

**ONTARIO'S CHALLENGE:
DENOMINATIONAL RIGHTS IN PUBLIC EDUCATION***

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Denominational rights in education have a long and controversial history within Canada. Ontario has struggled with denomination rights and continues to face the challenges posed by accommodating denominational rights. This paper examines those challenges and considers the future of denominational rights in Ontario, in light of John Tory's 2007 election campaign platform to extend funding to all faith-based schools or to none. It includes a consideration of the historical roots of denominational rights, their expression throughout Canada, the conflicts between denominational rights and the Charter, the media storm that surrounded the faith-based funding campaign, and proposed solutions to the question of denominational rights in Ontario.

Introduction

Denominational rights in education have been an issue of contention since the creation of Canada. The question of how education was to be established was one of the most difficult questions to address during the process of the formation of Canada (Brophy, 1894) and at the heart of the matter was the question of denominational rights (Bezeau, 2007). Denominational rights within education have continued to be contentious and have lead to some interesting developments within Canada. In particular, Ontario has struggled with the issue of denominational rights

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within education through challenges to its maintenance of a 'separate school board,' which administers Catholic education within a separate but publically funded system. During the 2007 provincial election, Ontarians were once again faced with the question of denomination rights within education. John Tory, leader of the Conservative Party, introduced an election platform that called for the extension of public funding to all faith-based schools or to none (Hurst, 2007). The questions of 'how Catholic education had come to be funded in Ontario' and 'what the funding of one denominational system within a multicultural and multidenominational society has on that society' were topics of hot debate both in political arenas and within the media.

These recent debates concerning the role of religion in public education centered on the tension between public funding of Catholic education in Ontario without any provision for the funding of other denominational schools. While the public funding of Catholic education in Ontario is supported constitutionally and has been upheld by decisions from the Supreme Court of Canada (Bill 30, 1987; Adler, 1996), the United Nations Human Rights Committee (1999) has ruled that the practice of funding Catholic schools but not other religious schools is discriminatory, and that the argument that Catholic education is constitutionally protected is not a justification for discrimination. This paper will focus on examining three core questions within the debates, namely: (1) How Catholic education came to be publically funded within Ontario, (2) How has Ontario dealt with the issue of denominational rights within education, and (3) Given the changes in Canadian society since confederacy – What challenges does Ontario face in addressing denominational education issues. In order to address these questions, this paper

will provide a historical overview of how education in Canada was established and currently functions, provide a context for the Ontario situation by considering how other provinces and territories have addressed denominational rights in Ontario, and examine the recent public debates about denomination rights within education as well as the relevant Supreme Court of Canada and United Nations Human Rights committee decisions. It will also consider the future of denominational rights in Ontario through an examination of the position that Ontario should follow Quebec's lead and amend the constitution to eliminate denominational rights.

Historical Overview of Education in Canada

Canada does not have a federal department or ministry of education as each province and territory maintains responsibility for elementary, secondary and postsecondary education. The federal government does play a role in education as a number of different federal departments have mandates that address issues within education. These mandates include postsecondary education funding, official languages, human resource development and most notably the elementary and secondary education of Aboriginal children. In addition, the federal government provides transfer payments to the provinces and territories and some of those funds are used to support education. In the absence of a federal voice on education, the Council of Ministers of Education (CMEC) was founded in 1967 with the purpose of providing a national voice for education. However, while this body does act as a forum it does not necessarily provide a national voice for education. There are a number of differences between education in the various provinces and territories. One of these differences is the handling of denominational education.

To understand how the issue of denominational rights within education emerged in Canada it is important to look back at how Canada was formed. As a result of the Constitutional Act of 1791 that was passed by the Parliament of Great Britain, the province of Quebec was divided into Upper Canada (currently Southern Ontario) and Lower Canada (currently Southern Quebec). Upper Canada was predominantly English and Lower Canada was predominantly French. Following the Lower-Canada rebellion of 1837-38, the British Parliament passed the Act of Union 1840 which formed the Province of Canada. The Province of Canada was established as consisting of two parts, Canada East (Lower Canada) and Canada West (Upper Canada), and was required to maintain a double legislative majority that allowed for equal representation of both parts of the Province. At this point, the Province of Canada was not connected to any of the other British colonies in North America but this was to change following a series of Conferences.

The Charlottetown Conference of 1864 was initially meant to examine the possibility of a Maritime Union between Nova Scotia, New Brunswick, and Prince Edward Island but a delegation from the Province of Canada requested permission to attend and proposed being included in the Union. During the Charlottetown Conference, education was recognized as a provincial responsibility and this continued to be upheld during the next talks in the Quebec Conference. In addition, the Quebec conference introduced the first clear resolution on denominational rights within education. While both the Charlottetown Conference and the Quebec conference were closed, the Quebec Conference released a set of resolutions. These resolutions included Resolution 43 on provincial responsibilities, which gave the provinces jurisdiction over education subject to some provisions (i.e. item 6). Item

6 stated the following "Education; saving the rights and privileges which the Protestant or Catholic minority in both Canadas may possess as to their denominational schools, at the time when the union goes into operation" (Browne, 1969). Here it is important to note that the provision for denominational rights within Canada was only provided for what would become Quebec (Canada East) and Ontario (Canada West). At that time, Canada East was characterized by a predominantly Roman Catholic population with a Protestant minority while the reverse was true for Canada West where Roman Catholics were the minority.

The Parliament of Great Britain passed the British North America Act, 1867 (referred to as The Constitution Act, 1867 since 1982) and united the first four provinces that formed Canada (Ontario, Quebec, New Brunswick, and Nova Scotia). The provisions regarding education were consolidated into a single section, Section 93, that has never been amended. The text of Section 93 is included below:

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:

(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 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.

