Importing U.S. Establishment Clause Principles in Canada: Changing the Debate on Funding for Faith-Based Schools in Ontario

by

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Abstract

Ontario is the only Province that publicly funds Roman Catholic separate schools, while providing no public funds to any other faith-based schools. This thesis explores the history, politics, past and current litigation surrounding Ontario’s education system. It looks at the education systems in other Canadian Provinces. I argue that focusing the debate around equality and fairness, and preventing the perceived establishment of the Roman Catholic Church in respect for multiculturalism will allow for an appealable solution. In many church and state cases, the Supreme Court of Canada made its decisions similar to the U.S. regarding the establishment of religion in public schools. This thesis suggests that Ontario should adopt a bilateral constitutional amendment that includes Establishment Clause principles similar to the U.S. Constitution. It concludes that the treatment of all faith-based schools equally, respects the historic rights of the Roman Catholic schools, and demonstrates a commitment to multiculturalism in Canada.
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Chapter 1
Introduction

“It is widely accepted that any form of state support or preference for the religious beliefs/practices of some over those of others (even when there is no direct coercion) is incompatible with a commitment to religious freedom and equality.”

-Richard Moon

There are many interactions between law and religion. Laws and court decisions are undeniably shaped by religious beliefs and many laws support religious beliefs. Laws, both in the United States and Canada, do not force religious beliefs on their citizens, but it sometimes favors one religion over another. This is particularly seen in the case of education in Canada. Ontario’s education system provides full public funding to Roman Catholic separate public schools, however, to the exclusion of all other faith-based institutions. There has been much political debate over whether or not the education system should be changed to either publicly fund schools of all faiths, or prohibiting funds from being used for any faith-based school in the province. The Constitution Act, 1867 gives the Provinces exclusive right to legislate with respect to education through section 93, limited by the requirement that historical rights and privileges be respected. However, there is a disconnection between the interpretation of the Provinces’ right to legislate education with the Charter of Rights and Freedom’s protection of freedom of religion and assurance of equality. The Confederation Compromise that united Upper and Lower Canada (Ontario and Quebec respectively), New Brunswick, and Nova Scotia protects rights given to Roman Catholic separate schools. They are immune from the challenge under the Charter’s religious freedom and equality provisions due to the inclusion of section 29. When the Ontario government sought to extend public funding to senior grades in the Roman Catholic secondary school system – public funding was originally limited historically to junior high levels – the Supreme Court of Canada declared that the extension of public funding through high

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2 Constitution Act, 1867, 30 & 31 Victoria, c. 3.
3 Adler v. Ontario [1996] 3 S.C.R. 609; Section 29 of the Charter states, “Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.”
school was a valid exercise of Provincial legislative power in regard to education and consistent with the constitutional commitment to public funding for separate schools in Ontario.\(^4\)

Publicly funding one religious educational system to the exclusion of others arguably violates section 2(a) of the Charter, because it indirectly punishes the less favored minority religious groups and prevents full participation as equal citizens. The UNHCR found that there was discrimination regarding the public funding of only the Roman Catholic schools in Ontario and that Canada should take steps to eliminate such discrimination.\(^5\) There is nothing legally preventing the Ontario government from extending public funding to other faith-based schools, except for the political situation. Other Provinces such as Quebec, made bilateral amendments\(^6\) to the Constitution Act, 1867 that opened the door for funding of all faith-based schools even though an amendment was not legally necessary to do so. This thesis suggests that Ontario should make a similar amendment and incorporate U.S. Establishment Clause principles consistent with Canada’s overall commitment to equality and multiculturalism. By doing so, the government will have more political will and motivation to allow for all faith-based schools to be treated equally.

1.1 Overview of the Thesis

This thesis will examine how the discussion surrounding the issue of publicly funding faith-based schools can be changed to address the concerns of both the Roman Catholic separate schools and the minority religious schools seeking public funding. It proposes that the discussion should be centered on equality, neutrality, and that any bilateral constitutional amendment should incorporate U.S. Establishment Clause principles. The First Amendment to the U.S. Constitution states, “Congress shall make no law respecting an establishment of religion…”\(^7\) Though the Establishment Clause has been interpreted in a broader manner


\(^6\) Section 43 of the Constitution Act, 1982 allows for a Province and the Federal Government to amend the Constitution that affects only that Province. It requires approval by the House of Commons, the Senate, and the legislative assembly of the Province affected.

\(^7\) U.S. Const. am. 1.
constituting a fairly strict interpretation of the separation of church and state in the U.S. context, it stands as providing principles applicable to the Canadian context. In light of Canada’s commitment to international law, multiculturalism, and respect for the Charter; an Establishment Clause would allow for equal treatment of all faith-based schools including the Roman Catholic separate schools. As is seen and discussed below, the Charter allowed for the de-establishment of formal Christian practices in the public sphere, especially in public schools. Several Supreme Court of Canada cases follow similar logic as cases present in the United States. Chapter 2 will outline the historical development of public funding for the Roman Catholic separate schools in Ontario. I discuss the politics and litigation (past and current) that helped the Roman Catholic separate schools preserve public funding for the separate schools. Finally, I provide a brief look at the funding in the other Provinces of Canada.

Chapter 3 consists of a discussion of the process by which the education system in Ontario can be changed. I argue that a bilateral constitutional amendment provides for the best option, and that it should incorporate U.S. Establishment Clause principles. I suggest that the rationale for doing so is that functionally, Canada’s jurisprudence is closely in line with the U.S. jurisprudence regarding separation of church and state in the context of public schools. In order to demonstrate this, I provide a comparison of similar cases in both the U.S. Supreme Court and the Supreme Court of Canada. Suggesting a specific system that Ontario should implement is beyond the scope of this thesis. There are many choices as seen by other Provinces that Ontario could decide is right. Instead, I conclude that the importation of U.S. Establishment Clause principles provides a legal and political compromise that allows for the equal treatment of all faith-based schools, maintains respect for privileges found in the Constitution Act, 1867 for the Roman Catholic separate schools, and maintains Canada’s commitments to multiculturalism and international law.
Chapter 2

History of Roman Catholic Public Funding in Ontario

This Chapter provides an overview of the history of the Roman Catholic public funding in order to understand the current debate over the public funding of faith-based schools in Ontario. The first part gives an overview of the history beginning in 1792 with Upper Canada’s (Ontario’s) first legislature. The second part focuses on the litigation and political situation in Ontario as it developed after the Confederation of Canada to the present day debate and court challenge. Finally, I provide a brief look at how the education systems in other Provinces treat public funding for faith-based schools.

2.1. Historical Context

Prior to the unified Dominion of Canada, there existed Upper (Ontario) and Lower (Quebec) Canada. In 1792, the first legislature of Upper Canada assembled under Lieutenant – Governor J. Graves Simcoe and by the act of the Imperial Parliament, the people of Ontario were given the right to “legislate with regard to all matters which concerned the development of the country and the welfare of the people educationally and socially.” Simcoe was influential in the creation of schools that incorporated principles, habits, and manners of religion. In 1807, the Public Schools Act of 1807 was passed that established eight public schools in eight districts in Ontario, in which the Lieutenant Governor had the authority to appoint a Board of Education. However, these schools were not popular because they appeared to be only for the well to do and to those belonging to the Roman Catholic or Protestant churches. After the War of 1812, the population of Canada increased, especially from the United States where common schools already existed and education for those who were less fortunate than the well off became more

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9 Ibid at 2.
10 Ibid at 3.
11 Ibid at 4.
important. This ideology led to the establishment of the common school system. Once these public schools were established, the Legislature passed an important act that provided funding for the public schools in 1816, but did not contain any provision that levied property taxes for the maintenance of schools (a fact that will be become important later). In 1824, an amendment was made in order to allow for a Board of Education over the entire province. It was later abolished in 1876 when the schools of the province were placed under a Minister of Education. The amendment in 1824 was also important allowing some funds to be diverted to schools to be used to teach “morals and religious” instruction; the purpose of which was to reach indigent and remote settlements throughout Ontario and to also reach students in the public schools. In 1841, John Strachan, Toronto’s Anglican Bishop, requested that the legislature provide public funds for the support of denominational schools, thus pushing for free education. The Provinces of Upper and Lower Canada united under The Act of 1841, providing a permanent fund for a common school system and united both provinces under a single Superintendent. The Act of 1841 provided that the Legislature could hold the property of the people in trust for the education of the people, and for the first time the school commissioners were authorized to tax the people for the maintenance of the common schools leading to the goal of providing free education. Funding of schools at this time also included a grant from the Province, apportioned among the townships, towns, and cities based on population. For the first time, the principle of Roman Catholic and Protestant separate schools was established by legislation, but they did not receive the same funding as the common schools at this time. This was due to a demand by clergyman and members of the Church of England urging the legislature to recognize religious

13 Ibid
14 Ibid at 7.
15 Ibid at 8-9.
16 Ibid at 9.
17 Albert J. Menendez, Church and State in Canada (Amherst, New York: Prometheus Books 1996), 48.
18 Supra note 8, at 10.
19 Ibid, at 12.
20 Supra note 12, at 300.
21 Ibid
instruction as an important part of education in the school system. These changes did not last very long as The Act of 1841 was repealed and replaced by The Act of 1843, a separate Act applying to each province. For Ontario, this allowed for the establishment of the Chief Superintendent for Ontario as opposed to being over both provinces; a superintendent for each city, town, and township; and retained the right of the Roman Catholic and Protestant churches to establish separate schools. Roman Catholic separate schools shared in the provincial grant for the maintenance of the schools, but were liable for all assessments for the maintenance of common schools as well, thus being burdened with having to maintain the separate schools and pay for the common schools that their children did not attend. This Act also provided that “no child shall be required to read or study in or from any religious book, or to join in any exercise of devotion or religion that shall be objected to by his or her guardian.” This was known as a conscience clause, and respected the right of parents to choose the education of their choice for their children.

