Public Financing of Religious Schools

The policy of the Canadian Secular Alliance

www.secularalliance.ca

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Table of Contents

Overall recommendation

Religious indoctrination should be left to the private sphere. The government should not use public funds to finance religious schools, either directly or indirectly. Although Ontario, Alberta and Saskatchewan still have archaic constitutional obligations to fund Catholic schools (“denominational privileges”) dating from 1867, the financing of religious schools can (and should) be eliminated via simple bilateral constitutional amendments similar to the one adopted by Quebec.

Executive Summary

Many Canadian provinces offer full or partial funding to religious schools, in many instances because of a historical artifact enshrined in the 1867 Constitution. The Canadian Secular Alliance (CSA) believes that the most fundamental argument against public funding of religious schools is that the education being offered in these institutions is contrary to the best interests of the children involved. The position of the CSA is that a child's constitutional right to freedom of religion is best served by ensuring that they have the opportunity to embrace religious beliefs of their own choosing when they are mature enough to do so — not by being indoctrinated in the faith of their parents and having their exposure to other religions and worldviews limited. The CSA believes that because religious indoctrination of children is fundamentally at odds with fostering their intellectual independence, autonomy, and religious freedom, it cannot in good conscience be financially supported by the state.

However, even without considering the question of whether religious indoctrination is in a child's best interests, there are many other powerful practical reasons why religious schooling should be left to the private sphere and not supported with public tax dollars. Not only is state funding of religious schools not in the public interest, but it also carries the risk of dangerous government interference with religious freedom.

Faith-based education segregates students based on their parents' religious worldview, thus partitioning children into "silos" where they have little contact with others outside the religious group into which they were born. Because a vast body of empirical scientific evidence from sociology and psychology has shown that such segregation increases the frequency of prejudice and inter-group mistrust, such education cannot in good conscience be financially supported by a multicultural and pluralistic country like Canada. In addition, because many religions advocate beliefs and practices that are contrary to the Canadian Charter of Rights and Freedoms, government funding of religious schools puts Canada in the dangerous position of financially supporting the indoctrination of future citizens against its own liberal-democratic values.

The potential solution — government monitoring and regulation of publicly funded religious schools — puts the state in the equally dangerous position of evaluating the acceptability of religious doctrine. It is unclear what objective criteria could be used to decide which specific religious beliefs are worthy or unworthy of state funding, and any attempt to do so could legitimately be seen as unacceptable government interference in religious affairs. In fact, the entanglement of church and state in Ontario's publicly funded Catholic schools has already led to the judiciary ruling on matters of religious doctrine. Refusing financial subsidy from the state may actually be in the best interests of private religious schools, since they will inevitably come under public pressure to change any anti-liberal-democratic practices as a pre-condition of receiving public money. Declining public funding would eliminate this source of leverage and free religious groups to practice their beliefs without interference by the government or the courts.

The CSA believes that religious indoctrination should be left to the private sphere — the government should not use public funds to finance religious schools, either directly via full or partial funding, or indirectly via tax credits or school vouchers. Those provinces that still have archaic constitutional obligations requiring them to fund Catholic schools should eliminate them with a simple bilateral constitutional amendment. Such an amendment can be as little as 12 words in length, and only requires the agreement of the province in question and the federal government.

1. Introduction.

1.1. Public funding of religious schools in Canada.

Every parent in Canada has the option of (i) home-schooling their children, (ii) enrolling their children in a private school at their own expense, or (iii) enrolling their children in the public secular school system at the state's expense [Zinga, D, 2008]. As education is a provincial responsibility, government policy on public funding of religious schools differs across Canada [Wilson, J, 2007; Gillespie, K, 2007; Offman, C, 2007; Oxaal, Z, 2003]. Ontario, Alberta and Saskatchewan still offer full public funding to Catholic schools — a historical artifact originating from "denominational privileges" enshrined in section 93 of the Constitution Act, 1867. In addition, British Columbia, Alberta, Saskatchewan, Manitoba and Quebec offer partial funding (typically 40-60%) to religious schools of any faith that meet some provincial criteria.

However, public opinion appears to be turning against the use of tax dollars to finance religious schools. A poll conducted by Angus Reid in April 2009 found that a majority of the Canadian public opposes the funding of religious schools: 51% of respondents opposed funding Christian schools; 75% opposed funding Islamic schools; 73% opposed funding Hindu schools; 75% opposed funding Sikh schools; 70% opposed funding Buddhist schools; and 68% opposed funding Jewish schools [Angus Reid Strategies, 2009].

1.2. The position of the Canadian Secular Alliance.

The Canadian Secular Alliance supports a single, secular, publicly funded school system that brings students of all religious and ethnic backgrounds together in an atmosphere of mutual respect and equality. The CSA urges government not to use public funds to finance religious schools — either directly via full or partial funding, or indirectly via tax credits or school vouchers.