As additional provinces were added to Canada, Section 93 was applied or in a few cases was replaced by another section. Manitoba joined Canada in 1870 and included a special section (Section 22) for education that replaced Section 93. Section 22 was similar to Section 93 but excluded paragraph two and added some protection for customary educational practices that had not become law. British Columbia joined Canada in 1871 and applied all of the provisions of the British North American Act, 1867 with the exception of those parts that apply only to one and not all provinces. Therefore Section 93 applies to British Columbia with the exception of paragraph 2 of Section 93 in terms of educational provisions. When Prince Edward Island joined in 1873, it joined under very similar provisions as those stipulated by British Columbia. Alberta and Saskatchewan both joined Canada in 1905, and had special sections that incorporated parts of Section 93. The special section (Section 17 of the Alberta Act; Section 17 of the Saskatchewan Act) applied Section 93 with the replacement of Section 93's first paragraph for three additional paragraphs that include a connection to the laws that established the separate schools' legal rights and a non-discriminatory funding provision. In 1949 Newfoundland and Labrador joined Canada with a special educational provision that pre-empted Section 93 and allowed for the constitutional protection of four

denominations in education. The Northwest Territories (joined 1870), Yukon (joined 1898) and Nunavut (joined 1999) fall under slightly different provisions as all constitutional powers are federal, thus education is a federal responsibility (Bezeau, 2007). However, the Parliament of Canada created the Territorial governments and has enacted legislation that delegates to the territories similar powers as were granted to the provinces in Sections 92 and 93 of the Constitution Act, 1867. This includes the provision of education as a delegated power of the territories and the denominational right for Catholic or Protestant minorities to establish separate schools and be free from taxes levied to support majority schools.

It is important to note that the Parliament of Canada cannot unilaterally amend any of the Constitution Acts and that the Constitution Act, 1982 contains amending provisions that detail how denominational protections in education within the provinces can be altered. However, as education in the territories has been legislatively delegated by the federal government, the denominational protections could be amended or repealed by federal legislation. In addition, Article 29 of the Constitution Act, 1982 specifies that denominational rights and privileges in education override the Charter of Rights and Freedoms (referred to as the Charter). Thus, it disallows Charter challenges of denominational rights and privileges in education as well as preventing those who are denied denominational rights to launch a case of discrimination under the Charter (Bezeau, 2007). Thus, the constitutional nature of Catholic and Protestant minority rights in education has not made religious education in Canada any less controversial.

Education in Canada and Denominational Rights

While denominational rights in education remain controversial, Section 93 or any sections that replaced Section 93 are useful in providing a framework on establishing whether or not denominational rights are constitutionally protected in any situations of conflict that arise in the provinces or territories. Not surprisingly, there have been a number of cases when conflict between legislation enacted by a province in regards to education has been seen as threatening denominational rights by a minority of that province's population. This section will focus on examining some of those conflicts and the resulting decisions as well as providing a brief overview of how the provinces and territories are currently operating. Table 1.1 provides a useful summary of how education is organized in provinces and territories and includes the relevant ministries/departments, available schooling options, and applicable sections of legislation. It is important to remember that Section 93 or any section that is seen to replace Section 93 (usually Section 17), provides the provinces and territories with the exclusive rights to make laws that pertain to education. Thus, as Table 1.1 illustrates, there is significant variation between the ways that education is provided in the provinces and territories. While differences in curriculum, educational administration, and the structure of schools may also differ, this paper will only focus on differences as they are connected with denominational rights and religion in education.

Table 1.1
Overview of Provincial/Territorial Systems of Education

Province/ Territory	Ministry/ Department Responsible for Education	Education Options	Denominational Rights
Alberta	Alberta Advanced Education and Technology Alberta Education	Public and Sep- arate Schools; Francophone Schools; Private Schools; Charter Schools; Home Education; Vir- tual Programs; Outreach; Alter- native	Section 17 of the Alberta Act,
British Columbia	Ministry of Advanced Education Ministry of Education	Public Schools; Independent Schools; Home schooling; Alter- native	Section 93 No denominational school board as denominational rights not seen as applicable.
Manitoba	Department of Advanced Education and Literacy Manitoba Education, Citizenship and Youth	Public Schools; Independent Schools; Home Schools; School Programs (Eng- lish Program, French Immer- sion Program, Français Pro- gram, Senior Years Technology Education Pro- gram)	Section 22 of the Manitoba Act replaced Section 93. Very similar to Section 93 but eliminated paragraph 2 and added a protection for customary rights. Eliminated denomination rights in 1890.
New Brunswick	Department of Education Department of Post- Secondary Education, Training and Labour	Anglophone Schools; Franco- phone Schools; Private Schools; Home schooling	Section 93 No denominational school board as denominational rights not seen as applicable.

Newfoundland & Labrador	Department of Education	Public School System; Private Schools; Native Schools; Home schooling	Section 17 of the Newfoundland Act ; amended in 1987 to increase denominations with constitutionally preserved rights from 4-5; repealed in 1998 by Constitutional Amendment, 1998 (Newfoundland Act) allowed Newfoundland and Labrador to create a non-denominational public school system
Northwest Territories	Department of Education, Culture and Employment	Public Schooling; Public Denominational Schooling; Private Schooling; Home schooling	Special section for education that is similar to Section 93, it allows the right for a Protestant or Roman Catholic minority to establish separate schools. These denominational protections could be amended or repealed by Federal legislation.
Nova Scotia	Department of Education	Public Schools; Alternative Public Schools; First Nation Schools; Home schooling,; Private Schools	Section 93 No denominational school board as denominational rights not seen as applicable.
Nunavut	Department of Education	Public Schools(Inuit societal values); French Schools; Home schooling; Private Schools	Special section for education (see entry for Northwest Territories)
Ontario	Ministry of Education Ministry of Training, Colleges and Universities	English-language Public Schools; English-language Catholic Schools; French-language Public Schools; French-language Catholic Schools; Alternative Schools; Private Schools; Home schooling	Section 93

