important decision on the nature of churches as voluntary associations is undoubtedly *General Assembly of Free Church of Scotland* v. *Lord Overtoun* (1904), [1904] A.C. 515 (H.L.Sc.), [also known as and hereinafter cited as *Wee Frees*]. See also, T. Bennet, "Free Churches and the State" (1918) 34 L.Q. Rev. 35 and 174; Holdsworth, *supra*, note 10; and, St. J.A. Robilliard, *Religion and the Law. Religious Liberty in Modern English Law* (Manchester: Manchester University Press, 1984) at 111-12.

There is, therefore, clear evidence that but for the protections afforded certain religious groups in the *Constitution Act, 1867* and the *Constitution Act, 1982*, no religious group has been favoured by the courts, rather all are voluntary associations which stand on an equal footing at common law.

III. CONSTITUTIONAL PROVISION FOR THE PROTECTION OF FREEDOM OF RELIGION

Until the enactment of the *Charter*, the written part of the Canadian constitution contained only one express provision pertaining to religion. In the education provisions of section 93 of the *Constitution Act, 1867* the provincial legislatures were given power to make laws in respect of education subject to certain limitations designed to protect and sustain the denominational school system in place in 1867. Section 93 provides:

> (1) Nothing in any such law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union;
>
> (2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec....

The section further provides that the Governor General in Council protect the rights of the Protestant and Roman Catholic minorities *only* in relation to education and that Parliament have power to enact remedial legislation to sustain the earlier provisions in section 93:

> (3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education;
>
> (4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper

Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this section.

While many observers have characterized these denominational rights as "strange,"[23] they are expressly protected by section 29 of the *Charter*:

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.

In general contrast, the *Charter of Rights and Freedoms* has substantially changed the nature of the protection of religious freedom and equality in Canada by virtue of its entrenchment of such protection. Section 15 expressly prohibits discrimination based on religion, and section 2(a) expressly protects freedom of conscience and religion. In addition, the protection of freedom of thought, belief, opinion, and expression in section 2(b), of peaceful assembly in section 2(c), and of association in section 2(d) are also clearly relevant, as is section 1. Finally, the interdependence of religion and culture make the section 27 protections relevant, as the section calls for the preservation and enhancement of Canada's multi-cultural heritage.

How these sections will be interpreted, individually or collectively, remains to be seen. Although, in the *Education Act Reference* the Supreme Court of Canada opined that the *Charter* and section 93 should be interpreted disjunctively so that any inherent religious inequalities contained in section 93 are to be regarded as fundamental principles of the written constitution.[24] The presence of section 29 in the *Charter* and the virtual impossibility of constitutional amendment given the amending formulae in the 1982 *Constitution Act* may for the forseeable future guarantee the continuance of a favoured status for Roman Catholic

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[23] See, for example, A.B. Keith, *Responsible Government in the Dominions*, vol. 1, 2d ed. (Oxford: Clarendon Press, 1928) at 540. E.R. Norman's account of the schools issue in nineteenth century Canada assumes the oddness of the solution of the dual system of state and church schools in Canada, see *The Conscience of the State in North America* (London: Cambridge University Press, 1968).

[24] *Supra*, note 4 at 1196-99, Wilson J., and at 1205-09, Estey J.

schools in Ontario. There is nothing in the copious pre-*Charter* litigation on section 93 that is especially relevant to the analysis of the protection of freedom of religion in post-*Charter* Canada.[25] The question is most significant now since the religious minority of 1867 is the religious majority of 1987.

The courts have yet to appreciate that the endowment of certain denominational schools to the exclusion of all other denominational schools may amount to a favoured or established status for certain religious groups. The only two academic commentators on the matter to date have suggested tentatively that section 93 *may* constitute an establishment of religion. Thus, Professor Irwin Cotler has argued that section 93 may amount to an "establishment clause"[26] affording protection to certain religious groups in preference to others. He further suggests that section 29 is an "entrenched ... limited 'establishment' provision,"[27] and that there is now an inherent tension within the *Charter* between section 29 and section 2 which must be confronted and reconciled by the courts.[28]

Professor William W. Black agrees.[29] He further argues that a law extending special benefits or privileges to particular religious

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[25] See G. Bale, "Law, Politics and the Manitoba School Question: Supreme Court and Privy Council" (1985) 63 Can. Bar Rev. 461; G.-A. Beaudoin, "Considerations sur l'influence de la religion en droit public au Canada" (1984) 15 Revue generale 589; A.S. Brent, "The Right to Religious Education and the Constitutional Status of Denominational Schools" (1976) 40 Sask. L. Rev. 239; P. Carignan, "L'etablissement du systeme confessionel d'enseignement sous le regime de l'Union" (1964) 14 Themis 266; P. Carignan, "La place faite a la religion dans les ecoles publiques par la loi scolaire de 1841" (1983) 17 Themis 9; P. Garant, "La deconfessionalisation des structures scolaires au regard de l'article 93 de la constitution et de la charte quebecoise des droits et libertes" (1984-85) Can. Hum. Rts Y.B. 169; D. Schmeiser, *Civil Liberties in Canada* (London: Oxford University Press, 1974) c. 3-4; and C.B. Sissons, *Church and State in Canadian Education: An Historical Study* (Toronto: Ryerson, 1959). In addition, there is an extensive literature produced by Canadian church historians since the early nineteenth century which sheds considerable historical light on the legal issues.

[26] "Freedom of Conscience and Religion in Canadian Law," in W.S. Tarnopolsky & G.-A. Beaudoin eds, *Canadian Charter of Rights and Freedoms: Commentary* (Toronto: Carswell, 1982) at 186, 190, and 210-11.

[27] *Ibid.* at 210.

[28] *Ibid.* at 210-11.

[29] "Religion and the Right of Equality" in A. Bayefsky & M. Eberts eds, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) at 169-70.

groups might also violate section 15.[30] However, he accepts that section 29 reflects a preference by the legislators to favour or "establish" certain religions rather than to ensure the equal benefit of the law for all Canadians in religious matters.[31]

The legal content of the words "establishment" or "established" when applied by these two scholars to section 93 and section 29 denominational rights is unclear. Nevertheless, when two leading scholarly commentators see fit to apply such emotive terms to express provisions of our written Constitution, an inquiry might validly be made into the legal content of "establishment" in Canada today. This is especially so in the light of the accumulating statistical and sociological evidence showing how different the religious complexion of contemporary Canada is from that of the mid-nineteenth century – whose sectarian struggles are codified in section 93.

IV. THE SIGNIFICANCE OF THIS INQUIRY

In the *Education Act Reference* both the Ontario Court of Appeal[32] and the Supreme Court of Canada[33] perceived the legal issue to be the protection of a religious minority which had been deliberately built into the Confederation "compact" and which was equally deserving of protection in post-*Charter* Canada. But might state-financed protection of an alleged religious minority not also amount to implicit state preference for and aid to a particular religious group? Such protection might in turn promote the future growth and resulting influence of that group to the exclusion of other religious groups in Canadian society. Neither court considered this issue, although it had already been raised tangentially, in two

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[30] *Ibid.* at 170.

[31] *Ibid.* at 171.

[32] *Supra*, note 4 at 57 and 64, Zuber, Cory, and Tarnopolsky JJ.A.

[33] *Supra*, note 4, Wilson J. refers frequently throughout her judgment to the question as one of the protection of religious minority rights.

articles discussing the protection of religious freedom in post-*Charter* Canada.[34]

Whether or not state support of denominational education is tantamount to state promotion of particular denominations or religions is significant in the light of social and historical factors never considered in legal discussions which suggest that state support might easily slip into state preference if not legal establishment of a supported religious group.

The protection of genuine religious minorities is above question in Canada today. To determine whether the Roman Catholic Church is such a group in either Ontario or Canada, it is instructive to examine the available statistical evidence relating to religious expression, in particular, the decennial censuses from 1851 to 1981; actual church membership statistics as kept by a selection of the largest religious groups in Canada; and actual weekly participation rates as compiled in several social science surveys.

The collection and interpretation of statistics in relation to religion is an imprecise and relatively youthful discipline in Canada. None of these three types of statistics currently available gives a perfectly accurate profile of religious preference and support in Canada. However, all reveal definite general trends among religious groups over a one hundred and thirty year period. Census statistics are based on declarations of religious preference on census forms. However, these statistics do not even remotely tally with individual churches' own membership statistics which in all instances reveal much smaller actual memberships than the decennial censuses would suggest. Moreover, in compiling membership lists individual churches use different criteria. These range from the Roman Catholic Church's criteria of baptism in a Roman Catholic Church to actual participation in Communion at least once every two or three years in the United Church or Presbyterian Church. Finally, the few surveys and estimates of weekly participation rates can by their very nature only be approximate. However, in the final analysis, statistics cannot accurately reflect actual belief, or its existence and intensity in individuals surveyed.

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[34] Schmeiser, *supra*, note 25, c. 3; Cotler, *supra*, note 26 at 185-90; and Black, *supra*, note 29 at 169-72.

Nevertheless, all the statistical evidence indisputably shows that for Canada and for Ontario, the Roman Catholic Church is not a religious minority – rather, it is by far the largest religious group in the country. Moreover, since 1851 Roman Catholicism has steadily grown as a percentage of the total Ontario population. Thus, from a *Charter* perspective, it becomes necessary to examine not just the past and present statistics, but also to attempt to anticipate the future by examining the reason why religious groups grow and shrink. In this regard the first major sociological study of religion in Canada, *Fragmented Gods: The Poverty and Potential of Religion in Canada*,[35] published in 1987 by Professor Reginald Bibby, is particularly helpful.

The following conclusions are relevant to the present discussion and may be drawn from an examination of the decennial census statistics.[36] First, in 1861 on the eve of Confederation, Roman Catholicism was the largest single religious denomination in Canada and the fourth largest in Ontario. Secondly, nationally it has retained its position as the largest single religious denomination to the present day. The 1981 Census found that 11,210,290 Canadians were declared Roman Catholics, in comparison to the second largest religious group, the United Church, which had 3,758,015 census members. Thirdly, in Ontario, the Roman Catholic Church became the third largest religious group in the 1901 census; the second largest in the 1941 census – exceeded in 1941 only by the United Church, a product of the union of three other Reformed churches in 1925; and the largest religious group in the 1951 census. Thus, for some 36 years before the *Education Act Reference* Roman Catholicism has been the largest religious group in Ontario. Fourthly, while in 1861 the Roman Catholic Church comprised approximately 42.5 percent of the population of Canada (Canada East, Canada West and Nova Scotia) and approximately 18.5 percent of Canada West, in 1981 the percentages were approximately 50

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[35] (Toronto: Irwin Publishers, 1987).

[36] These findings are drawn from statistical tables made by the author and abstracted from the following sources: *Censuses of Canada 1608 to 1876* (Ottawa: Government of Canada, 1878); *Census of Canada: Religious Denominations in Canada, 1871-1941* (Ottawa: Government of Canada, 1941); *1951 Census of Canada*; *1961 Census of Canada*; *1971 Census of Canada*; *1981 Census of Canada*.

percent and 35 percent respectively. By contrast, in 1861 the then largest religious denomination in Ontario, Methodism, comprised 25.1 percent of the provincial population, while in 1981 the second largest denomination in Ontario, the United Church (which was largely Methodist in origin) comprised approximately 19.4 percent of the population. In 1981 in Ontario the next largest groups were the Anglicans with approximately 13.6 percent of the population, and the Presbyterians with 6.1 percent of the provincial population. The last three churches find most of their national membership in Ontario, while the Roman Catholic Church is by far the largest religious group in Quebec and Atlantic Canada as well.

The second set of statistics available is more difficult to compare profitably because religious groups use different criteria to determine who is listed on their membership or communion rolls. Nevertheless, the following table again clearly demonstrates that in terms of actual individual church membership, Roman Catholicism enjoys the largest active membership.