The most fundamental argument against public funding of religious schools is that the education being offered in these institutions is contrary to the best interests of the children involved. This argument will be fully developed in a separate policy ("Religious Education versus Religious Indoctrination"), and will not be dealt with in detail here. For the purposes of this discussion, it suffices to note that it is far from clear that a child's right to freedom of religion (guaranteed under section 2(a) of the Canadian Charter of Rights and Freedoms) is best served by them being indoctrinated in the faith of their parents before the age of reason. On the contrary, a child's constitutional right to religious freedom may be best served by ensuring that they have the opportunity to embrace religious beliefs of their own choosing when they are mature enough to do so. The CSA believes that religious indoctrination of children is fundamentally at odds with fostering their intellectual independence, autonomy, and religious freedom, and therefore cannot in good conscience be supported by the state.

However, even without considering the question of whether religious indoctrination is in a child's best interests, there are many other powerful practical reasons why religious schooling should be left to the private sphere and not supported with public tax dollars. Not only is state funding of religious schools not in the public interest, but it also carries the risk of dangerous government interference with religious freedom.

2. The state has no obligation to finance private religious education, especially indoctrination of children contrary to its own liberal-democratic values.

Many commentators argue that if religious parents choose to opt out of the secular public school system, justice requires that the state pay for their child's education in a private religious school — in other words, parents are suggested to have a legitimate "right" (or "claim") to public funding for the religious education of their choice. To evaluate this argument, it is important to note the difference between a "negative claim" (which entails a corresponding duty of non-interference by others), and a "positive claim" (which entails a corresponding duty of assistance by others). As legal scholar James Dwyer has noted, "a parent has a 'negative claim-right' against the State with respect to a given action when the State is under a duty owed to the parent not to interfere with the parent's performance of that action. A parent has a 'positive claim-right' against the State when the State is under a duty owed to the parent to provide some form of assistance to the parent" [Dwyer, JG, 1994]. It is possible for one to concede that parents have a legitimate negative claim-right to religiously indoctrinate their child and limit their child's exposure to other religions and worldviews (although the CSA has deep reservations on this point). Importantly, however, this in no way implies that parents have a legitimate positive claim-right to money from the government to do so. Citizens opting out of publicly provided services do not automatically have a positive claim right to public funding for the alternative of their choice: those who choose not to use the Canadian public health-care system are not entitled to public money towards the offshore private clinic of their choice; those who choose not to employ the services of the public police and fire-fighting forces are not entitled to public money towards the private security contractor of their choice. The point is not that our society cannot collectively choose to fund private religious schools with public money as a public policy decision — we could theoretically choose to fund citizens' private health-care choices and private security contractor choices as well — the point is that parents who choose not to use the public school system have no automatic fundamental "right" to a taxpayer-financed alternative, religious or otherwise.

Government funding of religious schools in particular is further complicated by the fact that it often puts a country like Canada in the dangerous position of financially supporting the indoctrination of future citizens against its own liberal-democratic values. Many religions advocate beliefs and practices that are contrary to modern views of human rights as envisioned in the Canadian Charter of Rights and Freedoms [Canadian Charter of Rights and Freedoms, 1982] and the United Nations Universal Declaration of Human Rights [Universal Declaration of Human Rights, 1948.]. The CSA upholds the fundamental right of religious groups to freedom of association, freedom of expression, and freedom of religion — including the right to express views and maintain internal practices that are sexist, bigoted, authoritarian, discriminatory, and deeply illiberal. However, it rejects the idea that the state should be financing the indoctrination of children with such views. The stakes are high because, as legal scholar Christopher Richter has noted, "control of education is control of the coming generation" [Richter, C, 1997]. In short, a liberal democratic state with a minimal interest in ensuring its own survival can legitimately decline to finance the indoctrination of future citizens against its own principles.

3. Public schools perform an important integrating function in Canadian society by contributing to social cohesion and inter-group co-operation.

The CSA believes that segregating students based on their religious worldview — or, more accurately, their parents' religious worldview — does them a disservice by insulating them from the full range of cultures and perspectives that they will encounter in the larger Canadian public sphere when they reach adulthood. Public schools perform an important integrating function in Canadian society by providing an environment where children of all backgrounds can freely interact and collaborate. The lower the frequency of interaction between people of different religious, racial or ethnic groups, the higher the frequency of prejudice and inter-group mistrust. This assertion is not just "common sense", it is also supported by a vast body of empirical scientific evidence from sociology and psychology (reviewed in [Pettigrew, TF, and Tropp, LR, 2006; Dovidio, JF, Gaertner, SL, and Kawakami, K, 2003; Pettigrew, TF, 1998]). As noted by the Task Force on the Place of Religion in Schools in Quebec, "[t]he organization of school life, or the 'hidden curriculum', will also have an impact on the development of openness and tolerance. A school in which students from different cultures and different religions are also treated as equals in all respects will probably develop these dispositions to a greater extent than a school that suggests, through its institutional structure, that one culture or religion is superior to others" [Government of Québec, 1999]. Faith-based education — by definition — segregates students based on their parents' religious worldview, thus partitioning children into "silos" where they have little contact with others outside the religious group into which they were born. Because such segregation has been empirically shown to inhibit inter-group understanding, such education cannot in good conscience be financially supported by a liberal-democratic state, especially one as multicultural and pluralistic as modern-day Canada.