Prince Edward Island	Department of education and Early Childhood Development	Public Education (English Programs); Public Education (French Programs); Alternative Schools; Home Schooling; Private Schools	Section 93 No denominational school board as denominational rights not seen as applicable.
Quebec	Ministry of Education, Recreation and Sports	Public French Schools; Public English Schools; Private French Schools; Private English Schools; Home Schooling	Originally Section 93 but in 1998 a new section 93A was inserted stating that paragraphs 1 and 4 of Section 93 do not apply to Quebec
Saskatchewan	Ministry of Advanced Education, Employment and Labour	Public Schools; Francophone Public Schools; Separate School Divisions; Alternative Schools; Home schooling; Private Schools	Section 17 of the Saskatchewan Act
Yukon	Department of Education	Public Schools (including Catholic and French First Language schools); Alternative Programs; Home Education; Private Schools	Special section for education (see entry for Northwest Territories)

Please Note: Data has been drawn from Ministry/Department websites and the Education Acts for each Province/Territory

New Brunswick was the site of the first challenge that focused on a province's power to enact laws that govern education and denominational rights. When New Brunswick passed the Common Schools Act, 1971, it was replacing the Parish Schools Act, 1858 and the new Act contained a statement that all schools would be non-sectarian. According to Bezeau (2007), this would have abolished denominational schools, however, the question that had to be decided was whether or not such schools had existed legally prior to confederation. Petitions from Roman Catholic citizens of New Brunswick were sent to the federal government but no definitive action was taken. In the case of "Ex parte Renaud and others" (1873) the New Brunswick Supreme Court decided that the Roman Catholic population's rights and privileges to denominational schools had not been violated because they had not existed prior to confederation. In this case, the distinction was also drawn between denominational rights and religious instruction. The Privy Council reached a similar decision in their consideration of the Maher case in 1874.

The New Brunswick government has offered some informal accommodations for denominational education by allowing some denominational schools to exist without legal status, although such schools operate under provisions that do not allow for student attendance or hiring of personnel based on denominational requirements and that allow students to opt out of any religious activities. While some of these accommodations continue today, they are slowly being eroded by low enrollment.

Currently, New Brunswick operates two parallel but separate education systems. As it is the only officially bilingual province in Canada, its education system is organized into two distinct linguistic sectors – the Anglophone Sector and

the Francophone sector. Each sector is responsible for handling its own curriculum and assessment. In 2007, New Brunswick launched a new plan for education. The "When Kids Come First" plan is focused on building the best education system in the country by ensuring that students are given the best possible educational experiences and obtain the skills necessary to succeed. Parents also have the option of homeschooling their children or enrolling them in private schools. However, the province provides little or no support to private schools so parents face the full responsibility for private school tuition (Axelrod, 2005; Government of Alberta, 1998). The hard feelings that existed after the Renaud and Maher decisions have slowly dropped away with the assistance of the province's willingness to make accommodations and with the decrease in demand over time for those accommodations.

The Renaud and Maher cases created a legal precedent that affected other provinces who were subject to Section 93 provisions and did not have clear legal establishment of denominational rights prior to confederation. This was the case for two other maritime provinces, Nova Scotia and Prince Edward Island, as well as one western province, British Columbia. Nova Scotia and Prince Edward Island established Protestant oriented school systems and although there were some denominational influences, the school systems were nonsectarian by law. In contrast, British Columbia established a public school system that did not offer or support denominational schooling. Parents who required denominational education for their children were only provided with the option of private schooling. Unlike the two maritime provinces, British Columbia offered no accommodations.

In Nova Scotia, any denominational problems were addressed through compromise and did not result in any litigation. In areas such as the major city centres where a large Roman Catholic population exists, there are denominational schools within the school system but like New Brunswick, the demand for these schools is declining. Nova Scotia's public school system also supports some alternative schooling options. Parents and students may also opt for homeschooling or private schools. The province provides little or no support for private schools (Axelrod, 2005; Government of Alberta, 1998). So parents who exercise that option must foot the bill on their own.

Like the other two maritime provinces, Prince Edward Island officially operated a publically funded non-sectarian school system. However, unofficially the system operated by supporting public schools and Roman Catholic separate schools from 1877 until 1972. While the system was established on the New Brunswick model, it did not follow that model until after 1972 when the consolidation and centralization of schools was instituted. This move towards consolidation and centralization has almost eliminated denominational schools and the system resembles that of New Brunswick. The similarities go beyond the lack of denominational schools and also extend to the structuring of the education systems in terms of language. While Prince Edward Island is not officially bi-lingual, it does have a publically funded education system that includes an English programming division and one for French programming. Parents may enroll their children in this system, choose to homeschool their children, or enroll their children in private schools. The private school option has associated costs that can be

prohibitive for some families, as Prince Edward Island does not offer funding for private schools (Axelrod, 2005; Government of Alberta, 1998).

While British Columbia has never supported denominational schooling within its public education system, it does believe in providing parents with educational choices. British Columbia provides a public school system that has recently been expanded to offer more school choice by allowing students to enroll in any school with available space regardless of whether or not the student falls within the boundaries as well as supporting some alternative programming in addition to traditional schools. The province also funds private schools up to 50% of the per student operating costs within the provisions laid out by the 1989 Independent School Act. This provision includes the funding of private denominational schools.

The Renaud and Maher cases also influenced Manitoba as when it joined the confederation in 1870, Section 22 of the Manitoba Act was used instead of Section 93 and this section included a provision for the protection of denominational education rights that were established 'by practice.' As Manitoba clearly did not have legislation that governed education when it joined the confederation, this inclusion of 'by practice' was meant to address the issue that had been raised by the Renaud and Maher cases by protecting education as it existed in the province in practice at the time of confederation for Manitoba. When Manitoba's first school Act was passed in 1871, it created two separate systems of education – a Protestant system and a Catholic system. This formalized education as it had occurred in practice prior to Manitoba entering the confederation but extended public funding for the first time. Manitoba's School Act was amended a number of times to reflect changes in the population (increasingly Protestant and to allow for the

establishment of dissentient schools. This led to the next major controversy over denominational rights that became known as the "Manitoba School Question."