Table 1 - Church Membership

Denomination	1981 Census	1986 Membership[a]
Anglican	2,436,375	851,032[b]
Presbyterian	812,105	159,179[c]
Roman Catholic	11,210,290	11,210,290[d]
United Church	3,758,015	872,290[e]

[a] Only national statistics are available. No provincial statistics are kept, rather statistics are kept by diocese or synod and these church internal divisions cross provincial boundaries.
[b] Anglican Yearbook (1988) at 11.
[c] Acts and Proceedings (1987) at 772.
[d] The Roman Catholic Church regards the census numbers as its "membership" number.
[e] United Church of Canada Yearbook (1987) at 170.

Finally, further indication of the greater devotional strength of the Roman Catholic Church in comparison to other major religion groups in Canada may be found in the General Social Survey[37] of 1985. The survey showed that in 1985 the overall weekly attendance rate for Roman Catholics was 37 percent, while for the other major churches the rates were as follows: Lutherans 21 percent, Presbyterians 21 percent, Anglicans 17 percent, United Church 15 percent, Orthodox 12 percent, and Jews 11 percent. Only the Baptists with approximately 41 percent participation and a variety of fundamentalist groups – comprising only a tiny portion of Canadians – with a weekly participation rate of 46 percent, had higher rates. Of the largest churches, the Roman Catholics clearly boasted a substantially higher weekly participation rate than the others. These findings were virtually duplicated by Professor Bibby in a series of national surveys between 1975 and 1985.[38]

That the substantially greater statistical and devotional strength enjoyed by the Roman Catholic Church in relation to all other religious groups in Canada is likely to accelerate in the future is suggested by Professor Bibby's conclusions in *Fragmented Gods*. He found that whatever weekly participation rates might be, about 90 percent of Canadians continue throughout their adult lives to identify with the churches of their childhood or of their parents. In other words, religious affiliation does not change throughout life.[39] Thus, it becomes important to the future of each religious group that its children be indoctrinated successfully in the beliefs of that group if those beliefs and that group are to thrive in the future. Professor Bibby's findings provide strong statistical support for a common place among religious educators generally.

Moreover, of the major divisions of Christianity, Roman Catholicism in the modern era was the first to understand that fact. The drive for state support for Roman Catholic schools – which began in the early 1850s with the consecration of Armand Francois

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[37] F. Jones, "Age, Sex and Weekly Attendance in Canadian Religions" *The Presbyterian Record* (January 1988) 28-29.

[38] *Supra*, note 35 at 11-23.

[39] *Ibid.* at 47-51.

Marie de Charbonnel as the Roman Catholic Bishop of Toronto[40] in 1850 – was paralleled at the same time by identical drives by the Roman Catholic hierarchies in England,[41] Scotland,[42] Ireland,[43] and the United States.[44] Undoubtedly, the reason for this was the worldwide reorganization under the universal direction of the Vatican and the resulting resurgence of Roman Catholicism. Thus, the Syllabus of Errors, pronounced *ex cathedra* by Pope Pius IX in 1864, expressly condemned the separation of church and state and the division of education into secular and religious, the former taught in state schools and the latter by the church. Instead the Roman Catholic Church was enjoined deliberately to seek public funding for its own schools and ultimately to recapture the state.[45]

Ironically, this ultramontanist reinvigoration of Roman Catholicism which marked the pontificate of Pio Nono came at a time when liberal Protestantism in these countries had come to distrust formal relationships between church and state, and the Protestant state churches, which had come into existence at the time of the Reformation or of the creation of overseas colonies, were being disestablished. Educational ideals of the day called for state-

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[40] Sissons, *supra*, note 25 at 27-29; J.S. Moir, *Church and State in Canada West. Three Studies in the Relation of Denominationalism and Nationalism, 1841-1867* (Toronto: University Press, 1959) c. 6-7 [hereinafter *Canada West*]; Norman, *supra*, note 23 at 161-65; J.S. Moir, *The Church in the British Era, From the British Conquest to Confederation* (Toronto: McGraw-Hill Ryerson, 1972) at 170-73; M.R. Lupul, *The Roman Catholic Church and the North-West School Question: A Study in Church-State Relations in Western Canada, 1875-1905* (Toronto: University of Toronto Press, 1974) at 144-48. Compare F.A. Walker, *Catholic Education and Politics in Upper Canada* (Toronto: Dent, 1955) which argues that no change in Roman Catholic Church policy occurred in the 1850s. This book was authorized and financed by the Roman Catholic Bishop of Ontario and is highly sectarian in content. See the preface.

[41] See generally, Norman, *supra*, note 40.

[42] F. Lyall, *Of Presbyters and Kings: Church and State in the Law of Scotland* (Aberdeen: Aberdeen University Press, 1980) at 115-23; K.D. Ewing & W. Finnie, *Civil Liberties in Scotland: Cases and Materials* (Edinburgh: W. Green, 1982) at 213-16; A.M. Douglas, *Church and School in Scotland* (Edinburgh: Saint Andrew Press, 1985).

[43] See generally Norman, *supra*, note 40; and E. Graham, "Religion and Education - The Constitutional Problem" (1982) 33 N.I.L.Q. 20.

[44] Norman, *ibid.*

[45] E. Helmreich, *A Free Church in a Free State? The Catholic Church, Italy, Germany, France, 1864-1914* (Boston: Heath, 1964); see *Syllabus*, 39-55 at 3-4.

supported universal secular education with some minimal "non-denominational" religious exercises as the last vestige of Christianity in the classroom.[46]

The statistical and sociological evidence shows not only that the Roman Catholic Church is not a religious minority requiring state protection to ensure its survival on an equal footing with other religious groups in Canada and Ontario, but rather that it is more strongly placed than all other religious groups to enjoy future stability and growth. The decisions of the majority in the Ontario Court of Appeal and of the Supreme Court of Canada in the *Education Act Reference* are founded on a false premise. More significantly, however, this evidence suggests that the important legal question is not how to protect a religious minority but rather whether or not state endowment of religious education limited to one religious group which is already the strongest amounts to a favoured or established status in law for that group.

V. "ESTABLISHMENT" AND THE CHURCH OF ENGLAND[47]

"Establishment" is not and never has been a legal term of art. There is no comprehensive body of case law purporting to define it, nor have many legal writers attempted to do so, although the theological and historical literature on the general question of church-state relations is vast and includes a considerable volume of highly repetitive analysis of the meaning of "establishment." The word is first and foremost a political word, that is a word used in public life, most frequently by church leaders in dealing with state authorities. Moreover, however defined, its substantive content has changed since the sixteenth century when the Reformation first presented rulers with the novel dilemma of religious plurality.

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[46] A. Vidler, "The Relations of Church and State with Special Reference to England" in *Quis Custodiet* (1971) at 6-17; M.E. Marty, "Living with Establishment and Disestablishment in Nineteenth-Century Anglo-America" (1976) 18 Journal of Church and State 61; A.R. Vogeler, "Disestablishmentarianism at Flood Tide, 1877" (1980) 22 Journal of Church and State 295.

[47] Much of this part is also relevant to Part 6: "Establishment " and the Church of Scotland.

Further, it reflects the usual sixteenth century solution of a single state-supported religion as necessary to ensure royal supremacy, national sovereignty, and national integrity: *cuius regio ejus religio.*

The concept, then, is vague, imprecise, and ever-changing. Thus, the editors of the second edition of *Moore's Introduction to English Canon Law,*[48] the only contemporary text on English canon law, do not offer a definition as such. Also, Professor Francis Lyall has succeeded in writing the first ever complete *legal* analysis of church-state relations in Scotland since the Scottish Reformation of 1560, with only a passing reference to the futility of definition in his concluding remarks.[49]

Nevertheless, it is important to determine the significant constituent elements of "establishment" because the word remains in current use as meaning something, and especially because it is used in a pejorative and emotive fashion in British and North American public life today.

Despite express disavowals of attempting precise definition, there is a remarkable similarity in offerings "by way of a working definition" from lawyers, historians, and theologians. Thus, in almost the only judicial pronouncement in *Marshall* v. *Graham Bell,* Phillimore J. stated:

> A church which is established is not thereby made a department of state. The process of establishment means that the state has accepted the Church as the religious body in its opinion truly teaching the Christian faith, and given to it a certain legal position, and to its decrees, if rendered under certain legal conditions, certain civil sanctions.[50]

Halsbury's Laws of England,[51] drawing on scattered remarks throughout the 250 page decision of the House of Lords in the *Wee Frees*[52] case, offers this definition:

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[48] See generally E.G. Moore & T. Briden eds, (London: Mowbray, 1985) c. 2 [hereinafter *Moore*].

[49] *Supra,* note 42 at 148-49.

[50] (1907), [1907] 2 K.B. 112 at 126.

[51] 14 Hals. (4th), para. 334 at 158-59.

[52] *Supra,* note 22.

The word "established" in relation to a church is used in various senses. In one sense every religious body recognised by the law, and protected in the ownership of its property and other rights may be said to be by law established. In another sense the words "established church" are used to mean the church as by law established in any country as the public or state-recognized form of religion. The process of establishment means that the state has accepted the church as the religious body which in its opinion truly teaches the Christian faith, and has given it a certain legal position and to its decrees, if given under certain legal conditions, certain legal sanctions. What is called the "establishment" principle in relation to the church is the principle that there is a duty on the civil power to give support and assistance to the church, though not necessarily by way of endowment, and where this principle prevails a church is said to be established when it receives such support and assistance. In the fullest sense a church is said to be established when all the provisions constituting the church's system or organisation receive the sanction of a law which establishes that system throughout the state and excludes any other system.

In *Moore* the assertion closest to a definition is this:[53]

[I]t is only with the Established Church that the officials of the Church are officials of the State; that the governmental organs of the Church are the governmental organs of the State; and that the Church's judges are as much the Queen's judges as are the secular judges, with their decrees enforced by the machinery of the State.

The situation is reciprocal. It is only the Established Church which has to recognize the organs of the State as organs of the Church; which finds a good deal of its law in the decisions of secular courts; and which must look to the Queen in Parliament as the effective supreme authority in the ordering of its affairs.

Mr. Richard Davies offers the following definition:[54]

The establishment is the relationship between the Church of England and the state by which the former takes on the character of a national Church and the latter the role of its supreme governor. The legal incidents consist broadly of control exercised by the state by virtue of its integral place in the Church's constitution, and rights and privileges received by the Church.

In *The Conscience of the State in North America*, Dean Edward Norman uses the following working definition:[55]

The establishment principle can be said to operate where there is a connexion between the law and religious belief. The state 'confesses' religious belief and provides for its propagation. Where this connexion is sufficiently articulated, the

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[53] *Supra*, note 48 at 15-16.

[54] "Church and State" (1976) 7 The Cambrian Law Review 10 at 10-11.

[55] *Supra*, note 23 at 20.

religious beliefs of an entire church may become incorporated and protected at law: then it is possible to speak of a church establishment. Such an intimacy of relationship has generally been sealed by the state endowment of the church concerned, and in a fully confessional state this is done to the complete exclusion of all other churches, though it has been customary in civilized modern countries to extend full toleration to those left outside.

Britain's established churches have themselves offered definitions. Thus, the 1970 Report of the Archbishops' Commission on Church and State suggests:[56]

> The words "by law established" were originally used to denote the statutory process by which the allegiance of the Church of England to the Sovereign (and not the Pope) and the forms of worship and doctrines of that Church were imposed by law. The phrase distinguished the legality of the national Church from other Churches which were then unlawful and whose worship and doctrines were then proscribed.... For us 'establishment' means the laws which apply to the Church of England and not to other Churches.

Finally, the 1966 Report on Anglican-Presbyterian Conversations provides this definition:[57]

> The fundamental essence of "establishment" consists simply in the recognition by the State of some particular religious body as the "State Church," that is, as the body to which the State looks to act for it in matters of religion, and which it expects to consecrate great moments of national life by liturgical or official ministrations.

It is submitted that there are two correlative propositions concerning the essential nature of "establishment" in England which emerge from this sample of definitions. First, an established church is that single church within a country accepted and recognized by the state as the truest expression of the Christian faith. Secondly, the state's recognition of its established church places upon that state a legal duty to protect, preserve and defend that church, if necessary to the exclusion of all others.

