European Consortium for Political Research  
*Faith Based Schools in Liberal Societies*  
Reykjavik, August, 2011  

*Faith Based Schools and the Limits of Religious Freedom in Ontario*  
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This paper is part of my doctoral research which arises out of my advocacy work on behalf of a coalition of Muslim, Sikh, Jewish and Christian schools during the Ontario Election of 2007 when I became interested in the intensity of the debates and the ambiguities about religion. My research is part of a larger initiative called *The Religion and Diversity Project* headed by Dr. Lori Beaman of the *University of Ottawa* and *Canada Research Chair in the Contextualization of Religion in a Diverse Canada*.

1. Introduction

The first decade of the 21\textsuperscript{st} Century has proved to be a very dynamic and interesting one from a religious studies perspective. During that decade, it seemed that people of religion had suddenly emerged as unbalanced, demanding and violent disturbers of the peace, sending shock waves through, not only the liberal democracies, but through the Muslim states as well. Of course, the careful observer will know that people of faith had never gone away but, starting with the dramatic events of September 2001, religion had emerged as a point of consternation and discussion in a new way. \footnote{Jurisdictions around the world are struggling to respond to religious groups demanding public recognition. They range from multiculturalism in India (Bhargava, 1998, 1999), religious freedom in the context of American separation of church and state (Sullivan2005, 2009), Europe (Bader, 2007), Canada (Beaman 2000, 2004, 2008, Moon, 2008). While the Iranian Revolution (1979) was the first event which signalled a change in the role of religion in late 20\textsuperscript{th} Century global affairs, the events of September 2001 brought it home to North Americans in a new way.}

A number of political events and court cases in Canada demonstrated that it was not immune from the anxiety over religion sweeping the rest of the world. \footnote{The Hutterite Drivers Licence case (2006), the peremptory end to discussion of Sharia law in Ontario (2005), the Reasonable Accommodation Commission in Quebec (2007), the growing official scrutiny of polygamy culminating in the arrests of James Oley and Winston Blackmore in British Columbia (2009), the banning of the *kirpan* in the Quebec National Assembly (2010) suggest that Canadian jurisdictions, along with the rest of the world, were seeing religion as a national security issue to be monitored and controlled.} It is in this atmosphere of anxiety over particular kinds of religious expression that I situate the Ontario Election of 2007, which unexpectedly became a highly charged referendum on religion when John Tory, leader of the Progressive Conservative Party, announced government funding of the non-Catholic faith based schools as a plank in his party's platform. Dalton McGuinty, the incumbent and leader of the Liberal Party, effectively turned Tory's decision to his advantage using religion as threat so that this single issue became the key to Liberal electoral success. The results were decisive in two ways. First, the Liberals won 71 out of possible 107 seats with the Conservatives winning 24 seats. Second, a less easily definable result, was the entrenchment of an imagination which includes religion and people of faith as threats to the province's civic stability in general and educational governance in particular.
The intensity of the reaction to the Progressive Conservative proposal was surprising in two ways. First, it should have been an obvious extension of an already existing mechanism for funding faith based schools, Ontario having funded Roman Catholic schools since the 1860’s, an arrangement with constitutional protection under the provisions of Section 93 of the Constitution Act 1867. Further, other jurisdictions in Canada and throughout the world provide funding for faith based schools with no evidence of harm to their societies or their citizens. However, political decisions and arrangements operate on a logic unique to each jurisdiction and Ontario continues to fund a Roman Catholic system and a public system, while denying funding to other faith groups advocating for equal treatment. This apparent inconsistency is embedded in Ontario’s history and the ambiguous public role played by religion in shaping Ontario’s institutions, its laws and social practices.

There are a number of reasons why education became the site of a conflict over religion in Ontario. First, public education is designed to promote social cohesion around Canadian values which makes it a strategy in a larger social project that goes beyond teaching students how to read, write and compute. Among the things schools do is create an imagination and much of the anxiety over the introduction of religion into public schooling is rooted in a contest over control of the imaginations of young people. Second, it is designed to produce an educated citizenry equipped to compete in the modern world so that, while much of the rhetoric about is around student self actualization, education is a strategy in a larger national economic project in which religion plays an ambiguous role. Third, publicly funded education is an important industry which creates many jobs with professional organizations positioned to protect their interests so that, while much of the rhetoric is suggests student learning is the central focus of schooling, the reality is that professional interests and jobs are equally important in the debates about school funding in Ontario. At the same time, for members of religious communities, the prevailing secularism of the public school system represents threats to the identities of their children and to their collective memories, important enough to organize and privately fund hundreds of faith based schools serving the needs of thousands of children. Their advocacy for government support for their schools is based on primarily two things. The first is economic, the cost of tuition above the requirement to pay taxes for state schools representing a real financial burden but the second is that non funding is based on non recognition of their schools which marginalizes them as citizens. While the financial burden is an ongoing and daily issue, the non-recognition of their schools flares up periodically in political and legal contests during which they experience being marginalized, characterized as threats to the nation’s well being and being out of step with the modern world.

With so much at stake, it is no surprise that education in Ontario is a highly contested social site, something Veit Bader observed when he said

Raising and educating children are the most important ways to transmit religious practices and identities and thereby to perpetuate religious communities. For this reason, religious family law and religious education belong to the most hotly contested issues in modern states. Religious communities and parents, as well as modern state makers and liberal democrats are intensely concerned with education and their interests and strategies continue to clash. (Bader, 2007, 155).

The contest over the role of religion in Ontario’s public education is important in its own right but it also provides a window on conflicts over the public role of religion throughout the world.
Five recurring questions in the contest over religion in education reveal deeply entrenched assumptions about the nature of religion, its public role and the shape of religious diversity. These questions recur throughout the history of education in Ontario and they link the Ontario election to events around the world in that they are themes in any conflict over the role of religion. Ontario’s public policy governing religious diversity is based on particular answers to the five questions.

a. Definitions of religion and the secular: The key question is, "Are religion and the secular essentialized bases for truth claims or are they socially constructed and historically contingent human responses?". Ontario’s public policy seems conflicted on this issue. On the one hand, it reflects the view that religion is historically contingent and socially constructed. However, public policy governing education is based on a liberal secularization narrative which functions as a truth claim and is not itself subject to scrutiny. The definitions of the religious and the secular have significant implications for the definitions of inclusivity and exclusivity and for education and indoctrination.

b. Religion in society: The question here is, "Is religion a private matter or does it have a legitimate public role in society?". A source of tension here is the ambiguous place of religion in Ontario civil society. On the one hand it is a ubiquitous basis for individual and collective identity; on the other hand, religion is viewed as a source of sectarian animosity and social unrest. Ontario’s educational regulation is based on the idea that religion is a private matter, in contrast with advocates for faith based schools who claim a public role for religion.

