



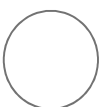
## Human rights and creed research and consultation report / III. Background and context

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**Systemic faithism** refers to the ways that cultural and societal norms, systems, structures and institutions directly or indirectly, consciously or unwittingly,<sup>[128]</sup> promote, sustain or entrench differential (dis)advantage for individuals and groups based on their faith (understood broadly to include religious and non-religious belief systems). Systemic faithism can adversely affect both religious and non-religious persons, depending on the context, as discussed in the examples below. Some forms of systemic faithism can be actionable under the *Code* (e.g. those amounting to “systemic discrimination”),<sup>[129]</sup> while others may not be (e.g. those taking broader cultural or societal forms). This section looks more closely at two dominant forms of systemic faithism in the current era, flowing from the “residually Christian” structuring of public culture and institutions, and from “closed secular” ideology and practice.



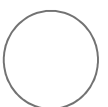
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various legacies in Canadian public life from the era of “Christian Canada” (1841-1960).<sup>[130]</sup> To be more specific, the term draws attention, to the ways such legacies continue to directly or indirectly structure contemporary “secular” Canadian institutions. While scholars using the term are generally critical of the systemic faithism that can result from this,<sup>[131]</sup> others argue that this is as it should be: that, as a historically Christian nation, Canada should continue to privilege Christianity in public life in keeping with its historical identity and tradition (to which others should “accommodate”).

Among the most obvious examples of residual Christianity in Ontario are the two statutory holidays organized around the Christian high holy days (Christmas and Easter), and public funding in Ontario of Roman Catholic separate schools, but not other religion-based schools.<sup>[132]</sup> Scholars have highlighted many other examples, both symbolic<sup>[133]</sup> and institutional.<sup>[134]</sup> One example in Ontario law is the Ontario *Education Act*'s provision in section 264(1) – under the subheading “*Duties of teachers*” – which explicitly states, in subsection (c) on “*religion and morals*” that it is the duty of the teacher or temporary teacher to:

inculcate by precept and example respect for religion and the principles of Judaeo-Christian morality and the highest regard for truth, justice, loyalty, love of country, humanity, benevolence, sobriety, industry, frugality, purity, temperance and all other virtues.  
<sup>[135]</sup>

Section 19 of the Ontario *Human Rights Code* preserving separate school rights under the 1867 *Constitution Act*, and 1990 *Education Act*, also states, “This Act does not apply to affect the application of the *Education Act* with respect to the duties of teachers.”<sup>[136]</sup>



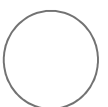
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privileging of individual autonomy and private (textual-focused) belief over more public and collective forms of worship, practice and identity. The more individuals' and communities' religious/creed beliefs and practices resemble this norm, such scholars argue, the more likely they are to be recognized and accommodated by law and society.[\[138\]](#)

In many contemporary controversies around religion in the public sphere – for instance those involving Muslims, Jews, Sikhs and non-mainstream Christian minorities – such norms have been, or are perceived to be, violated or threatened.[\[139\]](#) Survey and opinion poll research supports the contention that many Canadians are more accommodating of religious beliefs and practices that remain confined to the private sphere, than they are of expressions of identity and faith that take more public, collective and visible forms, against liberal Protestant and secular norms.[\[140\]](#) The same research also reveals a double standard sometimes at play where religion in public is tolerable if it is consistent with Canada's mainline Christian past, but is unacceptable when laid claim to by religious minorities.[\[141\]](#)

Scholars argue that one consequence of the culturally conditioned way that the law conceives and protects religion and creed is a failure to equitably protect the religious freedom and equality rights of religious minorities whose practices significantly depart from the dominant liberal Protestant norm. For example, scholars have observed how Aboriginal spirituality can often go unprotected under current freedom of religion laws. This happens when the courts fail to recognize and comprehend Aboriginal expressions of spirituality, many of which blur conventional western distinctions between sacred and profane activity, ritual worship and everyday life, and spirituality and ecology.[\[142\]](#)

Differences between definitions of religion in law, and how “religion” is traditionally conceived (if at all) and practiced in various religious



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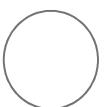
Also, Christians who practice their faith in more public and collective ways may find themselves disadvantaged by this dominant understanding of religion in law and society. However, there are also many case law examples of diverse belief systems and practices protected under the *Code* ground of creed, even where practitioners do not consider themselves to be practicing religion per se.<sup>[147]</sup>

Members of non-religious movements and creeds can also find themselves structurally disadvantaged and inequitably treated under law and policy, which tends to privilege recognized "religions" and religious practices. Some examples of how contemporary law can advantage religious groups and organizations over non-religious ones include granting:

- Tax exemption on lands used by religious communities for religious purposes, and for the residence costs for ministers, priests or other religious leaders
  - Charitable organization status for religious organizations making contributions to churches, mosques, synagogues and temples, as well as a host of tax deductibles for religious organizations.
- <sup>[148]</sup>

These same privileges and protections are denied to organizations and communities coalescing around non-religious creeds.<sup>[149]</sup>

Newer religious movements (NRMs)<sup>[150]</sup> and "para-religious groups" – both of which are on the rise<sup>[151]</sup> – have also been vulnerable to stigmatization, social exclusion, prejudice and discrimination, in some cases because of stereotypes and assumptions from the Christian past.<sup>[152]</sup> Such stigma was evident in the public outcry and media coverage of a recent proposal to fund a Wiccan chaplain in a federal prison, which led the federal government to review and then retract funding for all part-time



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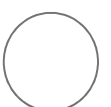
Communities organized around lesser known creeds can also face significant public scepticism and enhanced scrutiny when advancing creed-based human rights claims.<sup>[153]</sup> This can be due to minimizing their seemingly “strange” beliefs, or to antipathy to their non-theistic orientation (“atheists can’t have principles”) in what remains a predominantly (arguably post) theistic Christian public culture.<sup>[154]</sup>

## 4.2 Closed secularism and systemic faithism

Secularization and the privatizing of religion has been the dominant historical response in Canada (post WWII) to conflicts between and within various faith traditions. While an advance over the era of overt religious privilege and discrimination against persons of minority faith/creed traditions, the ongoing process of secularization in Canada has not been without its own exclusions. This section looks more closely at some of the inadvertent forms of discrimination and exclusion that religious communities can encounter when narrow (“rigid” or “closed”) models of secularism prevail that seek to bar religious voices, practices and perspectives in public life, based on alleged principles of “neutrality,” in ways that can inadvertently advantage non-religious persons. The section also adds clarity to the meaning and interpretation of the secular, in Canada, and its implications for accommodating religion in the public sphere.

### 4.2.1 History, definition and goals of the secular

Many scholars and commentators have noted the cloud of confusion often surrounding uses and understandings of the “secular” in contemporary public discourse and debate about religion in public



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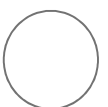
human well-being in the present life based on science and rationality. While aspects of this broader ideology have tacitly shaped modern political uses of the term,<sup>[158]</sup> contemporary scholars nevertheless distinguish between "secularism" as an ideology, and "secular" (or secularity) as "the modus operandi of a society that does not look to any particular religious tradition for the validation of its political authority".<sup>[159]</sup>

Scholars argue that much public debate about the demands of the secular suffers from a failure to distinguish between the underlying *goals* (or ends) of secularity, and the particular historical *institutional arrangements* (or means) for achieving them. <sup>[160]</sup> More often than not, the meaning of the "secular" is simply asserted and assumed rather than explained and explored,<sup>[161]</sup> in ways that can detract from analyses and appreciation of the plurality of values and options really at stake.