These propositions capture the fundamental constitutional nexus between a state and an established church: the complete identification of one church and one state. The established church is an organ of the state with the rights and benefits appropriate to that status, and as well, an instrument of the state subject to the

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[56] (London: Church of England, 1970) at 1-2 [hereinafter *Commission Report*].

[57] Appendix One, Report of the Group on Church, *Community and State* (Edinburgh: Saint Andrew Press, 1966) at 42.

restraints and duties implicit in that status because they are imposed by the state.

The identification, in its modern form, of a national established church with the English state was achieved at the time of the English Reformation. The reasons for this resolution to the unique problem of religious pluralism within one state, first encountered in Western Christendom in the early sixteenth century, explain the essential constitutional nature of the identification, as well as the particular incidents of that relationship as expressed to this day. Thus, a brief examination of the historical context in which the identification of church and state arose and the incidents by which it is marked should elucidate the substantive legal content of "establishment."

English Reformation scholarship is currently in a state of considerable ferment as to the correct understanding of the Protestantization of England in the sixteenth century.[58] Scholars are divided into a number of discernible schools of which the two leading schools are the "Reformation from above" group led by Professor G.R. Elton[59] and the "Reformation from below" group led by Professor A.G. Dickens.[60] Whether the Reformation was imposed on the English people by the Crown or arose from a

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[58] C. Haigh, "The Recent Historiography of the English Reformation" in C. Haigh, ed., *The English Reformation Revised* (Cambridge: Cambridge University Press, 1987) at 19-33.

[59] *The Tudor Revolution in Government: Administrative Changes in the Reign of Henry VIII* (Cambridge: University Press, 1959); *Policy and Police: The Enforcement of the Reformation in the Age of Thomas Cromwell* (Cambridge: University Press, 1972); *Reform and Renewal: Thomas Cromwell and the Common Weal* (Cambridge: Cambridge University Press, 1973); *England Under the Tudors*, 2d ed. (London: Methuen, 1974); *Reform and Reformation: England, 1509-1588* (London: Arnold, 1977); *The Tudor Constitution: Documents and Commentary*, 2d ed. (Cambridge: Cambridge University Press, 1982) [hereinafter *Tudor Constitution*]. See also P. Clark, *English Provincial Society From the Reformation to the Revolution: Religion, Politics and Society in Kent, 1500-1640* (Hassocks: Sussex, 1977); C. Haigh, *Reformation and Resistance in Tudor Lancashire* (London: Cambridge University Press, 1975).

[60] *Lollards and Protestants in the Diocese of York, 1509-1558* (London: Oxford University Press, 1959); *The English Reformation* (London: Batsford, 1964). See also C. Cross, *Church and People, 1450-1660: The Triumph of the Laity in the English Church* (London:Fontana, 1976); P. Collinson, *The Elizabethan Puritan Movement* (London: Cape, 1967); and *The Religion of Protestants: The Church in English Society, 1559-1625* (Oxford: Clarendon Press, 1982). Also, compare J.J. Scarisbrick, *The Reformation and the English People* (Oxford: Blackwell, 1984) who questions how sympathetic the English people were to the Reformation.

widespread popular conversion to the new faith which enveloped the state need not detain us. Rather, for our present purpose it is sufficient to examine the statutory framework which ousted the jurisdiction of the Papacy from England and placed the English church under the protection of the monarch.[61] This change did not mean that there was no national church in England prior to the early sixteenth century, rather in England, as in all other nation-states at the time, there was a national branch of the one indivisible church whose earthly supreme head was the Pope. A single national church existed in England before the Reformation and the same single national church existed after the Reformation, or at least by the end of the Reformation century.[62] The Church *in* England became the Church *of* England. Before and after the Reformation it was the sole, recognized expression of Christianity. Before the Reformation, it was under papal jurisdiction, whereas after the Reformation it was placed by Parliament under royal jurisdiction.

The identification of nation-state and national-church, which is of the essence of "establishment" as a legal concept, was, in fact, an unconscious and unintended by-product of the Reformation in England. While the Church of England was also a spiritual body characterized by certain theological principles, forms of church government, and liturgical and devotional practices, it was, from a constitutional perspective, simply a part of the national constitution, an institution of government. From a constitutional perspective, the effect of the Reformation was simple: the church was removed from the spiritual and jurisdictional supremacy of the Pope to an almost identical dominion exercised by the Crown.[63]

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[61] The relevant statutory material is most readily accessible in *Tudor Constitution, supra*, note 59.

[62] 14 Hals. (4th) para. 311 at 145 and para. 345 at 163-64.

[63] *Tudor Constitution, supra*, note 59 at 327.

According to Professor Elton[64] the establishment of royal supremacy over the church in England required of Henry VIII two separate tasks: first, the subjugation of the clergy to the royal will; and secondly, severance of the ties with Rome. In 1529 Henry began to manipulate Parliament to enact a series of statutes attacking clerical abuses, and followed this in 1530 by indicting the prelates and clergy for praemunire, that is, for engaging in any one or more of a number of offences breaching royal jurisdiction by virtue of directing appeals to Cardinal Wolsey, the papal legate in England, who had already been removed from his positions as Lord Chancellor and Archbishop of York. Convocation capitulated to the extent of buying a royal pardon and agreeing not to refer disputes to Rome, but refused to accept Henry's claim to be "sole protector and supreme Head of the English church and clergy."[65]

Apparently without a coherent plan or articulated goal, Henry then proceeded warily, perhaps because he did not wish to encourage what he regarded as the Lutheran heresy in England. If Henry had a clear goal it was to be earthly head of the Catholic Church in England, not of a Reformed church, or worse, ruler of a kingdom riven by religious factionalism.[66] For reasons which historians have yet to establish conclusively, and apparently on the advice of Thomas Cromwell, Henry reverted in 1532 to Parliamentary attacks on clerical abuses. By 1533 this resulted in total clerical surrender of the church's legislative independence to the Crown in the *Submission of the Clergy Act, 1533.*[67] This Act sustained only those canons of Roman canon law which were not "contrariant or repugnant to the king's prerogative royal, or the

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[64] *Ibid.* at 338-39. For a compact analysis of the Reformation Parliaments see, R. Lockyer, *Tudor and Stuart Britain, 1471-1714*, 2d ed. (Harlow, Essex: Longman Group, 1985) at 35-52; and M.H. Ogilvie, *Historical Introduction to Legal Studies* (Toronto: Carswell, 1982) c. 6. The most detailed reconstruction of these Parliaments is, of course, by S.E. Lehmberg, *The Reformation Parliament, 1529-36* (Cambridge: University Press, 1970), and *The Later Parliaments of Henry VIII, 1536-47* (Cambridge: Cambridge University Press, 1977).

[65] *An Act concerning the pardon granted to the King's spiritual subjects of the Province of Canterbury for the Praemunire* (Eng.), 1531, 22 Henry VIII, c. 15.

[66] Lockyer, *supra*, note 64 at 37-38.

[67] (Eng.), 1534, 25 Henry VIII, c. 19.

customs, laws or statutes of this realm."[68] Further, it also provided that future canons required royal assent.[69]

This *Act* was then followed by a series of acts which concurrently severed the remaining ties with Rome, established royal supremacy in the church, entrenched the Church of England in the constitution as the established church, and also provided the basis for seventeenth century Parliamentary claims to sovereignty over the Crown since it was Parliament which had created the royal supremacy in the first place. Thus, the *Act in Restraint of Annates*, 1532 and 1534[70] forbade payments to Rome, granted the crown power to appoint bishops and abbots, and declared papal sentences of excommunication and interdict of no effect in England. The *Act in Restraint of Appeals, 1533*[71] ended all judicial links between England and Rome, and declared in truly majestic language the authority of the Crown, as well as the confusion of secular and ecclesiastical authority, the unravelling of which determined much of English constitutional development until the early twentieth century:

> [T]his realm of England is an empire, and so hath been accepted in the world, governed by one supreme head and king having the dignity and royal estate of the imperial crown of the same, unto whom a body politic, compact of all sorts and degrees of people divided in terms and by names of spirituality and temporality, be bounden and owe to bear next to God a natural and humble obedience; he being also institute and furnished by the goodness and sufferance of Almighty God with plenary, whole and entire power, preeminence, authority, prerogative and jurisdiction to render and yield justice and final determination to all manner of folk resiants or subjects within this realm....

Initially intended to ensure that the king's "Great Matter" – the annullment of his marriage to Katherine of Aragon – be finally determined by Archbishop Cramner of Canterbury, this act established much more. A further series of acts completed the royal

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[68] *Ibid.*, s. 3.

[69] *Ibid.*, s. 1. The act also provided for the compilation of a comprehensive code of canons which was ultimately produced in 1603. These were subsequently amended annually, and remain subject to royal assent: 14 Hals. (4th), paras. 305-08 at 140-44 and Moore, *supra*, note 48 at 5-9.

[70] (Eng.), 1532, 23 Henry VIII, c. 20. Reconfirmed in (Eng.), 1534, 25 Henry VIII, c. 20.

[71] (Eng.), 1533, 24 Henry VIII, c. 12.

supremacy in the Church[72] and declared the crown to be "Supreme Head of the Church of England."[73]

The Henrician Reformation amounted to a revolution in political and ecclesiastical theory and practice.[74] Henry claimed to hold supreme headship of both church and state from God. In respect of the church, Henry claimed the powers previously exercised by the Pope, most especially, the power to determine her doctrine, discipline, and liturgy. He was a bishop, although not a priest: *rex et episcopus laicus sed non sacerdos.* In Henry's view since God alone had vested him, no earthly body shared his eminence, nor did Parliament actually bestow that supremacy by its Reformation enactments. Royal jurisdiction was entirely personal and Parliament's role was to provide sanctions and punish those who challenged royal jurisdiction. Royal supremacy was not regarded as shared with Parliament - the-King-in-Parliament. Yet, the fact that Parliamentary statutes could provide sanctions in relation to ecclesiastical matters was entirely novel.[75]

The significance of this novel role for Parliament was not lost on the ardent Protestant advisers to Henry's son, Edward VI, a head-strong boy, during whose reign (1547-1553) the personal character of the royal supremacy was undermined when Parliament under the guidance of Edward's advisers unilaterally enacted legislation defining the doctrinal content of the faith and the liturgical practices of the *Ecclesia Anglicana.* Thus, in 1549 the first *Act of Uniformity,*[76] required the clergy to use the first Book of Common Prayer on pain of punishment imposed by either a church

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[72] *An Act for the exoneration of exactions paid to the see of Rome* (Eng.) 1534, 25 Henry VIII, c. 21; *An Act whereby divers offences be made high treason* (Eng.), 1534, 26 Henry VIII, c. 13; *An Act extinguishing the authority of the bishop of Rome* (Eng.), 1536, 28 Henry VIII, c. 10.

[73] *An Act concerning the King's Highness to be Supreme Head of the Church of England and to have authority to reform and redress all errors, heresies and abuses in the same* (Eng.), 1534, 26 Henry VIII, c. 1.

[74] See generally, *supra,* note 59.

[75] *Tudor Constitution, supra,* note 59 at 342-44.

[76] (Eng.), 1549, 2 & 3 Edw. VI, c. 1.

or civil court. In 1552, the second *Act of Uniformity*[77] required the clergy to adopt a second Book of Common Prayer, revised to reflect the Zwinglian views of the Protestant leadership in England, particularly in respect of Communion. Appended to this second *Act of Uniformity* was a statement of faith, the Forty-Two Articles. England was now theoretically thoroughly reformed in doctrine and liturgy – by Parliament.