4. Government funding of religious schools leads to unacceptable government interference in religious affairs.

Many proponents of the public financing of religious schools argue that discrimination and the promotion of anti-liberal-democratic values can be avoided by requiring government inspections to ensure adherence to an approved curriculum [White, L, 2003]. However, religious schools would be permitted to supplement the government curriculum with tenets of their faith as they see fit. Government monitoring of this additional religious material puts the state in the untenable position of evaluating the acceptability of particular religious sects and doctrines — something that could legitimately be seen as an infringement of religious freedom. In response to Ontario Conservative leader John Tory's 2007 proposal to extend public funding to all religious schools, National Post journalist Robert Fulford noted: "Have they any idea of the theological and bureaucratic nightmares they are inviting? We'll need armies of officials to negotiate with those who say they want support — Hindus, Copts, Muslims, Jews, Sikhs and Protestants. Which of the many Protestant sects will be supported? Which Muslims? Which Jews?" [Fulford, R, 2007]. The Canadian Civil Liberties Association emphasized that "this is no minor point. If the Ontario government starts funding religious schools, it will find itself becoming immersed in matters of religious doctrine. It is all very well to require religious schools to follow the Ontario curriculum, but will such schools also be required to desist from teaching some of their central tenets and texts? To what extent is it

appropriate for the government to prescribe or proscribe what religious doctrines are acceptable for religious schools to promote? Conversely, if religious freedom means religious teachings and practices should be left alone, does that mean religious schools would have free rein to teach their beliefs as they will? … How could the newly-subsidized schools be monitored so as to ensure that public funds are not used to promote hate or discrimination? … public funding of religious schools is laden with a conglomeration of unacceptable risks and consequences" [Canadian Civil Liberties Association, 2007].

In fact, the entanglement of church and state has already led to bizarre consequences in Ontario's publicly funded Catholic schools. In a 2002 case [Hall (Litigation Guardian of) v. Powers], a gay student attending a Catholic high school was granted an injunction allowing him to bring his same-sex date to the prom against the explicit wishes of the school board (reviewed in [Oxaal, Z, 2003]). In reasoning that has far-reaching implications for religious freedom, the court saw fit to interpret Catholic doctrine and rule that bringing a same-sex date to the prom was not sinful, and was in fact consistent with Catholicism. It did so despite this conclusion directly contradicting the claims of a Catholic Bishop, and despite evidence establishing that because of the hierarchical structure of the Catholic Church, the Bishop had ultimate authority to rule on theological matters [Oxaal, Z, 2003]. As legal scholar Zoe Oxaal has noted: "It appears that the Church must pay a price for public funding. … it gets both state protection and state interference" [Oxaal, Z, 2003].

Refusing financial subsidy from the state may actually be in the best interests of private religious schools. Giving public money to private religious schools raises a problematic question: to what extent can government-funded religious schools contravene the Canadian Charter of Rights and Freedoms in exercising their right to religious freedom? The CSA believes that along with taxpayers' money comes the expectation of accountability. Canadians have a legitimate right to question the use of public funds to support religious schools that, for instance, do not believe in equal rights for women. Such schools will inevitably come under public pressure to change their anti-liberal-democratic practices as a pre-condition of receiving public money. Declining government subsidy would eliminate this source of leverage and free religious groups to practice their beliefs without interference by the government or the courts.

5. Regulation of the curriculum of religious schools is arbitrary and ultimately ineffective.

It is unclear what objective criteria could be used to decide which specific religious doctrines are worthy or unworthy of state funding. What religious beliefs are "acceptable" to the government? The belief that followers of the correct faith will achieve eternal salvation while followers of other faiths and non-believers will be damned? Non-equality of the sexes under the law? Condemnation of freedom of speech (blasphemy)? Condemnation of freedom of conscience (apostasy)? Condemnation of gays and lesbians? Opposition to sex education, including exposing children to information about contraception, sexually transmitted diseases, and abortion? Opposition to same-sex marriage? Opposition to stem-cell research? Rejection of evolution in favour of creationism? Promotion of polygamous marriage? Such an attempt to evaluate which religious tenets are unworthy of state financial support quickly descends into absurdity. The only other option is favoritism. For instance, in British Columbia — which offers partial public funding to religious schools that meet some provincial criteria — Vancouver Sun journalist Janet Steffenhagen found that "the government office that regulates independent schools has been dominated for more than a decade by evangelical Christians, including an inspector who wrote and sold textbooks championing creationism over evolution" [Steffenhagen, J, 2007]. Historian Jean Barman noted that these "inspectors are sympathetic to private schools. They're not going to go in and read the riot act". She

also noted that some inspectors have sounded “more like an apologist for the private schools than their inspector” [Steffenhagen, J, 2007].

