

“Taking a Fresh Look at Religion and Public Policy in Canada: The Need for a Paradigm Shift”¹

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Executive Summary

It is necessary that there be a new approach to religion and public policy in Canada. Much current discussion fails to recognize changes in the law in recent years and virtually all confuse key terms or fail to begin analysis of the state’s relationship to religion by examining “faith” and “belief” themselves. When it is recognized that religion has a public as well as a private dimension and that all citizens are believers (in something and with some propositions undergirding these beliefs) it is then clear that there should be no privileged place in Canadian public policy for atheist and agnostic beliefs or corresponding exclusion of religious groups and individuals.

The paper draws upon the conclusions of a Supreme Court of Canada decision (*Chamberlain v. Surrey School District No. 36*) to argue that “secular” in Canada should now be understood to be religiously *inclusive* rather than religiously *exclusive*². Another way of putting this is that a concept of a State that does not have an established religion (such as Canada) does not mean that religious beliefs, believers and communities have no relevance for the public realm or are, in some particular way, outside it more than other citizens and their groups. It shall be argued as a preliminary matter that many of the key terms and concepts in the discussion about religion and public policy that we currently use are so confused that they inhibit rather than assist clarity of analysis. Thus, terms such as “pluralism”, “believer”, “faith”, “secular” and “secularism” must all be reconsidered in order to move to the fresh and more just consideration of the religiously inclusive public sphere (called for in *Chamberlain* specifically) and principles of justice and fairness more generally.¹

The central thesis of this paper is that the relationship best characterizing an appropriate way forward for Canada is “the co-operation of church and state.”³ Co-operation, rather than separation, suggests *both* a necessary jurisdictional *distinction* (the “church” and state have different roles and Canada is not a theocracy) and a *functional relationship* rather

¹ This paper reflects the views and conclusions of the author and not those of the Federal Government of Canada, the Policy Research Initiative or any other group.

² *Chamberlain v. Surrey Sch. Dist. No. 36*, [2002] 4 S.C.R. 710, 749 (Can.) (“Chamberlain”)

³ “Church” here must be taken as shorthand for all centres of religious activities including, but not restricted to; mosques, temples, synagogues etc.

than strict separation. Separation fails to recognize the public dimension of religion and beliefs as well as the cultural benefits that accrue from involving religious communities and believers in the work of the state (encompassing, as it does, such important public dimensions as education, health care and civic involvements across a host of areas). Obviously, how the relationship between church and state is to be developed will build on what has gone before in Canadian history (not always an easy relationship) yet can be responsive to the identification of a new basis for co-operation.

In addition, other decisions of the Supreme Court have made it clear that there is no “rank-ordering” of rights in Canada with some taking a higher place than others. The implication of this is that no particular claim (for example one notion of equality or the rights of any particular right - - be it religion or sexual orientation) takes precedence over any other.⁴ Again, this calls for a more nuanced approach to potential rights conflicts and “sphere-sharing.”

What this means for public policy formulation in Canada is the need to be attentive to religious inclusion in each area to ensure that citizens who have religious concerns or who might be influenced by particular policies (in areas such as charitable status, immigration, social security, child care policy, multiculturalism, health care, education, to name but a few) should be considered and consulted in the course of policy formulation and involved on an ongoing basis with respect to the monitoring of such policies. Canada must become as “inclusive” “tolerant” and “diverse” in practice, as it purports to be in principle.

In a paper of this size, a topic as vast as “religion and public policy” can only be approached with, perhaps, distressingly few specific suggestions for legislators and bureaucrats. What can be done, though, and what is attempted here, is to suggest why we ought to rethink much of how we approach “religion and public policy” in order to make such public policy developments accord better with our commitment to pluralism, tolerance and diversity in Canada.

The paper is divided into three parts. Part One provides definitions of key terms that, understood correctly, provide the theoretical basis for a “fresh look” (in fact, a paradigm shift) for religion and public policy in Canada. Part Two provides some practical applications of the theoretical approach set out in the first part. Both are necessary since any moves towards the practical will depend upon policy formulators (including politicians) being convinced that the new theoretical approach is more just and in the interest of all Canadians, whether or not they are religious believers themselves.

⁴ *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 S.C.R. 835, where, at para. 72 Chief Justice Lamer stated that “When the protected rights of two individuals come into conflict...Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.” In *Trinity Western University v. British Columbia College of Teachers* [2001] 1 S.C.R. 772, Justice Iacobucci, in giving the reasons of the Court, stated, at para. 29: “Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute.”

Part Three deals with concluding components requested by the PRI (such as what success will look like and what impediments may be foreseen in relation to the recommendations offered in the paper) as well as a short conclusion based on what has gone before.

Part One: Key Terms and Concepts

Definition of Religion:

The Supreme Court of Canada has defined “religion” as follows:

Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.⁵

Accommodation and “The Separation of Church and State” in Canada

Only a richer conception of how citizens with differing belief systems can co-exist will solve the dilemma posed by erroneous uses of key terms in aid of universal consensus. What is clear is that claims for “neutrality” based upon the prior exclusion of religious beliefs but the inclusion of other beliefs under misuse of terms such as “believer/unbeliever”, “secular” or “faith” fail to support a proper approach to accommodation of differing beliefs. Approaches to “pluralism”, “equality” or “tolerance” that implicitly or expressly see us moving towards eventual agreement on all matters, need to be rejected as inconsistent with both human freedom and a proper understanding of diversity and accommodation.

If we want to affirm that Canada does not have a sectarian government then we should say so; this is different than using the concept of “separation of Church and State” which, in one reading of its American formulation would preclude the “co-operation of “Church” and State” which is the better Canadian model for the relationship.⁶

Former Chief Justice Dickson stated that American decisions on freedom of religion (and therefore concepts such as “separation”) must be applied with care by Canadian courts:

⁵ *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 576 (Can.) (Iacobucci, J.)

⁶ For a more detailed history of the relation between Church and State in Canada see: Iain T. Benson “The Freedom of Conscience and Religion in Canada: Challenges and Opportunities” Vol. 21, No. 1, *Emory International Law Review* (Spring 2007) 113 – 165 at 114 – 120 and authorities cited there.

In my view the applicability of the [Canadian] *Charter* guarantee of freedom of conscience and religion does not depend on the presence or absence of an “anti-establishment principle” in the Canadian Constitution, a principle which can only further obfuscate an already difficult area of the law.⁷

The State, through its primary public policy drivers of law and politics, should keep ever before it the need to find ways in which people who do not believe the same things can, nonetheless, share the public realm and even work together in their joint task and privilege of citizenship. To do this requires a re-thinking and re-formulation of some of the central terms and concepts in our understanding of religions and the state, terms that have, as this paper will attempt to show in the pages that follow, been much influenced by ideological developments intended to limit and exclude the public relevance of religious beliefs and religious communities.

What is “Belief” and Who are “Believers”/ “Unbelievers”?

The starting off point for my comments is an observation that may be put this way; all human beings are believers, the question is not one of belief or non-belief but of what is believed in.

Yet how often we hear those who do not have religious belief described as “unbelievers.” All citizens, as a matter of fact, as set out above, make their decisions in life based upon their beliefs. On one level, therefore, we are all “believers.” The question is: “what do we believe in” and “for what reasons” and does the origin of our beliefs mean that some people (or some beliefs) have less importance in a society that says it will respect the ability of citizens to have the fundamental right and freedom to “belief” and “expression” in addition to “conscience and religion.” In order to focus on something that most people believe – something that cannot be proven by weights and measures – let us consider “the dignity of the human person.” Most people, whether or not themselves religious, would agree that this principle is both important and one they themselves endorse. It is, therefore, something they believe in and hold as a belief.

Courts have, recently, come to acknowledge that any pre-emptive exclusion of “religion” from the category of “beliefs” that may operate in the public sphere of society, is an

⁷ *Big M Drug Mart*, [1985] 1 S.C.R. at 339. In this decision, Chief Justice Dickson stated, “[i]n my view this recourse to categories from the American jurisprudence is not particularly helpful in defining the meaning of freedom of conscience and religion under the *Charter*” at 341.

unwarranted attack on the freedom of “conscience and religion” set out in Section 2(a) of the *Charter of Rights and Freedoms*.

This recognition is of great significance for Canadian public policy but it has yet to be widely understood as such. To allow only the beliefs of atheists and agnostics to have any public relevance is not to treat religious beliefs fairly and those who hold them as equal citizens. To allow only those beliefs that emanate from the convictions of atheists and agnostics to have public relevance is discriminatory against religious beliefs just as much as it would be to allow *only* religious beliefs to have public relevance.

What is “faith?”

As with “belief” so it is with “faith.” Everyone has “faith” of some sort and not all faiths are religious. This, too, has implications for how we think about citizenship and public policy. It has been said that “to act is to assume and to assume is to have faith.”⁸ Why then do we speak of “communities of faith” or “people of faith” when we mean those who have religion or are religious and implicitly suggest that all the others do not have faith?