To avoid this conflation of aims and means, Canadian political philosopher Charles Taylor (2010) argues that it is helpful and prudent to begin discussions about appropriate responses to (religious) diversity with a clear understanding and engagement with the fundamental goals (or "goods") of the secular. These core goals include:

1. *Liberty* – maintaining non-compulsion in matters of religion and belief (the "free exercise" of religion and conscience, including the freedom not to believe)
2. *Equality* – the equal treatment of people of different faiths or beliefs (with no one moral outlook, religious or a-religious, enjoying a privileged status in public life).<sup>[162]</sup>

These goals can and do conflict with one another. Scholars point out that understanding secularity as a "multi-value doctrine," with at



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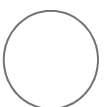
## 4.2.2 Secular models: open versus closed

Existing secular institutional arrangements generally range along a continuum from anti-religious models, which seek to completely remove religion from the public sphere, to liberal and pluralistic models, which are more inclusive of religion in public life.

[\[165\]](#) Though all models generally uphold some commitment to “principled distance” of the state vis-à-vis any one moral orientation or belief system, these can nevertheless be usefully contrasted and categorized into two main types: open and closed secular models (see Appendix 31 for contrast of open versus closed models of secularism).[\[166\]](#)

Open models of the secular generally emerged historically in contexts of, and response to, religious pluralism (as in Canada, India, USA). These models tend to be based on liberal pluralist political theories that affirm diversity in general, and thus welcome religion in public space, subject to limitations of non-compulsion and equality of treatment.[\[167\]](#) In contrast, closed secular models generally emerged in societies dominated by a single powerful church/established religion. The closed model – sometimes referred to in shorthand as “laïcité”[\[168\]](#) – tends to be inspired by republican[\[169\]](#) (“melting pot”) political theories that seek to eliminate religion in the public sphere, and bind members of political society through shared allegiance to civic (European Enlightenment) ideals and values. Appendix 31 talks further about distinctions between these two main contending secular models.

## 4.2.3 The Canadian model



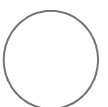
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in Canada is "secular without being secularist."<sup>[172]</sup> This affirms the need for the state and public institutions to retain a sufficient degree of "principled distance" from any particular religion or belief, to not privilege or impose any one over any other. Yet, at the same time, this consensus does not impose a "new secular morality" or require people of faith to check their faith at the door.<sup>[173]</sup> Legal and political analysts generally agree that the Canadian approach to governing religious diversity – although regionally and administratively diverse<sup>[174]</sup> – is mostly the open secular model described earlier. This is widely seen to be affirmed in religious freedom and equality case law,<sup>[175]</sup> and as being most consistent with Canada's legal and policy commitments to diversity and multiculturalism.<sup>[176]</sup>

While secular is not a term in use in the Ontario *Human Rights Code* or any OHRC policies, it has been cited in a few *Charter* rulings in the higher courts. The few Canadian Law Dictionaries containing entries for "secular" all singularly refer to a 2002 Supreme Court of Canada decision, *Chamberlain v. Surrey School District*,<sup>[177]</sup> arising out of the *British Columbia School Act*, as defining of Canadian legal understandings of the secular (see Appendix 32 for full definitions). The Supreme Court of Canada and British Columbia Court of Appeal decisions both affirmed an inclusive Canadian legal understanding of secular as open to religious expressions in the public sphere.<sup>[178]</sup> For example, the Canadian Law dictionary reflects this stance:

- The meaning of strictly secular is thus pluralist or inclusive in its widest sense.<sup>[179]</sup>
- Religion is an integral aspect of people's lives and cannot be left at the boardroom door (see Appendix 32 for full definitions).<sup>[180]</sup>

Since the *Chamberlain* decision in 2002, the courts have largely upheld this view. They have recognized, in accord with the first precedent-setting freedom of religion case under the *Charter* - *R. v. Big M Drug Mart*<sup>[181]</sup> - individuals' right to believe as they choose,



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voir) write testifying in a criminal proceeding, writing on behalf of the majority, Chief Justice McLachlin wrote:

A secular response that requires witnesses to park their religion at the courtroom door is inconsistent with the jurisprudence and Canadian tradition, and limits freedom of religion where no limit can be justified.<sup>[184]</sup>

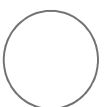
In another important (2013) decision, *R.C. v. District School Board of Niagara*,<sup>[185]</sup> the HRTO affirmed a legitimate place for the expression of diverse religious ideas and practices within public schools and institutions, provided particular requirements are met.<sup>[186]</sup>

## 4.2.4 Tensions and points of debate about religion in the public sphere

Legal scholars thus generally agree on the “open secular” texture of Canadian policies, law and jurisprudence. However, some debate remains about appropriate limitations on freedom of religion in the public sphere.

### Limitations on freedom of religion in the public sphere

It is a basic freedom of religion principle that “the freedom to hold beliefs is broader than the freedom to act on them.”<sup>[187]</sup> Limitations on *acting on* religious beliefs derive in part from recognizing their more direct potential impact (compared to beliefs) on the rights of others.



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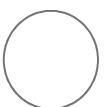
express and practice religion in public exists, albeit subject to limitations and balancing with other competing rights.

People advocating greater limitations on religion in public tend to favor the need to reach consensus on and defer to core common civic values, for instance as enshrined in the *Charter of Rights and Freedoms* (e.g. freedom, dignity, autonomy, security, equality, diversity, democracy).[188] In this perspective, religious practices in the public sphere, may be limited where they significantly grate against these core values.[189] In this view, religious believers crossing over the private to public sphere threshold must play not only by their own religious rules, but also by the liberal rules and norms of the Canadian public sphere (at least while there). This leads us to ask, what precisely are those fundamental “Canadian values” that shape and underlie our rights and freedoms? And to what extent are these values non-negotiable?

“Secularists must accept that religion is not left at the public door, but religious actors must also accept that they are no longer only playing by religious rules when they pass through the public door.”  
– OHRC Legal Workshop participant

“Is there a way to think about what the obligations are entering into the public sphere? One view is that it is just to articulate your own beliefs, defend and advocate for them. Another is that there is an obligation when you enter the public sphere to recognize that there is widespread disagreement, and that you don't just have an obligation to articulate your own, but also to stand in the shoes of others.”  
– OHRC Legal Workshop participant

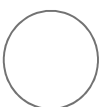
For instance, some people have argued that gender equality is or should be a non-negotiable “Canadian value” that should



People favouring fewer limitations on religion in the public sphere generally acknowledge the need for at least a minimal degree of consensus around shared civic values. However, they tend to either privilege the values of diversity and freedom of religion, conscience, expression and association as core Canadian values,<sup>[192]</sup> and/or argue for a much thinner language of civic values, stripped down to a procedural minimum.<sup>[193]</sup> While some argue that expressing religion in public space should be limited only by criminal law tests, others hold that the state should refrain as much as possible from imposing any substantive moral vision of what is good on the citizenry.<sup>[194]</sup> Still others question the ground rules and values of Canadian society itself, from a religious perspective.<sup>[195]</sup>

The Ontario *Human Rights Code* affirms the right to equal treatment for religious/creed adherents, which includes a duty to accommodate their religious or creed practices in both private and public spheres of activity governed by the *Code*. This is consistent with the *Code's* overarching aim to create an inclusive Ontario society where the dignity and worth of all Ontarians is respected (including people with diverse religious views). The distinction between the public and private sphere is largely irrelevant to *Code* considerations of whether a duty to accommodate religion or creed exists.<sup>[196]</sup> This duty is only limited by considerations such as undue hardship, *bona fide* requirements, and the need to balance creed-based rights with the legally enshrined rights of others, when they conflict with one another.<sup>[197]</sup> Notably absent in this is any consideration of whether the right or duty plays out in public or private. In fact, to not accommodate religious observances in protected social areas (services and facilities, employment, housing, contracts and vocational associations), in public or private, can contravene the *Code*.