This “regulation of the curriculum” approach, in addition to being wholly impractical, also fails to address another critical factor. As noted by Farzana Hassan and Salma Siddiqui, president and senior vice-president of the Muslim Canadian Congress, “this ignores the reality that values within schools are rarely taught through formal curricula. Rather, it is the school culture which plays a dominant role in imparting values to children” [Hassan, F, and Siddiqui, S, 2007]. For instance, at one private Islamic school recently profiled in the press [Rushowy, K, 2007]: (i) the daily call to prayer is always carried out by a male student and never a female one; (ii) during prayer, boys assemble at the front of the room and girls at the back; (iii) the girls and boys are seated separately in the classroom because of “religious etiquette”; (iv) the principal does not shake the hand of female visitors because of his religion; (v) although students learn evolution in science class, they also learn that a tiger is black and orange because “that’s how Allah made it”; (vi) when reading to her class, a teacher omits or changes parts of a popular children’s book where a girl tries to kiss boys, because “such talk is haraam, or forbidden by God”; (vii) in a 2nd grade classroom, all but 3 girls wear the hijab, or headscarf.

6. Funding multiple, parallel religious education systems is an inefficient use of scarce public resources.

On a practical level, financing multiple religious education systems that service the same geographic area is clearly an inefficient use of public resources. Prior to its adoption of a single, secular school system in 1997, Newfoundland was financing 5 distinct religious schools boards: Roman Catholic, Anglican, Salvation Army, United Church of Canada, and Pentecostal Assemblies [Zinga, D, 2008]. As a result, students were routinely transported on half-empty buses to half-empty schools of the “correct” faith [Chung, A, 2007; Bezeau, LM, 2007]. In fact, the prohibitive economic burden of maintaining this religiously segregated school system was likely a powerful motivation in Newfoundland’s decision to adopt a single, secular system [Canadian Civil Liberties Association, 2007; Chung, A, 2007]. During Ontario’s 2007 provincial election campaign, it was estimated that Conservative leader John Tory's proposal to extend public funding to all religious schools would cost the public purse an additional $400-$500 million per year [Urquhart, I, 2007; Rushowy, K, 2007; Wilson, J, 2007].

Supporters of public education have noted that public funding of religious schools undermines the public education system by encouraging an exodus of students (and thus financial resources) out of the public system. Following the extension of partial funding to private schools in British Columbia, Alberta, and Manitoba, these schools experienced a considerable increase in enrolment (reviewed in [Canadian Civil Liberties Association, 2007]). For instance, in British Columbia — which offers partial public funding to religious schools that meet some provincial criteria — Vancouver Sun journalist Janet Steffenhagen found in 2007 that (i) enrolments in independent schools had grown by an average of 2% per year over 5 years, despite a decline in the total number of school-aged children; (ii) depending on the school district, 10-20% of total students were now enrolled in independent schools; and (iii) new independent schools continued to be built while 150 public schools had closed over 5 years [Steffenhagen, J, 2007].

7. Conclusion.

The Canadian Secular Alliance supports a single, secular, publicly funded school system that brings students of all religious and ethnic backgrounds together in an atmosphere of mutual respect and equality. The CSA urges government not to use public funds to finance religious schools — religious indoctrination should be left to the private sphere. The entanglement of government and religious schools is not in the public interest, and carries the risk of dangerous state interference in religious affairs.

8. Background note: The current status of public funding for religious schools in the Canadian provinces.

Every parent in Canada has the option of (i) home-schooling their children, (ii) enrolling their children in a private school at their own expense, or (iii) enrolling their children in the public secular school system at the state's expense [Zinga, D, 2008]. As education is a provincial responsibility, government policy on public funding of religious schools differs across Canada [Wilson, J, 2007; Gillespie, K, 2007; Offman, C, 2007; Oxaal, Z, 2003]. Each province can be categorized in 2 ways: (1) whether it offers full public funding (100%) to Catholic schools because of an ancient constitutional obligation; and (2) whether it offers partial public funding (40-60%) to religious schools of any faith.