c. Religion in identity construction: The key question is, "Is religion integral to human nature and social cohesion or does it represent one choice among many in individual identity construction?". Ontario’s educational policy framework reflects the view that religion is one choice among many and that education about religion equips students to make intelligent choices about religion. This is diametrically opposed to the view of faith communities who see religion, not as a peripheral matter of choice but a central matter integral to identity and with education being an instrument to consolidate religious identity and tradition.

d. Religion and the secular in historical narrative: The key question is, "Do the changes in the role of religion in Ontario and throughout the world represent progress, decline or differentiation?". Ontario’s public policy reflects the secularization thesis as a sign of progress and the attempt to re-introduce religious instruction into a publicly funded system represents a threat to progress. In contrast, (some) faith based schools also accept the secularization thesis but, they see it as evidence of loss of tradition and cultural decline. For them, funding for faith based schools gives religion a public moral purpose in mitigating the effects of secularization.

e. Role of law in the shaping and regulation of religion: The key question is, "Are law and regulation culturally and religiously neutral or are they makers of culture and shapers of religion?". Ontario’s public policy is based on the idea that law and regulation are culturally and religiously neutral, something which faith based schoolers see as a fiction in their struggle for recognition.

These five questions are a way to access and understand the volatility of the Ontario Election of 2007 because they represent profound first principles about personal identity, communal memory and the nature of a good society. They also provide an entry point into the aesthetic (Berger, 2010) out of which law governing education and school arises. The topic of
this paper is the role of law and regulation as religious actors, which shape religion in particular ways.

My method to examine law and regulation as religious actors is discourse analysis. The language in law defining the role of religion in public schools and in the regulation regarding religion in education reveals that neither are religiously neutral. Rather, they rest on fundamental assumptions about the nature of religion and, in turn, they shape the social space within which religion occurs. The dynamic engagement between religious communities and the law reshapes both religion and the law. ³

Two scholars, Benjamin L. Berger and "The Aesthetics of Religious Freedom" Draft 2010) and Lori G. Beaman (Defining Harm,2008 and “Defining Religion”in Law and Religious Pluralism in Canada, 2008) examine the role of law as a religious actor. Following the work of Immanuel Kant, Berger theorized that law and regulation emerge out of an "aesthetic" or a priori construct of time and which shape religion in particular ways. The points of friction between law and religion cannot be understood without consideration of the often unexamined presuppositions deeply embedded in all cultural forms, including law. He said, The influence of aesthetics on religious freedom may not always be determinative but it will never be absent. Yet the role of aesthetics in structuring both the doctrine and lived realities of the constitutional protection of religion in modern societies has gone without critical comment in the growing literature on secularism and religious freedom in the modern rule of law. (Berger, 2010, 1).

Beaman comes at the problem of the relationship between law and religion in another way, examining the social context in which law is embedded, the ways in which law reflects and reifies social and political trends and the role of power in the creation and exercise of law. Law is its own producer of truth and, "In the process, other voices or ways of seeing are silenced or minimized or sometimes appropriated. Law is able to render some things "unsayable" - as being outside the boundaries of what is possible." (Beaman, Harm, 2008, 8).

Using six government reports on education, four Ontario court cases in which the role of religion in public education was contested and two Ontario Ministry of Education documents I demonstrate a shift in the social aesthetic reflected in the law and the regulation governing education. In the process a particular approach to the role of religion in education is given a position of privilege while other voices are marginalized.

2. Education and Religion in Ontario - a brief history

The Election of 2007 was only one event in a long history of contention over religion and education in Ontario going back to the 19th Century when suspicion between Protestants and Roman Catholics was a fact of social and political life in Upper and Lower Canada. The compromises required to create Canada in the 1850’s and 1860’s were models of political wisdom and pragmatism, based on respect for the identities of the two groups and their mutual fears of being dominated and assimilated by the other. One of the compromises in the British

³ I take discourse analysis to be the examination of the use of language around particular themes or issues which recur over time. An example would be the use of the religious and the secular which enters the history of education in Ontario at a particular time. Over time there are changes and there is continuity in the meaning and the uses of the categories, examination of which sheds light on the problem addressed in this thesis. These shifting uses of language indicate changes in the organization and deployment of power and in social trends.
The North America Act (1867) was the creation of a federal system of government with a division of powers between the central government and the provinces.

The division of powers between the central or federal government and the provinces designated education as a provincial matter with each province determining its own formula for managing unity and diversity in its school system. Both Protestants and Roman Catholics recognized education as integral to their collective identities which neither was willing to delegate to the other or to the federal government. In Ontario and Quebec dual school systems guaranteed protection for their religious and linguistic minorities, the recognized ones being French and Catholic in Ontario and English and Protestant in Quebec. Religious diversity was thereby institutionalized in Canada’s founding documents and reflected in the school systems.

In Ontario, a Common School system was established in mid-19th Century, following a pattern already in place in Western Europe and the United States. It was designed, largely by Egerton Ryerson, as an inclusive, non-sectarian Protestant Christian system to centralize control and supervision, the goal being to improve quality and uniformity of instruction. An important element in the instructional program was a value system which reflected traditions within Protestant Christianity; however, subsequent developments, particularly after the 1940s, reflected the changing role of religion in the school system. Beginning in the 1950s, government documents and legislation governing education reveal a shift away from Protestant Christianity as the dominant ideology to progressive liberalism, in response to urbanization, immigration, industrialization and a broadly based acceptance that, in order to be inclusive, religion had to be taken out of public affairs, including publicly funded education.

The Common School model in Ontario, reflecting similar education reform movements in Western Europe and the United States, was based on four principles: (1) social comprehensiveness, (2) total commitment to education, (3) linking of education with technological and social change and (4) heavy reliance upon action by the state, as opposed to "non-official activity. (Titley and Miller, 1982, 62).

However, what is equally clear was Ryerson’s commitment to non-sectarian Christianity as the basis for the school system and, more broadly, the basis for civilization, something noted by J. Donald Wilson when he said,

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4 Any discussion about the public schools and their prevailing mythology in Ontario must include Egerton Ryerson (1803 – 1882). Ryerson was born into an Anglican family but converted to Methodism when he was eighteen years old. He had a life-long commitment to reform politics and his legacy includes the “common school” system which was designed to create universal access to education. His chief rival was Anglican bishop John Strachan, a leading figure in the Upper Canadian social and political elite which became known among reformers and in history as the “Family Compact”. In the Ontario public school narrative of education, Strachan symbolizes an elite, exclusive past while Ryerson represents the progressive, inclusive future.

5 At the same time, a parallel Separate School system established to meet the needs of the Roman Catholic population has continued to express its religious identity protected by the BNA Act. However, its place in Ontario has had a complicated role in the discourse about educational funding. Although it is protected in s.93 of the Constitution Act, 1867, there has been a "one school movement which has advocated for its abolition. Full funding for Separate Schools, when it was finally extended in 1985, was highly controversial.
"Education for Ryerson was to be Christian, universal, free and compulsory. ... For Ryerson, the schools were proper vehicles for the dissemination of Christian principles; these Christian principles were, however, virtually synonymous with Protestant values. "Education is a public good, ignorance is a public evil", and therefore, every child, rich or poor should receive an education sufficient to overcome "the evils of want and poverty", and to "fit him to be an honest and useful member of the community". (Titley and Miller, 1982, 62).