## Neutrality and its limits



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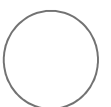
that taking religion out of the public sphere renders it neutral or secular fails to acknowledge how this can inadvertently privilege agnostic and atheist perspectives in the public square and thus put religious believers at a distinct disadvantage “compared to other bearers of comprehensive viewpoints.”<sup>[199]</sup> “[W]e are all believers,” Benson argues in this respect, “it is not a question of whether we believe, but what we believe in.”<sup>[200]</sup>

“[The] public sphere is [sometimes] spoken of as ‘neutral’ because it has been stripped of its narrow religious adhesions. What is not recognized (or debated) however, is that what is left when express religions are excluded from public complex spaces are the implied and inchoate beliefs of other belief systems that, not being animated by religion, seem to get a ‘pass’ and a special right of involvement (and funding) within the ‘public’ systems.”<sup>[201]</sup>

– Iain Benson

In the landmark Supreme Court decision in *Chamberlain*, Mr. Justice Gonthier and Justice Bastarache in their dissenting judgement, similarly take issue with the equation sometimes drawn between “secular”, “non-religious”, and “neutral”, as found expression in an earlier ruling by Saunders, J.<sup>[202]</sup> Describing the problems with this reasoning, in this overturned decision, Gonthier, J. states:

In my view, Saunders J. below erred in her assumption that “secular” effectively meant “non-religious.” This is incorrect since nothing in the *Charter*, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy. I note that the preamble to the *Charter* itself establishes that “...Canada is founded upon principles that recognize the supremacy of God and the rule of law.” According to the reasoning espoused by Saunders, J., if one’s moral view manifests from a religiously grounded faith, it is



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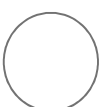
disqualification? To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of pluralism. The key is that people will disagree about important issues, and such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of a modern pluralism. [\[203\]](#)

Highlighting how 'neutral constructs' (in this case the secular) can often have unequal consequences for equity-seeking communities, as recognized in human rights jurisprudence, [Bhabha](#) analogizes to the disability context, where it is widely recognized today that the constructed world is not neutral but privileges the able-bodied. [\[204\]](#)

Though not explicitly stated in the *Constitution*, the Supreme Court of Canada has nevertheless inferred and affirmed, on many occasions, a duty of religious neutrality of the state as a consequence of sections 2(a) and 15 of the *Charter*, protecting freedom of religion and religious equality. However, Canadian legal scholars point out that in the Canadian legal context, where neither neutrality nor secularism operate as autonomous constitutional principles, the duty of neutrality is sourced, in the first instance, in the principle of religious equality and freedom of religion. [\[205\]](#) This has important implications as it suggests that the duty of state neutrality is relative. It is not an end in itself, but rather a means to the end of advancing religious equality and freedom of religion. This is supported in several high court legal decisions. [\[206\]](#)

Expressing and accommodating religion in the public sphere, from this perspective, need only be constrained by such considerations as:

- The need to maintain liberty (i.e. non-compulsion in matters of religion and belief)
- The need to maintain equality and non-discrimination – to not privilege or endorse any one faith (religious or non-religious)



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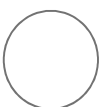
legitimate part of public life and it is also a necessary part of a fully inclusive public sphere.[\[207\]](#)

Legal analysts also point to the (2012) *S.L. v Commission scolaire des Chênes*[\[208\]](#) Supreme Court decision as evidence of the evolution of a more nuanced approach to the ideal of neutrality. The majority of the Court in *S.L.* conceded that, “from a philosophical standpoint, absolute neutrality does not exist”.[\[209\]](#) This decision also acknowledges “the difficulty of implementing a legislative policy that will be seen by everyone as neutral and respectful of their freedom of religion”,[\[210\]](#) citing Richard Moon in this respect:

If secularism or agnosticism constitutes a position, worldview, or cultural identity equivalent to religious adherence, then its proponents may feel excluded or marginalized when the state supports even the most ecumenical religious practices. But by the same token, the complete removal of religion from the public sphere may be experienced by religious adherents as the exclusion of their worldview and the affirmation of a non-religious or secular perspective . . . .

...Ironically, then, as the exclusion of religion from public life, in the name of religious freedom and equality, has become more complete, the secular has begun to appear less neutral and more partisan. With the growth of agnosticism and atheism, religious neutrality in the public sphere may have become impossible. What for some is the neutral ground on which freedom of religion and conscience depends is for others a partisan anti-spiritual perspective.[\[211\]](#)

While the court ultimately maintained that the state should still strive to be as neutral as possible, such neutrality was explicitly inclusively conceived,[\[212\]](#) in terms of religion, as “show[ing] respect for all postures towards religion, including that of having no religious

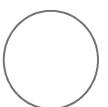


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## 4.3. Consequences of systemic faithism

Some scholars argue that among the main adverse consequences of the idea that contemporary Canadian secularism has solved the problems of religious discrimination and inequality by providing for a neutral and even playing field is that it prevents Ontarians from seeing (1) the persistence of Christian privilege in Ontarian public culture and institutional life, and, (2) the adverse effects of closed secularism and “neutral secular” constructs.<sup>[214]</sup> The inability to see the structural religious advantages and disadvantages<sup>[215]</sup> – or “systemic faithism” – that this sustains and engenders may in part explain the frequency with which religious accommodations are popularly denounced as providing “special privileges” to minority creed practitioners (instead of protecting their equality of opportunity to live according to their religious conscience by accounting for this uneven playing field).

Due to the close connections between religion, ethnicity and race in the Ontario context – where many religious minorities also belong to ethnic and racial minority groups – this structural religious disadvantaging may increasingly take on racial dimensions.<sup>[216]</sup> Some scholars also argue that not acknowledging or addressing systemic faithism could lead to increasing community polarization, alienation and radicalization<sup>[217]</sup> within minority creed communities, with all that this entails for the mainstream, as observed in other jurisdictions.<sup>[218]</sup> It may well be that this point in time is one of those moments, recurrent in Canadian history, calling for an expansion of the “inclusive circle” as John Ralston Saul terms it, drawing on Aboriginal Canadian cultural foundations – “an inclusive circle that expands and gradually adapts as new people join us.”<sup>[219]</sup>

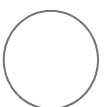


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[129] Systemic or institutional discrimination consists of patterns of behaviour, policies or practices in a *Code*-protected social area that are part of the social or administrative structures of an organization or sector, which adversely affect particular individuals, based on their membership in a *Code*-protected social group, in a *Code*-protected social area. Though often neutral on its surface, systemic discrimination can also overlap with types of discrimination that are neither neutral nor inadvertent (see the OHRC's *Policy on racism and racial discrimination*).

[130] The term as used here was taken from David Seljak et al's (2008) study. Seljak et al., 2008, p. 12 use the term to draw attention to the many ways the “putatively-secular” and “religiously neutral” contemporary Canadian public sphere remains “residually and normatively Christian;” that is, they explain, “it still bears the imprint of its Christian past... contains overt elements from the Christian tradition and is structured in a way so as to accommodate Christian values, practices and forms of community”. See also Seljak, 2012 available for download on the OHRC's website).

As one of Canada's foremost religious historians, Roger O'Toole, 2006, p. 8 argues that “no real understanding of the forms and values of Canadian society is possible without a knowledge of the diverse religious convictions, organizations and experience that have substantially shaped this society”. Religious studies scholar Paul Bramadat, 2005, p. 3 similarly argues that “[i]t is difficult to understand the historical, or even the present, social structure in this country without knowing, among other things, that for roughly a century prior to World War II, the Roman Catholic and several Protestant (especially the Anglican) churches enjoyed a kind of de facto (and in some institutions, de jure) status as established (i.e., formally favoured) denominations.”

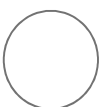


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[132] The *Canadian Constitution Act, 1867* contains provisions that enable and protect public funding of Roman Catholic Schools. Ontario and Saskatchewan, however, are the only provinces that still fund Catholic schools, without funding other faith-based schools. In 1999, the United Nations Human Rights Committee ruled that Ontario's school funding policy was discriminatory based on religion. This decision was reaffirmed in 2006 in another report on the state of human rights in Canada (Seljak et al., 2008).