As with belief, the separation of the world into two sharp divisions - - one side (the religious) thought of as based on “belief” and “faith” and the other side (the non-religious) not so based, is erroneous. The implicit suggestion of the contemporary period is that those who are not in “communities of faith” are people of facts and/or that they do not operate out of “faith” but (and here is another false division) “reason” alone. It is not so and when “faith” and “belief” (not necessarily religious of course) are understood to be aspects of human existence, and public policy based upon beliefs and faith (of some sort as well) we begin to see that the watertight compartments currently being used to insulate and confuse our analysis need to be replaced by better conceptions.

So the fact/belief distinction is often furthered by those who, ironically, don’t actually believe that religious beliefs are un-factual or that atheism and agnosticism have stronger claims to material reality than religious beliefs.

As with “believer/unbeliever” used inaccurately (as set out above) this serves to bracket out religious adherents from other citizens; as the context usually shows, such a bifurcation is usually implicit and unintentional. In combination with other dualistic constructions, however, we shall see that this eventually leads to a general failure to understand relevant

⁸ In his “Tamworth Reading Room Letters,” John Henry Cardinal Newman recognized that everyone who acts must take matters on faith and wrote: “Life is for action. If we insist on proofs for everything, we shall never come to action: to act you must assume, and that assumption is faith.” See *Discussions and Arguments on Various Subjects* (London: Longmans, 1899) at 295.

matters in a way that leads to accurate analysis of what is actually going on with respect to the state and public policy.

In short, the world is made up, in part, of believers who are themselves in communities that have faith in this or that - - some of this faith and belief is religious some of it is not. These distinctions play out in terms of other major categories and I'd like now to turn to the terms "pluralism" and "liberalism."

Pluralism:

The definition in the Glossary to the Taylor/Bouchard Commission Consultation Document is adequate. It reads: "A system or philosophy, which, in the name of respect for diversity, acknowledges the existence of different political opinions, moral and religious beliefs, and cultural and social behaviour."⁹

Recent writers have cautioned that there can be a version of pluralism that is inconsistent with a proper understanding of diversity. This "convergence pluralism" assumes that we shall all eventually agree about contested matters given enough time and guidance from the courts and government. Against this is the view that since we do not agree on basic assumptions on certain issues, eventual agreement cannot reasonably be assumed.¹⁰

A similar problem arises with respect to "Liberalism."

Liberalism:

The definition in the Glossary to the Taylor/Bouchard Commission Consultation Document reads: "Principles or theories that guarantee individual freedoms in society." As with "pluralism" however, it is important to note that there are competing theories of "liberalism" and that one of these, like "convergence pluralism" assumes eventual agreement. Again, recent writers have suggested that the future of liberalism requires that it turn its face against the notion of "eventual agreement" to one of "*modus vivendi*" or living together with disagreement.

⁹ The Consultation Document for the Commission may be seen at:
<http://www.accommodements.qc.ca/documentation/document-consultation-en.pdf>

¹⁰ See: Peter Lauwers "Religion and the Ambiguities of Liberal Pluralism: A Canadian Perspective" (2007), 37 S.C.L.R. (2d) 1 – 45, at 2 and 12 – 15, citing John Gray, *Two Faces of Liberalism* (New York: The New Press, 2000). See also, Ken Badley, "Assimilation in the Name of Pluralism: Education, Law and Religion in Ontario, Canada" in David E. Guinn, Christopher Barrigar and Katherine K. Young, eds. *Religion and Law in the Global Village* (Atlanta: Scholar's Press, 1999) (Volume 5, McGill Studies in Religion), 181 – 201. This helpful article, though it was written before *Chamberlain* and thus takes no account of the notion of the religiously inclusive "secular", discusses the variant uses possible for terms such as "tolerance", "neutrality", "religion" and "diversity" as well as "pluralism."

The Meaning and Nature of the “Secular”:

The term “secular” has changed its meaning over the one hundred and fifty years. The term in general usage now means, essentially, free *from* religion as in “we ought to keep religion out of the schools because they are secular.” This was not the original meaning, nor is it a meaning which recognizes the *modus vivendi* or diversity pluralism referred to above. In short, the term “secular” must have a neutral meaning lest it be taken in an anti-religious direction. In general, it is better not to use the term at all in relation to thinking about religion and the state.

We must be careful to guard against definitions that build into their use an assumption that is unexamined. Just as this has happened where convergence pluralism can look like diverse pluralism (when they are very different) so, too, how we define what we mean by the term “secular” is also important.

In fact, this more recent use of “secular”, which we may justly call the atheistic or agnostic interpretation, is seldom viewed alongside alternate understandings. This is not helpful since an atheistic definition, if used as the meaning for a central term such as “secular”, fails to give a proper place to religion in the private and public dimensions of society. The atheistic “secular” becomes, in effect, a blueprint for the naked public square. A more informed historical understanding, built upon a richer philosophical ground, better reflects both the reality of beliefs in society and the principles of freedom that ought to undergird a properly civil society.

If we start off with the assumption (building into our use of the term “secular” for example) that religion has no place in “the secular”, then, of course, we will tend to diminish the role of the religious in civil society. But this is really to adopt implicitly or explicitly the ideology of atheistically driven “secularism”, because the “secular”, viewed historically, does not require such a removal of the sacred dimension from all aspects of life. The secular is, properly understood, a realm of *competing faith/belief claims*, not a realm of “non-faith” or “non-belief” claims because, strictly speaking, there can be no such realm.

In contemporary usage, “secular schools”, “secular government”, etc. are generally understood to mean non-religious or not influenced by religion or religious principles. I suggest that this is because we have adopted a secularist (which may be atheistic, agnostic or even religious) definition of “secular” rather than a richer and more properly inclusive conception. The separation of church and state is, after all, a jurisdictional distinction important to both the church and the state. A valid separation should not preclude a valid *cooperation* between church and state. Most religious groups in the west, for example, do not in fact want the state to run “the church” or vice versa.

The historical shift in the use of “secular” should be recognized. It is tempting to glance off the historical critique by continuing to use the term “secular” and “religious” as if they describe different worlds. But they do not describe different worlds; they describe different functions. When we are tempted to use the term “secular” when we mean “the public sphere” or “the state” we would be better to *say that* as these are free of the religiously *exclusive* baggage that currently encumbers use of the term “secular.”

When the British Columbia Court of Appeal, in the decision in *Chamberlain v. Surrey School Board*, overturned the newer atheistic use of “secular” and affirmed the secular as a realm that has, properly, a place for beliefs that emerge from religious commitment, it was performing just the sort of linguistic reclamation argued for in this paper. The Supreme Court of Canada upheld the Court of Appeal on this religiously inclusive “secular” a finding of central importance for considerations of Government policy in the future.

The Meaning of “secular” in Canada Following the Supreme Court Decision in *Chamberlain*.

I should like now to examine briefly the Reasons of the British Columbia Court of Appeal and Supreme Court of Canada’s analysis in the decision. For our purposes here the key aspects of the decision were in relation, first, to the meaning of the phrase “secular principles” in Section 76 of the British Columbia *School Act* and, second, how the Court dealt with the concerns of religious parents in relation to the claims of same-sex advocates for social recognition - - involving the appropriateness of certain books (showing “same-sex parenting”) in the kindergarten to Grade Two curriculum of a school in British Columbia.

If the appellate courts had upheld the term “secular” as the trial judge had determined it - - to mean “non-religious” or “not influenced even in part by religion”, then the implications for the public place of religions (not just in education but other areas of Canadian society) were vast.

With respect to the question of the nature of “secular principles”; if these were read as meaning something other than “non-religious” then this would be more favourable to the place of religions, religious beliefs, religious communities and religious believers in the public. In short, should “secular” mean “religiously inclusive” or “religiously exclusive?”¹¹

Mr. Justice McKenzie in the unanimous decision of the B.C. Court of Appeal stated that:

(33)In my opinion, “strictly secular” in the School Act can only mean pluralist in the sense that moral positions are to be accorded standing in the public square irrespective of whether

¹¹ For a more detailed discussion of the term “secular” and alternative interpretations, see: Iain T. Benson, "Notes Towards a (Re)Definition of the `Secular'" (2000), 33 *U.B.C. L. Rev.* 519

the position flows out of a conscience that is religiously informed or not. That meaning of strictly secular is thus pluralist or inclusive in the widest sense. ...