Ryerson's assumptions about the role of Christianity as the basis for civilization, the role of the state in providing a forum for accessible, egalitarian education, and the role of the schools as instruments of the government for provide education as a public good were consistent with the predominant reformist views emerging in the middle of the 19th Century. While he may not have been an original thinker, he was a highly effective administrator in executing plans for a school system which embodied the prevailing imagination.

The dominance of Protestant Christianity in Ontario public schools continued without serious challenge into the 1960's, evident in regulations requiring devotional activities, moral and religious instruction based Christian tradition and the use of the Bible as the textbook for religious instruction. During the 1950's and 1960's, however, a number of trends were changing the social fabric of Ontario. Urbanization, industrialization, increasing religious and ethnic diversity, beginnings of a shift to a global, knowledge based economy and changes in the religious landscape created incentives for reassessing both the organizational structure and the identity of the public schools.

The government responded to the trends in a number of ways, one of which was the elimination of the "one room school house" run by locally elected trustees to be replaced by larger, centralized schools in order to consolidate resources and to simplify oversight. A second response was an emphasis on pedagogy and the nature of learning due to larger numbers of students entering the system who were expected to graduate with high school diplomas to prepare them for a changing economy. A third response to changes in the religious and social climate was legislation and regulation which shifted the Protestant character of the public schools to something the Courts and the Ministry of Education have identified as "secular".

Six Reports on Education

Six government reports on education; the Royal Commission on Education in 1950; The McKay Report, 1966; The Hall-Dennis Report of 1968 titled Living and Learning; Religious Information and Moral Development; The Report of the Committee on Religious Education in the Public Schools of the Province of Ontario, 1969; the Report of the Commission on Private Schools in Ontario or the Shapiro Report (1985); the Report of the Ministerial Inquiry on Religious Education in Ontario Public Elementary Schools, or the Watson Report (1990) illustrate the trend in the public schools away from Protestant Christianity to their becoming "secular". The language in the reports is important because it makes the link between "secularization" and "true education" while it reinforces the narrative of a progressive move away from tradition, religious and sectarian indoctrination. The language also makes clear the link between "public schooling" and the social good.

The Royal Commission on Education in 1950 or the Hope Commission, chaired by the Honourable Justice John Andrew Hope, was mandated to review the existing public education enterprise in Ontario and to provide recommendations for policy direction for the future. It
placed special emphasis on the "cardinal virtues" which would guide schooling and, in doing so, identified Christianity as the religion providing the moral framework for the public schools. It understood the values of respect for the individual and freedom of thought to have their roots in the Judeao-Christian and Greek traditions and unambiguously said, "There are two virtues about which there can be no question - honesty and Christian love. They reflect the intellectual and religious heritage of Western Civilization." (p. 230). Echoing Egerton Ryerson, the Hope Commission universalized virtue based in Protestant Christianity when it said,

Without proclaiming any creed or doctrine we know that in our democracy the Christian ideals as personified and exemplified by Jesus have an appeal to all persons of good will and are the surest common ground for an educational programme related to the pupil as a person. The attitude of Jesus toward children, His understanding of human nature and behaviour, His charity and loving kindness toward all men, form a perfect model for true democracy in the classroom, the community and the nation." (p.37).

For religious instruction, the Hope Commission reinforced the Christian narrative, saying, "The Bible is the only textbook for the subject of religious instruction."

The Keiller Mckay Commission was established in 1966 and, while its report was not officially adopted, its recommendations did signal a shift in the intellectual and social environment by critically examining the dominant role of Protestant Christianity in Ontario’s public schools. Among other things, it identified the religious studies offered in Ontario's public schools as "indoctrination" and "contrary to the requirements of true education" and recommended their removal from the elementary and high school programs; recommended more inclusive opening devotional exercises (for example, adding "other suitable prayers" to the Lord's Prayer); recommended the introduction of moral education or character building emphasis throughout the school program and recommended the adoption of formal high school courses in world religions and related professional training for teachers.

The Hall-Dennis Report of 1968, titled Living and Learning, was adopted by the government. It reflected the sentiments in Keiller Mckay that the prevailing ideology in Ontario’s public education system was moving from Protestant Christianity towards progressive liberalism. Although religion and teaching about religion did not receive the same attention as they did in the Hope Commission Report or Keiller Mckay, Hall-Dennis did observe a changing social environment which, according to the Commission, required significant adaptations in the delivery of educational services. It said,

"While data may not be available, there is evidence that Ontario is caught in the severe dislocation of values that accompanies today's social and technological changes. The existence and effectiveness of God are openly and widely challenged; the changing standards of sexual morality, the position of the church on birth control, its involvement in issues of social justice - raising of all these issues indicates that people in Ontario are questioning many basic religious beliefs." (p.27).

Hall-Dennis referred to a long standing theme in Ontario when it identified as a goal, "administrative cooperation, preserving what is considered by separate school supporters as essential to their system, and at the same time making possible a great deal of co-operation and sharing of special services, avoiding duplication in many areas and services, and bringing to an end a controversy that has burdened the administration of education in Ontario since Confederation.". (Recommendation 253, p.203). The language used suggests that, in Ontario,
religious diversity in the school system was an administrative problem to be solved rather than
an expression of dynamic democracy to be celebrated.

Hall-Dennis was based on a liberal progressivist idea as the foundations of the education
system, asserting that the point of education is "man's unending search for truth", although it
used Christian language to do so. The title for the relevant section of the Report is "The Truth
Shall Set You Free", a reference to the Gospel of John 14:6 and the motto of Victoria College,
which emerged out of Upper Canada Academy founded by Egerton Ryerson. The language
suggests a moral purpose of education in language that reflects the Protestant imagination
from which it is trying to distance itself.

The next report, titled Religious Information and Moral Development: The Report of the
Committee on Religious Education in the Public Schools of the Province of Ontario, 1969,
was specifically about religious and moral education. It identified the Protestant Christian bias
in school opening exercises and the religious instruction in public schools as a problem and,
further, drew conclusions about the nature of true education when it said,

The present course of studies in religious education has failed in its first obligation,
teaching, because it is not designed in accordance with modern principles of education. It
does not provide objective examination of evidence, nor stimulate the inquiring mind; it
does not teach children to think for themselves either about the facts of religion or about
other matters." (p.27).

While the 1969 Report made the distinction between "modern principles of education" and the
"present course of studies" on "objective examination of evidence", it included other
recommendations which suggested some ambiguities. Paradoxically, for example, it
recommended that opening exercises be held in the home rooms of elementary schools,
including "the singing of the National Anthem and a prayer, either of a universal character
appealing to God for help in the day's activities or the Lord's Prayer". It justified this
recommendation by making the distinction between "inspirational and dedicational activities"
rather than confessional ones designed to indoctrinate (p. 36-37). However, moral education
was still considered important and recommended in public schools, on the grounds that "moral
development means helping young people through practice make moral decisions". This moral
development was to take place without indoctrination, allowing students free discussion and
exploration, in order to come to their own moral decisions.