[133] Scholars include other less obvious, primarily symbolic, examples of the lingering force of Christianity in Canadian public institutions such as:

- The statement in the preamble of the Constitution: "Whereas Canada is founded upon principles that recognize the Supremacy of God and the rule of law..."
- 21 pieces of federal legislation refer to "God," 17 to "religion," four to "Christian" and one to the "Bible"
- 11 pieces of legislation require the swearing of an oath to God
- The official title of our head of state according to the Canadian election writ is "ELIZABETH THE SECOND, by the Grace of God of the United Kingdom, Canada and Her other Realms and Territories QUEEN, Head of the Commonwealth, Defender of the Faith"
- The Speech from the Throne concludes with the words "May divine providence guide you in your deliberations"
- The national anthem, *O Canada*, officially adopted by Parliament in 1980, includes the line. "God keep our land glorious and free!" (an addition to the anthem first made in 1968 at the recommendation of a government commission)



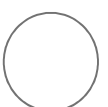


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- Some provincial and municipal governments have opened sessions of legislatures and municipal councils with Christian prayers and have required an oath to God in courtrooms (Examples taken from Beaman, 2003; Biles & Ibrahim 2005; Beyer, 2008; Kunz 2009; O'Toole 2006; Seljak et al., 2008).

[134] Scholars cite the following institutional examples of residual Christianity:

- Ongoing significant church ownership and operation of healthcare and social services institutions, including large-scale hospitals, health programs and child welfare services (e.g. Toronto's Catholic Children's Aid Society, St. Michael's Hospital)
- Christian structuring, or norm, of many chaplaincy programs and services in public institutions (including hospitals, prisons, and the military), many of which are jointly administered by religious (predominantly Christian) organizations. In its consultations, the OHRC also heard that the structuring of "chaplaincy" training and certification processes also remain overwhelmingly Christian in orientation. Even the title of "chaplain" has Christian origins. One Hindu participant at the policy dialogue commented, "I am the only qualified Hindu Chaplain in Canada, or even North America, and I had to take years of training at Christian institutions in order to get this designation"
- Organization of the work week around the traditional Judaeo-Christian Sabbath days of rest.

Roger O'Toole (2006) highlights many other ways that Victorian Christianity in particular (with historical roots in Britain and Western



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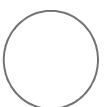
[136] R.S.O. 1990, c. H.19, s. 19 (2).

[137] Describing the relationship between law and religion as a “cross-cultural encounter,” Berger (2012) for instance shows ways current prevailing definition of religion in Canadian law, as elaborated by Justice Iacobucci in *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47 reflects this liberal cultural understanding of religion. For example, he argues that Canadian court assessments of religion overwhelmingly (1) envision religion as an individual versus group phenomenon, (2) cast religion as a fundamentally private rather than public phenomenon, and, (3) privilege values of individual autonomy and choice over community values, identity and norms (see also Kislowicz, 2012). Faisal Bhabha (2012) similarly observes how the courts have tended to only recognize religious accommodation rights claims based on individual interests, while “claims based on group or community rights, on the other hand, have been generally unsuccessful” (see also Beaman, 2003; 2006; Kislowicz, 2012).

[138] Summing up the impact of this cultural bias in law, which reflects and reproduces what Lori Beaman (2003) calls “religious normalcy,” Benjamin Berger, 2012 p. 26 argues:

Briefly put, the more that a religious claim comports with the way that the law imagines religion – as an individual and private expression of autonomy – the more it is fit for legal tolerance. The guarantee of religious freedom and equality will be readily enforced to protect religion that already comports with law's cultural commitments (see also Beaman, 2003).

[139] Many recent high-profile, precedent-setting accommodation cases receiving significant public and media attention have involved

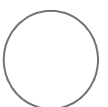


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has been at the forefront of expanding the legal human rights frontiers of religious accommodation. This has exposed members of this community to significant degrees of hostility and backlash (see for instance *Grant v. Canada (Attorney General)*, [1995] 1 CF 158; *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256; *Bhinder v. Canadian National Railway*, [1985] 2 S.C.R. 561; *Loomba v. Home Depot Canada*, 2010 HRTO 1434 (CanLII); *Randhawa v. Tequila Bar & Grill Ltd.*, 2008 AHRC 3 (CanLII).

Legal observers have also noted how the courts have been less than generous in recent years in extending religious freedom protections to Christian minority groups, such as the Hutterite Brethren of Alberta, or other Mennonite groups practicing more communally-centred forms of religion, against status quo religious norms (see for instance *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567). Scholars have also observed how growing immigration of non-western-born Christians to Canada is contributing to the significant growth of Evangelical and Pentecostal Protestant Christian denominations, which tend to favour more public, collective and politically-interested expressions of Christianity, sometimes in ways “rais[ing] the hackles of secular and mainline Christian Canadians” (Seljak et al., 2007). For more on the nature and impact of such intra-Christian diversity see also Fadden and Townsend (2009) and Wilkinson (2006).

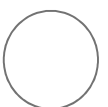
[140] A 2007 Léger Marketing poll commissioned by Sun Media surveying over 3,000 Canadians, for instance, asked respondents: “Does respecting the following religious practices pose a problem to living in your city’s society?” Levels of tolerance for religious practice progressively declined as observances became more public and visible, particularly those of the Islamic faith. For instance, whereas a majority believed that prayer (84%), the observance of the Ramadan fast (83%), and prohibition of alcohol (77%), did not pose a problem, the veil, contrastingly, was seen to pose a problem for 37% of



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identities and norms of civic engagement in the current era. The historic maxim that “to be a good Canadian one must be Christian,” Seljak, 2012, p. 10 for instance observes, has increasingly “been replaced with a new one: to be a good Canadian (egalitarian, democratic, rational and multicultural) one must be secular – or at least the right kind of religious person, that is, one who confines religion to private life”.

[141] Survey and opinion poll research provides some support of the view that “secularism in Canada can accommodate historically dominant forms of Christianity” and/or expressions of religion/creed that are consistent with this, but not faiths or practices that are perceived not to be as such. Drawing attention to this double standard, Seljak et al. (2008) for instance cite the example of the 2007 Ontario election campaign debate around religious school funding, which saw the (John Tory) conservative proposal for extending public funding to faith-based schools beyond Catholicism roundly rejected by the electorate, as an affront to secular ideals (in terms of what belongs in the private versus public sphere) and threat to civic unity. Interestingly, while a mid-election poll conducted for the CTV television network and the *Globe and Mail* newspaper showed that 71% of the electorate was opposed to public funding for faith-based schools, subsequent coalitional efforts organized under the banner of ‘One School System’, advanced by the Canadian Civil Liberties Association and (solely among political parties) the Green Party of Ontario among others, gained little traction or support from the public for its proposal to end public funding of Catholic schools. Another September 10, 2007 opinion poll published in the *Montreal Gazette* during the Quebec Bouchard-Taylor Commission on Reasonable Accommodation similarly revealed that while Quebecers overwhelmingly disapproved of Jews or Muslims getting time off work to pray (72%), or Muslim women wearing the (face-covering) niqab in public (67%), or the hijab in school (61%), some 59% of respondents had no issue with displaying

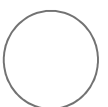


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rejected when laid claim to by Muslims).

[142] For example, Beaman (2006) argues that religious freedom and equality protects only a narrow range of what is considered sacred and spiritual from an Aboriginal perspective. Beaman suggests this is one reason why constitutional legal protections for religious freedom have rarely been used by Aboriginal Peoples as compared to treaty and land right claims, which, unlike religious freedom and equality laws, do recognize a collective basis for such rights claims. This has resulted in minimalizing and marginalizing Aboriginal spirituality, and desecration of Aboriginal sites and lands, Beaman argues. She also notes a general lack of awareness about and disregard for the more systematic disadvantages Aboriginal communities face in practicing their spirituality because of the culturally specific (individualistic) focus and bias of Canadian legal protections for religion and creed (*ibid*). Beaman highlights how the very categories of “creed” and “religion” – produced out of a Christian historical experience, language and tradition – in effect positions western European conceptions of religion as “the norm against which Aboriginal spirituality is measured” or “accommodated” (Beaman, 2006, p. 237; see also Beaman, 2012).