(34) No society can be said to be truly free where only those whose morals are uninfluenced by religion are entitled to participate in deliberations related to moral issues of education in public schools. In my respectful view “strictly secular” so interpreted could not survive scrutiny in light of the freedom of conscience and religion guaranteed by s. 2 of the Charter and equality rights guaranteed by s. 15.¹²

When the case reached the Supreme Court of Canada all nine judges agreed with the reasoning of McKenzie J. as to the religiously *inclusive* meaning of “secular” so that term in Canada now means religiously *inclusive* not exclusive.¹³

Mr. Justice Gonthier for himself and Justice Bastarache, who would have upheld the Board’s decision and therefore wrote in dissent on that part of the decision, said this about the “secular”:

137 *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 not to be heard in the public square, but if it does not, then it is publicly acceptable. The problem with this approach is that everyone has "belief" or "faith" in something, be it atheistic, agnostic or religious. To construe the "secular" as the realm of the "unbelief" is therefore erroneous. Given this, why, then, should the religiously informed conscience be placed at a public disadvantage or 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,*

¹² *Chamberlain v. Surrey School Board* (2000), 80 B.C.L.R. (3d) 181 (C.A.); reversing (1998), 60 B.C.L.R. (3d) 311 (S.C.) per McKenzie J.A. emphasis added; For a detailed analysis of this decision at the Court of Appeal level, see: Iain T. Benson and Brad Miller, “Court Corrects Erroneous Understanding of the Secular and Respects Parental Rights” *Lex View* No. 40.0 (2000) <http://www.culturalrenewal.ca/qry/page.taf?id=64>

¹³ *Supra.* note #2 above. Madam Justice McLachlin, who wrote the decision of the majority, accepted the reasoning of Mr. Justice Gonthier on this point thus making his the reasoning of all nine judges in relation to the interpretation of “secular.”

must be capable of being accommodated at the core of a modern pluralism. [emphasis added].

Needless to say, it will take some time before the full implications of this judgment are understood in relation to the wider public policy in Canada.

Secularism (and different sorts of “secularism”) :

“Secularism” is not a principle that, properly understood, forms or should form part of our national understanding as it is also deeply ambiguous and from its inception anti-religious.

The term “secularism” is not often examined but when it is I would argue that its historical meaning is such that we should challenge fundamentally any idea that “secularism” is a valid principle upon which to base an open and democratic society such as Canada. I have written about this historical background elsewhere¹⁴ and will not repeat that analysis here except to note that “secularism” is not a term that, properly understood, furthers the kind of religious inclusivity or relation between the state and public policy that we need to seek in Canada. Alternative terminology can and should be found in place of this term, laden as it is, with particular anti-religious intent and deep contemporary ambiguity. Secularism from its inception in the mid 19th Century was set up as a movement to exclude religious influence from the public square. As such it is not neutral or fair with respect to religion and religious believers.

Why did the majority judges in *Chamberlain* seem to embrace secularism and what did they mean by it? This is not possible to say since, unlike “secular” (which was argued and was central to the decision) they did not define secularism. Neither did the term appear in the provincial *School Act*, the Reasons for Judgment under review or the arguments of counsel before it. Despite this, it was referred to numerous times in the Supreme Court’s reasons as if it was a principle of Canadian constitutionalism. With respect, the Court erred in doing so.

Significantly, the dissenting judges, who gave the analytical framework of the whole court on the meaning of “secular” as religiously inclusive, did not use the term “secularism” in their analysis. They were right to avoid it.

The recent work of the Taylor/Bouchard Commission in Quebec has chosen to define “secularism” as equivalent to “the separation of Church and State.”¹⁵ This is not a usage of the

¹⁴ Iain T. Benson, “Considering Secularism” in, Douglas Farrow, ed., *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion and Public Policy* (Montreal: McGill/Queens, 2004) 83 – 93

¹⁵ The Consultation Document for the Commission may be seen at:

<http://www.accommodements.qc.ca/documentation/document-consultation-en.pdf> where the definition of “secularism” in the Glossary defines the term as meaning the equivalent to the French *laïcité* or, as it says, “the

term that fits with its historic meaning and I do not think that the principle of secularism should be used as something positive in Canada. Further, we should not enmesh ourselves in the language of the “separation of Church and state.” To define “secularism” as “the separation of church and state”, therefore, adds ambiguity to confusion and calling for an “open-secularism” is not necessary. The term should be avoided entirely.

Separation of Church and State versus Co-operation of Church and State:

Both “secularism” and “separation” are, as noted above, historically complicated and “secularism” is, in fact, found to be an expressly anti-religious ideology when examined properly. Neither the Supreme Court of Canada, nor the Taylor/Bouchard Commission examined the problems with the category of “secularism.” I suggest that this term (secularism) and other terms related to it (“open secularism” and “radical secularism”) ought *not* be used when what is sought is the idea that the State does not recognize any established religion. A better term to describe the State is “non-religious” or “non-sectarian.” A “non-sectarian” State is one thing, a “secularist” State quite another and we would do well to keep the terminology clear in this complicated area. As suggested elsewhere in this paper, we would do well, in light of Canada’s history (particularly in education and health care) to recognize that the more appropriate formulation of our relationship is “the co-operation of church and state.”

The State Does not Have “One” View on Many Matters and it is Important to Recognize Diversity on Legally Contestable Issues:

The State (as law and politics) exists to maximize diverse ways of living (within certain limits) rather than to enforce conformity in all areas. Mediating institutions such as the family, community associations of all sorts, and religions must be allowed to exist in a wide variety of forms. The idea of a singular “State” with “a” set of views, on legally contestable matters, that must govern on all topics, is an abstraction and an inaccurate one. By “legally contestable matters” I mean an issue about which it is legal to hold views on either side of that issue and act in appropriate ways to further one’s beliefs in relation to it. Good examples of such issues in the contemporary scene are the issue of abortion and the question of the nature of marriage (whether it should only properly be entered into by opposite gendered couples). Both the temptation to ever extend the State for this or that purpose as with the temptation to reduce the diversity of beliefs that must exist *within the State*, must be carefully guarded against.

separation of church and state.” Elsewhere the Document defines “open secularism” and “radical secularism” but, with respect, the definitions fail to analyze secularism itself as “anti-religious”, “separation of church and state” as a valid concept that does not preclude co-operation and do not sufficiently locate religious beliefs within the public sphere in the manner anticipated in *Chamberlain*.

Strictly speaking, “the State” has no beliefs. Citizens within the State have beliefs and may, through the processes of law or governance, bring in laws that reflect these beliefs. Acting through the formal mechanisms of the State (law and governance) rules and laws may be developed many of which may admit of necessary diversity themselves. We must be careful to classify issues correctly. This involves determining whether an issue is or is not the kind of issue that should remain legally contestable. Too often those who bring in laws, or abolish existing restrictions so as to achieve recognition (say of abortion or the nature of marriage) wish to use this recognition as a means of suppressing alternative viewpoints. This technique, to use the power of the State to force conformity to one side of a legally contestable debate, must be recognized and resisted so that accommodation may be nurtured and not thwarted. The State may manifest “one” view on certain matters where there is consensus or close to unanimity on the question. So, on some issues (say, torture or racism) there may be a consensus amongst the citizens and laws do not allow divergence.

On other sorts of issues, as I have said, (abortion or the nature of marriage) there may not be such a consensus and so accommodation (say, of hospital staff or physicians in relation to abortion) is required. In the first category (torture) there are not “two legally contestable viewpoints” on others (abortion or same-sex marriage) there are legally contestable viewpoints. We must be careful to ensure that the “open-texture” for dissent and development of views in the State is maintained to the greatest degree possible.

The existence of administrative discretion in many areas speaks to a certain capacity of flexibility that is necessary. Similarly, the State resiles from stating (as some would wish it did) certain conclusions in certain areas. Thus, to take the controversial current example about the nature of marriage, there is a debate about whether Marriage Commissioners should have their conscience views respected as “public office holders.” Both views, for and against accommodation, though in conflict, are “legally contestable” because, as a country, we allow divergence of beliefs as to what constitutes the meaning of marriage. I use this example as it neatly frames how the extension of a Constitutional recognition in one area does not preclude the freedom of citizens to hold other viewpoints on the matter. This is so for many issues in Canada today.

It follows from what I have argued that since there is and should be, *on certain types of issues*, no one “State’s view” of the matter regarding marriage, the accommodation of divergent views should allow people to perform as Marriage Commissioners who may have a personal conscientious or religious objection to certain kinds of marriage. As long as the objections are clearly set out in a civil manner, it would seem to me we ought to be culturally robust enough to accommodate such diversity of agreement into our laws at whatever level. This

view, favourable to accommodation of divergent beliefs seems to have the dominant support in the academic literature in this area.¹⁶

On the other hand, the State must be able to interfere with beliefs of citizens (religious or not) at the margins where there are genuine concerns about threats to life or property or “civil order” that require intervention by courts on review.¹⁷ Both International Documents and Canadian jurisprudence recognize such marginal limitations on beliefs.