Parliament consolidated its Reformation during the reign of Elizabeth I (1558-1603). The *Act of Uniformity, 1559*[78] enacted to restore a moderate Protestantism after the reign of the Roman Catholic Mary I (1553-1558), provided for the lasting Book of Common Prayer "as authorized by Parliament." Also, the *Act of Supremacy*[79] provided for a modified restoration of royal control over the church. Elizabeth was described as "Supreme Governor of this realm ... as well in all spiritual or ecclesiastical things or causes as temporal," rather than as "Supreme Head" of the church as her father had been. The propriety of a woman as *caput ecclesiae* was doubted at the time. More significantly, whereas Henry VIII's headship of the church has only been "revealed" by Parliament, the *Act of Supremacy, 1559* restored royal control over the church "by the authority of Parliament."[80] In 1563 Convocation promulgated the Thirty-Nine Articles of the Reformed faith in England, and in 1571 they were approved by Parliament.[81]

The constitutional relationship of church and state had been settled by 1559 – and by Parliament. Parliament authorized the royal supremacy in the church. Parliament dictated the doctrinal content of the faith. Parliament determined the liturgical expression of that faith. Whereas Henry VIII enjoyed personal supremacy over the church, Elizabeth I had to settle for a parliamentary supremacy. It remained only for the Canons of 1603 to summarize succinctly in

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77 (Eng.), 1552, 5 & 6 Edw. VI, c. 1.

78 (Eng.), 1559, 1 Eliz. I, c. 2.

79 (U.K.), 1559, 1 Eliz. I, c. 1.

80 Lockyer, *supra*, note 64 at 149.

81 (U.K.), 1571, 13 Eliz. I, c. 12.

its opening sentences what had been achieved from an ecclesiastical perspective in the sixteenth century:[82]

> The Church of England, established according to the laws of this realm under the Queen's Majesty ... belongs to the true and apostolic Church of Christ.

Over the next three centuries, Parliament was obliged to acknowledge the evolution of religious pluralism in England. While one church alone was the church established by law, other Christian denominations, whether Dissenting or Roman Catholic, as well as Jews, Moslems, and others, were permitted freedom of belief, expression, and worship.[83] In contrast to these unestablished churches which as mere voluntary associations were free from state control as regards doctrine, government, and discipline, the Church of England remained subject to state control.[84]

It remains, then, to outline briefly[85] the incidents which characterize the formal constitutional establishment of the Church of England within the English constitution. This is a perilous task because the incidents are legal and non-legal, essential and peripheral, political and social. Nor is there an agreed list of incidents. Moreover, depending on one's perspective, the very same marks of establishment may be characterized, as they were by the 1952 Church and State Commission as either "rights and privileges" or "restrictions and limitations."[86]

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[82] Revised Canons Ecclesiastical, Canon A1.

[83] The development of religious freedom within the English constitution may be traced in the following collections of legal and constitutional documents: J.P. Kenyon, *The Stuart Constitution* (Cambridge: Cambridge University Press, 1966); E.N. Williams, *The Eighteenth-Century Constitution* (Cambridge: University Press, 1960); H.J. Hanham, *The Nineteenth-Century Constitution* (London: Cambridge University Press, 1969). For a succinct analysis, see Ogilvie, *supra*, note 64, c. 7-9. See also Moore, *supra*, note 48, c. 16; and 14 Hals (4th) paras. 338-44; 1386-1435.

[84] *Supra*, note 22 at 648, Lord Davey.

[85] What follows is simply an overview of the incidents. For specific statutory or canonical references and fuller discussions, see, generally, Moore, *supra*, note 48; *Commission Report*, *supra*, note 56, Appendix A; Davies, *supra*, note 54 at 15-23; Robilliard, *supra*, note 22, c. 5; and 14 Hals., (4th), "Ecclesiastical Law."

[86] (London: Church of England, 1952) at 7.

The principle mark and foundation of establishment is that the sovereign is the supreme governor of the Church of England as authorized by the Reformation statutes: church and state are ultimately united in the Crown. Thus, the sovereign must be in communion with the church by law established, publicly confess that faith at her coronation and swear to defend that faith in the coronation oath. Conversely, all clergy at ordination and preferment are obliged to swear an oath of allegiance to the supreme governor. As supreme governor, the sovereign, whose royal supremacy is now exercised through the Crown in parliament, has power over numerous ecclesiastical appointments, over nominations of archbishops and bishops, and over appointments to all deaneries and some canonries. As well, the Crown has patronage over about ten percent of all benefices, and unlike private patrons is immune from legal provisions designed to prevent unsuitable presentations.

In theory, Parliament retains sovereignty over all aspects of the established church in relation to doctrine, government, and discipline. Moreover, the archbishops and twenty-four bishops have seats in the House of Lords, as lords spiritual, for the duration of their tenure over an episcopal see. Thus, since the Reformation, Parliament has legislated for the Church, occasionally overriding the wishes of the Church as shown in 1927 and 1928 when the House of Commons, suspicious of Anglo-Catholic influences, rejected the Church's proposals for changes in the Prayer Book. To some extent this was alleviated by the *Church of England Assembly (Powers) Act, 1919*[87] which enabled a General Synod of the Church to devise desired reform Measures (not bills) which after a resolution of both houses are presented to the Crown for assent. Once royal assent is given, the Measure has the same force and effect as an act of Parliament. While the Church has been given a greater voice in determining her own doctrine, government, and discipline, nonetheless parliamentary sovereignty over the Church has been retained.

In addition to these restrictions on the established church in England, there are, of course, certain benefits and rights which that status confers. These are far fewer than has been the case in

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[87] (U.K.), 1919, 9 & 10 Geo. V, c. 76.

the past because they are now shared with other religious groups. Such rights included the once exclusive rights to conduct marriage services, hold certain offices in the state or certain university appointments, take university degrees, and to baptize all infants resident within the parish. Other privileges which are now shared are the provision of chaplaincy services in the armed forces, prisons, and hospitals, and the conducting of religious services on national occasions, although in the latter case, the clergy of the Church of England take precedence. The Archbishop of Canterbury has a special status within the establishment in that he crowns the sovereign at a coronation and takes precedence after certain members of the Royal Family and before the Lord Chancellor.

Finally, the established church is the only church with its own church courts which were adopted by the Crown as the King's courts at the time of the Reformation, so that today the ecclesiastical courts and ecclesiastical law are part of the law of the land. In contrast, other religious groups must enforce their doctrine, government, and discipline informally through internal committees or as a last resort in the civil courts in contract. The two main roles which such courts play today are first, the faculty jurisdiction over alterations to the fabric or contents of a church or to changes in churchyards, and secondly, the disciplining of clergy. Until the late nineteenth century these courts enjoyed greater control over the lives of the laity than they do today since they once had jurisdiction over matrimonial matters. The fact that the church courts are still part of the royal courts means that even today appeal is to the Privy Council.

The 1970 Archbishops' Commission on Church and State observed that historically there was no relationship between education and the establishment.[88] This observation can only be partially correct because until the advent of a nationally organized state school system in 1870 most schools were organized by the established church and financed from state support for the established church. Today, the established church does not receive special state funds, rather, together with the other religious groups it may receive minor grants from local authorities for such matters

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[88] *Supra*, note 56 at 3.

as upkeep of burial grounds or local charitable services, and from the central government for the preservation of churches of historic or architectural value.[89] So too, in England today, church schools of all religious denominations are on an equal footing, receive state grants and in exchange are subject to the state's general direction. In that regard, Church of England schools are not privileged in any way, despite the constitutional entrenchment of that Church as the church by law established in England.[90]

VI. "ESTABLISHMENT" AND THE CHURCH OF SCOTLAND

If the relationship of church and state in England has been essentially Erastian in nature, that in Scotland has been of co-operation. Whereas in England the established church has been assimilated with the state, as Richard Hooker would have it,[91] in Scotland the prevailing view has been the doctrine of the two powers, the temporal and the spiritual. Church and state are equally divine ordinances and each is supreme within its own proper sphere. Based on Romans 13 and propounded by the early Fathers of the church, especially St. Augustine,[92] the Gelasian[93] theory of the two powers was the dominant explanation of the relationship of church and state throughout the Middle Ages and was adopted by John Calvin to explain the division of authority between the civil magistrate and the church.[94] The reformers in sixteenth century Scotland accepted this view and it is expressed in *The Second Book*

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[89] Robilliard, *supra*, note 22 at 92.

[90] *Ibid.*, see generally, c. 10.

[91] *The Laws of Ecclesiastical Polity* (1593).

[92] *De civitate Dei* (413-426); Migne, *Patrologiae Latina* (Paris, 1844-1864) XLI.

[93] Letter to Emperor Anastasius (494) in E. Schwartz, ed., *Publizistische Sammlungen zum Acacianischen Schisma* ("Abhandlungen der Bayerischen Akademie der Wissenschaften, Philosophische-Historische Abteilung," Neue Folge X; Munich, 1934) at 20-21.

[94] *Institutes of the Christian Religion* (1559), J.T. McNeill, ed., in *The Library of Christian Classics*, vols 1-2 (Philadelphia: Westminster Press, 1967) IV. 20; vol. 2 at 1485-1521.

of Discipline[95] as well as the Westminster Confession of Faith.[96] Or, as Andrew Melville succinctly informed James VI and I:

> Sirrah, ye are God's silly vassal; there are two kings and two kingdoms in Scotland; there is King James the head of this commonwealth and there is Christ Jesus the king of the Church, whose subject James VI is and of whose kingdom he is not a king nor a lord nor a head but a member.[97]

If in England, political and constitutional considerations preceded chronologically and determined the course of the Reformation and the resulting relationship of nation-state and established church, in Scotland popular rebellion in favour of the Reformed faith and theological considerations preceded and determined the nature of the constitutional settlement and the legal nature of the establishment of the Church of Scotland.[98] Thus, while the establishment of the Church of Scotland satisfies the two fundamental criteria for legal establishment of state acceptance of its theology as the truest expression of Christianity and state protection for its polity, the nature of the relationship between church and state in Scotland differs in significant ways from that in England.

In 1560 the Scots Parliament finally addressed the popular demand for Reformation which had swelled over the preceding thirty year period, and in 1559 had erupted in a revolt against the crown led by the Lords of the Congregation. In Scotland the Reformation pitted crown and church against lairds and theologians. In contrast to England in the early 1530's where Parliament could still be manipulated by the Crown in opposition to the church, the Scottish nobility dominated the Scots Parliament. In Scotland the Crown had long since lost control of Parliament which represented the interests of the nobility in securing religious reform (as well as the lands owned by the church in Scotland.) Thus, in 1560 Parliament

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[95] (1578), J. Kirk, ed. (Edinburgh: Saint Andrew Press, 1972).

[96] (1647), c. XXIII.

[97] Cited in T.M. Taylor, "Church and State in Scotland" [1957] Juridical Review 121 at 122.

[98] G. Donaldson, *Scotland: James V-James VII, The Edinburgh History of Scotland*, vol. 3 (Edinburgh: Oliver and Boyd, 1965); J. Wormald, *Court, Kirk and Community. Scotland 1470-1625, The New History of Scotland*, vol. 4 (London: E. Arnold, 1981).

"*ratified* and *approved* as wholesome and solid doctrine" a Scots Confession;[99] abolished papal jurisdiction in Scotland;[100] abolished idolatry;[101] and proscribed the Mass.[102]

The precise constitutional significance of these steps is unclear. One writer regards the acts of 1560 as formally establishing the Church of Scotland in much the same way as Henry VIII's Reformation statutes of the 1530s established the Church of England.[103] However, it is not clear that the Scots Parliament did more than oust Roman Catholicism from its ascendant position in Scotland and express a preference for the Reformed faith as stated in the Scots Confession. To assert that the Church of Scotland was thereby legally established is to assert too much. Perhaps, it is preferable to say that Parliament simply "ratified and approved" the Reformed faith. It did not enact it or establish it, rather it recognized as true, a statement formulated outside of itself by a congregation of believers which amounted to the Church *in* Scotland rather than the Church *of* Scotland.[104]

Until 1567 the company of believers of the Reformed faith in Scotland had neither polity nor economic endowment, but rather co-existed with the Roman Catholics who continued to control ecclesiastical estates and revenues although they were forbidden to preach and celebrate the sacraments. A second set of statutes was enacted by Parliament in 1567 to rectify the situation, and in the process the Kirk was established as the only institution in the realm embodying the true faith. Thus, *The Church Act*[105] declared the Church of Scotland "to be the only true and holy kirk of Jesus

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[99] *Confession of Faith Ratification Act* (Scot.), 1560, c. 1. All references are to Scottish Acts before 1707 which are found in *The Acts of the Parliaments of Scotland, 1424-1707* (London: H.M.S.O., 1966).