The Report of the Ministerial Inquiry on Religious Education in Ontario Public Elementary
Schools, or the Watson Report (1990) was a response to concerns expressed by citizens about
the shift away from Christianity to secular liberalism. This was in the context of wider concerns
about progressivism which was seen as having moved public education too far in the direction
of child-centered permissiveness. Concerns about "moral drift" as well as lack of accountability
and deteriorating standards in public education had risen to the point where they could not be
ignored and the last decades of the 20th Century saw a number of reforms in Ontario which
found their parallels in other jurisdictions. The Watson Report attempted to establish the role
of religion in the public schools within the parameters of the Elgin County decision (see below).

Watson's report addressed the long standing requirement that all teachers "inculcate by
precept and example respect for religion and the principles of Judaeo-Christian morality"
which, by 1990, was anachronistic, given the changes in Ontario's public education culture. He
changed the wording to read, "To inculcate by precept and example respect for religion and
those principles of morality underlying all major world religions and the highest regard for truth, justice, loyalty, love of country, humanity, benevolence, sobriety, industry, frugality, purity, temperance and all other virtues." (p.91). Watson was clearly trying to maintain the influence of Christianity but had to rework the language to reflect the social and cultural environment of the 1990's as seen through the lens of public education. For example, he recommended that one third of the time for teaching about religion be dedicated to Christianity (p.105) and he maintained the use of the term "inculcate".

The report of the Commission on Private Schools in Ontario or the Shapiro Commission was submitted in 1985. The mid to late 1980's was a period of intense legal and political activity around faith based school funding in Ontario. The Shapiro Commission did its work in this context, with the government exploring administrative options as a way forward on the complex questions of religious diversity in Ontario's schools. It is included here out of chronological sequence because it introduces a different note and it leads to the examination of law as an actor in creating particular social space for religion.

In 1985, the Progressive Conservative government of Ontario adopted Bill 30 which extended full funding to Roman Catholic Separate Schools, which, to that time, had been funded up to and including Grade 10. The government, however, paid a high political price for Bill 30 and, in 1985 lost power to the Liberals, an upset which continues to serve as a cautionary tale for any Ontario politician who enters the challenging area of religion and education. Bill 30 was challenged by a number of groups on both political and legal grounds but, by 1987, the Supreme Court of Canada declared it constitutional. The Liberal government, in response to the pressures created by the passage of Bill 30 and the growing demand for diversity in the public school system, established The Commission on Private Schools in Ontario, also known as the Shapiro Commission. Bernard Shapiro, drawing on funding models in effect in other Canadian provinces, recommended that private religious schools be included under the public school umbrella as “associate schools”. While he had recommendations regarding the teaching of religion designed to protect the goal of education as “intellectual and moral autonomy of the young” and the avoidance of “indoctrination”, his report was the first in Ontario to recognize religious diversity that went beyond the traditional Protestant/secular – Roman Catholic duality.

However, the confluence of two factors prevented this recommendation from being adopted. First, the strong political and ideological resistance against Bill 30 escalated in the reaction to Shapiro’s recommendation making it clear that consideration of further religious diversity created unacceptable political risks. The second was a series of legal developments between 1985 and 1996 which privileged a particular view of religion and education and making illegal the teaching of religion in publicly funded schools outside the Roman Catholic system. By doing so, the legal framework shaped the educational space for religion, reflecting a social trend which, beginning in the 1960's, saw the secular as a conceptual boundary around the religious pushing religion to the margins of social and educational space. It is to the legal history that we now turn our attention.

3. Legal and regulatory framework – Law as a religious actor

The current legal framework for religion in public schools was established in four court cases occurring in a relatively short period of time from 1985 to 1996. Zylberberg v. Sudbury Board of Education (1988) (hereafter Zylberberg), Canadian Civil Liberties Association v Ontario
(Minister of Education (1990) (hereafter Elgin County), Bal v. Ontario (1994) (hereafter Bal) and Adler v Ontario (1996) (hereafter Adler) provide a window on the changing social role of religion and demonstrate the role of law in privileging a particular view of religion and education, while marginalizing other voices. In Zylberberg and Elgin County, parents challenged the dominance of Protestant Christianity and the idea of Christian inclusivity while in Adler and Bal members of faith communities used similar arguments to challenge the dominance of secular liberalism and the idea that the secular is inclusive and universal. The constitutional bases for the claims in all four cases occurs within the parameters of The Constitution Act, 1867 (formerly The British North America Act, 1867 or popularly the BNA Act) and the Charter of Rights and Freedoms, 1982.

Section 93 of the Constitution Act, 1867 is relevant to the regulation of education and the four cases, creating constitutional protection for “dissentient schools” in Ontario and Quebec. In the 19th Century, "dissentient schools" meant the Roman Catholic schools in Ontario while in Quebec the term meant Protestant schools. Section 93 states:

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 of 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:

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 Provision 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 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.

The sections of the Charter of Rights and Freedoms relevant to this paper are s.2 and s.15. S. 2 includes guarantees of rights to various freedoms and states:

Everyone has the following fundamental rights and freedoms:

(a) freedom of conscience and religion:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

S. 15 includes guarantees of equality among which is

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without dis-
crimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.


The issue in *Zylberberg* (1988) was whether the religious exercises, prescribed in *Section 28 (Regulation 262)* of the *Education Act* for the opening and closing of the school day in public schools, violated the *Charter Section 2(a)* rights of parents and students who objected to the regulation's Christian character. In an earlier decision the Divisional Court had ruled that the *s. 2(a)* rights had not been violated in a substantial way because the religious exercises were not necessarily Christian and any references to "God" were consistent with the Charter which recognizes, in its preamble, "the supremacy of God and the rule of law". (Bayefsky and Waldman, 2007, 634). Further, in the opinion of the Court, coercion of students could not be demonstrated because of clearly identified procedures by which students and parents could exempt themselves from activities to which they objected.

The Ontario Court of Appeal reversed the Divisional Court decision, ruling that *Regulation 262* was in violation of *s.2(a)*, rejecting the arguments of the Sudbury Board's claim that the provisions allowing exemptions from the exercises adequately protected the students' religious freedoms. It addressed the issue of "coercion" by quoting Chief Justice Dickson in *R v Big M Drug Mart (1985)*, when he said

Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative course of conduct available to others. Freedom in a broad sense, embraces both the absence of coercion and constraint and the right to manifest beliefs and practices.

In addition, Dickson commented on the freedom from conformity to the majority when he said

What may appear good and true to a majoritarian religious group, or the State acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of the "tyranny of the majority". (Bayefsky and Waldman, 2007, 639).