Article 18 (3) of the 1948 *Universal Declaration of Human Rights*, to which Canada is a signatory, states that:

Freedom to manifest one’s religion or beliefs, may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

This limitation formulation was incorporated in the key passage to date in Canadian Charter jurisprudence dealing with the freedom of conscience and religion in Section 2(a). In an attack on the constitutionality of the *Lord’s Day Act* by several retailers who were convicted for opening their businesses on Sunday, Chief Justice Dickson, in agreeing that the Act was unconstitutional because it compelled religious observance, held that the essence of the freedom of religion is:

Freedom [of religion] in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the

¹⁶ Against the position I am taking here, see: Bruce MacDougall, *Refusing to Officiate at Same-Sex Civil Marriages*, 69 Sask. L. Rev. 351,353–54 (2006). Professor MacDougall notes that Prince Edward Island and New Brunswick have amended their Marriage Acts to provide the right of refusal and lists British Columbia, Manitoba, Newfoundland and Labrador, and Saskatchewan as Provinces that have policy statements denying the right to refuse. at 353 n.11. In favour of my position, see: Lorraine P. Lafferty, *Religion, Sexual Orientation and the State: Can Public Officials Refuse to Perform Same-sex Marriage?*, 85 Can. Bar Rev. 287, 307–312 (2007) (arguing that tolerance implies disagreement and requires accommodation and public officials should be entitled to refuse) and Geoffrey Trotter, *The Right to Decline Performance of Same-sex Civil Marriages: The Duty to Accommodate Public Servants – A Response to Professor Bruce MacDougall*, Vol. 70 (2) Sask. L. Rev. (2007) 365-392 (deals with issue as a “collision of rights” the “duty to accommodate” requires the ability to decline; does not deal with the problem of viewing “the state” as having one viewpoint on the matter).

¹⁷ We have seen much litigation to determine where the line exists in this area and one need only think of such issues as “blood transfusions”, “Sunday closing”, “turbans in the R.C.M.P.”, “kirpans in schools” “the conscience of physicians and pharmacists in relation to abortion” to recall how these matters have forced, and are forcing, Canadians to come to terms with divergence in our plural society. The first section of this paper and the need expressed there to develop a *modus vivendi* and accommodation rather than “convergence” of views is worth restating.

fundamental rights and freedoms of others, no one is to be forced act in a way contrary to his beliefs or his conscience.¹⁸

The focus on the public dimension of the freedom of religion as articulated in the earliest, and still centrally cited, decision of then Chief Justice shows that religion cannot properly be read merely into the private realm with no relevance for public policy. Its public dimension requires public consideration *and* accommodation.

¹⁸ *R. v. Big M Drug Mart, Ltd.*, [1985] 1 S.C.R. 295, 336 (Can.) at 353 – 54.

The Distinction Between *Public* and *Private* Remains Important:

In saying that conscience and religion are recognized to have public aspects, however, one must be careful not to assume that the distinction between private and public has been or should be collapsed.

An interesting aspect of the current debates about the public place of “sexual orientation” debates is the shift from private sexual moralities to public demands for public recognition. This shift and the danger it poses to genuine civil rights has been commented upon by Jean Bethke Elshtain. In her Massey Lectures, she writes that:

... the complete collapse of a distinction between public and private is anathema to democratic thinking, which holds that differences between public and private identities, commitment, and activities are of vital importance. Historically it has been the antidemocrats who have insisted that political life must be cut from one piece of cloth; they have demanded overweening and unified loyalty to the monarch or the state, unclouded by other passions, commitments, and interests....a politics of displacement is a dynamic that connects and interweaves public and private imperatives in a way that is dangerous to the integrity of both. ¹⁹

Elshtain gives two examples of this displacement politics: the ideology of women’s victimization and identity politics, particularly in relation to “gay liberation.” She concludes her insightful analysis by noting that: “...the demand for public validation of sexual preferences, by ignoring the distinction between the personal and the political, threatens to erode authentic civil rights, including the right to privacy.”²⁰ So, holding the Court’s finding in *Big M* (and later cases) together with the cautions of Professor Elshtain, we might attempt to put the matter this way. While religion and conscience have public dimensions, these public aspects must not be taken as meaning that there is no longer a private dimension to the lives of citizens and their groups. In fact, the maintenance of an appropriate sphere for private action is an indispensable part of a society that can craft public policy that is favourable to religion and to the lives of citizens while at the same time respecting that there are limits to such public entanglement.

¹⁹ *Democracy on Trial* (New York: Basic Books, 1995) at p.p. 38, 40

²⁰ *Ibid.* p. 57.

PART II: Some Practical Applications of Principles That Should Apply to More Justly Recognize the Place of Religion in Public Policy in Canada.²¹

Establish a Constitutional Forum for Canada: Encourage Civil Society Debate about Constitutional Rights and Freedoms rather Than Assume Litigation as the Primary Driver of Development. Establish a “Constitutional Forum” to deal with debates of the day.

There has been much discussion in recent years as to whether a Court Challenges Program should be continued. Whether or not such a program is continued, thought should be given to establishing a Constitutional Forum for stakeholders that will benefit all Canadians.

The establishment of a Constitutional Forum to foster discussion and debate from representative organizations will go a long way to encourage genuine dialogue and ameliorate a spirit of “sectarianism” between groups of differing perspectives on issues of the day. In line with what has been proposed above, such a body, if it is seen to have a role in a reinvigorated place for constitutional “dialogue”, might well come to be seen as important to politicians and the judiciary for the analysis so often missing in the vast areas of non-discussion that end up seeking the “winner take all” results of court-based processes. Use of such a forum could, in fact, be incorporated into a litigation assistance program as a requirement prior to financial support being given. This would go a long way to restore confidence in the representative nature of any assistance program and the rigour of its analysis.

A constitutional forum of this sort, alongside an appropriately structured Constitutional Litigation Assistance Program, would be innovative, creative and progressive in Canada. It would build upon and advance what has gone before while correcting the errors that many people have identified in the Court Challenges Program (such as favouring “challenges” when there ought to be no presumption that constitutionality favours the challenger rather than those who might wish to defend laws).

²¹ Obviously given the huge number of areas touched upon by “government” federal and provincial (health care, education, labour relations, human rights, tax, medical practice, charities, public education etc. to name some of the key ones) a review of “current policies” would be extensive and take us well beyond the space available. What I have sought to do in this background paper is identify kinds of approaches that could apply in a variety of areas. Thus, I have not sought to set out precise issues in public education, or health care so much as to indicate that inclusion of religions/religious communities and respect for their alternative perspectives are good things since exclusion is usually justified on a “secularist” set of arguments such as are discounted in the first part of this paper. Similarly, principles of accommodation would apply to health care workers and pharmacists who have objections to particular medical procedures or marriage commissioners as well. In each case the principles of accommodation of diversity and maximal inclusion apply.

What was missing from a focus on using the courts for furthering “equality” etc., was a recognition of the extreme limitations of litigation. For a variety of reasons inherent to litigation, it is a necessary but not sufficient way of developing the culture of inclusion we seek and need in Canada.

As Canadian philosopher Charles Taylor has noted:

Judicial decisions are usually winner-take-all; either you win or you lose. In particular judicial decisions about rights tend to be conceived as all-or-nothing matters.... The penchant to settle things judicially, further polarized by rival special-interest campaigns, effectively cuts down the possibilities of compromise.²²

This is why I suggest here that the Government of Canada should consider the advisability of establishing a Constitutional Forum which would be administered and funded by the Federal Government, the purpose of which would be precisely to encourage stakeholders on issues of the day (e.g. health, labour relations, rights debates, environment, immigration, international diplomacy etc.) to raise their concerns in a mediated forum in which these could be properly aired and recorded in an atmosphere of respect outside the guarded, nuanced, strategic and expensive four-corners of courts and tribunals. It is not possible to give an estimate of the cost of such a program as the scale might vary across a wide spectrum (i.e. what size of permanent staff would be envisioned etc.).

Anticipating an objection to the establishment of a Constitutional Forum:

It would seem that cost aspects might well be raised here as well as a generalized concern about the further extension of government bureaucracy. There are two responses to this objection; first that the social costs of failure to encourage civic participation in areas of central concern to citizens must be weighed against the financial considerations and, second, there is an equitable argument to the effect that the focus in past years on litigation at the expense of what we might call “constitutional conversation” needs to be redressed if the question is a choice between the two in future. This is particularly so given that we recognize benefits to conciliation and discussion rather than encouraging a primary focus on litigation as we have done in the past (see below with respect to the Court Challenges Program).

Changes to the Court Challenges Program:

²² Charles Taylor, *The Malaise of Modernity*, (Toronto: Anansi, 2001) p. 116.

With respect to making something like the Court Challenges Program more inclusive and transparent in future, it would make sense to set up any such program so that its make-up and access to its funds are transparent, representative and accountable. The limits of litigation (as referred to above), however, need to be considered so that the program can function equitably.

One example of a recent debate relevant to many people in Canada and certainly of interest to the major religions, will suffice to show why litigation was not the best way to formulate policy for all Canadians.