Egerton Ryerson, a Methodist minister and one of Ontario’s earliest and influential chief superintendents in the mid 1840s, was the first opponent of separate schools established by the Catholic Church. Ryerson had three fundamental beliefs: 1) He believed the freedom of individual Roman Catholics to support the common schools must be ensured. To this end he continually opposed any suggestion that Catholics should be obliged to support separate schools, demonstrating a belief that parents have the right to choose the type of education they wish for their children. 2) Ryerson opposed the development of two separate and distinct systems of education and instituted centralized control of curriculum and textbooks. 3) Ryerson believed in equal public grants for all schools both common and separate in return for common instruction. Ryerson pushed for a “free, universal, and an academically progressive public school system.”

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22 Supra note 8, at 141.  
23 Ibid, at 13, 144.  
25 Ibid, at 145.  
that would “promote loyalty to the Crown, solid citizenship, a sound curriculum, and a generic Christianity.”

Ryerson believed that the separate school system was a danger to the unity and efficiency of the national system, but reluctantly accepted them during his term as Superintendent.

Largely in response to Ryerson’s beliefs and recommendations, *The Act of 1846* provided for a Board of Education to be established with advisory responsibilities and to approve of curriculum, such as books and plans used in the classroom.

Overall, Ryerson’s influence over Ontario’s education system resulted in a public school system attended by students of all faiths, instruction in English (language arts) and the sciences, and the development of Normal Schools to train teachers to teach these subjects in the common schools.

Throughout the 1850s, several movements influenced the idea of giving separate schools the same funding on par with the common schools; an idea that Ryerson believed would upset the national system.

One such movement led by Bishop Armand de Charbonnel of Toronto led to the *Act of 1853* which limited the separate school’s share of the school fund to the provincial grant, limited separate school supporters from all property assessments for common schools, gave separate school trustees the authority to levy rates on parents, and allowed for teachers to be certified. Subsequently, the *Tache Act of 1855* provided for the separate school boards (trustees) to license their own teachers, levy rates on their own supporters, claim a due share of the provincial grant, and continue the exemption for separate school supporters from all municipal assessment for common schools.

Another proponent of the separate schools was R.W. Scott of Ottawa, who sought legislation in support of the separate schools. Scott proposed several legislative bills that did not pass, but was eventually successful in 1863 with the passage of the

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29 Mark McGowan, “Distinctly Catholic: The Development of Catholic Schools in Ontario” (2005), at 1, online: <http://www2.pvnccdsb.on.ca/library>.
30 Supra note 12, at 312-13.
31 Supra note 8, at 18.
32 Supra note 12, at 314.
33 In 1860, there were a total of 13,631 students in Roman Catholic separate schools in Upper Canada (Ontario) receiving a legislative grant from the Province in the amount of $7,549 resulting in approximately fifty five cents funding from the government per pupil for separate schools, compared with hundred percent government funding for the common schools. Separate schools received funding from local school rates, subscriptions, and other sources. J. George Hodgins, *Documentary History of Education in Upper Canada* (Toronto: L.K. Cameron, 1907), 31.
34 Supra note 12, at 315.
Scott Act of 1863. There were three reasons Scott’s bills were opposed: 1) the fear that separate schools would be injurious to the Common school system; 2) the fear that there would be a demand for separate schools from other denominations; and 3) the establishment of separate schools in certain localities that would divide the resources of the people already limited, and lower the standard of education overall. Even with these concerns, the Scott Act provided for the continuation of developing separate schools, subject to inspection and teacher training, allowing for a separate school board made up of Roman Catholic ratepayers, allowing for them to be funded by a provincial grant on the basis of average attendance, rates levied on property of the supporters of the separate schools, and fees from the students attending the separate schools. The Scott Act continued to not require separate school supporters to pay for the maintenance of Common schools.

Under the British North America Act, otherwise known as the Constitution Act of 1867, Canada became a united confederation with a separate government from the United Kingdom. It preserved the legal rights for the minority Roman Catholics in Upper Canada (Ontario) to always receive a portion of the provincial and municipal grants they were receiving under the Scott Act, and previous education legislation, which funded Roman Catholic schools through the eighth grade. The Constitution Act of 1867 also gave the same right to minority Protestants in Lower Canada (Quebec). This was known as the “confederation compromise.” Peter Hogg explains the “confederation compromise” by stating:

“At the time of Confederation it was a matter of concern that the new Province of Ontario would be controlled by a Protestant majority that might exercise its power over education to take away the rights of its Roman Catholic minority. There was a similar concern that the new Province of Quebec which would be controlled by a Roman Catholic majority, might not respect the rights of its Protestant minority...With respect to religious minorities, the solution was to guarantee their rights to denominational education, and to define those rights by reference to the state of the law at the time of

36 Supra note 28, at 288.
37 Ibid
38 Ibid
39 Supra note 17, at 48.
40 Ibid
41 Ibid
Confederation. In that way, the existing denominational school rights of the Catholic minority in Ontario could not be impaired by the Legislature; and the Protestant minority in Quebec would be similarly protected. This is the reason for the guarantees of denominational school rights in section 93.”

At this time, Ontario consisted of a bi-cultural society with a Protestant majority and Roman Catholic minority, while Quebec was the reverse. The Provinces of New Brunswick and Nova Scotia did not have legislation related to denominational or separate schools. Section 93 of the Constitution Act, 1867 grants provinces the exclusive right to legislate with respect to education. Section 93 reads:

“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 exist 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, and as far 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.”

The next major legislation in Ontario’s education system history was The School Improvement Act of 1871. This act was a major win for Ryerson and the common schools. It allowed for the common schools to become free public schools (including both elementary and high schools which were also created) funded by assessments on property. However, since high schools did not exist prior to the Confederation, they did not receive any portion of the provincial grant. The Act also introduced compulsory attendance; a new curriculum that included education on the natural sciences, history, civics, writing, the arts, and practical classes such as mechanical and industrial courses; and continued the training, examining, and certification of teachers. Roman Catholic high schools at this time did not receive any funding from the province. Ryerson faced much criticism and opposition to his changes and eventually resigned his position as Chief Superintendent. As a result, The Act of 1876 was passed to abolish the position of Chief Superintendent, replacing it with the creation of the Department of Education and Minister of Education in Ontario. By 1882, the Roman Catholic schools solidified its position as a separate school system and continued to develop by focusing mostly on the development of school instruction and the training and licensing of teachers according to the same regulations as teachers in public schools. In 1982, with the introduction of the

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45 Supra note 2, at s. 93 (1)-(4).
46 Supra note 12, at 318.
47 Supra note 27, at 2.
48 Ibid
49 Ibid
50 Ibid, at 319.
51 Ibid, at 340-41.
Charter of Rights and Freedoms, the Constitution Act of 1982, maintained the rights of the Roman Catholic and Protestant separate schools given them under the Constitution Act, 1867.\footnote{Supra note 17, at 49.} Section 29 of the Charter states, “Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.”\footnote{Constitution Act, 1982, c.11, Sch. B, s. 29.} The Charter also provides for the equal protection under the law and freedom of conscience and religion: Section 2(a) provides that “everyone has the following fundamental freedoms…freedom of conscience and religion”; and Section 15(1) states:

> “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”\footnote{Ibid at ss. 2(a), 15(1).}

Throughout the late nineteenth century, Roman Catholic separate schools continued to be underfunded because supporters only provided a small tax base. The schools received only a small portion of the provincial grant and did not receive any portion of the business tax assessment.\footnote{Supra note 26, at 2.}