The controversy started when the Manitoba government passed a new education act, the Public Schools Act, 1890, that restructured the education system as non-denominational and eliminated all Roman Catholic school boards. In addition, the new act instituted a universal property taxation system as the funding base for the school system. This meant that private denominational schools were allowed to operate and parents could send their children to these schools at their own expense but they would also have to pay taxes to support the public system. Two legal cases emerged. The Barrett case was based on challenging the system of taxation by arguing that it impaired the ability to maintain private denominational schools. After two unfavourable decisions in the lower courts, the Supreme Court of Canada supported Barrett's claim but it was later reversed by the Privy Council in 1892. The Brophy case followed put forward the Catholic minority's right to appeal to the federal cabinet. The Supreme Court of Canada ruled that no appeal was possible following the Barrett case but the Privy Council reversed this decision and allowed the appeal, moving the issue from the legal world into the political. Archbishop Tache petitioned the federal government to disallow the legislation under its powers to cancel or veto any provincial act and while the federal government agreed that the legislation should be reversed and issued an order to that effect to the Manitoba government, it did not enforce the order.

The Manitoba School question became a political issue for the 1896 federal election. In the end, Prime Minister Laurier and Manitoba Premier Greenway worked out a compromise that did not reverse the provincial legislation but did

work in some concessions for minorities. Known as the Laurier-Greenway compromise, it included clauses allowing for religious instruction and its remnants are recognizable in Manitoba's current Public Schools Act. Currently, Manitoba offers a public school system and has implemented a "Schools of Choice" initiative that provides parents and students with more funded options. The Schools of Choice program came out of the province's "Renewing Education: New Directions" action plan and has now been fully implemented. It offers four school programs that provide more options for students. The province also has Independent Schools that fall into two categories: funded and non-funded. Manitoba provides some funding to denominational private schools regardless of denomination as long as they meet the provincial criteria (Axelrod, 2005; Government of Alberta, 1998).

The other two prairie provinces did not face the same level of controversy over denomination rights as was experienced by Manitoba. Saskatchewan and Alberta were created out of the Northwest Territories at the same time and have the same entry provisions and rights preserved (Bezeau, 2007). This has led to a number of similarities between the educational systems in the two provinces and due to the identical entry provisions, court decisions in one province often apply to the other. In 1905, it was possible to create a separate school board within any public school district as long as the establishment of that separate board was supported by a majority vote of the minority (either Catholic or Protestant) wishing to establish the separate board. Once established, the supporters of the separate school board were required to pay taxes to that board and were excused from paying taxes to support the public board. In 1917, two cases (Bartz Case and Neida Case see McCarthy 1917; 1918) in Saskatchewan were launched to challenge the

assignment of taxpayers to either the public or the separate school board roles based on religion. Both cases were ultimately unsuccessful and resulted in decisions that taken together require minority residents to support the separate system and majority residents to support the public system regardless of their preference in the matter.

Alberta and Saskatchewan also have some significant differences and these lie mainly in how each province addressed secondary education in separate schools and in how their education systems have evolved. Saskatchewan did not provide for funding of secondary education within separate school boards until 1964 whereas Alberta operated on the basis that denominational education rights extended into the secondary school level and allowed the separate school system to develop under that assumption. Currently, Saskatchewan operates a public school system and a Francophone public school system as well as having separate schools as a division within the public system. The province also offers moderate support to private schools (Axelrod, 2005; Government of Alberta, 1998). Unlike Saskatchewan, Alberta instituted full provincial assumption of education finance by taking over property taxation and also provides a higher level of funding for private schools. Alberta provides funding for public and separate schools, francophone schools and charter schools. Students may also be enrolled in private schools of which there are two basic types; Registered Private Schools and Accredited Private Schools. Accredited Private schools are supported up to 60% of the base instructional rate for schools jurisdictions and may be eligible for other funding grants while Registered Private Schools are not eligible for funding (Axelrod, 2005; Government of Alberta, 1998).

The territories have not encountered any major controversies over education and would be in slightly different positions than experienced by the provinces due to their educational provisions having been legislatively delegated by the federal government. That being said, the territories all differ to some degree in their provision of education and their accommodation for denominational education. All of the territories recognize linguistic considerations in the organization of their schools in terms of both Francophone and Aboriginal languages. Each of the territories also has provisions for denominational public schools. The newest territory, Nunavut, has a public education system committed to operating its schools based on Inuit social values as well as within the framework of the principles and concepts of Inuit Qaujimajatuqangit. Its Education Act allows for the registration of private schools, the establishment of minority Catholic or Protestant denominational schools, and homeschooling (see Bill 21, 2008).

Unlike the territories, Newfoundland and Labrador experienced controversy and tensions as it moved from being the most denominational education system in Canada to becoming a unified non-denominational system. Newfoundland and Labrador was the only province that entered confederation with four established denominational school systems. Section 17 of the Newfoundland Act (1949) recognized the Roman Catholic, Anglican, Salvation Army, and United Church of Canada denominations. In 1987, the province extended denominational recognition to the Pentecostal Assemblies (Constitution Amendment, 1987). In the nineties, the provincial government adopted the position that the division of education across multiple boards was not sustainable. Educational reforms were suggested and the chosen course of action was a unification of the education system and a removal of

denominational rights. After two referendums, the province was successful in 1998 in securing a constitutional amendment (see *Constitution Amendment, 1997*) that removed the denominational rights and created a unified non-denominational system. Currently, Newfoundland & Labrador has a public school system that includes five districts. Four of these districts are geographically specific and one district, "Conseil Scolaire Francophone" covers the entire province and is linguistically based.

The remaining two provinces were the ones specifically mentioned in Section 93 paragraph (2) and both have experienced struggles with denominational rights. Quebec has settled its issues around denominational rights with its new linguistically-based non-denominational system. It currently operates two publically funded education systems that are based on linguistic differences – French Public and English Public. In contrast, Ontario operates a publically funded education system that consists of 72 school boards as well as several school authorities. There are 31 English-language public boards, 29 English-language Catholic boards, 4 French-language Public boards, and 8 French-language Catholic boards. Ontario has also been the site of controversial challenges to denominational rights over the years whereas Quebec recently removed the constitutional protections for denominational rights without any major conflicts.