The Court in *Zylberberg* built on Dickson's analysis of the shift in the public role of religion in post Charter Canada when he said

In an earlier time, when people believed in the collective responsibility of the community toward some deity, the enforcement of religious conformity may have been a legitimate object of government but since the Charter, it is no longer legitimate. With the Charter it has become the right of every Canadian to work our for himself or herself with his or her religious obligations, if any, should be and it is not for the State to dictate otherwise. (Bayefsky and Waldman, 2007, 640).

The judgement in *Zylberberg* was following the trend seen in government reports and in legal decisions in which the responsibility for religious identity and practice was shifting away from the collective to the individual and in which the dominance of Protestant Christianity was being challenged. This trend continues in *Elgin County* and subsequent cases.

**Canadian Civil Liberties Association v Ontario (Minister of Education) (1990)**

While *Zylberberg* dealt with opening and closing exercises, the issue in *Elgin County (1990)* was about religion in the academic program. *Elgin County* (1990) was a response to
several parents objecting, in 1985, to the Elgin County School Board endorsement of a religion course being taught in the public school attended by their children violated their Charter Section 2(a) and Section 15 rights. The Board’s position was based on Regulation 262, s. 28(4) of the Education Act which allowed the teaching of such a course, the purpose of which was identified to the court as the following:

...to provide pupils with a religious context, primarily Christian, in which to develop appropriate responses to life's situations. It should not be assumed by a statement of this objective that other religions and even nonreligious interests are to be ignored. Rather it is hoped that moral, ethical and religious consensus which they hold in common with Christianity will be the primary content in any religious education program in the public schools. (Page 34 of the Court edition of the decision).

The parents alleged that the classroom practice in Elgin County (which included incidents of a local pastor telling students that non-believers would go to hell) constituted coercion, thereby violating their s.2(a) rights. Further, they claimed that their s.15(1) rights had been violated by the Board’s privileging of Christianity and that their children were being unequally treated by having to absent themselves from part of the school’s program of study.

The Divisional Court, in 1987, had found in favour of the Elgin County Board, agreeing that coercion had not occurred since there were long standing provisions (since 1843) for students and parents to opt out of any teaching that was offensive to them. The majority of the Court rejected the s.15(1) claims by saying that the religious instruction was equally available to all students and that the decision to opt out was not due to the Board’s action but to the parents’ choices.

The Ontario Court of Appeal, however, agreed with the parents that the Board was engaged in "state authorized religious indoctrination" which violated the Charter rights of the students. Its 1990 ruling occurred after Zylberberg (1988) in which that court had ruled that the provisions for opting out were inadequate, given the realities of student experience in classrooms and, further, that the privileged position of Christianity evident in the religious exercises (prayer and devotional activities) used at the beginning of each school day was inappropriate in a secular school system. It quoted Zylberberg, saying

The exemption provision imposes a penalty on pupils from religious minorities who utilize it by stigmatizing them as non conformists and setting them apart from their fellow students who are members of the dominant religion. (Bayefsky and Waldman, 2007, 689)

The Court of Appeal in Elgin County applied the principles regarding religious exercises established in Zylberberg to the religious studies curriculum, ruling that “religious education” was inappropriate in state funded, public schools. The Court based its ruling on the distinction between "education about religion" and "religious education", concluding that education about religion is appropriate in publicly funded schools, while religious education is not. In this distinction, teaching about religion allows students to think critically and make informed decisions while religious education is designed to inculcate dogma. Education about religion is thought to increase agency while religious education reduces it. The Court described the proper role of the school as follows:

- The school may sponsor the study of religion, but may not sponsor the practice of religion.
The school may expose students to all religious views, but may not impose any particular view.

The school's approach to religion is one of instruction, not one of indoctrination.

The function of the school is to educate about all religions, not to convert to any one religion.

The school's approach is academic, not devotional.

The school should study what all people believe, but should not teach a student what to believe.

The school should strive for student awareness of all religions, but should not press for student acceptance of any one religion.

The school should seek to inform the student about various beliefs, but should not seek to conform him or her to any one belief. (Emphasis included in the original).

While the distinction between “education about religion” and “religious education” could be questioned on educational grounds (see below), it has been the basis for education regulation about religion in public schools since 1990 with the issuing of Policy/Program Memorandum No. 112. Elgin County confirmed, in law, the trend in government reports which identified the purpose of education to equip students to think critically and to make informed decisions about their religious choices. However, the next two cases, Bal and Adler, take this principle and establish, in law, the idea that true education takes place only in secular learning environments.

Zylberberg and Elgin County were decisions in response to parents objecting to the religious dominance of Christianity in the public schools with the rulings establishing the secular nature of the school system in order to ensure that no religion held a position of privilege in either the social practice or academic program. However, after 1990, members of a number of faith communities began to question the secular nature of the schools which, in their view, represented its own culture of indoctrination, coercion and exclusion. The next two cases, Bal and Adler, are the result of Charter claims by members of faith communities that the secular nature of the schools violated ss. 2(a), 2(b) and 15 of the Charter of Rights and Freedoms. Furthermore, they claimed that Ontario’s policy of funding only Roman Catholic schools guaranteed in Section 93 of the Constitution Act (1867) violated their s.15 rights on the basis that it discriminated against non Catholic religious groups. The decisions are significant, both for their results which reinforce Ontario’s current funding policy, but also for their assumptions about the nature of religion and the secular, the public and private and the nature and purpose of education. Further, the Courts interpret Section 93 of the Constitution Act as a constitutional anomaly.

In 1996 a complaint was submitted to the United Nations Human Rights Committee in a case known as Waldman v Canada. The complaint was that Ontario’s school funding policy was in violation of Articles 2, 18(1), 18(4), 26 and 27 of the International Covenant on Civil and Political Rights. Specifically, Waldman alleged that that Ontario’s policy of funding only one faith based school system was discriminatory because it did not recognize other faith based schools. In 1999 the United Nations Human Rights Committee issued a decision agreeing that Ontario’s funding policy did violate the relevant articles and, while the Committee did not suggest a remedy, a concurring opinion by one of the members suggesting that the extension of funding to other faith based groups would satisfy the complaint. In 2000 Janet Ecker, Ontario Minister of Education submitted a letter to the Canadian Foreign Affairs Department saying that Ontario would not change its funding policy to either eliminate funding to Separate Schools or to extend funding to other faith based schools.
aly born out political necessity in unique historical circumstances, thus rendering it immune from Charter challenges. The social impact of the rulings was the legal reinforcement of a particular space for religion in public education and the marginalization of certain religious voices and practices in public spaces.

**Bal v Ontario 1994**

*Bal* was a challenge by religious communities to *Memorandum 112 (1991)* which, based on Elgin County, instructed public school boards to cease all religious instruction programs. Up to this time, Boards of Education had offered programs in religious education and a number of religious alternative schools had existed in the province but those programs were, with *Memorandum 112*, prohibited.