[100] *The Papal Jurisdiction Act* (Scot.), 1560, c. 3.

[101] *Abolition of Idolatry Act* (Scot.), 1560, c. 4.

[102] *Abolition of Mass Act* (Scot.), 1560, c. 4.

[103] R.K. Murray, "The Constitutional Position of the Church of Scotland" [1958] Public Law 155 at 156-57.

[104] Lyall, *supra*, note 42 at 13-14.

[105] (Scot.), 1567, c. 6. Re-enacted (Scot.), 1579, c.6.

Christ within this realme," and also defined its doctrinal standards. The *Church Jurisdiction Act*[106] further declared:

> [T]hair is na uther face of kirk nor uther face of Religion than is presenthlie be the favour of God establisheit within this Realm And that thair be na uther jurisdictioun ecclesiasticall acknowlegeit within this Realme uther than quhilk is and sal be within the same kirk or that quhilk flowis therefra.[107]

Finally, *The Coronation Oath Act*[108] required all future monarchs to swear to protect the true church as established and to root'out all opposed to its teaching. Whether or not these statutes amounted to state creation of the church, or state acknowledgement of the existence of a church founded by divine ordinance, was unclear, and produced much of the future difficulty in Scottish constitutional and religious life.

While the acts of 1567 established the Reformed faith in Scotland, there had still been no provision made for its endowment or polity. Thus, over the next twenty years a series of enactments was still required, especially because the crown attempted repeatedly to impose an episcopal system of church government on the Kirk while Parliament and the leaders of the Kirk sought a presbyterian system of church government. Ultimately, in 1592 Parliament won and enacted *The General Assembly Act*,[109] which ratified the previous Reformation acts and "ratified and approved" the presbyterian form of church government. This "Great Charter of the Church" also vested all spiritual and ecclesiastical jurisdiction in Scotland solely in the established presbyterian Kirk.

Throughout the seventeenth century, the Stuarts persisted in their attempts to impose both an episcopal settlement and royal supremacy on the Kirk identical to the religious settlement in England. However, in 1689 when William and Mary accepted the Scottish as well as the English throne, the constitutional settlement establishing a presbyterian Kirk was once more affirmed by the Scots

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[106] (Scot.), 1567, c. 12. Re-enacted (Scot.), 1579, c. 7.

[107] Cited in Lyall, *supra*, note 42 at 15.

[108] (Scot.), 1567, c. 8.

[109] (Scot.), 1592, c. 8.

Parliament in a series of acts in 1689 and 1690.[110] Of these the *Confession of Faith Ratification Act*[111] remains the most significant since it not only ratified the religious settlement of the late sixteenth century but approved the Westminster Confession of Faith as the confession of the beliefs of the Church of Scotland.

With the union of Parliaments and of the separate Kingdoms of England and Scotland in 1707, both the Church of England and the Church of Scotland were re-established as the established churches in England and Scotland respectively. To ensure that the presbyterian polity and legal establishment of the Kirk in Scotland were preserved in the treaty negotiations leading up to the union and in the new union, the Scots Parliament enacted, first in 1705,[112] an act forbidding the negotiation commissioners from discussing the position of the Kirk and secondly, in 1706, the *Protestant Religion and Presbyterian Church Act*[113] (commonly called the *Act of Security*) which appointed the commissioners to ensure the insertion in any treaty of union with England a clause "confirming" the establishment of the presbyterian Kirk in Scotland in the new Kingdom of Great Britain. This clause was inserted in the Scottish act enacting the union, the *Union with England Act*[114] and the English Act enacting the union, the *Union with Scotland Act*.[115] The union became effective on 1 May 1707.[116]

From a constitutional perspective, the establishment of the Church of Scotland may be contrasted with that of the Church of England in 1707 since it differs in several fundamental respects.

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[110] *The Prelacy Act* (Scot.), 1689, c. 4; *Act of Supremacy (Repeal) Act* (Scot.), 1690, c. 1; *Presbyterian Ministers Act* (Scot.), 1690, c. 2; *Oath of Allegiance Act* (Scot.), 1690, c. 9; *Abolition of Patronages* (Scot.), 1690, c. 53.

[111] (Scot.), 1690, c. 7.

[112] *Treaty with England (Commissioners) Act* (Scot.), 1705, c. 50.

[113] (Scot.), 1706, c. 6.

[114] (Scot.), 1706, c. 7.

[115] (Eng.), 1706, 6 Anne I, c. 11.

[116] The Church of England was re-established by *The Maintenance of the Church of England Act* (Scot.), 1706, 6 Anne I, c. 8. See T.B. Smith, "The Union of 1707 as Fundamental Law" [1957] Public Law 99.

First, in constitutional theory the various acts of the Scots Parliament "establishing" the Kirk with its presbyterian polity by their own words merely recognized, approved or ratified an already existing and self-regulating entity which claimed divine institution. The Kirk was not the creation of a sovereign monarch, nor of a sovereign parliament. Rather, it was self-governing within its own consistorial system, whose final decision-making authority resided in the General Assembly. Secondly, the Kirk's consistent claim to have no earthly head was acknowledged by Parliament, occasionally in the teeth of Stuart claims to a royal supremacy over the Kirk, identical to their supremacy over the Church of England. This contrasts with the English constitutional settlement whereby church and state were ultimately united and unified in the sovereign, who was supreme governor of the earthly church. The Kirk consistently proclaimed Jesus Christ to be its only Head. Thirdly, whereas in England at the beginning of the eighteenth century legal theory still could not contemplate the extension of religious toleration and civil rights to subjects who did not support the established church, in Scotland, Episcopalians were offered complete toleration and civil rights,[117] despite the protests of the Kirk.

Moreover, the insensitivity of a predominantly "English" Parliament to the distinctive nature of Scottish constitutional theory expressed in the precarious division of temporal and spiritual authority within Scotland, as acknowledged in the Reformation statutes of the Scots Parliament before the union, led in 1711 to the enactment of the *Church Patronage (Scotland) Act*[118] which re-established patronage in the Church of Scotland. In contrast to the practice of the Scots Parliament which had never legislated for the Kirk, the British Parliament assumed that it could and did. English constitutional theory assumed a unified state emanating from the Crown; Scottish constitutional theory accepted the co-existence of temporal and spiritual kingdoms within one country, each supreme within its own sphere.[119]

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[117] *Scottish Episcopalians Act* (U.K.), 1711, 10 Anne I, c. 10.

[118] (U.K.), 1711, 10 Anne I, c. 21.

[119] Lyall, *supra*, note 42 at 22.

The grant of patronage to the landowners was offensive not only because it constituted actual state interference in church affairs but also because it constituted an abrogation of an individual congregation's right within the system of Presbyterian church government to "call" its own minister.[120] Over the successive two centuries the patronage issue would splinter the Kirk into numerous divisions. This left the established Church of Scotland as one of many divisions of presbyterianism in Scotland, until 1929 when, after a re-union process of about fifty years, all of the divisions had re-united with the exception to this day of the continuing Free Church of Scotland - the "Wee Frees"[121] - and the Free Presbyterian Church of Scotland - the "Wu, Wu Frees."

The unsatisfactory nature of the constitutional settlement was finally resolved in 1921 when *The Church of Scotland Act*[122] re-stated the legal nature of the establishment in Scotland by enacting the *Articles Declaratory of the Constitution of the Church of Scotland in Matters Spiritual.* The Act was passed to facilitate the union of the Church of Scotland and the United Free Church, and essentially enacted a set of principles stating the independence of the church from state control while retaining the legal status of establishment, and the internal freedom of the church's constitution in relation to doctrine, worship, government, and discipline.

The Church of Scotland Act, 1921 is a remarkable and puzzling document to have been enacted by a sovereign Parliament because it provides expressly for the total independence of the Kirk from state control by statutory adoption of the Reformers' teaching on the two powers, temporal and spiritual. Parliament has expressly relinquished all legislative authority over ecclesiastical matters to the

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120 J.T. Cox, *Practice and Procedure in the Church of Scotland*, 6th ed. by D.F.M. MacDonald (Edinburgh: Church of Scotland, 1976) at 242-61.

121 See A.L. Drummond & J. Bulloch, *The Scottish Church, 1688-1843* (Edinburgh: Saint Andrew Press, 1973); *The Church in Victorian Scotland, 1843-1874* (Edinburgh: Saint Andrew Press, 1975); and *The Church in Late Victorian Scotland, 1874-1900* (Edinburgh: St. Andrew Press, 1978). Also, see A.C. Cheyne, *The Transforming of the Kirk: Victorian Scotland's Religious Revolution* (Edinburgh: Saint Andrew Press, 1983); and *The Practical and The Pious. Essays on Thomas Chalmers (1780-1847)* (Edinburgh: Saint Andrew Press, 1985); and S.J. Brown, *Thomas Chalmers and the Godly Commonwealth* (Oxford: Oxford University Press, 1982).

122 (U.K.), 1921, 11 & 12, Geo. V, c. 29.

Church of Scotland and declared the General Assembly to be sovereign in such matters. This may constitute a sole and unique derogation from the legal doctrine of Parliamentary supremacy, as understood in English constitutional law. As Lord Cooper stated in *MacCormick* v. *Lord Advocate:*[123] "The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law."

It remains, then, to identify the main features of the legal nature of establishment in Scotland, and to do so by comparing and contrasting the legal status of the Church of Scotland with that of the Church of England.

First, both churches enjoy exclusive Parliamentary support as the truest expressions of Christianity within their respective territorial jurisdictions. However, whereas the Church of England was created by Parliament, the Church of Scotland's pre-existence as a divine institution was merely acknowledged by Parliament. Secondly, both churches owe their current respective "established" statuses to the Reformation statutes of their respective Parliaments and to their "re-establishment" by the Treaty of Union in 1707 as fundamental and unchangeable essentials of the union. Thirdly, both are linked to the state in contrast to other churches within their respective countries which are merely voluntary associations in law. However, whereas in England the established church is an institution of the state, in Scotland the established church is co-equal with the state, having exclusive legislative jurisdiction over its own affairs.

Fourthly, both churches are intimately associated with the Crown. But whereas the monarch is the supreme governor of the Church of England and the link unifying church and state, the Crown has no official status whatsoever in the Church of Scotland. the Crown is only "represented" for ceremonial purposes only at the General Assembly. The Lord High Commissioner sits symbolically in the gallery like any other spectator, rather than on the floor of the Assembly with the commissioners to whom the church has delegated its legislative powers. The Crown is not the linchpin of church and state in Scotland as it is in England. Fifthly, each new monarch must take a coronation oath to protect and defend both

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[123] (1953), [1953] S.C. 396 at 411.

established churches. Sixthly, just as the ecclesiastical courts of the Church of England are courts of the realm, so too the Church of Scotland courts are legally established courts of the realm within their own sphere. But whereas final appeal is to the Privy Council in England, the final court of appeal is the General Assembly which is sovereign in ecclesiastical matters in Scotland.[124]

In addition to the significant differences between the legal natures of establishment in England and Scotland stemming from the 1921 *Act*'s re-statement of the Reformed doctrine of the two kingdoms, there are two other major differences between the legal positions of the two established churches. First, the Church of Scotland has absolutely no representation in the House of Lords as does the Church of England. Secondly, whereas the Archbishop of Canterbury ranks before the Lord Chancellor in the kingdom, the Moderator of the General Assembly ranks after the Lord Chancellor and before the nobility, but only for the annual Assembly Week in June.

Finally, as in England - and in Scotland too before the modern era - most schools were established and maintained by the church. With the development of a universal state-supported school system in Scotland in the nineteenth century the role and the influence of the Kirk declined substantially. Thus, the *Education (Scotland) Act*, 1872[125] vested control of education in the state which created an integrated national system of schools. Although intended to be religiously neutral, it was inevitable that the schools would reflect the predominantly Presbyterian composition of Scotland at the time. However, the massive Irish Roman Catholic immigration to Scotland during the final decades of the nineteenth century produced considerable changes in the religious composition of Scottish society,[126] and resulted in demands for publicly funded Roman Catholic schools. In 1918 the state agreed to finance these

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[124] D.M. Walker, *The Scottish Legal System* (Edinburgh: W. Green, 1976) at 246-47.