Quebec's education system at the time of confederation was strongly denominational. Section 93 (2) stipulated that the same protections of denominational rights provided to the Roman Catholic minority in Ontario would be extended to the Protestant minority in Quebec. There was a "Quiet Revolution" of the 1960's and 1970's that saw sweeping reforms through Québec's major

institutional structures (Dostie & Hanley, 2005). During the sixties there was some debate over secularization versus the status quo of denominational schooling (see Morel, Lefebvre, Lacoste, Lussier, Gouin-Decarie, Chentrier, Rioux & Blain, 1962; Rioux, MacKay, Blain, Élie, 1961). One of the results of this debate was the creation of the Ministère de l'Éducation in 1964, which signified the provincial government taking control of education and was a movement towards secularization.

Secularization of Quebec's school system was not achieved until the Québec government amended the Constitution Act to repeal the denominational rights of Catholic and Protestant faiths within education (see Constitutional Amendment, 1999). The amendment added Section 93(A), which essentially stated that Section 93 no longer applied to Québec. This made it possible for the government to successfully eliminate its denominational school system and replace it with a dual linguistic educational system. It also removed the protections from challenges based on the Charter that denominational education had through Section 93. The Education Minister Pauline Marois commissioned a task force to examine the role of religion in education resulting in a report that provided guidelines for religion in education and clear implementation strategies (Québec Ministry of Education, 1999). The task force saw the choice between equal rights and denominational privileges as a pivotal question that would shape the future of education in Québec.

As Québec is a liberal democratic society it holds the fundamental equality of individuals as one of its basic principles and yet it operated an educational system that could be seen to privilege Catholic and Protestant rights. The task force unequivocally called for the education system to be reformed such that it is based on the right to equality and is secularized (Québec Ministry of Education, 1999).

The removal of denominational rights in education is linked to the diversity in the population and as these changes are relatively recent, only time will tell how the movement to secularization and a global perspective on moral and religious education will serve Québec in its efforts to produce citizens who are productive and competitive.

Like Quebec, denominational rights in Ontario have a long and interesting history. In Ontario denominational rights were for the Roman Catholic minority. Catholic education in Ontario had some rights through the Tache Act (1841) and the Scott Act (1863) prior to the introduction of Section 93 of the Constitution Act, 1867. The first challenge associated with denominational rights in Ontario occurred in 1925 with the Tiny Township case (Roman Catholic Separate School Trustees for Tiny and Others v. The King, 1928) which sought full funding for separate secondary schools. Three of the six Supreme Court of Canada's judges agreed with the school trustees' position but it was rejected by the Privy Council of Great Britain who found that there was a constitutional right to grades nine and ten but no valid constitutional claims to higher grades, although the government could choose to provide funding for those grades (Dixon, 2003). The separate school system would wait until 1985 before the provincial government under Premier William Davis, extended full funding to all high school grades (Dixon, 2003).

The extension of full funding to the separate school was accomplished through Bill 30, an amendment to the Education Act. The constitutionality of Bill 30 was challenged in the Court of Appeal of Ontario and the Supreme Court of Canada (Bill 30, 1987) and was declared constitutional by both courts. The Supreme Court of Canada decided that Bill 30 was a valid exercise of the province's power and that

the Charter cannot disallow Bill 30 due to Section 93.

There have been other challenges such as Bill 104 (1997) and Bill 160 (1997). The Fewer School Boards Act (Bill 104, 1997) called for a consolidation of all publicly funded school boards in an effort to decrease administrative funding and increase fiscal responsibility. It resulted in the reduction of separate school boards from 53-29 and its trustees from 710 to 250 but the public system experienced similar effects from the bill. While both school boards were unsuccessful in challenging Bill 104, the separate board was successful in retaining its right to take matters of faith into account when hiring personnel. The Education Quality Improvement Act (Bill 160, 1997) introduced an equitable funding formula for both the public and separate education systems. It was challenged but ultimately declared to be constitutional by the Supreme Court of Canada (Dickinson, 2002). Currently, Ontario continues to provide full funding to English-language public boards, English-language Catholic boards, French-language Public boards, French-language Catholic boards, and several school authorities. The province does not provide direct funding to private schools.

Denominational rights in education have been a source of challenge and conflict for most of the provinces, while Alberta and the territories have accommodated denominational rights with little conflict. How these rights have been addressed has varied and developments in one province have sometimes influenced other provinces. At the present time, every province and territory supports a non-denominational publically funded school system and offers parents the options of home schooling their children or enrolling them in private schools. Ontario, Alberta, and Saskatchewan continue to have constitutionally protected

denominational rights and provide full public funding to separate schools (predominantly Roman Catholic schools but also Protestant schools). Newfoundland and Labrador and Quebec have eliminated the constitutional protections for denominational rights through constitutional amendments. Ontario and Quebec who are specifically referred to in Section 93 have navigated denominational rights in very different ways. Denominational rights remain a controversial and contested issue in Ontario with much of the debate focused on discrimination and the question of funding 'faith-based' schools.

Challenges to Denominational Rights in Ontario

One of the largest challenges to denominational rights in Ontario has been the re-occurring issue of funding 'faith-based' schools. There have been tensions between the public board and the separate board throughout Ontario history as each fights for resources but the question of why Ontario does not fund other 'faith-based' schools has been gaining momentum. Following the extension of full funding to the separate system, the Ontario government commissioned Bernard Shapiro to research and report on the funding of private schools. This move was in response to continued pressure from other religious groups for public support of private denominational schools. Shapiro (1996) recommended that public funding should be extended to private schools and argued that while there was a clear constitutional right to Catholic education, that right did not inform the government about how to address other religious education. He also stated that as Ontario considered itself to be a multicultural society, parents should be able to select the right type of education for their children free from financial considerations.

However, he did not insist that there be full funding and instead suggested that as the public system was responsible for serving a greater social good it should have more funding than private schools. Shapiro made the case that a strong public system would not be threatened by public support of private schools and such support would support the parental right to choice, reducing discrimination. Such funding would be contingent upon the private school meeting a number of criteria that would establish its level of funding. Unfortunately, Shapiro's report was shelved by the government (Axelrod, 2005).