### 2.2. Litigation and Politics

The separate school system in Canada is a hotly debated issue and the cause of much political unrest and protests dating back to the recognition of separate schools in the Act of 1841. There was no public policy initiative in Canada that would separate church from state like in the United States.\footnote{Frank Peters, “Religion and Schools in Canada” (1998) 1:3 Catholic Educ. 275.} It was not considered appropriate to include the U.S. Establishment Clause when Canada wrote its constitution.\footnote{Ibid, at 276.} Many scholars and legislators disagreed with the direction the U.S. took finding that; “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be
encouraged.” They suggested that preferential treatment to particular religions could be avoided without providing any support at all to any religious institutions. Litigation over the rights of Roman Catholic separate schools to receive funding beyond elementary school began in a series of cases starting in 1925 and ending in a ruling in the case named *Tiny Roman Catholic Separate School Board v. R.* (otherwise known as the Tiny Township cases or “Tiny v. The King”) in 1928. Roman Catholic schools, in the late nineteenth century, started continuation classes known as “fifth book classes,” resembling the ninth and tenth grades. Catholics could not however direct their taxes to cover the expenses for those classes or for high school and had to pay tuition for private Catholic high schools. After much lobbying for the extension of funding to Catholic high schools, the Catholic Bishops and the Ontario government agreed to a test case in court that would ask whether or not Catholic high schools were entitled to government funding. The Privy Council analyzed the rights of the Roman Catholics to have separate, publicly funded schools under the *Scott Act*, the *Commons Schools Act of 1859*, and s. 93 of the *Constitution Act, 1867*. The Privy Council held that Roman Catholic schools had no constitutional right or guarantee to public funding for high schools (grade 11-13) at the time of Confederation in 1867 under s. 93 of the *Constitution Act, 1867*, and therefore only had claims to the continuation classes. The Privy Council also held that the provincial government could still grant funding to the Roman Catholic separate schools if they desired. From 1946-1950, the Roman Catholic school trustees argued for equal funding past grade 10 in The Royal Commission on Education (Hope Commission), but Premier Leslie Frost shelved it in 1950. Roman Catholics continued to fight for equal funding and in 1963, the Foundation Tax Plan

58 Ibid
59 Ibid
61 Supra note 27, at 2.
62 Ibid.
63 Ibid.
64 Supra note 60.
65 Ibid
66 Ibid
provided for an improvement in government grants to separate schools. In 1971, the Minister of Ontario, William Davis, refused to extend funding for separate schools because he believed it would be too costly. He also wanted to avoid the politics of other denominations requesting public funding. He believed that publicly funding Roman Catholic high schools would hurt the public system. Later that year, Davis became Premier, and Roman Catholic school boards were allowed to establish more high schools with limited government support. From 1971-1984, there was a growth in Roman Catholic high schools and enrollment.

In 1984, Premier Davis took a stance on extending separate school funding and proposed that the Ontario government extend full funding to all grades including the separate high school system. Premier Davis stated:

“As the nondenominational system has evolved to meet society’s needs, so too has the Roman Catholic school system. The extension of financing to separate school grades 9 and 10 demonstrates that financial and operational arrangements can evolve over time and honour the intentions of the original constitution. If we work co-operatively and prudently, we can complete this task without compromising the quality of our public schools.”

Premier Davis presented Bill 30, in which the Ontario legislature extended full funding to Roman Catholic separate schools through Grade 13. Premier Davis submitted Bill 30 to the courts to determine its constitutionality since the Charter came in to force in 1982 that provided for equality rights. Three specific questions were asked: First, was Bill 30 a valid exercise of the provincial power in relation to education under section 93 of the Constitution Act, 1987; second, was Bill 30 a valid exercise of provincial power because it returned to Roman Catholic separate school supporters rights which were constitutionally guaranteed in the Constitution Act, 1987; and third, was the Charter applicable to Bill 30, and, if so, to what extent and with what

68 Ibid
69 Ibid
70 Ibid
71 Ibid
72 Ibid at 25.
73 Ibid
75 Supra note 43, at 18.
effect.\textsuperscript{77} The Supreme Court of Canada ultimately decided the issues, and found that Bill 30 was a valid exercise of the provincial legislature’s power. The Court stated:

“The contextual background suggests that part of the compromise was that future legislation on the part of the province with respect to separate denominational schools was permissible. The province was to be able to grant new rights and privileges to denominational schools after Union in response to new conditions but that subsequent repeal of those post-Union rights or privileges would be subject to appeal…Bill 30 is a valid exercise of the provincial power to add to the rights and privileges of Roman Catholic separate school supporters under the combined effect of the opening words of s. 93 and s. 93(3) of the Constitution Act, 1867.”\textsuperscript{78}

In order to answer the question of whether there was a constitutionally guaranteed right to full funding under the Constitution Act, 1867, the Court surveyed the history of schools in Ontario prior to Confederation through the decision in the Tiny v. The King case.\textsuperscript{79} In response to this question the Court, in holding the provincial legislature had the power to return constitutionally guaranteed rights to Roman Catholic separate schools, stated:

“…Roman Catholic separate school supporters had at Confederation a right or privilege, by law, to have their children receive an appropriate education which could include instruction at the secondary school level and that such right or privilege is therefore constitutionally guaranteed under s. 93(1) of the Constitution Act, 1867…they were entitled to the proportionate funding provided for in s. 20 of the Scott Act. This conclusion, it seems to me, is fully consistent with the clear purpose of s. 93, namely that the denominational minority’s interest in a separate but suitable education for its children be protected into the future.”\textsuperscript{80}

Finally, the Court turned to the applicability of the Charter and held that Bill 30 was immune from Charter review regardless of whether or not s. 29 was included in the Charter, thus rendering Bill 30 immune to ss. 2(a) and 15 of the Charter.\textsuperscript{81} The Supreme Court of Canada affirmed the Court of Appeals conclusion that only a “specific constitutional amendment would be required” to change the original Confederation bargain.\textsuperscript{82}

\textsuperscript{77} Reference re Bill 30, An Act to Amend the Education Act (Ont), [19870 1 S.C.R. 1148 at 19.  
\textsuperscript{78} Ibid at 29.  
\textsuperscript{79} Ibid at 30-56.  
\textsuperscript{80} Ibid at 58-59.  
\textsuperscript{81} Ibid at 62-64.  
\textsuperscript{82} Ibid at 63.
In 1993, the Multi-Faith Coalition for Equity in Education (MFC) emerged to lobby for the extension of public funding to non-Catholic faith-based private schools. The issue of public funding of denominational schools came up in a decision by the Supreme Court of Canada called Adler v. Ontario in 1996. The appellants in Adler were parents, members of the MFC, who sent their children to private schools that included Jewish and independent Christian schools that did not receive any government funding. The appellants claimed that the non-funding of Jewish day schools was unconstitutional and the failure to publicly fund school health support services (services that were provided to children at Roman Catholic separate schools) at both the Jewish and independent Christian schools, violated their children’s rights under ss. 2(a) and 15(1) of the Charter.

First, the Supreme Court of Canada’s majority decision written by Justice Iacobucci, held that the appellant’s did not have a constitutional right to public funding under s. 93(1), because “these rights are limited to those which were enjoyed at the time of Confederation.” In other words, only the Roman Catholic minority in Ontario and the Protestant minority in Quebec had rights to public funding. The Court held, consistent with Reference Re Bill 30, that to find ss. 2(a) and 15(1) as requiring the public funding for other religious schools would be to hold one section of the Constitution violative of another, which was to be avoided. Justice Iacobucci recognized that this presented a problem stating “that this unequal funding might, as I mentioned above, sits uncomfortably with the concept of equality embodied in the Charter.”

In a near simultaneous case, the Ontario courts faced another challenge requesting funding for faith-based schools other than the Roman Catholic separate schools. The precise

83 John G. Stackhouse, Jr., “Bearing Witness: Christian Groups Engage Canadian Politics since the 1960s” in David Lyon and Marguerite Van Die, Rethinking Church, State, and Modernity: Canada Between Europe and America (Toronto: University of Toronto Press Incorporated, 2000), at 120.
84 Supra note 3.
85 Ibid at 1.
86 Ibid at 5-7.
87 Ibid at 35.
88 Ibid
89 Ibid at 38.
issue was whether the Charter required the Minister of Education to provide and fund denominational religious schools for minority religious groups within the public school system. The plaintiffs argued that excluding their schools for funding as a part the public school system was discriminatory, denying them freedom of religion and conscience under the Charter’s ss. 2(a), (b) and 15. The Ontario court found that since the public school system was secular in nature, the government was not taking any coercive action to indoctrinate majority religious views. The Court stated, citing the Adler case, “What is really complained of in this case is not government action, but government inaction which in the circumstances of this case cannot be the subject of a Charter challenge.” The Court held, consistent with Adler, that there was no obligation on behalf of the government to publicly fund minority faith-based schools.