(1) Ontario, Alberta and Saskatchewan still offer full public funding to Catholic schools – a historical artifact originating from "denominational privileges" enshrined in section 93 of the Constitution Act, 1867. All other provinces do not have (or have since eliminated) this constitutional obligation.

(2) British Columbia, Alberta, Saskatchewan, Manitoba and Quebec offer partial funding (typically 40-60%) to religious schools of any faith that meet some provincial criteria (typically, agreeing to teach the provincial curriculum, submit to standardized testing, and employ certified teachers). All other provinces do not support private religious schools with public money.

The combination of the above policies means that: (i) New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland offer zero funding to religious schools of any kind; and (ii) Ontario is the only province with the especially unjust combination of 100% funding for Catholic schools and zero funding for all other religious schools.

9. Background note: The entrenchment of Catholic and Protestant "denominational school privileges" in Canada's Constitution.

Catholic and Protestant religious minorities are recognized in Canada's constitution as having the guaranteed privilege of their own publicly funded religious schools ("denominational schools"). As a condition of Confederation in 1867, each group agreed to protect and finance the other's minority schools in Canada East (Quebec) and Canada West (Ontario) (reviewed in [Bezeau, LM, 2007; Zinga, D, 2008; Richter, C, 1997; Smith, WJ, 1994; Hurst, L, 2007]. The constitutional compromise is embodied in section 93 of the British North America Act, 1867 (since 1982, referred to as the Constitution Act, 1867). The purpose of section 93 was to grant the provinces the absolute authority to legislate in the realm of education, but to limit this power with respect to minority religious schools. As legal scholar Zoe Oxaal has noted: "The s.93 denominational schools provisions of the Constitution Act, 1867 have been cited as the source of more bitterness than any other section of our Constitution. Described variously as the 'Confederation compromise', the 'solemn pact' and the 'cardinal term', it has often been said that without the guarantees contained in s.93, Confederation could not have occurred. But while s. 93 may have made sense in 1867, it also 'shackled the new nation of Canada with the chains of nineteenth-century sectarian strife'. … While other parts of mid-nineteenth-century education legislation, such as the provision for separate schools for 'coloured

people', have been largely forgotten, by contrast, s.93 has been described as having 'frozen in time' the denominational school rights of 1867" [Oxaal, Z, 2003].

Section 93 grants the provinces the absolute authority to legislate in the realm of education, while subsections (1)-(4) indicate areas where they are limited or subject to review: subsection 93(1) protects the rights of denominational schools at the time of the Union from provincial jurisdiction; subsection 93(2) extends the separate school rights in Ontario to the Protestants in Quebec; subsection 93(3) provides a right of appeal to the federal Cabinet in the event of any provincial decision affecting denominational education rights; and subsection 93(4) allows Parliament to enact remedial legislation to enforce any resulting decision from the federal Cabinet. The exact wording is as follows [Constitution Act, 1867]:

> 93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:
> (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:

Subsection 93(1) thus restricts the provinces' legislative power such that it cannot infringe upon denominational school privileges that were provided for "by Law … at the Union". Note that privileges enjoyed in practice but not by law at Union are not protected, nor are privileges granted after Confederation.

> (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:

Subsection 93(2) thus extend the rights of Catholic separate schools in Upper Canada (Ontario) to "dissentient" schools in Quebec. (In any geographic area, a Catholic or Protestant minority could — if it was dissatisfied with the school of the majority faith — exercise the right to "dissent" and form a "dissentient" school.)

> (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:

Subsection 93(3) thus gives Protestant and Catholic minorities the right to appeal any provincial legislation that affects their privileges in education to the "Governor General in Council" (effectively, the federal Cabinet). Note that this right covers both pre- and post-Union provincial legislation — thus this political mechanism is broader than the legal guarantee in subsection 93(1), which only applies to rights existing by law at the Union.

> (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.

Subsection 93(4) thus gives the federal government authority to enact laws to override provincial legislation seen to infringe on denominational rights, if it so chooses. Note that this authority has never been exercised, although its use was considered after Manitoba eliminated its denominational schools in 1890.

Provinces that joined Confederation after 1867 adopted similar minority education guarantees with almost identical wording to section 93: section 22 of the Manitoba Act, section 17 of the Alberta Act, section 17 of the Saskatchewan Act, and Term 17 of Terms of Union of Newfoundland with Canada [Endnotes to Constitution Act, 1867; Bezeau, LM, 2007; Zinga, D, 2008; Oxaal, Z, 2003].

10. Background note: Elimination of denominational school privileges.

The Canadian Constitution provides 2 mechanisms by which denominational school privileges can be removed:

(1) First, since the provinces have the ultimate authority to legislate in the realm of education, they can choose to unilaterally eliminate denominational schools. Any parties that oppose the legislation can then pursue an appeal to the federal government, which can impose remedial legislation if it so chooses. (Manitoba exercised this authority in 1890, and the federal government declined to exercise its right to intervene.)