The question of public funding of private schools was not as easy to shelve as the report. The Ontario government has continued to be challenged on its refusal to fund private schools and increasingly the arguments have focused on the funding of the separate system and human rights. Politically the debate over funding centres around neutralist liberal and cultural pluralist values (Blattberg, 2000). According to Blattberg, the neutralist liberal position sees the common and public education system as being the promoter of common values and of being charged with training people to be citizens. Thus, from this perspective the funding of private schools creates separation within education that could lead to more societal divisions and lack of tolerance and additionally the funding of minority religious schools could lead to a failure to transmit core national values further fragmenting society. The neutralist liberal position contends that a common education system is the best way to educate for national citizenship. On the other hand, the cultural pluralist position insists that the other position is deluding itself through the belief that the education system is really neutral. Instead, it insists that the public education system

enforces the majority culture and thus can be responsible for intolerance and discrimination.

Two legal challenges to denominational rights in Ontario were issued by citizen activists on the basis of religious discrimination. *Adler v. Ontario* (1996) was heard by the Supreme Court of Canada and was an unsuccessful Section 15 challenge. The primary argument was that Ontario's funding of the separate school system violated Section 15 (freedom of religion and equality) of the Charter and called for the extension of full funding to other denominational schools. The Supreme Court of Canada referenced the Bill 30 case and stated that the court had already dealt with the matter of discrimination under the Charter in the case of Section 93. They reiterated their decision from the Bill 30 case that Section 29 of the Charter "specifically exempts" the rights granted to denominations, dissentient and/or separate schools in the Constitution Act, 1982 and further that one part of the Constitution cannot interfere with rights granted by another part of the Constitution. *Waldman vs Canada* (1996) was submitted directly to the United Nations Human Rights Committee and argued that Ontario's funding of the separate school system violated several articles of the United Nations Covenant on Civil and Political Rights. The Canadian government argued that the Waldman case was inadmissible as Waldman had not exhausted all courses of action available under domestic law before presenting the case to international law (Allison, 2007) and that there was a similar case currently in process with the Supreme Court of Canada. The Waldman case was halted until the Adler case was decided and then the Government of Canada removed its concerns about admissibility and the United Nations Human Rights Committee ruled that the case was admissible.

In the United Nations Human Rights Committee decision, the Committee stated that having a distinction enshrined in the Constitution does not automatically render it reasonable and objective and that argument identifying the distinction to protect Roman Catholic schools as nondiscriminatory due to Constitutional obligation is rejected by the Committee. Furthermore the Committee observed that the Covenant does not require the funding of religious schools but if religious schools are funded, funding should be made available without discrimination. The Committee found that there was a violation of article 26 of the Covenant as the differential treatment between the Roman Catholic faith and Waldman's faith was discriminatory. While the federal government of Canada is responsible for addressing international law, the Ontario government has sole authority over education in the province. The decision was announced in 1999 and Ontario responded through the federal government and clearly stated that it had no intention of changing its education system and that it would continue to uphold its constitutional obligations. Despite slight pressure from the federal government to comply, the Ontario government pushed back and asserted their right to manage education (Allison, 2007). A later submission to the Human Rights Commission on similar grounds as Waldman (Tadman, 1999) was reviewed and declared inadmissible by the Commission on the grounds that the authors of the submission could not be considered to be victims of discrimination.

The United Nations Committee decision on the Waldman case has been brought into the political arena and rehashed in the media periodically. In 2001, the Ontario government responded to the increasing pressure to fund private schools by proposing a tax credit entitled "Equity in Education." This tax credit was

specifically aimed to address the lack of choice Ontario parents felt that they faced. When he announced the tax credit, the then Finance Minister Jim Flaherty stated, "For years we've heard from parents who want their children educated in their own culture and religion. With this measure, Ontario would join other provinces in supporting educational choice..." (Ontario Ministry of Finance, 2001a). This proposed tax credit was the first substantial movement that the Ontario government had made towards funding private schools. A second news release provided details on the tax credit which would provide a maximum of \$3500.00 per child per year and was proposed to be phased in over five years until it reached the level of the \$3500.00 credit by 2006 (Ontario Ministry of Finance, 2001b). Additional information on the tax credit identified that there were no major stipulations on the private schools but that only parents could collect the tax credit and that if a denominational school was already able to provide charitable tax receipts for tuition then the eligible tax credit of \$3500.00 would be reduced by 40% (PricewaterhouseCooper, 2002).

The proposed tax credit would have placed Ontario in the middle ground for funding private schools as its funding would not have been as extensive as Québec or Alberta. However, the Conservative government delayed the implementation of the tax credit for a year and then lost power to the Liberal party who opted not to proceed with the tax credit. Currently, there is no public funding for private schools in Ontario nor does there appear to be any plan to change the lack of funding. There is no place for religion in education within Ontario's public schools which has lead some critics to claim that the Protestant majority in Ontario has no publicly-funded education (Hepburn, 1999a). It is ironic that the constitutional guarantees

were created to protect the religious minority from being overpowered by the religious majority and yet it is the Protestant majority who has lost publicly funded denominational education.

Conservative Leader John Tory stirred up the denominational education debate when his election campaign called for public funding of all faith-based schools or of none. The debate over the extension of funding to all faith-based schools quickly turned into a debate about denominational rights with some calling for a single unified system (Alphonso & Bonoguore, 2007; Benzie, 2007; Brown, 2007; Murray & Stunt, 2007; Wilson, 2007). The arguments for and against the extension of funding to faith-based schools focused on a number of issues, including the following: divisiveness or creating further divides both in education and society; spreading scarce resources too thin; undermining the public education system; living up to our multicultural society; improving the public system (Alphonso & Bonoguore, 2007; Benzie, 2007; Hurst, 2007; Wilson, 2007).