In February 1996, Professor Anne Bayefsky submitted a complaint to the UNHCR on behalf of Arieh Waldman. Waldman was a father of two children of the Jewish faith who enrolled his children at a private Jewish day school that did not receive any public funding in Ontario. Professor Bayefsky and Waldman argued that the legislative grant of power to publicly fund Roman Catholic schools under s. 93 of the Constitution Act, 1867, violated articles 2(1), 18(1), 18(4), 26, and 27 of the International Covenant on Civil and Political Rights (ICCPR). The Committee held that Canada violated its obligations under the ICCPR, specifically violating Waldman’s right to equal and effective protection against discrimination. The Committee stated,

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\text{Ibid at 707.}
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\text{Supra note 43 at 22; See Supra note 5.}
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\text{Supra note 5 at para 1.2.}
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\text{Ibid at paras 3.1 – 3.5; The ICCPR is an international treaty in which Canada is bound by the obligations therein. Canada ratified the treaty and its Optional Protocols in 1976, and the government of Ontario agreed to the ratification of both treaties. Supra note 43 at 21-22.}
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\text{Ibid at para 10.6.}
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“…the Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State Party chooses to provide public funding to religious schools, it should make this funding available without discrimination.”

The Committee also held that because Canada is a party to the ICCPR, it has an obligation to ensure there is an effective and enforceable remedy when the Committee finds a violation to the ICCPR. Even though Canada was found to have an obligation to provide a remedy to Waldman, the Ontario government in 2000 stated, “Ontario has no plans to extend funding to private religious schools or to parents of children that attend such schools, and intends to adhere fully to its constitutional obligation to fund Roman Catholic schools.”

In 2001, the conservative Government of Ontario under Premier Mike Harris introduced the Equity in Education Tax Credit that provided a refundable tax credit to parents sending their children to religious and non-public schools. The tax credit was an attempt to alleviate the financial burden to those parents sending their children to faith-based schools and eliminate some of the differences in religious education funding. Opponents of the tax credit claimed that it would destroy the public school system, fearing many would leave the public school system and ignored the discrimination in religious education funding and the UN Human Rights Committee’s decision. However, the fear that the public school system would be destroyed did not happen as opponents thought. In 2003, the Liberal government came to power under Premier Dalton McGuinty who previously opposed the tax credit and successfully repealed the tax credit. In 2005, the UN Human Rights Committee reiterated its position in Waldman,

100 Ibid
102 Supra note 43, at 27.
103 Ibid at 31.
104 Ibid
105 Ibid at 32.
107 Ibid
finding that Canada had not adopted any steps to eliminate the discrimination regarding the funding of schools in Ontario.\footnote{Concluding Observations of the Human Rights Committee: Canada, CCPR/C/CAN/CO/5, Adopted 28 October 2005.}

The issue of extending funding to all faith-based schools arose again in 2007 when John Tory, Leader of the Progressive Conservative Party in Ontario, released his platform for his campaign to become the Premier of Ontario. He advocated for taking some form of action to bringing non-Catholic, faith-based schools into the public school system the same way the Catholic schools had previously done.\footnote{Peter McCluskey, The Big Gamble: How Faith-based schools sunk John Tory’s dreams, online: CBCNews <www.cbc.ca/ontariovotes2007/features/features-tory.html>.} Tory proposed budgeting about $400 million to fund the extension of funding to all faith-based schools. The issue dominated the election.\footnote{Ibid} Tory argued that it was an issue of fairness and stated that the private schools that would receive funding would still have to follow the same curriculum as students in the public system. Teachers would have to meet the same qualifications as public school teachers.\footnote{Ibid} One poll released showed that 71% of those surveyed opposed public funding of faith-based schools, while 26% supported funding faith-based schools.\footnote{Duncan MacLellan, “Faith-Based Schooling and the Politics of Education: A Case Study of Ontario, Canada” (2012) 6:1 Catholic Edu. 37, at 49.} Another public opinion poll also showed that 53% of voters favored a single school system.\footnote{Ian Urquhart, McGuinty staking future on religious school stance, online: <www.vigile.net/McGuinty-staking-future-on>.} Tory’s plan did not receive much support, even from his own party and it led to a downturn in his popularity, resulting in Tory’s and the conservative’s defeat in the election for Premier to Dalton McGuinty.\footnote{McGuinty wins massive majority, Tory loses seat, online: CBCNews <www.cbc.ca/canada/ontariovotes2007/story/10/10/leaders.html>.} In 2007, the One School System Network (OSSN) was established in Ontario to bring together members who support a single non-sectarian school system under English and French school boards and to choose between publicly funding all religious schools or none.\footnote{See One School System Network, online: <www.onessn.com/>.
“The Public Funding of Religious Schools” that made two recommendations: “1) At a minimum, there should be no new public funding of any religious schools; 2) A constitutional amendment should be enacted to terminate the public funding of Catholic schools.” The CCLA argued that the extension of public funds to additional religious schools would effectively destroy the survival of the public school system.

In the 2011 Ontario provincial election, the issue of publicly funding faith-based schools did not re-emerge. The Progressive Conservative Party took the position that they would be raising the issue of publicly funding faith-based schools again and suggested that it was an issue for the school boards to handle. Most recently, the issue of the publicly funded Roman Catholic separates schools arose in a constitutional challenge by Reva Landau, a retired business systems analyst and non-practicing lawyer. Landau argues that the Ontario education system unjustly forces her, as a taxpayer, to support Roman Catholic schools. Landau is seeking for the elimination of all government aid for Roman Catholic schools from grades 9 to 12 and asking the Court to limit funding to those schools from grades 1 to 8. Landau is arguing that the Roman Catholics are entitled only to the aid that was given them at the time of Confederation and aid should be limited to the property taxes from Catholics who declare themselves as separate school supporters and Catholic-owned businesses as it was in 1867. Landau believes that the Court should reconsider its previous decisions in light of the Quebec’s withdrawal from the original Confederation compromise since Quebec amended the Constitution in 1997 in order to restructure its education system on linguistic lines. She also argues that giving aid to one

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117 Ibid at 7.

118 Supra note 112, at 51.

119 Ibid at 52.


121 Ibid

122 Ibid

123 Ibid

124 Ibid
religious institution that is not equally available violates the Charter and that there is blatant discrimination in the Catholic board’s hiring practices of teachers. On February 7, 2012, Landau appeared in an interview on “The Agenda” with Steve Paikin, to discuss the issue of public funding of Ontario’s Catholic separate schools in which she presents her argument. On that same episode, “The Agenda” also presented a debate on the issue with several guests that included Patrick Daly (Past President of the Ontario Catholic School Trustees Association); Patrick Monahan (Vice-President of Academic and Provost at York University); Mike Schreiner (Leader of the Green Party of Ontario); and Gila Martow (Spokesperson for the MFC). In regards to Landau’s court challenge, both Daly and Monahan did not believe she would be successful, though recognizing that the system is discriminatory. Monahan stated that the concern for extending funding to other faith-based schools is that it would cause fragmentation of the public school system and did not believe there would ever be enough political support for defunding the Roman Catholic separate school system. Daly agreed with Monahan and argued that the quality of the Roman Catholic schools is amongst the top in the world, and would be adversely affected if they lost any funding. When asked why this issue is not going away, Martow responded that the system is discriminatory as the reason for the debate to keep reigniting and infers there has been no compromise to prevent the issue from continuing to come up by asking “where is the compromise?” She stated that Ontario supports boutique and alternative schools for other various interests (such as athletics, the arts, etc.), but not for other religious schools. Schreiner also argued that there is much duplication of costs between the public and separate school systems related to building maintenance costs

126 Reva Landau, *Catholic School Funding*, online: <http://www.youtube.com/watch?v=qth2ZnuUC9Y>.
127 *Education and Religion* online: <http://www.youtube.com/watch?v=ZckchZT5XLU&feature=relmfu>.
128 *Ibid*
129 *Ibid*
130 *Ibid*
131 *Ibid*
132 *Ibid*
and transportation expenses in particular.\textsuperscript{133} The guests were asked whether there was a political and legal solution to the issue of public funding that would be satisfactory to all sides of the argument. Monahan responded by stating the problem is largely a political issue, and Daly agreed stating that not even McGuinty who is a Roman Catholic would be able to muster the political support for change.\textsuperscript{134} However, Martow suggested alternative and boutique or charter schools (which have seen success in the United States) for religious purposes was one solution, as well as bringing schools under the Roman Catholic school boards as was done in Alberta.\textsuperscript{135} Daly agreed that Alberta has seen success in bringing some Jewish schools under the Roman Catholic school boards recognizing it as one possible solution, but Schreiner noted that Alberta also pays more per pupil and increased taxes which may not be the way for Ontario to go.\textsuperscript{136} Schreiner proposed a single public school system that allows for religious choice under that system similar to Newfoundland’s education system, which was achieved through a bilateral constitutional amendment and is supported by approximately 60\% of Ontarians.\textsuperscript{137} Finally, the guests, especially Martow, recognized that informally there is movement in Canada towards less “religiosity” in society as a whole which includes support for publicly funding the Roman Catholic separate school system.\textsuperscript{138} This is especially true in light of the most recent development in Ontario regarding Bill 13, which outlaws bullying in schools including LGBTTIQ (lesbian, gay, bisexual, transgender, transsexual, two-spirited, intersex, queer) and requiring schools to allow Gay Straight Alliances.\textsuperscript{139} Bill 13 caused controversy over the naming of Gay Straight Alliances in Roman Catholic schools and put the separate school system at odds with the provincial government in Ontario.\textsuperscript{140} Even though there is no intention by the government to defund the Roman Catholic schools, the issue reignited the debate. A recent survey showed that the majority of Ontarian disagreed with funding the Roman Catholic school