[125] (U.K.), 1872, 35 & 36 Vict., c. 62.

[126] C. Brown, *The Social History of Religion in Scotland Since 1730* (London: Methuen, 1987).

and continues to do so.[127] However, as in England, the state finances *all* denominational schools which are part of the state school system and does not discriminate in favour of only one denominational group.[128] But only the Roman Catholic schools have taken advantage of state funding.

VII. "ESTABLISHMENT" AND THE CANADIAN CHURCHES

For Canadian church historians it is axiomatic that the history of church-state relations in Canada before 1867 reflected the British colonial religious policy of reproducing as far as possible the religious settlement in England as a means of ensuring loyalty to the Crown and to the Empire. This was especially so after the American Revolution when religious dissent and political insurrection became justifiably identified in English minds.[129] Thus, Charles Inglis, the first Bishop of Nova Scotia and the first overseas prelate of the Church of England, stated in defence of the Church of England establishment in Nova Scotia:[130]

> Government and Religion are therefore the pillars, as it were, on which society rests and by which it is upheld; remove these, and the fabric sinks into ruin.... There is a close connection between that duty which we owe to God, and the duty we owe to the King.... So intimate is this connection, that they can scarcely be separated. Whoever is sincerely religious towards God, from principle and conscience, will also, from principle and conscience, be loyal to his earthly Sovereign, obedient to the laws, and faithful to the government which God hath placed over him.

The ecclesiastical and political history of the British North American colonies which united in 1867 to form the Dominion of

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127 *Education (Scotland) Act* (U.K.), 1918, 8 & 9 Geo. V, c. 48.

128 A.M. Douglas, *supra*, note 42; Lyall, *supra*, note 42 at 115-23.

129 See, for example, H.H. Walsh, *The Christian Church in Canada* (Toronto: Ryerson Press, 1956) at 5ff.; J.S. Moir, "Sectarian Tradition in Canada" in J.W. Grant, ed., *The Churches and the Canadian Experience* (Toronto: Ryerson Press, 1963) at 126-27 [hereinafter *Sectarian Tradition*]; Norman, *supra*, note 23; *Church and State*, *supra*, note 3.

130 Steadfastness in Religion and Loyalty recommended in a Sermon preached before the Legislature of His Majesty's province of Nova Scotia in the Parish Church of St. Paul at Halifax on Sunday 7 April 1793 at 6 and 28; cited in J. Fingard, "Charles Inglis and his 'Primitive Bishoprick' in Nova Scotia" (1968) 49 Can. Hist. Rev. 247 at 251.

Canada is, then, one of a movement from establishment toward disestablishment. However, just as the establishment in each of these colonies was not identical in all essentials to that in England, so too there has never been a complete disestablishment. Moveover, as the following analysis will show, the establishments and attempted establishments in each of the colonies differed in significant ways from that in England and reflected to some extent the religious settlement in Scotland (although there is no evidence that this was deliberate.)

First, just as in Scotland, Episcopalians and non-Presbyterian protestants were permitted freedom of conscience and religion and civil rights, so too in the colonies of British North America, dissenters and Roman Catholics were permitted similar freedoms which they did not at the time enjoy in England. Secondly, the ties with the royal supremacy in the colonial establishments could be said to be considerably weaker than in England since no statute establishing the Church of England asserted the supreme governorship of the Crown within the colonial churches *per se*, rather the tie was mediated through the English church. Thirdly, whereas in England, the archbishops and certain bishops sat in the House of Lords as spiritual peers, in the colonies, members of ecclesiastical hierarchies had no constitutionally entrenched places in either the legislative councils or legislative assemblies, although as a matter of fact, colonial bishops were usually invited to join legislative councils – but then so were clerics from other churches, including the Roman Catholic Church.

Conversely, there was at least one distinctive feature of establishment in the colonies, that is, the extent to which the established church was endowed with property and financial support. Extensive state endowment of the established church to the exclusion of all others was intended to strengthen the establishment which in turn would ensure loyalty to the crown. This policy failed. Instead, the course of political life before 1867 was dominated by disputes in which the non-established churches sought to share in the wealth. Thus, church-state relations before Confederation focused less on legal toleration for the doctrine, worship, and government of non-Anglican churches than on attempts to crack the Anglican monopoly over land, taxes, schools, and universities. Thus, while an understanding of the legal context of "establishment" in England and

Scotland is necessary in order to understand the debate in the British North American colonies because British models of establishment determined the nature of colonial establishments, it is equally necessary to identify and delineate distinctive Canadian elements in attempting a legal definition of "establishment" in Canada.

At the outset, it should be recalled that the question of establishment historically related only to those colonies which entered the union in 1867. After Confederation explicit establishment legislation was not enacted in any of the post-1867 additions to the union and with the exception of Newfoundland, there were no further politico-religious controversies expressed in establishment terms. Rather, the disputes which did erupt were sectarian and centred around state support of education as enshrined in section 93. Section 93, however, codified the remaining unresolved establishment issue from before Confederation, and so shackled the new nation of Canada with the chains of nineteenth century sectarian strife.

A. *"Establishment" in the Maritimes*

The Church of England, by legislative enactment, was declared to be the church by law established in Nova Scotia, New Brunswick, and Prince Edward Island, and indeed by virtue of the absence of legislation disestablishing it, may still be so today.[131] In 1758, in keeping with British colonial policy of encouraging where possible the development of an Anglicized Anglican state,[132] the first legislative assembly of Nova Scotia enacted *An Act for the Establishment of Religious Publick Worship in this Province, and for Suppressing of Popery.*[133] This act was the model for enactments in New Brunswick and Prince Edward Island, and established the colonial pattern of establishment for the Church of England

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[131] *Supra*, notes 11-14.

[132] See generally J. Fingard, *The Anglican Design in Loyalist Nova Scotia, 1783-1816* (London: S.P.C.K., 1972) c. 1.

[133] (U.K.), 1758, 32 Geo. V, c. 5.

combined with limited toleration for others which characterized the religious settlement in Canada before 1867. Quebec was the notable exception once the British government accepted that it was wiser to grant full toleration and some state support to Roman Catholicism in that colony, in contrast to the civil disabilities under which Roman Catholics in England laboured at that time. Although, these were light in comparison to the complete intolerance and active persecution meted out to Protestants in the Roman Catholic states of Europe until this century.

The 1758 *Act* provided not only for state sanctioning of the doctrine, worship, government, and discipline of the Church of England but also

> That Protestants, dissenting from the Church of England, whether they be Calvinists, Lutherans, Quakers, or under what Denomination soever, shall have free Liberty of Conscience ... and all such Dissenters shall be excused from any Rates or Taxes to be made and levied for the Support of the established Church of England.[134]

The act also provided that all Roman Catholic priests had to leave the province and for criminal penalties for those who harboured priests.[135]

While some attempts were made to facilitate the supremacy of the established church in Nova Scotia, including land grants for churches and glebes, a parochial corporation for Halifax for collecting rates, and a parochial system of government for Halifax,[136] extensive clergy reserves were never set aside on the same scale as in Upper Canada for the established church in Nova Scotia.[137] In any case, while the established church maintained grand claims, the influx of Loyalist Congregationalists from the Thirteen Colonies and of Scots Presbyterians and Roman Catholics as well as Irish Roman Catholics created a religiously plural society in Nova Scotia in which these claims appeared increasingly ridiculous. Loyalty to the crown

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134 *Ibid.*, s. 2. Cited in *Church and State*, *supra*, note 3 at 33.

135 *Ibid.*, ss. 3-4.

136 Walsh, *supra*, note 129 at 93; J.C. Clough, "Landed Endowments for Religious Purposes in Nova Scotia and the Canadas, 1749 and 1857" (1934) 15 Can. Hist. Rev. 406.

137 *Church and State*, *supra*, note 3 at 49-58; also, see generally Fingard, *supra*, note 132, c. 4.

was not a monopoly of the established church. Thus, a series of enactments at the turn of the nineteenth century eliminated the disabilities suffered by Roman Catholics;[138] granted land and money to other religious groups;[139] permitted non-Anglican clergy to conduct legally valid marriages;[140] and as well, non-Anglicans were invited to join the legislative council.[141]

The establishment quickly failed in Nova Scotia for a number of reasons.[142] First, it was moderate in nature, endowing the Church of England with only limited rights and privileges as well as an insufficient financial endowment to undergird that limited establishment. Moreover, Anglicans were numerically inferior and centred in Halifax, whereas there were simply more Congregationalists, Presbyterians and Roman Catholics spread across the colony. Again, with a few notable exceptions, including Bishops Charles and John Inglis and Chief Justice Jonathan Belcher, Anglicans were notably diffident about their privileges and their defence when challenged. Conversely, those few who actively sought to maintain and extend the establishment did so in a high-handed fashion so as to anger and unite divergent religious groups in opposition. The greatest error was in alienating the Presbyterians who abandoned their traditional policy of claiming co-establishment in favour of leading the attack on Anglican privilege.

Thus, attempts to enforce the original Anglican monopoly over education, especially higher education, provoked the bitterest dispute of all. The original legislative scheme, modelled on the educational system of England provided for Church of England grammar schools and universities requiring matriculants to subscribe

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[138] (U.K.), 1783, 23 Geo. III. c. 9 repealed the prohibition against the ownership of property and the ban on priests; (U.K.), 1786, 26 Geo. III, c. 1 repealed ban on Roman Catholic schoolmasters; (U.K.), 1826, 7 Geo. IV, c. 18 abolished special oath required of Roman Catholics; (U.K.), 1827, 8 Geo. IV, c. 1 extended civil liberties to Roman Catholics enjoyed by Dissenters; (U.K.), 1830, 11 Geo. IV, c. 1 permitted Roman Catholics to hold political office or other civil or military office.

[139] *Church and State, supra*, note 3 at 46; Norman, *supra*, note 23 at 70-71.

[140] *Church and State, ibid.* at 58-64.

[141] *Ibid.* at 35.

[142] What follows is a summary of Fingard, *supra*, note 132, c. 6.

to the Thirty-Nine Articles. These institutions were intended primarily to produce an indigenous Anglican clergy. Not unnaturally they met with fierce criticism from non-Anglicans in the province. By the second quarter of the nineteenth century the educational monopoly of the established church was smashed in favour of a state supported universal non-sectarian education system from primary to university levels.[143]

Finally, it remains to note that when New Brunswick and Prince Edward Island were created as separate colonies, the Church of England was established by statutes virtually identical to that in Nova Scotia.[144] The nature of these establishments was similar to that in Nova Scotia, as was their ultimate fate.[145]

What, then, were the major features of the legal nature of the church establishments in the Maritimes? First, the Church of England clearly enjoyed exclusive legislative support as the truest expression of Christianity, by virtue of the various "establishment" statutes enacted in each colony. However, since the Church of England in the Maritimes was simply a mission of the mother church in England, it cannot be said that the colonial legislatures created it, rather they adopted it as the state church. Secondly, in contrast to the other churches which were merely tolerated as voluntary associations, the Church of England enjoyed state endowments in land and money intended to strengthen its position in relation to and to the exclusion of other churches. Given the high degree of religious toleration granted in the Maritime colonies to Dissenters and latterly to Roman Catholics alike, contemporaries regarded this state endowment as the principle mark of establishment. Thus, it is hardly surprising that the movement toward disestablishment would focus on equal access to state resources for all or in the alternative, access for none.

Conversely, in the Maritimes the established church did not share in certain legal marks of establishment enjoyed by its mother church in England. First, it was not created by legislative fiat.

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143 *Ibid.*, c. 7.

144 *Supra*, notes 11 and 13.