The debate resulted in quite a media storm that will not be reviewed in depth. However, a brief overview is necessary to provide a sense of the major themes. Some media articles talked about how many Ontarians are not aware of the history behind denominational rights and that with the changing demographics in Ontario it was only a matter of time before there was a challenge to the education system (Hurst, 2007; Wilson, 2007). Several articles also discussed the mixed support that Ontarians seem to be displaying in the polls by pointing to Ipsos-Reid (September 10, 2007) poll and the Environics poll (September 13, 2007), both of which showed mixed results. The Ipsos Reid poll indicated that 35% of Ontarians supported Tory's plan, 53% were in favour of merging the public and separate

school systems into a single school system, and 62% were not in favour of extending funding to other faith-based schools (Wilson, 2007). The Environics poll found 48% in favour of Tory's plan with 44% opposed, while 47% were in favour of creating a single merged system (Wilson 2007). Other articles reported different aspects of the polls but many agreed that they were reflective of Ontarians being very divided over the funding of faith-based schools (Benzie, 2007; Stevens, 2007).

The separate school board became a target in the debate and an article by representatives of the Ontario Catholic School Trustees' Association defended Catholic education by stressing its strengths and the numbers of students that it serves, as well as claiming that "Catholic education is embedded in the very social fabric of Ontario" (Murray & Stunt, 2007). Another article pointed out that the debate had centred around the funding of the public and separate systems without acknowledging that Ontario has four publically funded systems that are divided according to religion and language (Swan, 2007a). Lauwers (2007) argued that the election introduced a simplistic all or nothing debate that did not recognize the complexities of the issues and the multiple ways that compromise might be reached. This resonates in part with Ben Levin's comments that religious issues in education may never be resolved due to their highly contentious nature and history and that students would be better served by a focus on how to improve access to school and student achievement (Wilson, 2007).

Future Challenges

While the uproar over denominational rights triggered by proposed plan to extend public funding to all faith-based schools has quieted down after the election,

it is an issue that has a history of re-emerging and it remains an issue that will challenge the provincial government and Ontarians in the years to come. The current liberal government seems to have no intention of extending funding to faith-based schools, as Education Minister Kathleen Wynne has been quoted as saying "We would continue to support the publicly funded education system as it exists. It's based on our history and our Constitution. To look at fracturing the education system to fund other faith-based schools is not something that this government is prepared to do." (Swan, 2007b). Paikin (2007) makes the point that this is not the only time that the funding of faith-based schools has impacted a provincial election. The Progressive Conservative Party's loss of the 1986 election was seen by many as a direct result of Premier Davis' extension of funding the secondary separate schools. While John Tory was one of Davis' closest advisors at the time, it seems that he did not fully appreciate the volatile mix that education and religion could create in election politics.

The election issue aside, Ontario is still faced with the complex issue of how to address denomination rights within education—an issue that is both rooted in history and contextualized by the directions in which Canada has developed. The Supreme Court of Canada (Bill 30, 1987; Adler, 1996) has made it clear in several decisions that the Charter has no bearing on Section 93 but that if it did, there would be clear grounds for discrimination. The Ontario provincial government has held to the position that it will uphold its constitutional obligations by maintaining the public system as it is with four types of publically funded school boards. However, political parties come and go making it possible that a different stand on

denominational rights could emerge. The remaining question is how will Ontario face the challenge of denominational rights in the coming years.

Challenge is an apt characterization as there are activists (i.e., Waldman, 1996; Adler, 1996, Tadman, 1997) and organizations who will continue to put pressure on the provincial government to address denominational rights. The One School System campaign actively lobbies for the creation of one unified system and has the support of the Green Party. Another organization, the Ontario Multi-Faith Coalition for Equal Funding for faith-Based Schools, has pushed for the extension of public funding and has had the support of the Conservative Party in the 2007 provincial election.

Many scholars and policy analysts have also weighed in with theories about how Ontario should address the challenge. Dickinson (2002) suggests that the Ontario government could have followed suit with Quebec and Newfoundland by amending the constitution such that Section 93 would not apply to Ontario and then bringing the education system in line with the Charter and the current demographics of Ontario. Foster and Smith concur (2002a; 2002b) and have called for Ontario, Alberta, and Saskatchewan to follow the example of Quebec by removing the application of Section 93's denominational rights and to model the education system within the framework of the Charter. They argue that while we do have two official languages in Canada, we have no official religions and thus while English and French have their place in Canadian classrooms, Catholic and Protestant religions do not. The Charter offers a framework that is based on entrenched human rights while the current framework is based on entrenched constitutional privilege. As it is based on human rights principles, the Charter can

evolve with time whereas Section 93 of the Constitution Act, 1982 is static.

Watkinson (2004) agrees that the human rights framework offered by the Charter should be applied to education and questions why any religious organization should have a place in public education. All of them agree that the constitutional protections for denominational rights in Canada are a part of history that is out of step with Canada's present and future.

Mulligan (2008) has written about denominational rights being seen as acceptable at the time of confederation but as no longer viable within Ontario's current realities. He has written a working paper reflecting on what he sees as a paradigm shift in the Ontario electorate. Some of the shift has to do with the challenges faced when religion clashes with the modern world and other aspects of the challenge have to do with the clash between religion and secular ideology. He views most of the shift as being due to this consideration of denominational rights as a stumbling block to creating unity and social cohesion. Mulligan also addresses the big "C" versus little "c" catholic education debate that emerged as part of the media firestorm preceding the election. He observes that some groups and individuals who have opposed the extension of funding to all faith-based schools have used the argument that the current separate board is small "c" Catholic and well on its way to becoming secularized and indistinguishable from the public board. However, others like Watkinson (2004) are opposed to even the current Catholic or Protestant funded boards.

In reflecting on the Waldman decision, Zur (2003) has argued that the majority in Ontario has admitted that an injustice is being perpetrated on a minority but that it has opted out of addressing the issue. He also outlined some

interesting conflicts in the positions adopted within editorials offered by the media following the Waldman decision. In particular, he pointed out that the argument of the multicultural nature of Ontario was being used as support for creating a single monocultural education system. An approach he argues that is a very superficial form of multiculturalism that allows the majority to proudly display their tolerance while silently ensuring assimilation through the school system. On a similar note, Fahmy (2004) argues that the failure to fund other faith-based schools has the effect of enforcing conformity as faith-based private schools are often prohibitively expensive for families and they opt to enroll their children in publicly funded schools. She sees the non-funding policy as indirect coercion. Furthermore, she argues that under Section 27 of the Charter, multicultural heritage is to be preserved and enhanced, including the diversity of faiths.