(2) Second, provinces can eliminate denominational school rights through a bilateral constitutional agreement. (Quebec and Newfoundland each secured such a constitutional amendment in the 1990s in order to adopt a single public school system for each official language.) Such an amendment can be as little as 12 words in length, and only requires the agreement of the province in question and the federal government.

Currently:

- Only three provinces (Ontario, Alberta and Saskatchewan) continue to maintain denominational school guarantees.

- Three other provinces (Quebec, Newfoundland, and Manitoba) eliminated their constitutionally protected denominational schools. The Quebec and Newfoundland governments obtained constitutional amendments eliminating denominational school rights [Constitution Amendment, 1998 (Newfoundland Act); Constitution Amendment, 1997 (Quebec)] through the bilateral constitutional amendment mechanism outlined in section 43 of the Constitution Act, 1982 [Constitution Act, 1982]. Manitoba eliminated denominational schools unilaterally in 1890 without a constitutional amendment. The federal parliament subsequently declined to impose laws restoring them, which was its right under section 93(4).

- Although section 93 can technically be said to apply to New Brunswick, Nova Scotia, British Columbia, and Prince Edward Island, these provinces had no denominational rights at the time of their entry into Confederation, and thus the section 93 rights are devoid of content [Zinga, D, 2008; Oxaal, Z, 2003].

The Canadian Secular Alliance believes that denominational privileges no longer serve a legitimate purpose and should be eliminated. The remaining denominational privileges in Ontario, Alberta and

Saskatchewan can be eliminated via bilateral constitutional amendments similar to the one adopted by Quebec, which simply reads: “93A. Paragraphs (1) to (4) of section 93 do not apply to Quebec” [Constitution Act, 1867]. As legal scholar Zoe Oxaal has noted, “[t]he fact that Quebec has turned its back on s. 93 has also brought into question its continued existence in Ontario, given the original purpose of the provision as a compromise between these two provinces. In addition, the fact that Catholics are no longer a religious minority, but now form the largest religious group in Ontario, is seen by some as straining the characterization of s. 93 guarantees as a form of minority protection …” [Oxaal, Z, 2003]. An editorial in the Ottawa Citizen stated the obvious when it noted that “the dual system is wrong in principle. It is no longer necessary for Ontario to protect a Catholic minority, for the simple reason that the public school system no longer serves a Protestant majority. It is a secular system that serves families of all backgrounds and beliefs. In that context, public funding for Roman Catholic schools is bizarre. If such a system did not exist, would we invent it now?” [Ottawa Citizen, 2007].

11. Background note: Denominational privileges in education override the fundamental rights and freedoms enshrined in the Canadian Charter of Rights and Freedoms.

The entrenchment of denominational privileges in section 93 of Canada’s Constitution has resulted in a long history of judicial decisions in which courts — shackled by this constitutional provision — have ruled that an 1867 historical anomaly trumps modern human rights law and the Canadian Charter of Rights and Freedoms. (For reviews of section 93 jurisprudence, see [Zinga, D, 2008; Bezeau, LM, 2007; Oxaal, Z, 2003; Richter, C, 1997; Smith, WJ, 1994; Stainsby, J, 1988; Bale, G, 1986].)

When deciding if a denominational school activity is protected by section 93(1), courts have examined (i) whether it was a privilege enjoyed by denominational schools by law at the time of Confederation, and if so, (ii) whether it is “essential” to the religious nature of denominational schools [Oxaal, Z, 2003]. For instance, cases dealing with the legality of extending full public funding to Catholic high schools in Ontario ([Reference re Bill 30] and [Adler v. Ontario]), were decided based exclusively on a point of historical fact: whether or not Catholic high schools were established by law in Ontario in 1867 (reviewed in [Bale, G, 1986; Stainsby, J, 1988]). Similarly, even in the 2002 “same-sex prom date” case [Hall (Litigation Guardian of) v. Powers], the court ruled against the Catholic school board at least in part because it found that the right to exclude a student’s same-sex partner from the prom was not a denominational school right in existence in 1867 [reviewed in Oxaal, Z, 2003].

This critical emphasis on conditions that existed at Confederation is due to the fact that, once the conditions for section 93 protection are met, a denominational school activity is immune from challenge under the Canadian Charter of Rights and Freedoms. Section 29 of the Charter reads: “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” [Canadian Charter of Rights and Freedoms, 1982]. Thus, denominational privileges in education override the other fundamental rights and freedoms enshrined in the Charter. In the 1987 case of Reference re Bill 30 (see below), Supreme Court Justice Wilson wrote that it “was never intended, in my opinion, that the Charter could be used to invalidate other provisions of the Constitution” [Reference re Bill 30]. Justice Estey agreed, writing that “the role of the Charter is not envisaged in our jurisprudence

as providing for the automatic repeal of any provisions of the Constitution of Canada" [Reference re Bill 30].