145 See generally *Church and State*, *supra*, note 3, c. 2; see also Norman, *supra*, note 23 at 69-74.

Secondly, its establishment was not a fundamental constitutional principle as were the establishments in England and Scotland after 1707. Thirdly, its links with the Crown were at best second hand because they were mediated through the mother church. Fourthly, no coronation oaths, or other oaths, were required of colonial officials, to protect and defend it. Fifthly, its ecclesiastical courts were never regarded as courts of the realm or in any way integrated with the civil courts. Sixthly, the hierarchy of the established church enjoyed no constitutional right to places in the legislative councils or assemblies, rather it joined by invitation only.

This pattern for establishment was repeated in the two Canadas. In other words, in contrast to England and Scotland, the legal nature of establishment in the British North American colonies was simpler. However, while simpler, nevertheless it satisfied the two fundamental criteria which, as argued earlier, constitute the essential content of the legal definition of establishment, recognition of one church only by the state as the truest expression of Christianity, and the defence and preservation of that established polity with state resources to the exclusion of all other churches.

B. "*Establishment*" *in the Canadas*

The fiercest battle over establishment occurred in Canada West in the four decades before Confederation. The size of the economic prize undoubtedly magnified the number of contenders and the ferocity with which they advanced their claims. The issue was not religious toleration which was freely conceded, rather whether or not the Church of England was, in fact, the church by law established and so entitled to the lion's share, if not all, of the rights and privileges, property, and money set aside for an established church.

Canadian church historians have produced a voluminous literature on the issue.[146] However, for our present task of defining

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[146] Not only is the literature voluminous but it is also highly sectarian. The following historical writings appear to be the best of the non-sectarian and scholarly: J.S. Moir, "The Settlement of the Clergy Reserves 1840-1855" (1956) 37 Can. Hist. Rev. 46; *Canada West*, *supra*, note 40; *Church and State*, *supra*, note 3; *The Church in the British Era, from the British*

the legal nature of "establishment" in Canada, it is unnecessary to rehearse the bitter events of the dispute, rather it is enough to examine the elements immediately relevant to the narrow legal issue under consideration. The underlying problem with the purported religious settlement in the Canadas after the conquest of Quebec in 1759 was its ambiguity. In contrast to the Maritimes where the Church of England was clearly established by legislative fiat, British colonial policy in the Canadas was never so clearly set out. This ambivalence was especially evident between 1759 and 1791 when the *Constitutional Act* attempted to clarify the final religious settlement for Upper and Lower Canada.

Prior to 1759 the colony of New France was Roman Catholic. Although there had been some Huguenot immigration in the seventeenth century, after 1627 all Protestants were excluded,[147] and as in France, were persecuted both before as well as after the Revocation of the Edict of Nantes in 1685.[148] After the fall of Quebec in 1759 and of Montreal in 1760, Quebec came under British rule and the Articles of Capitulation[149] signed after each defeat included clauses providing for the maintenance of the rights and privileges of the Roman Catholic church in Quebec without change. The response of the Roman Catholic hierarchy to this tolerant gesture was co-operation, however ambiguity was introduced into the religious situation in Quebec when the Treaty of Paris, 1763 gave only cursory consideration to the novel issue of Roman Catholicism in a British overseas colony by providing in Article Two that Roman Catholics could continue to practise their faith "as far as the laws of Great Britain permit."[150]

Conquest to Confederation (Toronto: McGraw-Hill Ryerson, 1972) [hereinafter *British Era*]; Walsh, *supra*, note 129; A. Wilson, *The Clergy Reserves of Upper Canada; A Canadian Mortmain* (Toronto: University Press, 1968).

[147] Schmeiser, *supra*, note 25 at 60.

[148] Professor Schmeiser, *ibid.*, makes no reference to the Revocation of the Edict of Nantes thereby leaving the impression that Protestants in France enjoyed full religious freedom. This was not the case: see R. Lockyer, *Habsburg and Bourbon Europe, 1470-1720* (London: Longman, 1974) at 486-88.

[149] References are to documents found in *Church and State*, *supra*, note 3, c. 3.

[150] *Ibid.* at 77.

A more precise indication of British policy at this time may be found in the Instructions to Governor Murray of 1763, which were repeated to Governor Carleton in 1768, which provided both for toleration for Roman Catholicism as far as British laws permitted and for the establishment and endowment of the Church of England.[151] Both governors practised a policy of reconciling the Canadians to British rule and interfered very little in ecclesiastical affairs. However, continuing ambiguities in relation both to the religious as well as the political and economic settlements after 1759 required a more definitive statement of British policy for Quebec, and this was forthcoming in the *Quebec Act, 1774*,[152] which enshrined the fruits of the previous policy of reconciliation.

The *Quebec Act* provided freedom of religion for Roman Catholics subject to the royal supremacy and prescribed an oath of allegiance to the crown to be sworn by all Roman Catholic subjects. With the exception of the religious orders, Roman Catholics were permitted to own property and to litigate all matters relating to property and civil rights in the civil courts according to French civil law. Moreover, the Roman Catholic church was permitted to continue to collect tithes and to enforce this right in the civil courts. At the same time, the *Act* provided for "the Encouragement of the Protestant Religion, and for the Maintenance and Support of the Protestant Clergy."

The high degree of toleration shown to Roman Catholics in the *Quebec Act* is matched by an equally high degree of ambiguity as to the precise legal status of the Church of England, not to mention Dissenters who are completely ignored. However, the true intent of the British government behind the *Act* can probably be surmised from the Instructions sent to Governor Carleton in 1775. He was advised "that it is a tolerance of the free exercise of the religion of the Church only, to which they are entitled, but not to the powers and privileges of it, as an established Church, for that is a preference, which belongs only to the Protestant Church of

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[151] *Ibid.* at 78-80.

[152] (U.K.), 1774, 14 Geo. III, c. 83; *Ibid.* at 97-98.

England."[153] Although the Instructions also contained a number of clauses increasing state control over the Roman Catholic Church in Quebec and asserting royal supremacy over it, the British governors on the whole ignored these and appreciation was suitably expressed when the Canadians refused to join the American Revolution. The influx of Protestant Loyalists into the western regions of Quebec after the Revolution necessitated a further constitutional revision in the *Constitutional Act, 1791*[154] which contained clauses purporting to provide a religious settlement for Upper and Lower Canada.

The ambiguities in this act were the source of the bitter sectarian disputes before Confederation. Sections 36 and 37 empowered the governments in each of the colonies to set aside about one seventh of all the lands and the rents from them solely "for the Support and Maintenance of a Protestant Clergy." Section 38 empowered the governments to erect within every township or parish parsonages or rectories "according to the Establishment of the Church of England" and to endow them with appropriated lands. Section 39 endowed the crown with the right to present "an Incumbent or Minister of the Church of England" to such parsonages or rectories on the same terms as in England. Finally, section 40 made all such incumbents subject to the ecclesiastical jurisdiction of the Bishop of Nova Scotia and to English canon law.

The intention of the *Constitutional Act* was undoubtedly to establish the Church of England in Upper and Lower Canada.[155] Indeed, the British Prime Minister, William Pitt, stated in the House of Commons in the debate on the Constitutional Bill that its purpose was "to encourage the established church."[156] However, in contrast to the establishment legislation in Nova Scotia and New Brunswick, no express grant of establishment was made. Nor was provision for religious toleration for Dissenters contained in the *Act*. However, there was also no derogation from the privileges granted by the *Quebec Act* to Roman Catholicism which appears to have,

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[153] *Ibid.* at 99.

[154] (U.K.), 1791, 31 Geo. III, c. 31; *ibid.* at 108-10.

[155] Walsh, *supra*, note 129 at 135; *British Era, supra*, note 146 at 60.

[156] *Hansard* XXIX, 1078; 8 April 1791, at 429; cited in Wilson, *supra*, note 146 at 15.

"retained its peculiar status as a semi-established church within an officially Protestant Empire."[157]

The Church of England asserted claims to establishment and conducted itself like the established church of Upper Canada until the late 1840's when it became apparent even to its most articulate and forceful leaders, such as Bishop John Strachan of York, that the tide of establishmentarianism had run out. The legal basis for such a claim is of immediate interest.

It will be recalled that the essential content of a legal establishment as suggested earlier by lawyers, historians, and theologians is comprised of state acknowledgement of one church as the truest expression of Christianity within that state and of state protection and support for that polity to the exclusion of all others. The Church of England in Upper Canada was never recognized by the state as the truest expression of Christianity in the same way nor to the same extent as in the Maritimes or in England. Whatever the real intent of the legislators, the *Constitutional Act, 1791* simply did not expressly adopt the doctrine, discipline, government, and worship of the Church of England as the statutorily established truest expression of Christianity in Upper Canada. On the other hand, the *Act* richly endowed that church alone and created a further tie between church and state in the right of presentment. *Prima facie*, the Church of England was at least arguably "quasi-established," if its legal status in Upper Canada is measured against the second of the two essential criteria earlier suggested for legal establishment.

For contemporaries, the endowment and the close ties with the government were enough to constitute the Church of England a privileged if not the established church in Upper Canada, and the object of considerable hatred as a result. Professor Alan Wilson summed up the position admirably:[158]

> The constantly increasing theme of Upper Canada politics before 1837 was religious unrest. The subtleties of a "real" church establishment - beliefs, doctrines, discipline, forms of worship - were lost on a pioneer community. For the settler,

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[157] *Sectarian Tradition*, *supra*, note 129 at 82. This view is also shared by Walsh, *supra*, note 129 at 135.

[158] Wilson, *supra*, note 146 at 136.

> an endowment of land, administrative control of that land and a voice in the councils of government were tangible proofs of a sacerdotalism that defied the academic qualifications of contemporaries (and of modern scholars) who pleaded that there was "no real Church Establishment." The Clergy Reserves were reviled as a symbol of a single establishment that had arisen *de facto* and might be consolidated *de jure*. The rectories crisis seemed to many to have given witness to that imminent possibility.

To understand the legal content, if any, given to "establishment" in Upper Canada, it is useful to examine the marks of establishment as asserted by contemporaries. At the outset it should be stated that while Bishop Strachan and some members of the colonial government considered the Church of England to be established, many contemporaries did not, nor do most Canadian historians of the period who are agreed that either it was not established at all[159] or at best, it was quasi-established.[160]

The first mark of establishment attacked in Upper Canada was the exclusive monopoly over the valid solemnization of marriage enjoyed by the Church of England by virtue of the *Marriage Act of 1793*.[161] Since there were only two Anglican ministers in the colony at that time permission was granted to justices of the peace to perform marriages according to the form prescribed by the Church of England. Presbyterians and Baptists petitioned the government to extend the privilege of solemnizing marriage to the clergy of other churches, and this was eventually done in 1797[162] after some bitter squabbling. However, the breach in the Anglican monopoly was modest since permission to solemnize marriages was granted to clergy marrying "members of the Church of Scotland, or Lutherans, or Calvinists." It was not until 1829, however, that permission was extended to all Christian clergy to solemnize marriages according to

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[159] A.H. Young, "A Fallacy in Canadian History" (1934) 15 Can. Hist. Rev. 351; J.J. Talman, "The Position of the Church of England in Upper Canada, 1791-1840" (1934) 15 Can. Hist. Rev. 361; J.L.H. Henderson, "The Abominable Incubus: The Church as By Law Established" (1969) 10 Journal of the Canadian Church History Society 58.

[160] *Supra*, note 157.

[161] (U.K.), 1793, 33 Geo. III, c. 5; *Church and State*, *supra*, note 3 at 142-43.