\textsuperscript{133} Iibid
\textsuperscript{134} Iibid
\textsuperscript{135} Iibid
\textsuperscript{136} Iibid
\textsuperscript{137} Iibid
\textsuperscript{138} Iibid
\textsuperscript{139} Antonela Artuso, “Ont.’s Bill 13 raises Catholic school funding issue” (3 June 1012), online: News Canada <http://www.standard-freeholder.com/2012/06/03/onts-bill-13-raises-catholic-school-funding-issue>.
\textsuperscript{140} Iibid
system - 60% amongst Green Party supporters, 58% amongst Tory supporters, 53% of New Democrat Party supporters, and 48% of Liberal Party supporters – for an overall 48% of Ontarians disagreeing with taxpayer support for Roman Catholic schools. The issue of funding the Roman Catholic school system also highlights the discrimination that takes place within the separate school system, namely the Catholic school boards rejection of non-Catholic teachers.

2.3. Education Systems in Other Provinces

2.3.1. British Columbia

In British Columbia, the government funds public secular schools and provides a tiered grant system providing between 0-50% support for independent schools based on certain criteria, including Catholic, Protestant, Mennonite, Seventh-Day Adventist, Jewish, Muslim, Sikh, Evangelical, Lutheran, and Fundamentalist Christian schools. These religious institutions are divided into four groups: a) Group one which may receive 50% of funding based on criteria such as minimum enrollment of ten students, operated under authority of the Independent School Act, do not promote doctrines of racial or ethnic superiority, religious intolerance, social change through violence or sedition, no discrimination in the schools, and all teachers certified by the province; b) Group two receives 35% of funding based on similar factors as Group one; c) Group three receives no funding because they are not required to follow the curriculum set by the province and/or hire teachers certified by the province; and d) Group four receives no funding because enrolled students are not eligible for funding, such as foreign students.


\[142 \text{ Ibid} \]

\[143 \text{ Supra note 43, at 4.} \]

\[144 \text{ Ibid at 4-5.} \]
2.3.2. Alberta

The Alberta education system consists of six kinds of schools including public, separate, Francophone, charter, alternative, and independent (private) schools.\textsuperscript{145} Full funding is available for public, separate, alternative, and Francophone schools.\textsuperscript{146} Alternative schools may be related to a particular religion and include Jewish, Muslim, and Christian denominational schools.\textsuperscript{147} The alternative schools receive funding equal to that of public schools, but any additional costs may or may not be funded.\textsuperscript{148} Religious schools are also funded as independent schools. These schools are private schools that become accredited and apply to the Minister for funding through grants.\textsuperscript{149}

2.3.3. Saskatchewan

Saskatchewan has a mixed system that includes fully funded public, Francophone, Catholic and Protestant schools, along with partial funding for independent schools that are classified as historical, associate, or alternative.\textsuperscript{150} The \textit{Independent School Regulations} in Saskatchewan lists nine schools that are considered historical: 1) Athol Murray College of Notre Dame; 2) Caronport High School; 3) College Mathieu High School; 4) Luther College High School; 5) Lutheran Collegiate Bible Institute; 6) Rivier Academy; 7) Rosthorn Junior College; 8) St. Angela’s Academy; and 9) Western Christian College High School.\textsuperscript{151} These schools include Lutheran, Catholic and nondenominational Christian, which existed prior to the \textit{Independent Schools Regulations}.\textsuperscript{152} The regulations define associate schools as “independent schools that has a subsisting agreement with a board of education to operate in association with

\textsuperscript{145} Ibid at 5.
\textsuperscript{146} Ibid
\textsuperscript{147} Ibid at 6.
\textsuperscript{148} Ibid
\textsuperscript{149} Ibid at 7.
\textsuperscript{150} Supra note 43, at 7.
\textsuperscript{151} The Independent Schools Regulations, c. E-0.1 Reg. 11, s. 2(k), as amended by Saskatchewan Regulations 78/2003 and 49/2012; and by the Statutes of Saskatchewan, 2000, c. 50.
\textsuperscript{152} Supra note 43, at 7.
that board."\(^{153}\) Associate schools are religious based consisting of Christian and Muslim religions, and receive per pupil funding.\(^{154}\)

### 2.3.4. Manitoba

Manitoba provides full funding for public schools and operational support to independent and private schools, which includes religious schools (including Christian, Catholic, Muslim, Jewish, Lutheran, Sikh, Seventh-Day Adventist, and Montessori religions).\(^{155}\) In order to obtain funding for independent schools, the school must apply for a “School Code,” meet legislated criteria, and submit to a three year waiting period while the Province observes the school to verify they meet the criteria consistently.\(^{156}\)

### 2.3.5. New Brunswick, Nova Scotia, and Prince Edward Island

New Brunswick, Nova Scotia, and Prince Edward Island only fully funds a single secular public school system.\(^{157}\) New Brunswick eliminated the distinction for separate schools and in 1871 created a single non-sectarian system with no provisions for faith based schools.\(^{158}\) Similarly, Nova Scotia had no separate schools in existence since 1867.\(^{159}\) In both Nova Scotia and New Brunswick, some public schools continued to operate as Catholic schools after 1871 under informal agreements with the public schools and had the same curriculum as the public schools with additional religious education.\(^{160}\) However, in today’s system there is no public funding for religious schools of any religion.\(^{161}\)

### 2.3.6. Newfoundland

Newfoundland joined the Confederation in 1949, and in order to appease the Roman Catholic Church, negotiated Term 17 to protect denominational education in Newfoundland in

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153 Supra note 53, at s. 2(f).
154 Supra note 43, at 8.
155 Ibid at 8-9.
156 Ibid
157 Ibid at 10-11.
158 Ibid at 10.
159 Ibid at 11.
160 Ibid
161 Ibid
the Terms of Union with Canada.\textsuperscript{162} In 1967, the Royal Commission on Education recommended that the education system in Newfoundland be changed to a secular system.\textsuperscript{163} The Newfoundland-Labrador Human Rights Association (NLHRA), a government sponsored human rights committee, recommended abolishing the denominational system.\textsuperscript{164} In 1984, the NLHRA, in a brief to the Minister of Justice, argued, that “the greatest single threat to equality of religion and freedom of worship [in Newfoundland] is the restrictive nature of the denominational education system.”\textsuperscript{165} In 1998, through section 43 of the \textit{Constitution Act, 1867},\textsuperscript{166} Newfoundland repealed Term 17, which resulted in the elimination of the denominational school system.\textsuperscript{167} The current system is a single secular system that protected religious education by requiring students in public schools to take religious classes.\textsuperscript{168} However, parents have the option of opting out of these course requirements and may request that a public school allow for the observance of a religious holiday.\textsuperscript{169} There is no public funding for any religious or secular independent schools.\textsuperscript{170}

\textbf{2.3.7. Yukon Territory}

The \textit{Education Act} for the Yukon Territory provides for full funding of Francophone, public, and Catholic separate schools under an agreement between the Commissioner of the Yukon Territory and the Catholic Episcopal Corporation.\textsuperscript{171} The \textit{Education Act} leaves open the

\begin{footnotesize}
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\item\textsuperscript{163} \textit{Ibid} at para 33.
\item\textsuperscript{164} \textit{Ibid} at para 34.
\item\textsuperscript{165} \textit{Ibid}.
\item\textsuperscript{166} Section 43 of the \textit{Constitution Act, 1982} provides the bilateral amending formula for amending the Constitution.
\item\textsuperscript{167} \textit{Supra note} 43, at 11.
\item\textsuperscript{168} \textit{Ibid}.
\item\textsuperscript{169} \textit{Ibid} at 11-12.
\item\textsuperscript{170} \textit{Ibid} at 12.
\item\textsuperscript{171} \textit{Education Act}, R.S.Y. 2002, c. 61, ss. 56-57.
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possibility for other faith-based schools to be established within the publicly funded school systems, however there is no demand to do so.  

2.3.8. Northwest Territories and Nunavut

Both the Northwest Territories and Nunavut includes education systems that publicly fund both public and denominational schools (Roman Catholic, and Protestant schools). Both territories allow for the opening of other faith-based private schools, but do not provide funding for those schools.  