In December, 1990 the Ministry of Education issued *Memorandum 112*, to go into effect January, 1991 with the purpose of bringing program policy and practice in the public schools into line with parameters for religion established in *Elgin County* and *Zylberberg*. *Memorandum 112* began by summarizing the legal context in 1990 in which *Sections 28 and 29* of the *Education Act* had become invalid and then went on to outline the implications for the future of religion in public schools. It made the link between “religious education” and “religious indoctrination” and, while acknowledging that “the line between indoctrination and education, in some instances, can be difficult to draw”, refers to the distinguishing characteristics of both outlined in *Elgin County*. In describing the “Permanent Policy (Section II) it instructed the Boards of Education that:

1. Boards of education may provide programs in education about religion in Grades 1 to 8 during the school day for up to 60 minutes per week.
2. Boards of education may continue to provide optional credit courses in World Religions in secondary schools, as specified in the curriculum guidelines entitled *History and Contemporary Studies, Part C; Senior Division, Grades 11 and 12, 1987*. The program described in the guidelines meets the court’s definition of permissible education about religion.
3. Schools and programs, including programs in education about religion, under the jurisdiction of boards of education must meet both of the following conditions: a) They must not be indoctrinational. b) They must not give primacy to any particular religious faith.
4. Boards of education may continue to provide space before the beginning or after the close of the instructional program of the school day for indoctrinational religious education. Given the provisions for equality of treatment in the Canadian Charter of Rights and Freedoms, boards choosing this option must make space available on an equitable basis to all religious groups.

In Section VI (Context) it says the following:

This permanent policy and forthcoming amendments to *Regulation 262* are to be understood within the context of the long-established vision of the public elementary and secondary schools as places where people of diverse backgrounds can learn and grow together. The public schools are open and accessible to all on an equal basis and founded upon the positive societal values which, in general, Canadians hold and regard as essential to the well-being of our society. These values transcend cultures and faiths, reinforce
democratic rights and responsibilities and are founded on a fundamental belief in the worth of all persons.

In Bal, Charter ss. 2(a), 2(b) and 15(1) challenges to Memorandum 112 were launched by a group of Sikh, Hindu, Muslim, Mennonite and Christian Reformed parents, who sought to retain minority religious school accommodation within the public system. Their claim was that the secularism of the public school system was coercive and exclusive and, therefore, a violation of their religious freedom and equality rights. The Court, however, identifying the public school system as “secular” and “inclusive” ruled that Memorandum 112 did not violate the Charter s. 2(a) freedom rights of the applicants. It rejected the arguments of the plaintiffs that Memorandum 112 was a violation of Section 2(a) rights by pointing to the option exercised by parents to opt out of the public schools and enrol their children in private schools. The Court said

In my opinion, the purpose of Policy Memorandum 112 and the regulations is to secularize the public school system, not to restrict protected expression. The effect is to promote secularism in the public schools, not to restrict expressive activities which promote the interests or values underlying the freedom of expression. The stated objective is the protection of minority rights.

But, in reality none of the parties to this application have had their expression restricted. A student is not prevented from speaking his or her beliefs. Indoctrination is limited but not expression. (Bayefsky and Waldman, 2007, 837)

Quoting Chief Justice Dubin in the Bill 30 Reference (1987) the Court said

The publicly funded educational system provides universally accessible education opportunities for all, regardless of their ethnic, racial or cultural background, social or economic status, age or religious preferences. The Education Act provides access to public education without regard to religious belief or conviction. The public school system is solely secular and, in my view, because it is secular, it cannot found a claim of discrimination because it does not provide public funds for religious education under private auspices. The Education Act does not provide for public funding of any private school, be it denomination or otherwise. Adler P 10#15).

In its conclusion the Court stated that it was bound by the trilogy of Zylberberg, Elgin Count and Adler (1994) and affirmed that Policy Memorandum 112 did not infringe ss. 2(a), (b) and 15(1) of the Charter. (Bayefsky, 840). Bal established that public funding for religious education either in the secular schools or in alternative faith based schools would have reversed the trend in the government reports since the 1960's, the legal parameters established in the trilogy of legal cases and in government regulation since 1990. It also stated its opinion on the nature of secularism and religion and the implications of its definitions for schools.

Adler v Ontario 1996

Adler (1996) was an appeal by parents of a 1994 lower court ruling on behalf of their learning disabled students who were not receiving the support services available to students in state funded public schools. First, they claimed that Ontario’s funding policy was unconstitutional, alleging that the funding of Roman Catholic schools, guaranteed in Section 93(1) of the Constitution Act 1867, should be extended to other faith groups and that not doing so was a violation of their Section 15(1) equality Charter rights. Further, they claimed that the services required by their children were essentially “health services” and not “education” services, a distinction
which would place this claim outside the very contested area of public education and into the much less controversial jurisdiction of health care. They argued that the Government’s refusal to extend (health) support services and other funds to non-Catholic faith based schools constituted a further violation of their Section 15(1) equality rights. Third, they claimed that the financial burden of having to pay school fees for their faith based schools constituted a violation of their Section 2(1) religious freedom rights guaranteed in the Charter. They argued that religious freedom is meaningless if it the costs of exercising it are prohibitive and that states have a duty to create conditions which allow free exercise of religious expression. Central to the case are the interpretation of Section 93(1) of the Constitution Act, 1867, the definitions of “school” and “board” in Section 1(1) of the Education Act and the question of whether the services requested are “health services” or “education services”.

The Court of Appeal (1996) upheld the lower court ruling in a judgement which included the following:

First, claims based on Section 93 of the Constitution Act, 1867 have no standing because Section 93 was a political response to unique historical circumstances requiring protection for religious groups (ie, Roman Catholics and Protestants) who felt threatened in the 19th Century. Without such provisions, the cooperation required to create the nation of Canada would not have been possible. Therefore, Section 93 was a “constitutional anomaly” which did not establish legal or constitutional principles on which religious groups could make s. 2(a) or s.15(1) equality claims in the late 20th Century. The majority opinion stated that

Section 93 of the Constitution Act 1867 is the product of a historical compromise crucial to Confederation and forms a comprehensive code with respect to denominational school rights which cannot be enlarged through the operation of s. 2(a) of the Charter. It does not represent a guarantee of fundamental rights. The appellants, given that they cannot bring themselves within the terms of s. 93’s guarantees, have no claim to public funding for their schools. (Adler, Page 2)

The Court acknowledged that the s.15 equality rights of the appellants were being violated but referred to s.1 of the Charter in ruling that the violation was constitutional when it said

The encouragement of a more tolerant harmonious multicultural society constitutes a pressing a substantial objective capable, provided its effect is duly proportionate of justify the infringement of s. 15. The public school system represents the most promising potential for realizing a more fully tolerant society. ... The denial of funding to separate schools is rationally connected to the goal of a more tolerant society.