Fahmy also points out some interesting questions that were largely absent in the debate. According to her analysis, public schools are assumed to be neutral accessible sites offering equal opportunities to all children and thus the provincial government can make the argument that the funding of faith-based schools would interfere with this crucial role. However, it is not clear that publically funded schools do serve this role for all children. Furthermore, it should not be assumed that faith-based schools could not foster multicultural integration.

Lauwers (2007) engages in a similar argument but from a more theoretical perspective. He considers the clash of autonomy and pluralism as an emergent political problem for liberal democracies. He argues that Canada is struggling with two different approaches to liberalism, one in which pluralism and diversity are viewed as temporary bumps on the way to unity while in the other approach

pluralism and diversity are permanent and natural. Both the courts and the legislatures have opted for either view at times and public education is often the site for liberal fundamentalism that sees toleration as the road to universal civilization. This tension between accommodating diversity and moving towards a universal unity has been clear in education for some time. Shapiro (1986) made note of it in his report when he argued that the public education system provided a common acculturation experience for children and that such an experience is necessary in pluralistic and multicultural society.

Clearly there are different approaches to addressing the issue of denominational rights in Ontario. The provincial government is sticking to the status quo and continuing to maintain its constitutional obligations amidst calls to both extend funding to all faith-based schools and to eliminate funding of any faith-based schools. While it is obvious that the issue of denominational rights in education lie just beneath the surface ready to emerge at the slightest encouragement, how the issue will be addressed when it next re-emerges is unclear.

Conclusion

This paper has focused on examining denominational rights within Canada's educational systems and on the challenge that denominational rights have posed for Ontario's education systems. The consideration of the historical origins of denominational rights and their application in the provinces and territories has provided a contextualizing framework for understanding the challenges faced by Ontario. A further examination of Ontario's situation through the consideration of

relevant Supreme Court of Canada cases and the Waldman case (1996) submitted to the United Nations Human Rights Committee illustrated the conflicts between Section 93 of the Constitution Act, 1982 and the Charter. The review of the recent public debates about denominational rights kicked off by John Tory's election platform of funding all faith-based schools or none provided interesting insights into how Ontarians engaged in debating denominational rights within education. Further to that, an examination of the position that Ontario should follow Quebec's lead and amend the constitution to eliminate denominational rights was also considered and the challenges that Ontario faces were discussed. The future of denominational rights in Ontario is unclear and many potential pathways lay before Ontario. The current provincial government is following the path of least resistance by maintaining the status quo but as the questions surrounding denominational rights come to the forefront, that path could change.

It seems that the question of denominational rights within education raises more questions than are answered in the public debates about its future. In political arenas, public debates, media editorials and within the literature the consideration of denominational rights is often fraught with unclear language and with a blurring of issues.

The question of denominational rights in education does have fleeting moments of clarity. For example, it is clear that Ontario could choose to extend funding to faith-based schools. However, there is disagreement about whether or not Ontario is obligated to do so. Some would use the decision of the United Nations Human Rights Committee that the funding of one denominational school system is discriminatory to argue that Ontario is obligated to extend funding to

other faith-based schools and others would use the Charter to argue obligation. It is also clear that there are several ways open to Ontario that could eliminate denominational rights either in practice or on a constitutional basis. Manitoba has never amended the constitution like Newfoundland and Labrador or Quebec, but it removed denominational rights in practice when it enacted an Education Act that eliminated separate schools. Ontario could also chose to go the amendment route that Newfoundland and Labrador and Quebec have taken. Now that Quebec has added Section 93A stipulating that Section 93 no longer applies to Quebec, Ontario could pursue an amendment that would only involve Ontario and Federal government as removing the application of Section 93 could be argued not to effect any other provinces and thus would not require the cooperation of other provinces to pass the amendment.

It is also clear that there are options open to Ontario that do not require a constitutional amendment. There are many different ways to address the needs of other religions within public education. Alberta provides a model of education that offers a way to incorporate denominational considerations within a publically funded system. Ontario could seek solutions to address the United Nations Human Rights Committee' decision that the current educational systems are discriminatory by pursuing a model such as Alberta's, by implementing a tax credit such as was proposed by the Conservative government, or by extending full public funding. While factions within Ontario may not be satisfied by the tax credit, it may be able to satisfy the United Nations Human Rights Committee as it could then be argued that funding of the separate system would then be a minimal infringement on other religious rights. Ontario could also develop its open model and strengthen its

educational systems through innovative programming and a stronger financial commitment to developing appropriate school structures and curriculum.

What these moments of clarity are missing is a thorough examination the complexity of the issue and the important questions that have to be addressed in order to examine the future of denominational rights. Questions like the following. Are denominational rights an artifact of history that no longer mesh with Ontario's changing demographics and realities or are they an integral part of its social fabric? Can denominational rights and Charter principles be brought into harmony within a pluralistic and multicultural society? Are Ontarians committed to a pluralistic and multicultural society or are the majority of Ontarians going through the motions of tolerance while awaiting universal assimilation? Is it appropriate to invalidate denominational rights as a way of addressing discrimination or are changing demographics and realities a sign that it is time Ontario engaged in serious consideration of how the current publically funded system can address the emergent needs of Ontario's diverse population? When will Ontario engage in a real public debate about both the future of its education systems and accommodation of religious diversity in those systems?

The answers to these questions and others along with the questions that are actively avoided or overlooked will shape the future of denominational rights in Ontario. Ontario has an opportunity to examine its provision of education and to consider how best to accommodate the needs of all of its students within the context of a pluralistic and multicultural society. The most important question that remains to be answered is whether or not Ontario will rise the challenge and grasp this opportunity or let it fall by the wayside.

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