[143] Bannerjee and Coward (2005), as well as Boisvert (2005) and King (2012) show how Hindu and Buddhist end-of-life customs and burial rituals have to be significantly altered in Canada to comply with Canadian law and health and safety regulations. The ways Hindu and Buddhist religious buildings are designed and built must also adapt to meet local Building Codes and standards, as must traditional religious governance structures within those buildings [for example, to qualify for non-profit organization status and recognition (Bramadat & Seljak, 2005). Structuring and organizing the Canadian work week around the Christian Gregorian calendar affects these communities' ability to practice their religion in customary ways.



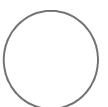
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(an individualized, faith-based tradition which draws heavily upon liberal Protestantism)" (King, 2012, p. 70). He argues that obscured from view and equal legal protection is "the more social, exteriorized and community-based experience of hundreds of thousands of 'ethnic' Buddhists in Canada," for whom "religious affiliation and identity are perhaps less about belief and practice so defined, as they are about marking a familiar social enclave in the midst of an alien Canadian society" (*ibid.*).

[145] Lai et al.'s (2005) discussion of the failure of Canadian public discourse, institutional practice and official census data collection to even recognize "Chinese religion" – as distinct from Daoism, Confucianism or Buddhism – is a particularly poignant example of "subtle discrimination" that denies the reality of Chinese religion, and with this, "the very basis of their culture and their self-identity" (Lai et al., 2005, p. 104).

[146] Noting the significant forms of exclusion that can result from mono-cultural understandings of religion in law, policy and popular discourse, Mahmood, 2005, p. 62 calls for a "a dialogue about how Canada's diverse self-defined religious groups actually think about the concept of religion" as a critical starting point for future discussions on advancing Canadian multiculturalism (and, we could add, on creed rights under the *Code* more generally).

[147] See for instance *Huang v. 1233065 Ontario*, *supra* note 14, and the OHRC's *Creed Case Law Review* for more examples. In *Huang v. 1233065 Ontario*, the Human Rights Tribunal of Ontario rejected the argument that Falun Gong is akin to a "cult" and should not be accepted as a creed because as a belief system it is not reasonable, cannot withstand scientific scrutiny, or espouses beliefs that are not consistent with *Charter* values. The complainant referred to Falun Gong as a "practice" instead of a "religion." However, the HRTTO accepted expert evidence that the notion of "religion" is significantly



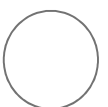
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[149] The OHRC's own definition of creed with respect to secular moral and ethical belief is examined in Section IV. McCabe et al. (2012) have suggested further examples of how secular humanists are disadvantaged by current policy and legal definitions of rights based on religion and creed.

[150] Sociologists of religion have moved away from the language of "cults" and "sects," with their negative connotations, in favour of the term New Religious Movements (NRMs) or "baby religions" as Canadian sociologist, Susan Palmer, prefers to call newer religious movements and creed-based communities (see Palmer, 2006).

[151] Census statistics reveal a growth in "para-religious groups" ranging from Scientology, New Age, Paganism and Satanism, to Theosophists, Rastafarians and Wiccans. For more on such demographic trends, see Section III 1 in this Background section.

[152] Siân Reid's survey of contemporary practitioners of Wicca and other forms of paganism found that many "believe that there is some stigma attached to their religious affiliation, [and] the potential for undesirable social consequences ranging from ridicule and scorn to ostracism to the possibility of job losses, loss of custody and refusal of housing to actual physical threat exists" (cited in Seljak et al., 2007, p. 28; see also Reid, 2005; Beaman, 2006b). Sociologists of religion have debunked many of the myths that have surrounded such para-religious groups, often pejoratively labelled "cults," such as their alleged coercive brainwashing methods, irrationalism, use of violence and "black magic." Seljak et al. (2007) note that popular perceptions of Wiccans and Pagans as engaging in devil worship, sexual promiscuity and other forms of sensational diabolism, have been largely fuelled by a combination of inquisition-era imagery that



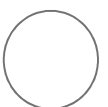
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pushing the boundaries of what and who rightfully merits human rights legal protection (see for instance Gail McCabe et al., 2012; David Sztybel, 2012; Camille Labchuck, 2012; and the OHRC's Creed Case Law Review). The fact that HRTO applications by atheists, agnostics and people identifying with "no religion" in 2011 outnumbered applications by Roman Catholics is one indicator of this.

[154] See Seljak et al. (2008).

[155] One of the primary recommendations of the 2008 Bouchard-Taylor *Commission Report on Religious Accommodation in Quebec* was the need to develop a government White Paper to clarify the nature and meaning of Canadian commitments to the secular. Political philosopher Rajeev Bhargava (2010), similarly observes the need in Western liberal states, more generally, "to improve the understanding of their own secular practices". See also Seljak (2012), Chiodo (2012a), and Benson (2004 and 2012) for more on "fuzzy," ahistorical uses of the term in contemporary Canadian public discourse.

[156] According to the New Oxford Companion to Law (2008), the word 'secular' comes from the Latin word 'saecularis' (meaning 'temporal' or 'of a generation, belonging to an age'), which was used in Catholic Canon Law to describe clergy who lived within medieval society and not in seclusion in a monastery. In this usage, dating back to the 14<sup>th</sup> century, the term meant "of or pertaining to the world," or, as defined in Dr. Johnson's Dictionary "worldliness – attention to things of present life" (Benson, 2004). Earliest uses did not necessarily connote a-religiousness, consistent with some of the more pluralist uses and interpretations today (Berger, 2002), though the term did also come to be used more negatively to mean 'godlessness' (New Oxford Companion to Law, 2008). The latter



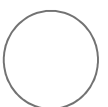
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took myriad forms, including everything “from belief that scientific materialism exhausts the explanation of existence to the view that values inhere only in human orientations to the world and not in the world itself to the notion that there is no world of transcendent meaning or eternal time that should orient people in relation to actions in the everyday world” (Calhoun, 2008, p. 7).

[158] Despite contemporary conventional (‘everyday, commonsensical’) renderings of ‘secular’ as “simply the absence of religion, rather than the presence of a particular way of looking at the world or, indeed, as ideology,” aspects of positivist ideology have been “tacitly incorporated” into modern political theories and uses of the secular (Calhoun, 2008, p. 8). It was the 19<sup>th</sup> century positivist movement, for instance, that first recommended relegating religion to the sphere of private worship.

[159] Novak, 2006, p. 107. Modern political uses often denote this more minimal (secular versus secularist) understanding, presupposing a degree of: separation between religion and the key branches of the state (religious authorities do not govern the state, nor do religious rules or principles form the basis of governing); state neutrality with respect to religion (though diversely interpreted, generally, state representatives may hold religious beliefs but this cannot influence their state affairs); and, as a corollary, the non-privileging of any one religion over another in public life. However, modern political renderings of the secular generally retain, indeed hinge on, this latter distinction between public and private affairs, more and less relegating religion to the private side of this foundational dichotomy (Calhoun, 2008).

[160] Usually a particular historical institutional model of the secular – most often the American or the French version – is taken



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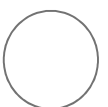
[161] Benson referred to this problem, at the March 2012 Human Rights, Creed and Freedom of Religion Legal Workshop at York University, as “presuppositional definition”, i.e. presupposing a definition that is far from clear.

[162] These goals were first stated in the in the (2008) Bouchard-Taylor Commission Report (2008, p.135-6; see Woehrling, 2011 for further discussion). Taylor, 2010, p. 23 adds a third core goal of secularity in his article, in keeping with original aims of the French Revolution:

(1) *Fraternity* – namely, the pursuit of (at least a minimal degree of) consensus and relations of harmony and comity between members of different faiths, through the inclusion of all spiritual families (religious and non-religious) “in the ongoing process of determining what the society is about (its political identity) and how it is going to realize these goals (the exact regime of rights and privileges).” (See also Bouchard-Taylor, 2008 for this distinction between ends and means).

[163] Bhargava (2010). In this same article, Bhargava argues for the need for “contextual secularism” and “contextual moral reasoning”, drawing on the instructive Indian secular model. Unfortunately, Taylor, 2010, p. 29 observes, it is common in disputes around the “demands of secularism” to remain “under the illusion that there is only one principle here, say, laicite and its corollary of the neutrality of public institutions or spaces” or “that there is no need or place for choice or the weighing of different aims,” which impoverishes meaningful dialogue on the choices before us.