Second, the Court ruled that the services required by the students identified in Elgin County were “educational” services and not “health” services as claimed by the appellants. The Court said

These services, which should be characterized as education services as opposed to health services, are designed to ensure that children with special needs have full access to the public school system. (Adler, Page 5)

Third, the public schools are described as religiously neutral and socially inclusive. The s. 2(a) freedom claims were rejected because parents’ enrolling their children in faith based schools are the result of their religious choices, not the result of any action of the Ministry of Education or of laws or regulation. While their choice to enrol their children in non-government faith
based schools is protected by s. 2(a), the government has no obligation to pay for their choices. The Court said

Some overlap exists between the clams based on s.2(a) and s.15 of the Charter. Neither section is infringed even if the non-funding of private religious schools imposes an economic disadvantage in relation to parents who send their children to secular public school. Nothing in the Education Act relating to mandatory education per se involves a breach of appellants’ rights under s. 2(a) of the Charter. The Act allows for the provision of education within a religious school or at home and does not compel the appellants to act in any way that infringes their freedom of religion.

Quoting Dubin CJ of the Ontario Court of Appeal (1994), the Court said

..the (Education) Act only made education (as opposed to school attendance) compulsory and that children need not attend school so long as they receive satisfactory instruction elsewhere. Dubin CJ found that this provision of excusing children form public schools provided a sufficient protection for religious freedom.

Fourth, the Court accepted the definition of “school” in the Education Act s. 1:

“school” means (a) the body of public school pupils or separate school pupils or secondary school pupils that is organized as a unit for educational purposes under the jurisdiction of the appropriate board or (b) the body of pupils enrolled in any of the elementary or secondary school courses of study in an educational institution operated by the Government of Ontario.

In legal and regulatory terms, this use of definitions marginalized any non-government group by denying that their educational endeavours are not schools, thus rendering them, by definition, ineligible for funding. Further, by identifying the support services required for the students as "educational" rather than "health" services in Adler, the Court identified those students as ineligible for support. The court also linked the secular nature of the schools to the greater project of building a "more tolerant, harmonious society".

4. "Education about religion" and "religious education" - a critical review

In 1994 the Ministry of Education issued a policy document titled Education About Religion in Ontario’s Public Elementary Schools (hereafter Education 1994) which outlined the program implications of Policy Memorandum 112. Reflecting the parameters established in Elgin County, Education About Religion in Ontario Public Elementary Schools (1994), placed an emphasis on students making choices about religion, based on the distinction between "indoctrination" and "education". In the section, "Recent Legal Developments", it commented on Elgin County, saying,

The court also ruled, however, that education designed to teach about religion and to foster moral values without indoctrination in a particular religious faith would not contravene the charter.

Education 1994 referred to the regulatory parameters established in Elgin County and Policy Memorandum 112 (1991) which reinforced the distinction between “religious education” and “education about religion” and went on to define the program implications within the bounds created by Zylberberg, Elgin County, and Memorandum 112.

A number of questions arise from the distinction used by the courts, one of which is why, in supposedly secular system, religion should be treated at all. Repeating the principles
established in Memorandum 112, *Education 1994* says the following to establish the universal nature of its program:

"The ..... amendments to Regulation 262 are to be understood within the context of the long-established vision of public elementary and secondary schools as places where people of diverse backgrounds can learn and grow together. The public schools are open to and accessible to all on an equal basis and founded upon the positive societal values which, in general, Canadian hold and regard as essential to the well-being of our society. These values transcend cultures and faiths, reinforce democratic rights and responsibilities and are founded on the fundamental beliefs in the worth of all persons." (*Education About Religion in Ontario's Public Elementary Schools, 1994*)

It then goes on to position education about religion as evidence of its inclusivity but defining religion as something about which students must make choices. In addition, it assumes that the state has an interest in the kind of choices students make when it says:

Education about religion can contribute to a curriculum that seeks to support not only the physical, intellectual, social, moral and emotional but also the spiritual growth of the child as he or she develops basic attitudes, values and beliefs and an understanding of life. By increasing students’ awareness and appreciation of the central role of religion and spirituality in human life, the study of other faiths can also help students to acquire a deeper understanding and appreciation of their own spirituality and religious heritage.

Further, *Education 1994* includes the following:

The ..... amendments to Regulation 262 are to be understood within the context of the long-established vision of public elementary and secondary schools as places where people of diverse backgrounds can learn and grow together. The public schools are open to and accessible to all on an equal basis and founded upon the positive societal values which, in general, Canadian hold and regard as essential to the well-being of our society. These values transcend cultures and faiths, reinforce democratic rights and responsibilities and are founded on the fundamental beliefs in the worth of all persons. (*Education About Religion in Ontario's Public Elementary Schools, 1994*).

This suggests that the public schools have fundamental beliefs which "in general, Canadians hold and regard as essential" and to which students in Canada are expected to conform. "Canadian values", which are assumed but not clearly identified are given considerable weight which transcend other beliefs. The transcendent nature of "Canadian values" raises questions about the distinction between education and indoctrination. While the binary forms the basis for the treatment of religion in public schools and is an important element in the mis-recognition of faith based schools, it may, in fact, not be all that clear since the values themselves are considered normative and not subject to scrutiny.

*Education 1994* expresses a bias similar to the one in *Bal* and *Adler* in assuming that respect for difference, commitment to Canada and Canadian values, democratic rights or critical thought can occur only in schools identified as secular. However, examination of faith based school websites, their student populations, educational practice and school cultures suggest that this may not be the case.

The Ottawa Islamic School (Ottawa) states that its mission

*is to provide students with excellent academic skills while instilling a sound knowledge of Islam. The school fosters in them the characteristics that will enable them to acquire the*
necessary tools which will better prepare them to face future life challenges as self confident, strong and caring Muslim Canadian citizens.

To attain these objectives the school follows the guidelines for the expectations and requirements of the Ministry of Education. In addition, the school also offers courses in the Arabic language and Islamic Studies. With this philosophy of academic excellence coupled with religious studies, the school hopes to culture, motivate and inspire the students toward becoming productive, educated and caring citizens.

The Ottawa Modern Jewish School describes itself as a contemporary Hebrew school which provides a stimulating and enjoyable and high quality Jewish education. OMJS is a secular Jewish school inclusive of all elements of Jewish society, a school which recognizes the principle of individual choice. Our school is not affiliated with any synagogue or any branch of Judaism so all are welcome to attend. Our graduates have become successful educators, volunteers and professionals at all levels of Jewish and local communities. We emphasize in the curriculum the teaching of Modern Hebrew and contemporary Jewish issues without denying the links of the modern to the historical past. Our students learn to love and appreciate their rich and complex heritage and become proud members of the Jewish community.

Hillel Academy (Ottawa) introduces itself with this statement.

Ottawa's only Jewish community day school, we pride ourselves on being a distinctive and unique institution that offers the very best in general and Judaic education.

A dynamic, innovative and inclusive private school, Hillel strives to foster a strong Jewish identity within a caring community. We prepare our students for future successes in top high schools and universities and for a life of commitment to the Jewish community and to Canadian society.