Canadians have not yet had any proper discussion about *whether marriage is properly a matter for the state* once the conditions of agreement about what marriage is no longer command general support. The state got into marriage very late in history after all. Yet the manner in which same-sex marriage challenges were pushed in the courts with careful strategy that skirted around the edges of marriage then dove into the heart of it did not leave room for a proper analysis of marriage in relation to the State or the religions that are so important a part of it. A big part of that failure of analysis was precisely the way in which litigation with its “winner take all” prize provided a goal for litigants.

Debate and analysis in relation to both subjects (equality and the scope and nature of sexual orientation protection and advancement) still exist and in relation to same-sex marriage might erupt sooner rather than later again. *We would have had* a more measured, nuanced and richer understanding of the necessary limits to various claims (on all sides of the issues) once we sat down at the table and debated things without recourse to the guillotine of litigation in the way that happened in Canada in the last decade of litigation. Religious communities and others would have much to gain from greater involvement offered to discuss major issues of the day in such a manner. Alienation was a frequent expression in the affidavits of religious groups put before the courts in the “same-sex marriage” litigation (from the Jewish, Evangelical, Muslim and Catholic points of view).

Yes, constitutional rights are important and the courts have a necessary role in defending them, particularly when the state is acting against individuals or groups: but it is a necessary role the courts’ have, not a sufficient one.

When recourse to law is used as a foreclosure on debate we see what happens to democracy when debate and analysis (best suited to Parliamentary and Legislative Committees and more flexible formats than courtrooms) are truncated by premature recourse to judicial determination.

It is well known that hearings by the Justice Committee of the day were simply cancelled once the government of the time, with no caucus discussion, no discussion in the House, in short, none of the usual opportunities for analysis and discussion, simply skipped the matter to the Supreme Court in the *Marriage Reference*.²³

That was not our finest hour and our analysis of the optimal relationship between the irreconcilable views of citizens and the state with respect to same-sex marriage has suffered as a result. We have only seen the beginning of the disputes that will erupt in such areas as public education curriculum.

If Some Sort of Constitutional Litigation Support is Considered What Principles Should Guide The Establishment of Such a Program?²⁴

Recall that the Court Challenges Program (CCP) funded not only litigation but conferences and even discussion between government officials and members of activist organizations on a particular theme²⁵ and in recent Reports suggested that it should be extended to the provinces as well.²⁶ In such an environment it is important that this be done openly and fairly and not

²³ For the views of a Liberal Party M.P. on the processes followed in relation to the *Marriage Reference*, see: Tom Wappell (Scarborough, South West, Lib.) Hansard, 38th Parliament, No. 060, Friday, February 18, 2005 available at: <http://www.tomwappellmp.ca/Speeches/C-38.htm> . For a very helpful recent article in this area see: Peter Lauwers “*Religion and the Ambiguities of Liberal Pluralism: A Canadian Perspective*” (2007), 37 S.C.L.R. (2d) 1 – 45 at 34 – 35 (includes a criticism of the government’s handling of the Same-sex marriage issue in deciding not to seek a stay or to appeal the decision of the Ontario Court of Appeal in *Halperin* thereby “evad[ing] responsibility by leaving contentious issues to be decided by the courts”).

²⁴ The items that follow are not intended to provide an exhaustive list of key principles but only some of the more important ones. Specifics will have to be worked out through discussion with stake-holder groups should it be deemed advisable to establish a constitutional litigation assistance program in the future. It is important to note that the focus of these recommendations is not litigation only or even primarily but as an adjunct to a more widely consultative and representative process than has existed in the past.

²⁵ In its Report for the years 2000 – 2001 the CCP funded negotiations described as follows: 3.3 Negotiations EGALE - definition of spouse in federal legislation (Bill C-23) -- This group undertook negotiations with the Federal Government concerning proposed changes meant to bring Federal laws dealing with relationship issues into conformity with the *Charter*. The Federal government's Bill C-23 amended the opposite-sex definition of spouse in 68 pieces of federal legislation to include "common-law partnerships" of either heterosexual or same-sex partners. The full Report may be found at: <http://www.ccpcj.ca/documents/annrep0001.html>

²⁶ The most recent Report available from the CCP has an introduction by Chantal Tie, as Chair of the Board, which shows the program’s wider ambitions as follows: “...the importance of the Court Challenges Program (Program) cannot be overstated. Comprehensive strategies, which include social mobilization, academic analysis and commentary and strategic litigation, need to be developed in a coordinated and comprehensive manner. Now, more than ever, the expansion of the Program's mandate to include challenges to provincial legislation has become urgent for our members.” See Report 2004-2005, p. 4 available at: <http://www.ccpcj.ca/documents/Annual-Report-2004-2005.pdf>

just from one perspective. Religions, as key players in Canadian society, must form an integral place within this discussion.

Any method of governmental assistance for constitutional litigation needs to be aware of the problem of rights' disputes in terms of society itself²⁷ and the fact that all citizens should be encouraged to be part of the dialogue that is constitutional litigation and/or the civil society debates that should occur "around" it. If we assume that courts are not merely necessary but are sufficient for the maintenance of a constitution, we assume too much about the role of law.

For any program of constitutional litigation assistance to be fair it must be open to everyone not just to those challenging laws but also to those defending them or those arguing against a particular sort of challenge (where there is no "law" as such in the area - - which was the situation in the "same-sex marriage" cases). If constitutional litigation is going to affect everyone then those who may need assistance in relation to that litigation do not all come neatly labelled as "challengers" and therefore any program seeking to develop constitutional interpretation must do so on a neutral basis and not only assist one side of the arguments.

What is constitutional is not just what is new and challenging, it can also be what the parliament and legislatures, federal and provincial, may have brought into place already. The principles that could guide a constitutional litigation support (as an adjunct to the creation of an extra-litigation Constitutional Forum) are:

- Assistance should seek to best elucidate the merits of both challenges and defence to laws since constitutional merit does not belong only to challenges;
- So that all citizen groups may have confidence in its fairness any Constitutional Assistance Program should be set up with representative fairness;
- Once the courts have granted Intervener Status to groups in a constitutional litigation, funding assistance to a certain level should flow to all sides of the litigation subject, perhaps, only to a "mean's test" principle;

Anticipating an objection to Amending the Court Challenges Program;

Some will argue that taking the approach I have set out, placing less emphasis on litigation and more on consultative "round table" discussion, would not lead to the results we have seen in Canada with "equality seeking groups" through the courts in the first two decades of assisted

²⁷ See, for example, Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991)

litigation. They may point to such developments as equality jurisprudence or same-sex advancement as two examples where strategic litigation with a particular purpose in mind was successful. That may be so. On the other hand, Canada's current position in relation to both issues is hardly a sterling example of the creation of civic confidence. The response to this concern would be to highlight transparency, representative status and fairness in the proposals in relation to what went before.

Changes to Charitable Status and Activities in Light of Expressed Concerns from a Wide-variety of groups. There is a need to clarify the role of litigation participation/education and advocacy in relation to charitable status.

The history of certain groups in relation to the Canada Revenue Agency²⁸ and generalized concerns expressed by many others, suggests that clear administrative statements showing why some groups are entitled to active legal and political involvement under the rubric of "education" while others are denied it, is in order. Many religious groups currently feel alienated and threatened by Federal Government practices and policy in this area and have expressed fears that they will lose charitable status, and their belief that threats to such status are motivated by political beliefs against them from within government and that current rules are antiquated and need to be replaced to further democratic principles.

In his Appearance before the House Standing Committee on Justice and Human Rights in July 2005 in relation to Bill C-38, Bishop Fred Henry of Calgary stated that he felt "harassed" by an official from the CRA on the position he had taken with respect to same-sex marriage in his capacity as a Bishop. An article from the *Calgary Sun* references several concerns expressed by religious groups that CRA is attempting to "silence them."²⁹ A group called Focus on the Family (Canada) was similarly subjected to an audit by CRA and warned about their advocacy of certain positions around the time of the 2004 elections. Other groups have also voiced concern that their views are not "politically correct" according to CRA and are expressed concern that there would be taxation consequences to views that it is otherwise perfectly legitimate to hold in Canada. Clearly, some changes are warranted to provide the encouragement to religious groups and projects argued for in this paper. Regardless of ones'

²⁸ Human Life International (deregistered); *LexView Vol. 18 "An Uncharitable Threat"*

<http://www.culturalrenewal.ca/qry/page.taf?id=86>

²⁹ See,

<http://www.exacom.net/firstlibrary/Articles/Moral%20Issues/Discrimination%20and%20Tolerance/Tax%20bullies.htm>

views of the arguments made, it is clear that wide-spread uncertainty and concern exists in this area in Canada.³⁰

Perhaps it is time to recognize frankly that legal intervention and advocacy necessarily have a political dimension. We should be careful that a political dimension to a group's work not be used to deny recognition or access to funding to those who might well have important contributions to make to debates of the day.