[162] (U.K.), 1797, 38 Geo. III, c. 4; *ibid.* at 146-47.

their own forms, although non-Anglican clergy were still required to seek a government certificate to do so until 1859.[163]

A second mark of establishment attacked in Upper Canada was the right of the Church of England to collect tithes from *all* residents in the colony and to enforce this right in the civil courts. In Lower Canada, the Roman Catholic Church's pre-Conquest right to collect tithes from all Roman Catholics had been confirmed in the *Quebec Act, 1774*. However, in Upper Canada tithes were never collected because it was not clear that they could be and also because it seemed impolitic given how few in numbers Anglicans were becoming in Upper Canada.[164] In 1823 an *Act* forbade their collection.[165]

Several other less significant marks of establishment were also lost to the Church of England in the early nineteenth century. Thus, thirdly, Quakers, Mennonites, and other recent Loyalist immigrants who shared their pacifist views were relieved in 1808 from the colonial statutory obligation to serve in the militia[166] and were also relieved in 1809 from the need to take oaths of office or for swearing testimony in courts.[167] Fourthly, while the Church of England was believed to have the status of a body corporate for the purposes of holding property, other churches initially were unable to hold property and were required to vest property in individual members. Over Anglican objections that making provision for property holding by these churches would amount to the recognition of religious pluralism, the legislature in 1828 permitted these churches to vest property in trustees.[168] Fifthly, in 1832 the Legislative Assembly dispensed with its Church of England chaplain

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163 (U.K.), 1829, 1 William IV, c. 1; *ibid.* at 148-49; Talman, *supra*, note 159 at 373-74.

164 *Church and State, ibid.* at 149-152; Talman, *ibid.* at 368.

165 (U.K.), 1823, 2 Geo, IV, c. 32; *Church and State, ibid.* at 152.

166 (U.K.), 1808, 48 Geo. III, c. 1; *ibid.* at 153.

167 (U.K.), 1809, 49 Geo. III, c. 6; *ibid.* at 154.

168 (U.K.), 1828, 9 Geo. IV, c. 2; *ibid.* at 154-55.

to circumvent the demands from other groups that the chaplaincy be rotated among all denominations.[169]

The bitterest challenge to the alleged establishment of the Church of England in Upper Canada concerned the sixth and most significant mark of establishment characterizing that Church: the clergy reserves and the rectories.[170] Although said to be for a "Protestant clergy" in sections 37 and 38 of the *Constitutional Act*, it was initially assumed that the clergy reserves were created for the maintenance of the Church of England in place of tithes. In 1819, clergy corporations were established in both Canadas to collect and administer the rents from the land appropriated for reserves amounting to about 2,395,687 acres in Upper Canada and 934,052 acres in Lower Canada.

However, in 1819, the first challenge to the Church of England's alleged exclusive right to benefit from the reserves was made by St. Andrew's Presbyterian Church in Niagara which requested £100 annually from the reserves for the purpose of rebuilding the church, which had been burnt by the Americans in 1813, and for employing a minister.[171] The Lieutenant-Governor Sir Peregrine Maitland rightly saw this as a threat to the "establishment" and secretly sought a legal opinion from the Law Officers of the Crown in London. That opinion, dated 15 November 1819, stated that "a Protestant clergy" included ministers of the Church of Scotland, but did not "extend to dissenting Ministers since we think the terms Protestant clergy can apply only to Protestant clergy recognised and established by law."[172] The opinion also stated that the Church of England had an exclusive right to the rectories. Maitland told only the Anglican members of the council about the opinion and refused to grant funds to the petitioning congregation. Its contents were not publicly known in Upper Canada until 1840,

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169 *Ibid.* at 155-58.

170 See *supra*, note 146 for the best discussions of this issue. The following discussion is entirely indebted to those sources.

171 The petition is reproduced in *Church and State*, *supra*, note 3 at 161.

172 *Ibid.* at 162.

but by that time the clergy reserves controversy was *the* predominant political issue in the colony.

Although as yet few in numbers in the colony, the claims of the Church of Scotland to co-establishment were strong because like the established position of the Church of England, they were founded on establishment in Scotland as a fundamental condition of the union with England. Failure to acknowledge this claim resulted in the Kirk siding with all of the other religious denominations in Upper Canada in opposition to the privileged status of the Church of England, once it accepted that it could not share in the "establishment" and to a large extent becoming the leader of that opposition because of the political and social influence which certain of its members commanded in Britain.

Faced with a mounting political crisis, which in 1837 had already erupted in two rebellions, the British Parliament enacted the *Clergy Reserves Act*[173] in 1840 which provided for the clergy reserves sections of the *Constitutional Act* to be repealed and for the gradual sale of the reserves and the division of the proceeds into six separate parts, of which two were to be appropriated to the Church of England, one to the Church of Scotland, and the residue to be applied at the discretion of the government for the purposes of public worship and religious instruction. Some of these funds were granted to the Methodists and Roman Catholics in the colony.

This settlement pleased very few, except perhaps the Roman Catholic church whose claims to state support were first granted in Canada West. The clergy reserves issue lingered on and flared up again in the late 1840s. The final resolution came in 1854 when a second *Clergy Reserves Act*[174] of the legislature of the two Canadas provided that the existing recipients of annual stipends were to continue to receive payments for life and that the remaining funds be paid to the municipalities. The *Act* stated that the purpose was "to remove all semblance of connection between Church and

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[173] (U.K.), 1840, 3 & 4 Vict., c. 78; *ibid.* at 192-95.

[174] (U.K.), 1854, 18 Vict., c. 2; *ibid.* at 243-45.

State."[175] Thus, Egerton Ryerson's "abominable incubus"[176] was gone.

Parallel to the clergy reserves issue was that of the creation of forty-four Church of England rectories in 1836 by the Lieutenant-Governor, Sir John Colbourne, pursuant to section 38 of the *Constitutional Act*. Comprised of about four hundred acres each, of which about three-quarters was taken from the clergy reserves, this endowment was clearly for the exclusive benefit of the Church of England. This unilateral *Act* was undoubtedly a cause of the 1837 rebellion, and a source of political trouble until 1851 when the legislature repealed the provisions of the *Constitutional Act* permitting the creation of rectories.[177] The rectories were subsequently sold pursuant to legislation enacted by the legislature of Canada.[178]

The seventh and final major area in which the Church of England claimed the exclusive rights and privileges which mark an established church was in relation to control over education.[179] These claims were made in relation both to university education[180] and to elementary and secondary education.[181] In both areas Anglican claims to exclusive control were challenged and defeated. Thus, in respect to university education, initially only the Church of England foundation, King's College, which required its faculty and students to subscribe to the Thirty-Nine Articles, and founded in 1827 by Archdeacon Strachan, received state endowment. However, once sufficient numbers of Presbyterians, Methodists, and Roman Catholics warranted their own universities in the 1840's, these were established, including Queens and Knox by the Presbyterians,

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175 *Ibid.*, s. 3.

176 Cited in Henderson, *supra*, note 159 at 65.

177 (U.K.), 1851, 14 & 15 Vict., c. 175.

178 (U.K.), 1866, 29 & 30 Vict., c. 16; (U.K.), 1875, 39 Vict., c. 108.

179 I do not intend to explore the education issue here in any detail because I hope to do so in an article in preparation on the history of education background to the "Bill 30" case.

180 The only major study of this in Canada West is by J.S. Moir: see generally *Canada West*, *supra*, note 40, c. 4-5.

181 See *supra*, note 25 for the important relevant literature.

Victoria by the Methodists and St. Michaels, Ottawa, and Regiopolis by the Roman Catholics. The ultimate settlement of the university question was one of state support for purely secular institutions as well as denominational institutions on an equitable basis, although after a long and bitter struggle.

Whereas the university question was resolved equitably, the elementary and secondary school question was not. In Canada West, the original province-wide school system was controlled by the Church of England, however by the 1840's these schools were increasingly secularized once the rising tide of voluntaryism favoured a single state-supported secular school system. This might have been the ultimate resolution had the struggle over the schools been resolved in the same way as the struggles over the clergy reserves or the universities. However, by the early 1850's the Roman Catholics began to demand their own separate school system as of right and in a manner in which the Church of England had never done.[182] Thus, throughout the 1850's and until the eve of Confederation, the Roman Catholic church, spurred on by the massive Irish immigration to Canada West to complement its hegemony in Canada East as well as militant ultramontanism, mounted a concerted public and private political campaign for state support for its own schools.[183] The growing number of Roman Catholic electors increased the number of Canada West representatives in the combined legislature supporting a separate state-financed Roman Catholic school system so that voting together with the predominantly Roman Catholic members for Canada East, a separate school system was imposed on Canada West which all other religious groups were united in opposing.

In Canada East,[184] the tiny Protestant minority had since 1841 enjoyed state support for its "Protestant" schools, since the principle of complete bifurcation had been adopted in Canada East at the outset. However, in Canada East, state endowment was of a "Protestant" system, without favouritism to any one "Protestant" denomination. Moveover, given the tiny minority of "Protestants"

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[182] *Canada West*, *supra*, note 40 at 130.

[183] *Ibid.*, c. 6-7.

[184] Sissons, *supra*, note 25 at 134-60.

in Canada East, this could be said to amount to real protection of a genuine religious minority, since the state school system was explicitly Roman Catholic in orientation. In Canada West, on the other hand, the state system was Christian and non-denominational and increasingly secular.

In 1867 the Confederation compact proved to be possible only because all agreed to preserve the 1866 stalemate in state funding for denominational education in section 93 of the *Constitution Act, 1867*.[185] Paradoxically, just as the claims of the established churches of England and Scotland had given way to the rising tide of secularization and voluntaryism, and the separation of church and state, the state, to achieve the goal of Confederation, agreed to protect, defend and finance the separate schools of the Roman Catholics in Canada West and the "Protestants" in Canada East. Thus, new chains binding church and state shackled the new country of Canada.

It remains, then, to define the legal nature of "establishment" in Canadian law. The task is easy if confined to the Maritimes. As argued earlier, while the establishments in the Maritimes did not possess all of the marks of establishment of the established churches in Britain, they did enjoy the essential conditions of state adoption of the doctrine, worship, and discipline as the truest expression of Christianity within that state, and state support for their polities.

Conversely, in the two Canadas, the constitutional status of the Church of England was unclear both to contemporaries as well as to us. There was no exclusive state adoption of the Church of England, although there was exclusive endowment sufficient to support the requirements and pretensions of establishment. In the absence of other judicial or legislative guidance, it does not seem unfair to characterize the position of the Church of England until at least the 1840s in both Canadas as that of a quasi-established church.

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185 *Ibid.*

VIII. CONCLUSION

What, then, is a church by law established?

A church by law established is that single church within a country accepted and recognized by the state in its doctrine, worship, and discipline as the truest expression of Christianity within that country. The state's recognition of its established church encumbers that state with the legal duty to protect, preserve and defend that church, if necessary to the exclusion of all others.

Forms of state recognition might differ. In England, it is by constitutional creation of a single national church. In Scotland, it is by constitutional recognition of the claims of a single national church. In Canada, it has been by express constitutional adoption of one particular pre-existing church as a single "national" church. Forms of protection and preservation may differ as well. Economic endowment is, of course, the obvious form since state financed support to one church to the exclusion of all others inevitably tends to favour the long-term viability of that church. Physical protection against domestic harassment or foreign enemies is also support, although few monarchs have been required to honour their coronation oaths in this latter regard.

This study shows that it is wrong in law to label the Roman Catholic Church an established church in Ontario, as has been done in the wake of the "Bill 30 Case." However, it also shows that it may fairly be labelled a "quasi-established" church by virtue of the substantial state support given to its schools to the exclusion of all other religious groups in the province. Such a quasi-establishment is, of course, less pronounced than that ascribed to the Church of England in the nineteenth century. In post-*Charter* Canada, it might fairly be asked whether state preference for any religious group and most especially the dominant religious group can be tolerated. In its place Canadian constitutional and historical experience offers two alternatives. Either the state could decide to grant funds to all denominational schools on an equitable basis as is done in Newfoundland, Saskatchewan, or Quebec, or it could establish a single unitary secular system of state-supported schools and permit those who believe that all education should be fundamentally religious education to finance privately their own schools.

A wall of separation between church and state has never been built in Canada. While the modernists and voluntaryists of mid-Victorian Canada succeeded in destroying the vestiges of the Reformation settlement of *cuius regio eius religio* imported into the British overseas colonies, in their haste to build a new nation they left the wall partially unbuilt and in the hands of new owners. It remains to be seen whether the new owners will destroy what has been built, or whether Canadians will seize the bricks and mortars provided in the *Charter* to complete the task begun by their forebears.