12. Background note: Legal challenges to constitutionally entrenched denominational school privileges.

In the 1987 case of Reference re Bill 30, the Ontario government sought to establish the constitutionality of extending full public funding to Catholic high schools (Catholic elementary schools already enjoyed full public funding to the exclusion of all other faiths). The question was examined by the Court of Appeal of Ontario and the Supreme Court of Canada, and both courts ruled that Bill 30 was a valid exercise of the province's section 93 power to legislate in the field of education.

The minority dissenting judges of the Ontario Court of Appeal had a different understanding of historical fact — they viewed public funding of Catholic high schools as an expansion rather than a restoration of Catholics' pre-Confederation privileges, and thus subject to the Charter. In this context, they wrote: "In our opinion, Bill 30 is inconsistent with s.15(1) of the Charter which gives to every individual the right to equal benefit of the law without discrimination based on religion. If this right is to mean anything, it must mean at least that the followers of one religion are not to be the beneficiaries of greater benefits provided by law than the followers of other religions. Bill 30 provides benefits on the basis of religion to one religious group only and is therefore a direct conflict with this right. … The issue must be decided in the context of the constitutional pact of 1982 and in the light of contemporary conditions in this province which bear little, if any, resemblance to those existing at the time of Confederation … It is essential also to recognize … that Ontario today is a multicultural and pluralistic society composed of people of many diverse social, ethnic, racial and religious backgrounds" (quoted in [Bale, G, 1986]).

The Supreme Court's decision in Reference re Bill 30 also conceded that: "It is axiomatic (and many counsel before this Court conceded the point) that if the Charter has any application to Bill 30, this Bill would be found discriminatory and in violation of s. 2(a) and s. 15 of the Charter of Rights" [Reference Re Bill 30]. However, the court found that Catholics' right to publicly funded high schools was protected by section 93 of the Constitution Act, 1867, and that section 29 of the Charter specifically exempted such rights from Charter scrutiny. Criticizing the Supreme Court decision, legal scholar Jonathan Stainsby has noted that "by adhering to a pre-Charter interpretation of the Constitution, the Supreme Court has sent a strong message that the Charter is not to reshape the face of the Canadian community. In deferring to the provincial government, the Court has let it be known that it will not take the lead in giving effect to the values which the Charter reflects. … [T]he Reference represents an entrenchment of the status quo in relation to minority rights and education and a firm statement that historical contingency is of greater importance than the equality rights in s-s. 15(1)" [Stainsby, J, 1988].

In the 1996 case of Adler v. Ontario, non-Catholic religious minorities sought to establish that the Ontario Government had violated their Charter rights to equality and freedom of religion by fully funding Catholic religious schools exclusively. The Supreme Court of Canada ruled that the Ontario Government had no obligation to fund the religious schools of non-Catholics. Although it noted that "[t]he Education Act funding scheme represents a prima facie violation of the s. 15 [Charter of Rights] guarantee of equal benefit of the law", it re-iterated the fact that denominational rights are immune from Charter challenge [Adler v. Ontario, 1996].

The courts also have found in a number of cases that public funds can legally be used to discriminate in favour of Catholics in the hiring, firing, and promotion of teachers in denominational schools (reviewed in [Oxaal, Z, 2003]). A religious school enjoys a special exemption under human rights law — as “a charitable, philanthropic, educational, fraternal, religious or social organization" whose target population is an identifiable religious group, it has the power to engage in preferential employment practices that would otherwise be considered discriminatory. Organizations that primarily serve people of a particular religion can preferentially hire likewise-identified people, provided the religious membership is a legitimate qualification for the job. While this exception is arguably legitimate in the context of private organizations, the use of public money for discriminatory hiring practices is problematic. Nevertheless, the courts have found it to be legal, again citing section 93(1). For instance, in the 1999 case of Daly v. Ontario (Attorney-General), provisions of section 136 of Ontario’s Education Act where struck down as unconstitutional because they restricted the ability of publicly funded Catholic schools to discriminate against non-Catholics in employment and career advancement.

13. Background note: Canada has been censured twice by the United Nations for violating the International Covenant on Civil and Political Rights.