Given that constitutional matters require inputs from philosophy, political theory and theology/ religious studies, it is time to re-evaluate a restriction on the very groups whose participation might well assist constitutional reflection and the development of informed and civil debate in Canada.

Treat Religious Beliefs and Religious Communities/Concerns as Significant: Heritage and Multiculturalism and Health Canada Ought to Recognize and Involve Religious Communities and examine issues related to “conscience” accommodation.

A review of Federal Government websites, in such areas as Heritage (and Multi-culturalism) and Health indicates that while such categories as “race”, “official languages” “diversity” “multi-culturalism” “aboriginal affairs” or “women” (Heritage) or “aboriginal health” or “Women’s Health” (Health) and the advancement of certain groups has been incorporated into the government publications (electronic and otherwise), religion (or “conscience”) are notably absent despite their similar constitutional status. One cannot help but get the impression that conscience and religion, at least in terms of official government recognition, are invisible and irrelevant. Of course, it is true that there are various projects currently receiving funding that have a “religious faith” dimension (for example the recent grant from Heritage Canada to the Centre for Faith and Media based in Calgary, Alberta) but the official websites in key areas show no such recognition or active government involvement.

Government websites and materials should recognize religions as well as other heads of rights as important both to heritage and multi-culturalism.

³⁰ See, for example, a letter to the editor of the *Ottawa Citizen* by Janet Epp Buckingham, then Counsel to the Evangelical Fellowship of Canada, June 12, 2005 at <http://www.evangelicalfellowship.ca/NetCommunity/Page.aspx?pid=1411&srcid=1406> See also, a general discussion regarding views that current rules are long –outdated and fears about charitable status being removed for “political activity”: <http://www.familyaction.org/Articles/issues/family/marriage/05-06-13-fighting-church-charity-status.htm> See also, to the effect that charitable status challenges are part of the strategy of influencing rights debates within certain religious traditions (Judaism and Christianity); http://www.wnd.com/news/article.asp?ARTICLE_ID=54186 These referred to are representative of a vast number of such articles readily available on the internet from Canadian groups.

With respect to the *Canadian Multiculturalism Act* (1985) for example, though “religion” is mentioned in the recitals, the specific components of work ongoing are restricted to race and the advancement of certain racial groups or categories (see above). Where one might expect to see “religion” mentioned, it is not (for example in Section 5 (g))³¹ Since “religion” is, unlike “multi-culturalism” an enumerated Charter right and “multi-culturalism” appears only as a principle of interpretation (in Section 27 (“This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multi-cultural heritage of Canada”) the elevation of “multi-culturalism”, over the enhancement and protection of religion could lead a casual observer to sense a certain belief that religion is not significant (at best) or a bias against religion (at worst). There is no recognition of religion anywhere on the site in terms of active projects, discussions or protocols.

This kind of wholesale omission sends a message to ethnic and religious groups that they do not matter or are less important despite their equally important constitutional status. Even the A – Z index to both sites contains no listing under “R” for “religion.” The category seems not to exist despite its location in the governing Statute.³²

In the federal sector, there have been requests for greater inclusion of respect for variation in practice (with respect to health licensing requirements etc.) so as to accommodate “legitimately differing value systems” rather than “imposing one ethical viewpoint upon all.”³³ The opinions given before the Royal Commission on New Reproductive Technologies need to be reconsidered in light of current Federal government policy in the area of Health.

Culturally, however, religion is far from invisible. In schools, work-places, a plethora of clubs and associations and on the street, religion is an important part of our common life in Canada. Religious and spiritual beliefs are said to be amongst the most important indicators of the extent to which a citizen is “socially embedded” or not. Regular attendance at a place of worship - - whether church, mosque, synagogue, temple or what have you, is one of the three

³¹ See, for example, http://www.pch.gc.ca/progs/multi/policy/act_e.cfm last accessed on December 2, 2007.

³² Similarly, the official website for **Heritage Canada** is notably silent with respect to the category of religion. As with **multiculturalism**, there is no index listing for religion, nothing is mentioned in terms of religious activities (though I believe they exist - - such as project funding in 2003 and 2007 for the Alberta based “Centre for Faith and Media” project dealing with Islam and other religions) and, as with multi-culturalism, one gets the distinct impression, rightly or wrongly, that religion is, for practical purposes, irrelevant to Heritage Canada. See: http://www.pch.gc.ca/pc-ch/a-z/index_e.cfm last accessed December 30, 2007. The same can be said for the website for **Health Canada**. See: http://www.hc-sc.gc.ca/index_e.html Obviously, in health care, the accommodation of conscience is of interest to many Canadians religious or not, yet nothing appears on the Health Canada web site to indicate it is of any relevance at all.

³³ See the six dissenting Opinions and Detailed Reasoning of Dr. Suzanne Rozell Scorsone in *Proceed with Care, Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa,; Minister of Government Services, 1993) Volume 2, 1053 – 1146 at 1057, 1095.

key indicators as to whether one volunteers, donates or joins in our society.³⁴ As such religion as a cultural reality is something we must protect and nurture. While religion should be recognized and, at times, assisted and encouraged, it must not, under the proper understanding of co-operation of Church and State, mentioned above, be a category that the State and public policy dominate.

Some years ago in British Columbia, the government entered into a Master Agreement between itself and a denominational health care facilities association so as to ensure the continuation of and respect for “denominational values” in certain facilities (such as acute care hospitals and a Jewish long-term care facility). This sort of co-operation, rather than a strict and strident separation, speaks better of the ongoing realities of Canadian society and is the model we should embrace going forward.

There is one important caveat here. The old adage “he who pays the piper calls the tune” sums up the concerns from within religious communities that by taking government support they will lose their ability to function according to their religious ethos and beliefs. On the other hand there is a concern from the funding side that with financial support comes a certain expectation that what is being supported comports with general Canadian mores (however difficult it is to nail down the parameters of such beliefs today). I believe both concerns are justified.

Two principles must apply overall. First, Canada allows a diversity of viewpoints to exist within associations that might not be tolerated “outside.” Thus, what is appropriate with respect to religious rule-making internally (such as doctrines about the eligibility of male or female persons to occupy certain religious roles) might not be appropriate externally. There have been suggestions from certain quarters that Canada’s “Charter values” should be applied to the internal rules of organizations. Thus, with respect to funding, the argument could be made that only if such and such a group upholds “our” conception of gender representation (for example) could it receive funding.

While one might understand the motivation of such a demand, it is, with respect, incorrect and misapplies the “Charter values” against themselves. Other Constitutional principles must be kept in mind here. One such principle is the general limitation in the Constitution that all

³⁴ Dr. Paul Reed, Senior Social Scientist at Statistics Canada and others there have done extensive research on this sort of question and I have benefitted a great deal over many years from conversations with Dr. Reed on this and related topics. This data provides the statistical support for the larger principled argument for inclusion, respect and nurture that is argued for in this paper.

rights and freedoms are guaranteed up to “the reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”³⁵

We should also note that the Constitution protects other freedoms such as “association” and “religion” and these call us to question what these mean in relation to the role for the State (law and politics). It does not take much thought to realize that a society in which the law and politics determine every aspect of the lives of citizens (including the dogmatic beliefs taught in their private places of worship) would not be a society in which there could be much freedom or respect for diversity. Part of our heritage of freedom, therefore, is to be attentive to those areas in which law and politics (the State) need to be cognizant of their limitations.

This point has been elegantly discussed by Albie Sachs of South Africa, before he became a Justice of that country’s Constitutional Court who wrote:

If you cooperate with the state, does that mean that you are co-opted by the state? If you work together on projects of mutual concern, does it mean that you lose your right to criticize? The right to criticize is central to the sovereignty of religion. One has to have the right to bear witness. I think that our constitution will be the first in the world that will actually enshrine in the Bill of Rights the words, ‘the cooperation between the religious bodies and the state will be encouraged, but this will not in any way take away the right to bear witness.’ The phrase, “the right to bear witness”, is acceptable to many faiths and denominations. It is not associated with any particular confession. We feel that it is a very valuable constitutional principle. *It fits in with what is an emerging, developing view of the very nature of the state and of society. In that view, we are not only dealing with the state, individuals and political parties. In the constitution there is a recognised sphere for organisations of civil society that exist before the state, outside of the state, and after the state. They do not owe their existence to the state.*³⁶

Anticipating an Objection to Referencing Religion by Government Ministries and Departments

Those who object to religion within the public sphere will find any recognition of religion offensive and seek to avoid this outcome. The best reply to this objection is to point out the inclusive nature of the public sphere is now legally mandated following the decision in *Chamberlain*. In addition to the legal requirement are arguments based upon fairness and diversity being important to Canadians and to the future of the country - - we must be in

³⁵ Canadian Charter of Rights and Freedoms, Section 1.