2.3.9. Quebec

Quebec took a very different approach. Quebec sought a bilateral constitutional amendment, and in 1997 revoked the provisions in Section 93 of the Constitution Act, 1867 as it applied to the province. The amendment provided for Section 93 to no longer apply to the Quebec, and allowed for schools to be reorganized on linguistic lines instead of protecting the Roman Catholic and Protestant separate schools. There is no longer any distinction between religious and non-religious schools, and funding is given to independent schools that are accredited.

172 Supra note 43, at 11.
174 Ibid
175 Ibid at 10.
177 Supra note 43, at 10.
Chapter 3

Importing the U.S. Establishment Clause to Ontario

In this Chapter, I argue that the best political and legal solution to the issue of public funding of faith-based schools, is a bilateral amendment to the constitution between Ontario and Canada, which is nothing new for Canada. However, I suggest that as a political compromise, that any bilateral amendment should include establishment clause principles. The first part provides the rationale for importing U.S. establishment clause principles in to a bilateral amendment. The second part discusses the applicable establishment clause principles that would allow for a political and legal compromise that addresses the concerns surrounding public funding of faith-based schools in Canada.

3.1. Rationale

Canada and the United States have very divergent histories. The Constitution of the United States, which precedes Canada’s Charter of Rights and Freedoms by over two centuries, has seen many cases involving the establishment of religion. The U.S. Supreme Court takes a very strict approach to separation of church and state. On the other hand, as seen through Canadian history, religion, in particular Christianity, is deeply rooted in Canadian society and history. However, over time, in particular post-Charter, the Canadian courts became instrumental in functionally applying Establishment Clause principles without having an explicit constitutional amendment to interpret. Even without an explicit Establishment Clause, the Supreme Court of Canada interpreted the role of religion in social settings, specifically in public schools, similarly to decisions made in the United States that interpreted the Establishment Clause in the First Amendment of the United States Constitution. In some ways the Canadian courts differed in their rationale interpreting church and state related issues but still came to the same end result – a secularization of the public school system. Albert Mendez states, “Canadian society has become more pluralistic, with a wide range of religious practices and beliefs…coupled with a relatively secular age, has resulted in religion playing less of a part in
In addition, s. 15 of the Charter, provides for the equal treatment of individuals in Canada. The Ontario court found that “the praiseworthy object of s. 15 of the Charter is to prevent discrimination and promote a society in which all are secure in the knowledge that they are recognized as human beings equally deserving of concern, respect, and consideration.”\textsuperscript{179} The Supreme of Canada stated, in regards to s. 15(1) of the Charter, “Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment...has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society.”\textsuperscript{180}

These important principles of equality and recognition of a more pluralistic society are also found in Establishment Clause principles.

3.2. Supreme Court of Canada and U.S. Supreme Court Decisions

Since there was no establishment clause in Canada, Parliament was able to pass legislation that explicitly supported the Christian majority without any means of challenging those laws until after the Charter came in to force.\textsuperscript{181} The lack of any challenges led to such legislation as the Lord’s Day Act, 1906\textsuperscript{182} to be kept in force until after the Charter established religious and equality rights in 1982.\textsuperscript{183} Jewish and Seventh-Day Adventist challenges seeking accommodations to the Lord’s Day Act were rejected up until the Supreme Court of Canada rendered its decision in the Big M\textsuperscript{184} case striking down the Lord’s Day Act as violating the Charter.\textsuperscript{185} The political situation in relation to church and state was a relationship that

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\item \textsuperscript{178} Supra note 17, at 107.
\item \textsuperscript{180} Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, 529.
\item \textsuperscript{181} Lorraine E. Weinrib, “Ontario’s Sharia Law Debate: Law and Politics under the Charter” in Richard Moon, Law and Religious Pluralism in Canada (Vancouver: UBC Press, 2008) at 244.
\item \textsuperscript{182} “Lord’s Day Act, 1906 (Can.), c. 27.
\item \textsuperscript{183} Ibid
\item \textsuperscript{184} R. v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295.
\item \textsuperscript{185} Supra note 181.
\end{itemize}
depended on what religious community had the majority status in the political arena.\textsuperscript{186} The federal Minister of Justice and The Lord’s Day Alliance argued against exemptions for minority regions because they believed minority religions were meant to bear the burdens, and any exempted labor would rob the majority of its Sunday privileges.\textsuperscript{187} The Minister of Justice stated “as alien immigrants, they were perpetual outsiders in a society where the religious majority rightfully governed according to its own religious and moral precepts…the fact that other “Christian countries,” such as the United States and England, offered such exemptions was not relevant.”\textsuperscript{188}

The modern view of church and state abandons the previous pre-\textit{Charter} views in that starting with the \textit{Big M} case; the Supreme Court of Canada began slowly dismantling the formal and informal establishment of religion.\textsuperscript{189} “Formal establishment bound religious institutions and their leaders to the political structure of the state. Informal religious establishment wielded similar authority through entrenched personal, social, political, and institutional privilege…”\textsuperscript{190} The formal and informal religious establishment can easily be seen in the education system where the state is providing public funds for the Roman Catholic separate schools that have their own school boards and have the perception of an established religion in Ontario. The \textit{Big M} case in 1985 involved the \textit{Lord’s Day Act}, which prohibited work on Sundays, with few exemptions that only recognized the Christian observance of the Sabbath on Sunday.\textsuperscript{191} The Supreme Court of Canada looked at a similar case in the United States, \textit{McGowan v. Maryland}\textsuperscript{192} which upheld a similar Sunday closing state law because the U.S. Supreme Court held that there was no religious purpose for the law or effects of the law that would bring it under establishment clause principle scrutiny.\textsuperscript{193} Justice Warren looked at the history of the development of Sunday closing laws in the United States and found that they did not hold the same religious purposes as they

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\textsuperscript{186} \textit{Ibid} at 244-45.  \\
\textsuperscript{187} \textit{Ibid} at 245.  \\
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\textsuperscript{189} \textit{Ibid} at 246.  \\
\textsuperscript{190} \textit{Ibid}  \\
\textsuperscript{191} \textit{Supra note} 184 at paras 5-7.  \\
\textsuperscript{192} 366 U.S. 420 (1961).  \\
\textsuperscript{193} \textit{Supra note} 184 at paras 73-77.
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originally did, and provided sufficient exemptions to not have an adverse religious effect on members of other faiths.\textsuperscript{194} Utilizing similar purpose and effect logic\textsuperscript{195} as Justice Warren, Justice Dickson in \textit{Big M} found that the \textit{Lord’s Day Act} had a “religious purpose, in compelling sabbatical observance,” which “has been long-established and consistently maintained by the courts of this country” unlike that of the Maryland law in \textit{McGowan}.\textsuperscript{196} The \textit{Lord’s Day Act} violated s. 2(a) of the \textit{Charter} in that it amounted to religious compulsion or imposition of enforcing the Sunday Sabbath since “non-Christians are prohibited for religious reasons from carrying out activities that are otherwise lawful, moral, and normal.”\textsuperscript{197} Justice Dickson stated, “…as I read the \textit{Charter}, it mandates that the legislative preservation of a Sunday day of rest should be secular, the diversity of belief and non-belief, the diverse socio-cultural backgrounds of Canadians make it constitutionally incompetent for the Federal Parliament to provide legislative preference for any one religion at the expense of those of another religious persuasion.”\textsuperscript{198} The Supreme Court of Canada additionally held that because the purpose of the \textit{Lord’s Day Act} was to compel religious observance, it could not be valid as a reasonable and demonstrably justified limitation on the right to freedom of religion and conscience under s. 1 of the \textit{Charter}.\textsuperscript{199} The difference from the \textit{McGowan} case was that Justice Dickson places emphasis on preventing the compelling or coercive nature of religion in which the purpose and effects of such legislation could include the indirect burdens on the religious minority. He notes that:

“…coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices.”\textsuperscript{200}

\textsuperscript{194} Supra note 192, at 431-37.
\textsuperscript{195} Justice Dickson states, “…both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.” \textit{Ibid} at para 80
\textsuperscript{196} \textit{Ibid} at para 78.
\textsuperscript{197} \textit{Ibid} at para 98.
\textsuperscript{198} \textit{Ibid} at para134.
\textsuperscript{199} \textit{Ibid} at paras 137-143.
\textsuperscript{200} \textit{Ibid}
Thus was the case, since the Charter does not have an establishment clause, and provides for the freedom of religion and conscience.

A year later, the Sunday closing law issue arose again in Canada in the case of Edwards Books where the Supreme Court of Canada applied the same purpose and effect test as in Big M but came to a different conclusion. This case involved a challenge to an Ontario provincial Sunday Closing law (the Retail Business Holidays Act) that required the closing of operations on certain holidays as defined in the law that included days that were significant to Christians, and others secular in nature. Similar to McGowan and referring to Justice Warren’s opinion in that case, Justice Dickson examined the origins of the legislation and stated,

“…distinctive legislative treatment of a day, such as Sunday, which has particular religious significance does not invariably require the legislation to be characterized as religious in nature…to say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state.”