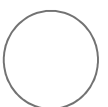
Interestingly, many of the Canadian federal governmental policy practitioners interviewed in Gaye and Kunz’s (2009) study favoured a



[164] The failure to acknowledge the differing ways of weighing and realizing secular goals can fuel polarizing discourses between religious and non-religious persons (for or against secularism), where opponents are caricatured as either a-religious/anti-religious extremists, or as religious zealots having no commitment to the secular (instead of acknowledging the diverse ways of understanding and realizing secular ideals).

[165] Many scholars, as well as a Canadian legal decision, have outlined this diversity in understanding and concretely institutionalizing the secular, with multiple gradations in between these two poles (see for instance Adelman, 2011; Berger, 2002; Benson, 2004; Bhargava, 2010; Buckingham, 2012; Cladis, 2009; Seljak et al., 2008; Woehrling, 2011). In *Simoneau v Tremblay*, 2011 QCTDP 1 (CanLII), the Quebec Human Rights Tribunal heard expert evidence that identified four ways secularism interacts with the life of the state:

- (1) Integral secularism is characterized by a determination to secularize the public sphere through an 'antireligious activism' and a vision of an insurmountable conflict between modernity and religion.
- (2) "Neutral" secularism claims a secularism open to individual freedom of religion, coupled with the strict neutrality of the state. Its followers oppose religious expressions in the sphere of power, but they accept the preservation of certain religious symbols and practices in public institutions.
- (3) Open secularism is similar to "neutral" secularism, but recognizes both individual and collective religious rights. A



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predominance of secularism (cited in Chiodo, 2012a).

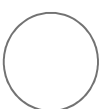
[166] This draws on the (2008) Bouchard-Taylor Commission Report and its distinction between “*la laïcité ouverte*” and “*la laïcité fermée*.” These models have been alternatively contrasted and conceived (with some minor differences) as “moderate secularity” versus “radical secularity” (Novak, 2010); “secularism-as-pluralism” versus “secularism-as-a-religiousness” (Berger, 2002); or “accommodationist” versus “separationist” approaches (Beaman, 2006).

[167] The Bouchard-Taylor Commission defines “open” secularism:

Open secularism recognizes the need for the State to be neutral (statutes and public institutions must not favour any religion or secular conception) but it also acknowledges the importance for some people of the spiritual dimension of existence and, consequently  
“the protection of freedom of conscience and religion”  
(Bouchard-Taylor, 2008, p. 140).

While noting “profound disagreement” during their extensive consultations in Quebec on these competing models of the secular, the Bouchard-Taylor Commission report “affirms that it is the model of open secularism that should continue to be applied because it best allows us to respect both the equality of persons and their freedom of conscience and religion and thus to achieve the two fundamental purposes of secularism” (Bouchard-Taylor, 2008, p. 141).

The term “open secularism” was used in an earlier report, entitled *Religion in Secular Schools: A New Perspective for Quebec*, published in 1999 by a Quebec Task Force on the Place of Religion in Schools. The Task Force recommended adopting “open secularism”



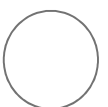
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[168] **Laïcité** is often used in Canada to denote the closed French republican model of secularism, whether as instituted in France or as aspired to in Quebec post-Quiet Revolution. However, the term *laïcité* does not necessarily have to connote this closed model, despite popular uses as such. An example is the Bouchard-Taylor Commission Report's distinction between "*la laïcité ouverte*" (open secular) and "*la laïcité fermée*" (closed secular). Religious studies scholar Lori Beaman (2008) also draws attention to the semantic complexity of defining the term *laicity*. Drawing on the work of Solange Lefebvre, Beaman argues the term is often mistranslated and misunderstood as "secular" or "secularization" in English. Lefebvre (2008) argues that the term can neither be simply translated nor transposed to other cultures. However, in her (2009) article on "Laicity and Religious Diversity," Sophie Therrien, Advisor to the Quebec Ministry of Immigration and Cultural Communities, attempts to do just this, distinguishing between *laicization*, *laicity* and *laicism*, drawing on the work of Micheline Milot (2002):

**Laicization** refers to the deliberate steps taken by the State to maintain neutral relations with religions and to prevent any direct interventions by religions in the management of the State.

These elements are either formulated by means of constitutional provisions, by judicial decisions, or through common law.

**Laicity** describes the result of the process of *laicization*. It can be defined as "a progressive development of social and political institutions with respect to the diversity of the moral, religious and philosophical preferences of citizens. With this development, freedom of conscience and religion are guaranteed by a neutral State with respect to the different conceptions of the good life, on the basis of commonly shared values that make encounter and dialogue possible



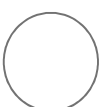
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underlying commitment to individual freedom of conscience and religion, she argues: “Laicity defined in this way is quite different from **laicism**, a doctrine which aims to remove religion, in all its manifestations, from the entire public sphere” (Therrien, 2009, p. 67).

[169] The French variant of modern républicanisme in which civic identity, as a citizen of the republic, is to ideally supercede and replace other more local, cultural and religious identities is exemplary in this respect. Not all republican political philosophies, however, concur in this respect.

[170] It is common belief, particularly among Canadian social and political elites, and some government policy makers (see Biles and Ibrahim, 2005; Bramadat, 2005; Gaye and Kunz, 2009), that Canada has a disestablishment clause in its Constitution, affirming Canada's commitment to secularism and a separation of church and state, as in the American (First Amendment) example. This is simply incorrect. Seljak et al. (2008) argue that the absence of a constitutional clause requiring church/state separation or neutrality makes relations between church and state in Canada open to considerable policy/political challenge and change (albeit within limits set by the *Charter of Rights and Freedoms*). Indeed, many have argued, cooperation has been the norm. However, freedom of conscience and religion jurisprudence under section 2(a) of the *Charter* does pose limits on the extent that such arrangements are open to transformation. Though not explicitly stated in the Constitution, on many occasions the Supreme Court of Canada has inferred and affirmed a duty of religious neutrality of the state as a consequence of section 2(a) and s.15 of the *Charter*, protecting freedom of religion and religious equality (see for example *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7).

[171] These include:





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*Import Act*, R.S.C. 1985, c. C-51, which mentions "religious or **secular**" property in its definition of "cultural property"

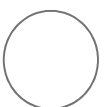
(3) Schedule 1 of Quebec's *Act Respecting Industrial Accidents and Occupational Diseases*, 2010, G.O. 2, 3190, which refers to "...the operation of lodging facilities for the members of religious communities or for **secular** priests" [at para61110] (harking back to Catholic canon law uses in the Middle Ages)

(4) Section 4 of a Regulation under Ontario's *Education Act*, R.R.O. 1990, Reg. 298, which states that opening or closing school exercises may include singing "God Save the Queen" [s. 4(2)] and "Scriptural writings including prayers" [s. 4(2)(1)], as well as "**Secular** writings" [s. 4(2)(2)] that impart social, moral or spiritual values and that are representative of Ontario's multicultural society.

[172] Novak, 2006, p. 114.

[173] *Ibid.*

[174] Canada's strategy for managing religious diversity – legally, administratively and constitutionally – has been appropriately described as more of a "bricolage" of regionally-inflected institutional arrangements, which have been pragmatically (versus programmatically or philosophically) arrived at (Seljak et al., 2008). Showing this bricolage approach, the country's foundational (1982) *Constitution Act* acknowledges in its Preamble that "Canada is founded upon principles that recognize the supremacy of God and the rule of law." At the same time, s. 2(a) of the *Charter of Rights and Freedoms* guarantees "freedom of conscience and religion" as a "fundamental right." Though eluding neat classification, from a global



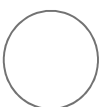
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chaplaincy services in state institutions (see earlier discussion of Canada's historical "plural" but arms-length "shadow establishment") (*ibid.*).

[175] See for instance Beaman (2008); Benson (2012); Calhoun (2008); Novak (2006); Seljak (2012); Woehrling (2011).