As noted above, Ontario is the only province with the especially unjust combination of 100% funding to Catholic schools and zero funding to all other religious schools. Although domestic Canadian courts are limited by the historical anomalies of Canada’s 1867 constitution, international courts are not. In 1999, the United Nations censured Canada for violating article 26 of the International Covenant on Civil and Political Rights. Article 26 states: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” [International Covenant on Civil and Political Rights, 1976]. This was in response to a complaint made by an Ontario Jewish man, Arieh Waldman, who had to personally finance his children's private religious education while Catholics had their children’s religious education paid for by the state. The U.N. decision stated that “the Committee observes that the Covenant does not oblige State parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination” [Waldman v. Canada]. In other words, Canada was advised to fund all religious schools or none at all. The U.N. also specifically dismissed the Canadian Government’s argument that Catholic education is constitutionally protected, stating that: “The Committee begins by noting that the fact that a distinction is enshrined in the Constitution does not render it reasonable and objective. … [T]he Committee rejects the State party's argument that the preferential treatment of Roman Catholic schools is nondiscriminatory because of its Constitutional obligation” [Waldman v. Canada]. However, the Ontario and Canadian governments ignored this U.N. ruling.

In 2005, after 6 years of inaction following the Waldman decision, Canada was censured a second time by the United Nations because of Ontario’s discriminatory school system. The U.N. decision stated: “The Committee expresses concern about the State party’s responses relating to the Committee’s Views in the case Waldman v. Canada (Communication No. 694/1996, Views adopted on 3 November 1999), requesting that an effective remedy be granted to the author eliminating discrimination on the basis of religion in the distribution of subsidies to schools (arts. 2, 18 and 26). The State party should adopt steps in order to eliminate discrimination on the basis of religion in the funding of schools in Ontario” [Concluding observations of the Human Rights Committee, 2006].

14. Background note: Canadian politicians are eager to avoid controversy by maintaining the status quo, as evidenced by the recent debate in Ontario during the 2007 provincial election.

Despite the embarrassment of the above U.N. rulings, Ontario politicians appear steadfastly opposed to modernizing the province's education system. During the controversy over public funding of religious schools in the 2007 Ontario election, Premier Dalton McGuinty supported continued full public funding of Catholic religious schools to the exclusion of all others — or, as Ottawa Citizen journalist Dan Gardner put it, he was "stuck trying to defend the indefensible" [Gardner, G, 2007]. Politicians' eagerness to avoid controversy by maintaining the status quo is likely due to at least 2 reasons.

First, politicians respond to public opinion, which — in Ontario's case — was not yet overwhelmingly in favour of eliminating public funding for Catholic schools. A poll conducted by Oraclepoll Research in May 2007 found that 58% of respondents said they supported "the creation of one publicly funded education system in Ontario by merging the Catholic and public school boards across the province", while 29% said they opposed it [CBC News, 2007]. However, as the issue of funding for religious schools came into focus during the 2007 election campaign, the divide was no longer as clear. An Environics poll conducted in September 2007 found that 47% of respondents supported "removing the current funding of Roman Catholic schools and directing all public taxpayer dollars to the public school system", while 45% were opposed [Environics, 2007]. Another poll by Angus Reid at around the same time found that 53% of respondents supported merger of the public and Catholic systems into a single school system [Wilson, J, 2007]. One reason why Ontarians may be sympathetic to the Catholic school system is their false perception — propagated by the government and the Catholic system itself — that Catholics actually pay for the Catholic school system via their taxes. On property tax forms, Ontarians continue to designate whether their taxes should support the public or Catholic school board, even though this choice has zero financial consequences [Bezeau, LM, 2007]. In reality, the provincial government assumes full responsibility for all the costs of education, and both public and Catholic school boards are funded equally on a per-student basis [Bezeau, LM, 2007]. The "window dressing" exercise of designating property taxes to the Catholic school system only serves to mislead the public.

Second, after the dismantling of publicly funded Catholic education in Newfoundland, Catholics in Ontario moved to construct an effective lobbying infrastructure that would make the Catholic school system difficult to eliminate [Chung, A, 2007]. This infrastructure includes the Institute for Catholic Education, the Ontario Conference of Catholic Bishops, Catholic parents groups, Catholic teachers unions, and the Catholic trustees association. As one anonymous Catholic education official noted: "We saw how it could happen, and it put everyone in Ontario on alert … [A] good offence is the best defence" [Chung, A, 2007]. Head of the Ontario Catholic School Trustees Association Bernard Murray has noted that "Catholic education in Ontario is supported by a strong infrastructure of organizations" and that any attempt to reform the current system would incur "a great backlash" [Chung, A, 2007]. This coalition of organizations seems to be effective, as exclusive public funding of Catholic schools is currently supported by all 3 main political parties in Ontario (Conservative, Liberal, New Democrats), with only the Green Party advocating a single secular school system. Ontario Education Minister Kathleen Wynne has apparently told The Catholic Register that no amount of public debate over whether it is fair to fund Catholic schools but not Jewish and Muslim

schools would cause a Liberal government to re-examine current funding for Catholic schools as the only publicly funded separate system [Swan, M, 2008].

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