Justice Dickson subsequently held that the purpose of the Retail Business Holidays Act was not an attempt to encourage religious observance. Again, Justice Dickson turned to the coercive nature of the Ontario law, and found that even though the law did not directly compel religious practice, it indirectly placed restrictions on the practice of Saturday Sabbath observers making it difficult for them financially since they would be forced to close on Sunday and observe their religion on Saturday. Though recognizing this burden, Justice Dickson upheld the law in applying s. 1 of the Charter, holding that the law’s objectives did not disproportionately infringe freedom of religion rights since there was a serious effort in accommodating Saturday worshippers, and the law did not have a religious purpose.

Another significant establishment issue that arose in Canada as it did in the United States was religion in public schools. In Zylberberg v. Sudbury the issue was whether religious

202 Ibid at paras 7-10.
203 Ibid at paras 57-59.
204 Ibid at para 62.
205 Ibid at paras 95-151.
206 Ibid at para 151.
exercise of opening and closing school with a Christian prayer in the public schools infringed on freedom of religion and conscience guaranteed by the s. 2(a) of the Charter.\textsuperscript{207} The Ontario Court of Appeals considered the \textit{Engel v. Vitale} case in the United States that applied the Establishment Clause.\textsuperscript{208} The \textit{Engel} case also dealt with the issue of prayer in public schools.\textsuperscript{209} In \textit{Engel}, the U.S. Supreme Court found that prayer in public schools violated the Establishment Clause because it officially established religious beliefs.\textsuperscript{210} The U.S. Supreme Court relied predominately on Establishment Clause principles in finding the violation of the First Amendment instead of focusing on the prayers’ coercive or compelling nature.\textsuperscript{211}

The Ontario Court of Appeals stated that an important aspect of the freedom of religion “is freedom from conformity…the practices of a majoritarian religion cannot be imposed on religious minorities.”\textsuperscript{212} The Court recognized that one must turn to the minority religion’s perspective and appreciate the feeling of pressure and awkwardness that is caused by the majority.\textsuperscript{213} The court noted the Divisional Court’s opinion that “peer pressures, and the desire to conform, are notoriously effective with children…the peer pressure and the classroom norms to which children are acutely sensitive, in our opinion, are real and pervasive and operate to compel members of religious minorities to conform (to) majority religious practices.”\textsuperscript{214} The court specifically adopted the view of another United States Supreme Court case, \textit{Abington School District v. Schempp} that held:

“…[B]y requiring what is tantamount in the eyes of teachers and schoolmates to a profession of disbelief, or at least of nonconformity, the procedure may well deter those children who do not wish to participate for any reason based upon the dictates of conscience from exercising an indisputably constitutional right to be excused…even devout children may well avoid claiming their right and simply continue to participate in

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\textsuperscript{208} \textit{Ibid} at 28-32.
\textsuperscript{210} \textit{Ibid} at 430.
\textsuperscript{211} \textit{Ibid} at 423-24.
\textsuperscript{212} \textit{Supra note} 207, at 19.
\textsuperscript{213} \textit{Ibid}, at 23.
\textsuperscript{214} \textit{Ibid}
\end{flushright}
exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists simply on the basis of their request.”

The Ontario court further held that:

“…the right to be excused from class, or to be exempted from participating, does not overcome the infringement of the Charter…the exemption 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.”

The Ontario court also stated “the absence of an establishment clause in s. 2(a) does not limit the protection it gives to freedom of conscience and religion.” However, there are many principles that are applicable in the Canadian context and should be included as a part of any bilateral constitutional amendment in order to address the unequal treatment of minority religious institutions in Ontario’s education system.

As can be seen, in many ways the U.S. and Canadian courts have interpreted the separation of church and state similarly with differences in rationale, but coming out to the same end result. In regards to the use of taxpayer funds in support of religious schools, it is clear that the Canadian courts are protecting the right of the Roman Catholic Church to receive funding as is evident in Adler and the politics of Ontario as discussed above. This is where the U.S. courts differ. One of the earliest cases related to the use of taxpayer funds in support of religious schools in the U.S. was Everson v. Board of Education of Ewing Tp. in 1947. In that case, a state of New Jersey statute allowed for reimbursement to parents of transportation expenses for bussing children to school, including Catholic schools. The challenge was brought before the U.S. courts arguing that the school Board’s reimbursement to parents of parochial school students violated the constitution. The Court evaluated the statute with the definition of the establishment of religion to mean the following:

216 Ibid
217 Ibid, 32.
219 Ibid at 2.
220 Ibid
“The United States’ interpretation of the Establishment Clause is that “…neither a state nor the federal government can set up a church. Neither can pass laws, which aid one religion, aid all religions, or prefer one religion to another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between Church and State.”  

Even with this broad definition of the meaning of the establishment clause, the U.S. Supreme Court upheld the New Jersey statute as not being a breach of the U.S. Constitution. Justice Black recognized that some of the funds expended were used to get children to parochial schools, but found that this was only a part of a more general program that supports children attending public and other schools. Justice Black stated, “That Amendment [the First Amendment] requires the state to be a neutral in its relation with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.”  Justice Black recognized the right of parents to send their children to schools of their choosing and the taxes being spent for transportation supported that purpose. Justice Black held, “The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.”  

In a more recent similar case, Zelman v. Simmons-Harris, taxpayers in the state of Ohio challenged a scholarship program that provided funds for tuition that could be used for enrolment

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221 Ibid at 15.
222 Ibid at 18.
223 Ibid at 17.
224 Ibid at 18.
225 Ibid
226 Ibid
in public or private schools of the parent’s choosing. During the school year 1999-2000, 96% of the students participating in the program attended religiously affiliated schools. The U.S. Supreme Court was then faced with another establishment case that involved taxpayer money for the support of religious education, and parental choice. The Court asked, “Whether the government acted with the purpose of advancing or inhibiting religion [and] whether the aid has the ‘effect’ of advancing or inhibiting religion.” Chief Justice Rehnquist, writing for the majority, upheld the program as a neutral program that does not offend the establishment clause of the First Amendment. He further cited three cases that provided the law as follows:

“...where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.” In addressing the possible perception of the State endorsing religion, Justice Rehnquist held that, “…no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the imprimatur of government endorsement.” The Zelman case is a good example of the neutrality principle and in way equality principles, since it allows for all religious interests to be treated equally.

3.3. Applicable Establishment Clause Principles

Even though the Canadian courts argue that the absence of an establishment clause in the Canadian Constitution is not necessary, there are still many principles that can be applied.

228 Ibid
230 Ibid
233 See Supra notes 184, 207.
Drawing from the various establishment cases in the United States, there are principles that can be considered and included in a bilateral amendment between Ontario and the federal government even though the United States interpretation is much more broad and strict. The Establishment Clause, as originally proposed by James Madison, read, “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.” The fear in the United States was that a state supported, established church, or group of churches would dominate the government and infringe on the rights of the minority. The *Engel* case provides a brief historical background important to the development of the Establishment Clause in the United States. Historically, many who sought religious freedom from the established Church of England that controlled government founded the United States. However, those same groups that opposed the Church of England began treating governments with that same kind of control with the establishment of the Episcopal Church, including writing “their own prayers into law and passing laws to make their own religion the official religion of their respective colonies.” With the Revolutionary War came an opposition to the establishment of churches and the minority religions gained power becoming the new majority over the established Episcopal Church. The result, led by political leaders, was to effectively prevent the establishment of any one church or group of churches. The view of the United States was articulated in *Engel*:

“…the purposes of the Establishment Clause…rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion,

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234 Supra note 192, at 440.
235 *Ibid* at 441 (“…the real object of the amendment was…to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.”).
237 *Ibid* at 426.
239 *Ibid* at 428.
240 *Ibid*
the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.”

Thus the United States interpreted the establishment clause broadly and strictly as noted in the *Everson* case above.

This is not the same issue in Canada. There is no fear or danger of an established church, but the problem is the favoritism that occurs and the perceived establishment of the Roman Catholic Church in Ontario; leading to the unequal treatment of minority religions schools regarding public funding. The similarity with the United States is that the historical developments in Ontario is that the once the minority religion, is now one of the largest religious groups in Ontario. Out of a total Ontario population of 11,285,550 in 2001, Roman Catholics made up 3,911,760. Comparatively: Jewish had a population of 190,795; Muslim a population of 352,530; Hindu a population of 217,555; Sikh a population of 104,785; and those with no religious affiliation had a population of 1,841,290. The once Roman Catholic minority in Ontario fought for equal public funding and was successful. Today, there are many minority religious groups that want the same equal treatment the Roman Catholic minority fought for over a hundred years to obtain. The Canadian government and court’s insistence on excluding minority religious groups from public funding tends to show less appreciation for the burdens placed on minority groups.