[176] Calhoun, 2008, p. 8 argues: "[v]iewing religion as a fully legitimate part of public life is a specific version of seeing culture and deep moral commitments as legitimate – and indeed necessary – features of even the most rational and critical public discourse". Benson (2012b) argues that the link between religious diversity, accommodation and inclusion, and commitments to diversity more generally, is affirmed in the following passage from the Courts' decision *R. v. Oakes* where Chief Justice Dickson discussed the "ultimate standard" of Section 1 of the *Charter*:

Inclusion of these words [free and democratic society] as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified



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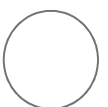
religious organizations that mark the societal landscape and this diversity of views should be respected" (*Trinity Western University v. British Columbia College of Teachers* [2002] 1 SCR 772 at 812).

[177] *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710.

[178] Section 76 of British Columbia's *School Act*, R.S.B.C. 1996, c. 412, s. 76, is unique among Canadian statutes in explicitly stating in 76(1): "All schools and Provincial schools must be conducted on strictly **secular** and non-sectarian principles."

Until *Chamberlain (ibid.)* in 2002, the court had not defined "secular" in section 76 of the B.C. *School Act*. This case involved a controversy generated during a school board approval process for three storybooks featuring same-sex parents (as educational resource material) for use in kindergarten and grade 1. When the Surrey school board voted against approving the books out of concern that the books would raise concerns for some parents, the two teachers who first proposed introducing them (both members of Gay and Lesbian Educators of B.C.) applied for judicial review of the board decision, arguing, among other things, that it had inappropriately based its decision on religious concerns. The case was heard at the B.C. Supreme Court, and then appealed at the B.C. Court of Appeal, before finally making its way to the Supreme Court of Canada (see Buckingham, 2012 for in-depth analysis of each court's decision, as well as Benson, 2004).

The B.C. Court of Appeal overturned Justice Saunders' B.C. Supreme Court decision which stated at para. 78 that "In the education setting, the term secular excludes religion or religious belief." Justice Mackenzie, writing for a unanimous B.C. Court of Appeal, found "to interpret secular as mandating 'established unbelief' rather than simply opposing 'established belief' would effectively banish religion from the public square," (at para. 30) and also that "No society can be said to be truly free where only those whose morals are



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recognition to the family models of other members of the school community.

[179] *Dictionary of Canadian Law* 4<sup>th</sup> edition at 1168.

[180] *Words and Phrases*, 2008 at 25036.

[181] *R. v. Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295

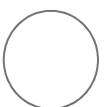
[182] Quoting Chief Justice Dickson in *R. v. Big M Drug Mart Ltd* at para. 94. Of course, this right, like all others, is subject to Section 1 limitations and must be balanced with the rights of others (for example, to non-discrimination or non-coercion).

[183] *R. v. N.S.* 2012 SCC 72.

[184] *Ibid.*, at para. 2.

[185] *Supra* note 8.

[186] The applicants, who identify as atheists, alleged that the Niagara District School Board's original and amended policies concerning the distribution of religious texts were discriminatory because of creed, contrary to the Ontario *Human Rights Code*. The original policy allowed only the Gideons to distribute Gideon Bibles to grade five students with parental consent. The amended policy granted discretion to approve the distribution of other "religious publications" with parental consent. However, in practice, only Gideon Bibles had been distributed. The Ontario Human Rights Commission intervened in the case.



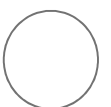
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are permitted under the *Code* if all creeds are treated equally, there is no subtle or formal coercion to participate, and the school makes clear that it is not favouring any of them. Equal treatment without discrimination because of creed does not require that all activities relating to creed other than education about diverse religions be banished from the public schools. I agree with the respondent that, under a carefully developed policy that ensures equality between all creeds, it can permit distribution of religious and creed literature outside the school day with parental consent.

To find that there can be no promotion of religious ideas or practices in public schools for those who want to participate in them would be to prohibit activities like optional religious clubs in high schools or the provision of prayer rooms. In my view, the *Code* ensures equality because of creed, but does not ban creed from all public spaces. Indeed, such a policy could be contrary to *Code* values of diversity and inclusion. Creed-based activities outside the classroom need not be eliminated, so long as participation is optional, no pressure is applied on students to participate, the school is neutral and it makes clear that it is facilitating such optional activities for all creeds, not promoting any particular creed (*R.C. v. District School Board of Niagara, supra* note 8, at para. 59-60).

[187] *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772.

[188] Berger, 2002, p. 52 argues that these core values, though "institutionally unidentified," exist in Canadian law and can be "teased out from the fabric of the *Charter of Rights and Freedoms*" – human dignity, autonomy and security. Taylor (2010) alternatively describes the civil norms structuring contemporary liberal democratic societies as (1) human rights, (2) equality and non-



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p.249). Bhabha (2012) also argues that these core liberal civic values are not simply one set of values among others, to be "balanced" in an equilibrium (e.g. by a proportionality test). Instead, they are "hypergoods" or supreme values, providing the normative framework and basis for evaluating and mediating between competing moral claims and rights scenarios.

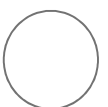
[189] For example, Berger, 2002, 62 argues:

[W]here religious conscience demands actions that are dissonant with the civic concern for the fundamental tenets of our society, principally human dignity, autonomy, and security, these actions do not attract the protection of the *Charter*.

In his review of legal trends in Canadian religious freedom case law, Bhabha (2012) notes a growing tendency among Supreme Court Justices of "attaching caveats at various opportunities" to the broad construction of religious freedom since *Amselem* (*supra* note 137), by articulating and highlighting "non-negotiable" Canadian values. Justice Abella argues, "Not all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their expression are arbitrary," in *Bruker v. Markovitz*, [2007] 3 S.C.R. 607 at para. 2. (cited in Bhabha, 2012). The OHRC's (2012) *Policy on competing human rights* similarly highlights the important mediating role underlying constitutional and societal values play in reconciling competing rights (see OHRC *Policy on competing human rights*, Section 5.4.2).

[190] Stein (2009).

[191] See the OHRC's *Policy on competing human rights* and *The Shadow of the Law case law review* of competing rights jurisprudence.



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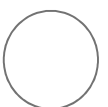
the same faith and impose religious conditions on their employment, are overly restrictive, and fail to adequately protect the positive **associational rights** that form a core basis of this provision.

[193] Some people draw inspiration from the liberal political theory of John Rawls, who argues for a liberal society that is neutral with respect to the good life, uniting only around a strong procedural commitment to treat people with equal respect.

[194] See Chiodo (2012a) for an argument in favour of this view (what she calls pluralistic liberalism, or “modus vivendi”, drawing on the political philosophy work of John Gray). Chiodo also draws on the earlier work of Iain Benson in this regard (Chiodo, 2012a, p. 15).

[195] Legal scholars and practitioners arguing for minimal restrictions on religious practice in public life argue that citizens with religion-informed ethical and moral positions have just as much right to interpret and contribute creating and transforming those core Canadian values, from a distinctly religious perspective, as any other citizens. As well, Canadian political philosopher Charles Taylor (2010) points out that such core values as dignity, equality, liberty and fraternity may be not only diversely interpreted, but also diversely sourced, in terms of the sources of inspiration informing their embrace (religious or non-religious). Calhoun notes that the ideas of freedom, emancipation and liberation, emerged largely from religious discourses in Europe (Calhoun, 2008; citing Habermas, 2006).

[196] The *Code* requires non-discrimination and equality of treatment – which includes a duty to accommodate religious belief and practice – in five social areas: services and facilities, employment, housing accommodation, contracts, and professional and vocational associations. All of these social areas interface with (indeed find their dominant expression in) the public sphere.



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the public square.

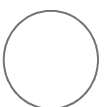
[197] See the OHRC's *Policy on competing human rights* for the OHRC's approach to rights conflicts in this respect. See the OHRC's *Policy and guidelines on disability and the duty to accommodate* for more on undue hardship and *bona fide* requirements. While constitutional values in competing rights scenarios are an acknowledged additional potential basis for delimiting creed rights as discussed in the OHRC's *Policy on competing human rights*, these constitutional values themselves are generally understood to be consistent with the *Code's* aim to promote diversity and inclusion (in keeping with the open model of secularism).