³⁶ Albie Sachs, “Religion, Education and Constitutional Law”, Institute for Comparative Religion in South Africa (ICRSA), Second Annual Lecture, 7th November 1992, Cape Town South Africa, p. 7, emphasis added. Again, it is stressed that approaches in South African and Canadian contexts are showing a certain cross-pollination as the Canadian Supreme Court cites South African jurisprudence and vice versa.

practice what we purport to be in theory. This response may be useful to a variety of the proposals in this paper.

Establish a Permanent Religious Commission for Canada.

Taken together, the concerns of many religious groups and the current invisibility of formal State contact with religion³⁷ (excepting, of course, this current set of discussions and those ongoing in Quebec) suggest the possible utility of a permanent Religious Commission in Canada. What framework for enabling legislation would be most appropriate is an open question but perhaps in the context of a Federal Ombudsman or even as adjunct to Human Rights legislation, such an office could be of significant benefit to Canadian policy formulation in the future. Such a body has been established elsewhere.

Chapter 9 of the *Constitution of the Republic of South Africa* (1996) provides for “State Institutions Supporting Constitutional Democracy” and sets out a series of institutions one of which is (121(1) (c) “the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.” The institutions are independent but must report their activities to the legislature once a year. Section 185 sets out the functions of the Commission which are listed as being (a) to promote respect for the rights of cultural, religious and linguistic communities; (b) to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association....

The Commission is designed to assist the Parliament by reviewing all legislation that might affect one of the interest groups (cultural, religious or linguistic) under its purview.

There is no provision like this in the Canadian Constitution but the principle of a body (Commission or Institution) created to advise governments (federal or provincial) on religious matters is a good one. As long as the principles of representative transparency and authority (set out with respect to a Constitutional Forum) apply here there is much to be said about the place of a religious advisory Council along the lines of the South African model.

Consideration could be given to the appointment of a religious ombudsman who would work

³⁷ There have been notable exceptions, however. The amendments to the *Divorce Act* in 1990, some of which touched upon internal religious rules for divorce (annulments, *gets* etc.), included meetings with over 50 leaders of major religious groups in Canada. Religious groups frequently appear before a wide-variety of House and Senate Committees on a wide variety of issues. No doubt other initiatives and presentations occur from time to time as well. Encouraging though these are, and a sign that consultation is possible and sometimes helpful to policy formulation, a consistent framework for systematic liaison such as the establishment of a formal Commission would reduce the *ad hoc* aspects of the current framework and perhaps build a greater sense of confidence in the working of Parliament.

with religious leaders and groups or a Commission so that the important task of governmental liaison with religions can be made consistent and can be seen to be important.

Anticipating Objections to the Establishment of a Permanent Commission for Religious Matters in Canada.

As with other categories of recommendation, those who wish religion to be exclusively private and resist the extension of government will object to this recommendation. In addition there will be those who view this as the government intermeddling in religious matters. The response to this objection is that, post *Chamberlain*, it is important to find mechanisms to engage religious believers and their communities and that religion plays an important role in Canadian society and that the government and all citizens therefore have an interest in how government policies might affect religious communities.

Approaches to Public Prayer:

The Canadian “memorial” after 9/11 did not offer prayers from any particular tradition but provided for three minutes of silence. In another context, many Canadians expressed concern (some bordering on outrage) when government officials dictated that prayers could be said at a memorial service following the Swiss Air tragedy off Nova Scotia but that the name of “Jesus” should not be mentioned.³⁸ Both removing any reference to transcendence (some would say, making it, in effect an atheistic or agnostic ceremony as in the case of the 9/11 memorial service) or dictating what sorts of prayers could be said by one religion (as in the Swiss Air memorial) seem, depending on one’s viewpoint, either the right sort of balance (anyone is free to pray during a period of silence but no one is compelled to) or, where one sort of prayer is excluded, unduly restrictive, biased and unfair.

On the other hand, it seems that Canadians do not have a generalized policy against religious involvement in public matters as can be seen by the fact that in recent years prayers have been said and a homily given by a military chaplain at the National Armistice (Nov. 11th) memorial ceremony in Ottawa.³⁹

It would seem that the idea of a religiously inclusive “secular” following *Chamberlain*, would admit prayers from a variety of traditions or the inclusion of a period of silence to allow for personal meditation and/or prayer. Concerns expressed by various religious groups following

³⁸ See the on-line *Anglican Journal* for February 1, 1999 indicates that both Protestant and Catholic clergy were given the same instructions from someone within the Prime Ministers office: see; <http://www.anglicanjournal.com/issues/1999/125/feb/02/article/clergy-protest-ban-on-jesus-in-swissair-prayers/>

³⁹ See: <http://www.thefreelibrary.com/Anti-discrimination+leads+to+new+discrimination-a0144402217>

the Swiss Air memorial suggest that the subject should be given further consideration in Canada.

There are basically two competing and opposite conceptions regarding public devotions (school prayer or public commemorations etc.). The first accepts the idea of public devotion and says that because spirituality or religion are important to culture, public events should not deny this element and some sort of public prayers might be appropriate. The second rejects public prayers and says either that prayer should be private entirely (for secularist or pietistic reasons) or that since people do not pray to the same divinities (or even to a divinity at all) such public prayers amount to unacceptable coercion unless the prayers are open to all and every tradition. This creates a third response.

A third group suggests that the inclusion of such broad prayers (any and all groups having an equal right to be involved with prayers from their tradition) results in a meaningless or even blasphemous cacophony that works to, in fact, diminish the value of public devotion by trivializing or reducing in a syncretistic and unrealistic manner the awe and piety that prayer should elicit.

Writing from an American perspective, and focused upon “school prayer” but relevant in principle and articulating in a manner I think relevant more generally to Canada, is yet another argument.

I believe that a narrow focus on a “school prayer amendment” would be a mistake for two reasons. First, whatever its merits in an earlier and more homogeneous era, the practice of officially sponsored and led prayer in public school classrooms would be impossible to maintain today in a way that would be either spiritually valuable or non-coercive. In order to be broadly acceptable, a prayer would have to be so general and abstract that it would be largely meaningless. Religious Americans are justified in attempting to integrate their faith into their ordinary lives, including the spheres of work and education, but a watered-down civil religion serves no one’s interest. If anything, civil religion denigrates and trivializes religion by subordinating the forms of worship to the needs of the state. Moreover, no matter how abstract and how general the prayer may be – and for some, precisely because it has become so abstract and so general – it will remain unacceptable to some children in this world of diverse beliefs. I do not believe that officially sponsored vocal classroom prayer can be offered without effectively coercing those in the minority. And that should not be permitted.⁴⁰

⁴⁰ Michael M. McConnell, “Equal Treatment and Religious Discrimination”, Stephen W. Monsma and J. Christopher Soper eds., *Equal Treatment of Religion in a Pluralistic Society* (Cambridge: Eerdmans, 1998) p. 34.

This leaves the question whether a moment of silence and reflection set up by appropriate formularies to recognize it expressly as a time “for prayer and/or meditation” serves a public purpose and overcomes the already expressed shortcomings of other approaches. I am not sure about this but, on balance, believe that some recognition of a space for the transcendent or the divine is better than complete avoidance; inclusion of particular religious officials must, however, be done on an inclusive basis without attempts to restrict the prayers offered.

Anticipating an Objection to Public Prayers

As with other areas the objection here will be that the State should have no involvement in religious manifestations such as prayers. In addition, it will be argued either that too many prayers from too many traditions (and how will we decide between what is acceptable and what is unacceptable?) will water down the devotion that the inclusion of prayers seeks to serve or that any prayers are offensive to those citizens who are not “believers.” In response to this it might be argued that in the public sphere all citizens (and all religions) have a right of fair access limited only by the bounds of civility and that a sphere dominated by no reference to transcendence is itself offensive to those citizens who believe there “is a Divinity that shapes our ends.” Perhaps ways can be found, as there was in the Ottawa 9/11 memorial, to provide for moments of silence at which religious believers may pray in their own traditions and those who are not religious believers would not find offence. There may be those who find offence at anything even remotely suggesting religions or the transcendent - - but these sorts of objections should be discounted as mere bigotry. This sort of discussion is an example of something that could usefully be canvassed with Canadian religious groups (and non-religious groups concerned about it) in the format of a Constitutional Forum.

Part III: Concluding Components:

A detailed description of what “success” of religion in the public sphere looks like

It follows from the foregoing that what success looks like is a set of compellingly argued principles that provide for maximal respect for diversity, inclusion and accommodation within the public sphere in Canada for all citizens irrespective of belief in or affiliation to religion or non-religion. In order for these principles to have the kind of public recognition and long-term force that they should have in Canadian society, it is recommended that the Federal Government consider whether it might be a good idea to develop something like a *Freedom of Conscience and Religion Act*.