The principles embodied in the establishment clause can be interpreted in Canada as giving more weight to the *Charter*’s protections under ss. 2(a) and 15, affirming the right to religious freedom and conscience and equality, as opposed to the privileges given to the Roman Catholic minority in the *Constitution Act, 1867*. It would also give more meaning to s. 27 of the *Charter*, which provides “This Charter shall be interpreted in a manner consistent with the

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241 *Supra note* 209, at 431.
242 *Supra note* 17, at 107.
244 *Ibid*
245 *Ibid*
preservation and enhancement of the multicultural heritage of Canadians.” 246 This is especially true since the Canadian courts have taken a broad interpretation of the coercive and compelling nature that such state support for religion can have, in particular, the burdens it places on the minority religions and the increasing separation of church and state in Canada. Establishment clause principles emphasize the equality of the treatment of different religions that prevents the establishment or perceived establishment of one religion, requiring the state to be neutral. In other words, it reiterates the equal treatment of all religions and supports the UNHCR’s statement in Waldman; that if Canada undertakes funding any religion, it should fund all equally. Both the compulsive/coercive nature religion can have, and emphasis on equality brings together the Canadian and United States’ approaches to analyzing and interpreting religious freedom. In addition, it emphasizes the fundamental rights in the Charter, as opposed to the privileges that were given to Roman Catholic separate school supporters in a time when they were the minority religion. At the same time, it would not require the courts to defund the Roman Catholic school system. It would require, however, the equal treatment of all religious institutions in any school system that Ontario agrees upon politically.

Establishment Clause principles prevent the idea of favoritism for one religion over others. This principle is not a foreign concept in Canada’s jurisprudence, and is well supported in many Canadian cases. For example, the Supreme Court of Canada explicitly stated that, “Freedom of religion is not diminished, but is safeguarded, by the state’s abstention from favoring or promoting any specific religious creed” in referring to the British Columbia School Act that allowed for school books depicting same-sex couples to be used in the public schools against some individuals’ religious doctrine. 247 In 2004, the concept of state neutrality to religion similar to that found in U.S. jurisprudence was explicitly found by the Supreme Court of Canada to exist in Canadian society:

“The duty of neutrality appeared at the end of a long evolutionary process that is part of the history of many countries that now share Western democratic traditions…Canada’s history provides one example...which made it possible for the ties between church and state to be loosened, if not dissolved.” 248

246 Supra note 53, at s. 27.
The Supreme Court of Canada went on to further state:

“The concept of neutrality allows churches and their members to play an important role in the public space…while the state acts as an essentially neutral intermediary in relations between the various denominations and between those denominations and civil society. In this context, it is no longer the state’s place to give active support to any one particular religion, if only to avoid interfering in the religious practices of the religion’s members. The state must respect a variety of faiths whose values are not always easily reconciled…the principle of neutrality must be taken into account in assessing the duty of public entities, such as municipalities, to actively help religious groups.”

Most recently in 2012, the Supreme Court of Canada in the S.L. case reiterated neutrality:

“The religious portrait of our society is a key factor in the adoption of a policy of neutrality…as a result of globalization of trade and increased individual mobility, the diversity of religious beliefs in Canada has increased sharply over the past decades. The 2001 Census of Canada listed approximately 95 religious groups that were large enough to be considered separate religious institutions for the purposes of statistical records. Furthermore, more than 23 percent of Canadians declared that they were members of non-Christian religions or reported no religious identity at all.”

It was further held that, “…state neutrality is assured when the state neither favors nor hinders any particular religious belief, that is, when it shows respect for all postures towards religion, including that of having no religious beliefs whatsoever, while taking into account the competing constitutional rights of the affected individuals affected.” The Court again recognized that, “While it is true that the Canadian Charter, unlike the U.S. Constitution, does not explicitly limit the support the state can give to a religion, Canadian courts have held that state sponsorship of one religious tradition amounts to discrimination against others.” Consistent with the Supreme Court of Canada, various other courts followed the principle of neutrality and the prevention of favoritism. In Manitoba, the court stated, “to prefer one religion over another…contravenes the provisions of the Charter relating to freedom of conscience and religion.” The Quebec Superior Court found that the Charter “would certainly prevent any instrument of the State from establishing an official religion or discriminating against a particular

249 Ibid, at paras 67-68.
251 Ibid at para 32; See also Canadian Civil Liberties Association v. Ontario, [1990] 71 O.R. (2d) 341 (Ont. C.A.).
252 Ibid at para 17.
religion.” The Ontario Supreme Court even recognized that “the separation of church and state is a fundamental principle of our Canadian democracy and our constitutional law.” The result of these decisions has led to similar policies regarding the teaching of religion in schools in both the United States and Canada. Both countries allow for teaching of religion in schools as long as the curriculum does not provide for preference of one religion over another. However, when it comes to the public funding of the Roman Catholic separate schools, the courts reject the argument that the government action in funding those schools has no indirect compelling or coercive effects on the minority religions. Regardless of the courts recognizing neutrality principles in Canada, they are still unwilling to apply the neutrality principle to the public funding of the Roman Catholic separate schools. They fail to view the Ontario government’s choice to exclude funding to minority faith-based schools as government action since there is no legal obligation to do so despite the unequal treatment of those schools. By including an explicit clause that incorporates the neutrality principle of the Establishment Clause, the Canadian courts would be able to better apply the Charter’s ss. 2(a) and 15 to the funding issue, with respect to the multicultural make up of Canadian society.

The view of the establishment clause in the United States is clearly stricter, however, much of the original interpretation does not hold true anymore, especially since religious institutions are supported by federal and state funds through various means such as religious affiliated charities, hospitals, and religious charter schools that receive taxpayer funds from parents, especially as society evolves. In regards to charter schools, the emphasis is thus more on the right of the parent to provide the education of their choosing for their children as discussed in Zelman along with the neutrality principle of the Establishment Clause. This is similar to the arguments being made on both sides of the debate in Canada. Both Roman Catholic separate school supporters and the minority religious institutions agree that parents should have the right to choice in the educational developments of their children. The Canadian courts have referred to a parent’s right to choose the education of the child, and the

255 Supra note 173, at para 31.
256 Supra note 56, at 280.
257 See supra note 85, at 707.
258 See supra note 127.
school system cannot infringe their right to freedom of religion.\textsuperscript{259} The Court found that s. 7 of the \textit{Charter} included the right of parents to have input into the education of their child as a fundamental right protected in the concept of a right to liberty, as long as the child’s rights are not violated by parents or government policies.\textsuperscript{260} This was one of the arguments that the Roman Catholic separate school supporters made when fighting for equal funding. However, the parental choice argument falls short due the increased secularization of public schools. It would be tough to have a system that teaches every individual religious belief. Instead, Establishment Clause principles allows for more parental choice to be taken into consideration because it at least would provide minority faith-based schools with an opportunity to obtain access to public funding, which helps parents send their children to separate schools without having to pay tuition. It places them on an equal footing with parents of Roman Catholic parents who are currently benefiting from the separate school system.

\textbf{Conclusion}

The debate over public funding of faith-based schools in Canada is not going away until a legal and political solution is devised and the current system in Ontario is changed to address the unequal treatment of faith-based schools. It is well established that legally, there is nothing preventing the Ontario government from changing the current education system. However, the Canadian courts have protected the Roman Catholic separate school system and not found any obligation on the government to treat minority faith-based schools equally. These decisions have made it easier for the government to, not only extend public funding to Roman Catholic separate schools, but refuse to allow any access to public funds for minority faith-based schools since there was nothing in the Constitution that provided for the same rights. A bilateral constitutional amendment is a way in which the Ontario government can change the education system, which will require political support. Thus far the political situation has prevented any change to the education system in Ontario. The current political atmosphere is one of an increase in secularization of the public school system and less support for the use of public funding for the Roman Catholic separate school system. The inclusion of U.S. Establishment Clause principles,

\textsuperscript{259} See supra note 247.
especially the principle of neutrality and equal treatment, gives more weight to the Charter’s protections of freedom of religion, conscience, and equality. It allows for any system developed with those principles in mind, with respect for Canada’s commitment to multiculturalism, will result in a system that treats all faith-based schools equally. This would also provide a fair compromise between Roman Catholic separate school supporters and those fighting for equal funding for minority faith-based schools. It does not force the current system to give up funding for the Roman Catholic separate schools, as is often the argument against extending funding to other faith-based schools. Instead, it allows the Ontario government to produce a system that treats all faith-based schools equally whether that is providing funds for religious charter schools, bringing other faith-based schools under the current public school system, or creating a single system with more choices within that system.


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