The stated mission of Redeemer Christian High School (Ottawa) is to provide a community of learning that challenges students to develop disciplined hearts, minds and bodies according to the full measure of Jesus Christ.”.

Further, the website includes this:

At Redeemer, parents, students and teachers cooperate in a lively academic and social environment which prepares young people for service in today’s world by encouraging them to explore and practice the gifts God has given them.

While the legal language and education regulation is based suggests clear differences between the education offered in publicly funded "secular" schools and faith based ones, in reality there is more agreement about the purposes of education between funded and non funded schools than one is lead to believe. Although faith based schools use religious language, they share with their publicly funded counter parts the goals of safety for their students, effective training in academic skills, productive integration in society, the ability to be self directing and have transcendent values for their lives. Student populations in faith based schools can be highly diverse, especially in urban environments, with students coming from a great array of cultures, requiring sophisticated practices of social integration both within the schools and within Canadian society. Further investigation shows that the programs of the schools mentioned here reflect Ministry of Education expectations and the high schools are inspected by the Ministry of Education as part of the accountability mechanism within which they offer the Ontario Secondary School Diploma. Among the objections to faith based schools, the issues of quality
of instruction or the outcomes of graduates is rarely under discussion. There is widespread acceptance of the high quality of education offered in faith based schools and there is no evidence that the graduates of faith based schools are less prepared for participation in a multicultural society than are graduates of publicly funded schools. In fact, there is evidence to suggest that parental choice in education raises standards for everyone in the education enterprise. *(The Economist, May 3, 07)*. However, law and regulation in Ontario have a tendency to obscure these nuances by casting religion in a particular way that places religious identity at the margins of the modern educational enterprise.

The binary consisting of "religious education" and "education about religion" has lead to "religious education" being identified as indoctrination in contrast to "education about religion" being identified as "true education" leading to critical thought. In this binary, education can only occur in secular learning environments while indoctrination is characteristic of religious environments. This binary, codified in law, has important implications but is questionable on educational grounds.

Talal Asad (2009) provides a way to engage the educational aspects of the binary, which is so important in Ontario's treatment of faith based schools, in his examination of "critique". Asad suggests that there are very different understandings of critical thought that can't be reduced to the simple distinction between secular criticism (freedom and reason) and religious criticism (intolerance and obscurantism). The practice of secular criticism is now a sigh of the modern, of the modern subject's relentless pursuit of truth and freedom of his or her political agency. .... But every critical discourse has institutional conditions that define what it is, what it recognizes, what it aims at, what it is destroying and why. Neither philosophical nor literary criticism can successfully claim to be the privileged site of reason. (2009).

While the Courts in *Bal and Adler* and the Ministry of Education in *Education 1994* base their judgements on a view of religion and the secular which reinforces the idea of the secular as being the "privileged site of reason", Asad's comments suggest that, in doing so, they are privileging a particular definition of the religious and the secular.

### 5. Conclusions

1. It is clear that law and regulation are not religiously neutral but that they are religious actors creating particular space for religion. This paper demonstrates the shift in law and regulation in the 1980's and 1990's from Protestant Christianity as the dominant ideology in public education to something identified by the Courts and the Government as secular. Protestant Christianity and secularism play similar roles in relationship to the five key questions identified in the Introduction; both assume definitions of religion and the secular, a social role for religion, a role of religion in identity construction and a historical narrative in ways that privilege some voices while marginalizing other. Further, both Protestant Christianity and liberal secularism claim universal normativity and claim to be socially inclusive and non-coercive. Law has played an important role in privileging both Protestant Christianity and secularism at different stages in Ontario's history.

2. This has lead to what appears to be an inconsistency in the treatment of ss. 2(a), (b) and 15 claims in *Zylberberg* and *Elgin County* on the one hand and *Bal and Adler* on the other. Rejecting the s. 2(a) claims of coercion, the Divisional Courts in *Zylberberg* and *Elgin County* affirmed Protestant Christianity as the appropriate ideology for public schools claiming that ex-
emption provisions adequately protected their S. 2(a), (b) and 15 Charter rights. However, the Courts of Appeal, agreeing with the appellants in Zylberberg and Elgin County, identified the dominance of Protestant Christianity as being inherently exclusive and coercive to minority groups, making important statements prohibiting public schools from engaging in religious coercion. Zylberberg and Elgin County also left the door open to specific questions about the role of religion in public schools, the issues of religious diversity in the public school system and more general questions about the philosophical identity of public schools.

Those questions were clearly answered in Adler and Bal when the Courts made statements defining the nature of secularism, religion and their role in education, identity construction and the public and private domains. Further, they interpreted Canada's constitutional history in such a way that renders S 93 of the Constitution Act, 1867 without basis for Section 2(a), (b) and 15 Charter challenges in the late 20th Century. In doing so, however, the interpretation of secularism in Adler and Bal as neutral and inclusive allowed the Courts to reject the claims of coercion by members of faith communities, using the same reasoning as that used by the Divisional Courts in Zylberberg and Elgin County, concluding that the exemption provisions adequately protect the s.2(a) and (b) Charter rights of minority groups. Ontario is, therefore, in the same position in regards it religious minorities as it was before 1985, something observed by the United Nations in 1996 (see footnote 6) although the minorities being affected are different.

3. The judgements in Zylberberg, Bal and Adler, as well as Regulation 112 and Education 1994 have identified religion as a matter of private choice. S.2(a) claims in Adler and Bal were rejected because, in the view of the Courts, parents had the opportunity to enrol their children in the publicly funded secular school system and that their decision not to do so was a matter of private religious choice for which the government need take no responsibility. However, Justice Heureu Dube, dissenting in Adler, suggested that the matter of choice may be much more complex and that, for people of faith, religion is not a matter of choice peripheral to identity but a much more profound matter integral to identity. She stated:

Evidence submitted by the appellants and accepted by the trial judge establishes that to remain a member of the particular religious communities in question and to act in accordance with the tenets of these faiths, the appellants are required to educate their children in a manner consistent with this faith and therefore outside of the public or separate schools. also established by the appellants evidence was the finding that control over the education of their children was essential to the continuation of the religious communities in question. (Adler:68)

Thus the appellants in Bal and Adler find themselves in the same position as those in the Divisional Courts in Zylberberg and Elgin County, the difference being that the dominant ideology had changed and, with it, the legal space for their religious expression and the support they can expect for their educational choices.

4. The cases cited in this paper illustrate Benjamin Berger observation that modern Canadian constitutional law casts religion in terms compatible with its own structural assumptions, as well as symbolic and normative commitments, which are themselves informed by the contemporary political culture of liberalism. (2008, 265)

While Zylberberg and Elgin County addressed the concerns of non-Christian parents and students about the domination of Protestant Christianity in public schools, more work needs to
be done in Ontario to create an education environment which more closely reflects the needs of religious minorities for whom liberal secularism represents an equivalent coercive threat to their communal memory and their religious identities.

Bibliography