[198] See Benson (2012b).

[199] Quoting Chiodo, 2012a, p. 10. Drawing attention to some of the ways appeals to secular neutrality can exclude religious citizens, Seljak et al. (2008) observe:

[P]olitical philosophers have begun to argue that to forbid religious discourse in the public sphere – a priori – is a violation of the rights of members of religious communities and contrary to liberal democratic philosophy. They argue that the requirement to translate their religious discourse into a secular idiom in order to participate in a putatively “value-free” public sphere according to allegedly “neutral” rational rules places an unfair burden on members of religious communities. Such a requirement asks some Canadians – and not others – to sacrifice important elements of their identity and group solidarity (Seljak et al., 2008, p. 19) – of published document.

[200] Benson, 2013, p.15. In this article, Benson further notes how George Jacob Holyoake, the 19<sup>th</sup> Century positivist champion who is



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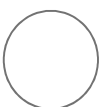
that for a belief is not a belief and that for principles are not a faith," Hitchens nevertheless acknowledges, "We do not rely solely upon science and reason, because these are necessary rather than sufficient factors..." (Hitchens, 2007, cited in Benson, 2013, p. 14). See also Benson, 2010; Benson, 2012a; Benson, 2012b; Chiodo 2012a).

Charles Taylor (2010) argues against this tendency to obscure "belief commitments," however much supported by science. Instead, he argues it is important for all persons to recognize the ways their beliefs (religious or not) reflect deep evaluative commitments that are not in the least neutral or simply matters of fact. In this respect, sociologist Craig Calhoun, 2008, p. 8 notes how secularism has often been understood "as though it were simply the absence of religion rather than the presence of a particular way of looking at the world or, indeed, as ideology". He also notes how aspects of positivist ideology have been "tacitly incorporated" into modern political theories and uses of the secular, despite conventional (everyday, common sense) renderings of secular as "simply the absence of religion."

[201] See for instance Benson (2012). Both Andre Schutten (2012) and Iain Benson (2012) take issue with court and tribunal interpretations of the limitations on the statutory defence in ss. 24(1) of the Code enabling "special employment," in the context of religious organizations. They argue that prevailing interpretations of ss. 24(1) limit on the right of religious organizations to hire persons of the same faith and impose religious conditions on their employment, are overly restrictive, and fail to adequately protect the positive associational rights that form a core basis of this provision.

[202] *Supra* note 177.

[203] *Supra* note 177 at para 137.



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[205] See Woehrling (2011) for extensive discussion.

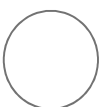
[206] See Whoerling (2011). The relativity of the state duty of neutrality, in the Canadian legal context, is given explicit expression in Justice LeBel's dissenting opinion in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650. The Justice observes (at para. 76): "an inflexible application of the principle of neutrality that fails to take the circumstances into account may prove to be inconsistent with the right to the free exercise of religion" (cited in Chiodo, 2012a, p. 13).

[207] Anticipating the court's reasoning in *S.L. v. Commission scolaire des Chênes* (*supra* note 170), Charles Taylor (2010) argues that "the point of state neutrality is precisely to avoid favoring or disfavoring not just religious positions, but any basic position, religious or nonreligious" (Talyor, 2010, p. 25). Taylor reminds us that the deeper value commitments underlying Canadian secular democratic arrangements, are, after all, about "protecting people in their belonging and/or practice of whatever outlook they choose or find themselves in; treating people equally whatever their opinion; and giving them all a hearing" (2010). He argues that failing to do this, whether in the name of secularism, "civil religion, or anti-religion," is to betray those very secular democratic principles (*ibid.*).

[208] *Supra* note 170

[209] Deschamps, J. writing for the majority in *S.L. supra* note 170 at para. 31.

[210] Deschamps, J. writing for the majority in *S.L. supra* note 170 at para. 30.



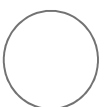
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the *S.L.* decision (*supra* note 170), in this respect, for explicitly embracing the value of what he calls 'secular pluralism' (respecting not just religious but cultural differences of all kinds in Canada's multicultural society), and for not shying away from, or concealing, the inevitability of normative (versus falsely 'neutral') assessments of the limits of individual rights and freedoms, and the background norms out of which these very rights and freedom grow. In this context, he argues, "the Court may be moving, slowly but surely, towards a theory of religious freedom that is defined and shaped by the normative priority of respecting difference in a multicultural society"

(p. 14). He sees this as a departure from the historical legal norm in Canada of protecting religious diversity, not for reasons of multicultural diversity, but for reasons of upholding equality between religions.

[213] For example, see Chiodo (2012a) and Buckingham (2012) for analyses of legal decisions that exhibit this less inclusive understanding of the secular.

[214] The fact that Canadian public culture remains latently structured by liberal Protestant norms is neither exceptional (from a global historical perspective (see Beyer, 2008) nor necessarily troubling, as a historical fact, given Canada's historical development and religious make-up. More problematic, however, is the failure to recognize this fact, as a result of a widespread assumption among Canadians that secularism and its increasing separation of church and state and privatization of religion has resolved the problem of religious intolerance and discrimination in the present era. Rather than providing a bulwark against discrimination, Seljak et al., 2008, p. 14 in fact argues, strict ideological adherence to secularism (perceived as neutral) may further engender and promote intolerance and discrimination, as "[m]inority communities find their own needs unmet while the needs of the Christian majority are – for



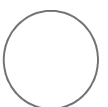
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structures, see Seljak et al. (2008); Beaman (2008); and Beyer (2008). The failure to recognize the structural privileges and accommodations that already exist, by default, for the majority group is often compounded by the dominant Canadian self-image as tolerant, egalitarian, open and multicultural.

[216] Craig Calhoun (2008) observes, from a global sociological vantage point that could equally apply to Canada, that to exclude religion in public life “is arguably to privilege a secular middle class in many countries, a secular ‘native’ majority in Europe, and a relatively secular white elite in the U.S. in relation to more religious Blacks, Latinos, and immigrant populations” (Calhoun, 2008, p. 13). Looking to the Canadian future, Seljak et al. (2007) similarly predicts:

[Anti-immigration – and worse anti-immigrant discourse – will increasingly be constructed in terms of the need of a putatively secular, democratic, egalitarian and enlightened society needing to protect itself from religious communities identified with immigrant populations and imagined as regressive, anti-democratic, authoritarian and irrational (Seljak et al., 2007, p. 29).

[217] Scholars further observe that not recognizing or including religious minority communities in mainstream Canada can and has led to segments of the community adopting a defensive “fortress mentality” that sees fellow mainstream Canadians and government as a “hostile and dangerous ‘other,’ to be feared, resisted and avoided” (Seljak et al., 2007, p. 18). In their study of youth radicalization in Canadian Judaism, Christianity, Islam, Hinduism and Sikhism, Paul Bramadat and Scott Wortley (2008) highlight inequality, discrimination and marginalization as key factors contributing to youth religious radicalization. They contrast the importation model, that assumes religious extremism is imported into western countries, with the strain model that emphasizes

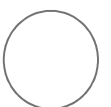


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[218] Seljak et al. (2008) suggests there the risks of a militant secularism and not recognizing the adverse impacts resulting from a residually Christian, and, in some cases increasingly anti-religious and closed structuring of contemporary secular institutional norms and arrangements, include:

- Alienating and preventing the integration of ethno-religious minority communities by “refusing to acknowledge or respect the public elements of their religious traditions” (Seljak et al., 2008, p. 6) and conveying to such communities that their religious practices and identities are incompatible with Canadian identity and citizenship; and as a consequence
- “Encouraging the creation of religious “ghettoes” – closed ethno-religious communities that have relatively little connection to the rest of Canadian society and, potentially, religious radicalization and disengagement from Canadian public life (Seljak et al., 2008, p. 19).

[219] Saul (2008).





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