This legislative framework would be in addition both to the Religious Commission and to the Constitutional Forum (the latter being the civic involvement aspect and the former being the governmental framework for contact).

As with the *Canadian Human Rights Act* itself this would set out a set of principles to give greater clarity to Canadian society and to decision makers (Federal and Provincial) about the kinds of principles that are important for religious believers and their communities. Such an Act (or “Charter”) is currently being considered in South Africa and preliminary meetings have been held there with further discussions involving a wide representation of religions being set for Spring and Summer 2008. This legislation would expressly deal with conscience and religion giving a set of guidelines regarding rights and obligations of religious believers and their communities as well as stipulating the limits on government power in certain areas. In Canada such discussion with religious leaders has led to fruitful developments in specific pieces of legislation (for example, the *Divorce Act* as referred to above) in the past, but there has been no consistent mechanism put in place for ongoing involvement between government and religious communities.

This document could, for example, include recitals that involve more creative, flexible and nuanced approaches than we often see in Canada at the moment. What is the duty of accommodation, for example, in relation to public office holders such as Marriage Commissioners or those largely funded by public monies, such as physicians or pharmacists? How have these issues been approached and what does that show us about what is possible and what challenges might be anticipated? What principles of inclusion of religious communities and their leaders should be anticipated within education (private and public). On the other hand, what are the responsibilities of religious or independent schools in relation to the wider “civil society?” Addressing these questions would itself be a formal sign of success in this area.

Canadians have already developed a significant track record of how to accommodate dissent (see the *Code of Conduct* of the Canadian Medical Association for example)⁴¹ in some areas more than others (the Pharmacists have not developed a similar approach to dissent and “the duty of referral” in their professional Codes).

In general what is needed are guidelines which respect the internal autonomy of religious institutions while providing an indication of where the limits are with respect to religious practice. Health-care restructuring has led to stresses upon denominational health care facilities. Such was the case a few years ago in a situation in which a group of nurses in the Markham-Stouffville area, opposed to personal involvement with abortion (and previously working in denominational facilities that did not offer that service), were told they must become involved in the procedure as a result of health-care restructuring and their movement

⁴¹ See the Canadian Medical Association *Code of Conduct* at: http://www.cma.ca/index.cfm/ci_id/43892/la_id/1.htm

to other facilities in which abortions were performed. Failure to accommodate these beliefs over many years, eventually led to a large out of court settlement.

Similarly, in British Columbia, the removal of questions regarding “religious belief” from hospital admitting forms under the mistaken belief that this was a “neutral” move designed to avoid non-religious patients being “embarrassed” had the effect of severing visiting religious officials from their adherents. Such visiting chaplains, pastors, ministers, imams etc. had been in the habit of perusing patient admitting forms to determine which patients were members of “their” religious community.

These sorts of concerns can be addressed in a general “Charter of Religious Rights and Freedoms” or an Act though Federal/Provincial issues create challenges with respect to application. At the very least a Charter, Bill or legislative instrument could provide for express recognition of the importance of the group dimension of religious adherence - - an aspect known to be only weakly recognized in our current jurisprudence.⁴²

In public education, there is generally not a good working relationship between religious officials and the local public school because we have proceeded on a model that renders religion largely to the more private sphere of church, temple, synagogue or mosque. Such marginalization might give the sense to children that religions do not matter to the public realm of culture. This sort of stigmatization should be avoided by careful attempts to integrate religious leaders in a non-dogmatic and entirely voluntary way (parents being the primary educators of their children as recognized by the courts and international documents) into the public school framework.

Consider this ringing statement from a recent leading South African decision on religious faith and culture, a decision referred to in the most recent Supreme Court of Canada decision touching on religious rights:

For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of

⁴² See, Benjamin L. Berger, “Law’s Religion; Rendering Culture” (2007) 45:2 Osgoode Hall L.J. 277 at 283. Berger argues that there are three elements to the Canadian Constitution’s understanding of religion. These establish that i) religion is essential *individual*; ii) religion is essentially focused upon *autonomy and choice*; and iii) religion is essentially *private*. These are, needless to say, rather limited aspects of the importance of religions as cultural *group* phenomena important to civic association. Such an understanding, though, emerges, says Berger, from a certain liberal *individualistic* conception of religion.

self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong.⁴³

Decisions from the courts of other countries are useful for Canadian courts. Such decisions are, of course, not binding on Canadian courts but those of countries with similar constitutions or similar historical experiences can be of assistance to our judiciary. The Constitutional Court of South Africa, because its constitution was modelled in many ways upon the Canadian *Charter of Rights and Freedoms*, and came into force more recently than Canada's *Charter*, has always looked at Canadian case-law for guidance for its own decisions. More recently, the Canadian courts, as in the *Bruker* decision (December 2007), have begun to examine South African cases.

An analysis of why this is the desired outcome and how it can best be achieved

The new inclusivity resulting from the paradigm shift suggested in this paper (both theoretically in Part I and with practical examples in Part II) is a question of fairness that follows from insights about the nature of belief and equitable access to resources.

Our approach to sharing the public space needs to be fair to all sorts of believers (religious and non-religious) and their communities. As long as there are commitments to appropriate shared social goals then diversity of educational models is not only correct in theory it is required in terms of justice when "public monies" are used to provide education (denominational education or otherwise). The provision of such monies then becomes a means to place an appropriate "civic virtue" program in schools of a denominational or non-denominational nature.

⁴³ *Christian Education South Africa v. Minister of Education* 2000 (4) SA 757 (CC) para. 36. See, generally, for the Scope of Freedom of Religion in South Africa (much of which has been based upon Canadian decisions) Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (Cape Town: Juta, 2005) 5th ed. 336 – 357. Referred to in *Bruker v. Marcovitz* 2007 SCC 54, docket 31212, December 14, 2007. For a comment on this decision see: Kevin L. Boonstra and Iain T. Benson, "When Should the Courts Enforce Religious Obligations?" *Lex View* No. 63 (2008) <http://www.culturalrenewal.ca/qry/page.taf?id=150>

Wider knowledge of and awareness of the applications of the principle of reasonable accommodation.

Principles of accommodation provide insights into how diversity can be made practical in workplaces and other settings. It should be remembered that the root of the word “accommodation” is the latin word (*commodus*) meaning “fit” or “agreeable” we might say “comfortable.” The Canadian approach, unlike the American or the French has been to adopt a multi-culturalist approach to claims for exemptions that has been described this way:

Anyone seeking to disregard the duty to accommodate must show that it is necessary, in order to achieve a legitimate and important objective, to apply the standard in its entirety, without the exceptions sought by the claimant.⁴⁴

Canada has not followed the restrictive approaches of France or the United States, but has charted a wide course of religiously public accommodation.⁴⁵

Establishing a series of propositions and proposals that will lead to greater understanding and respect of the various ways of being that are the fabric of a plural and multi-cultural, multi-ethnic culture such as Canada will strengthen the nation and the state; failure to do so will weaken it.

Central areas such as public school education and health care (the latter as referred to above) to name but two) must become more attuned to the spectrum of diversity that exists culturally so as to adapt policies in ways consistent with our profession of tolerance.⁴⁶ Examples of where nuanced and acceptable respect were put into practice would include the Master Agreement respecting Denominational Health Care in British Columbia from the mid

⁴⁴ Patrick Lenta “*Muslim Headscarves in the Workplace and Schools*”, The South African Law Journal Vol. 124 (2007) 296 – 319 at p. 307 citing José Woehrling , “L’obligation d’accommodement raisonnable et l’adaptation de la société à la diversité religieuse” (1998) 43 *McGill LJ* 325 particularly at 360. See, also, Sarah Wayland “Religious expression in public schools: Kirpans in Canada, hijab in France” (1997) 20 *Ethnic and Racial Studies* 545.

⁴⁵ Note should be taken of the linkage of “culture” and “religion” in the recent Constitutional Court of South Africa decision in *Mec for Education: Kwazulu-Natal v. Pillay* CCT 51/06, October 5, 2007 (the Durban Girls High School decision) in which Chief Justice Langa, giving the majority judgment, followed Canadian authorities throughout and determined that the wearing of a nose-stud by a young girl in breach of school uniform rules should have been accommodated by the school despite the practice being voluntary (i.e. not religiously required) and as much “cultural” as “religious.” This latter point was of significance in South Africa due to “culture” being an enumerated protection in that country’s Constitution as it is not in Canada’s.

⁴⁶ The complexity of religious accommodation in connection with health and medical ethics has been mentioned above in relation to new reproductive technologies (see footnote #33); it arises in many other areas as well (“licensing”, “blood transfusions”, “informed consent” “accommodation in relation to abortion” etc.). For general discussion of how ethics must be sensitive to religious viewpoints see the discussion of “male circumcision” in Margaret Somerville, *The Ethical Canary: Science, Society and the Human Spirit* (Toronto: Viking, 2000) at 211 – 219. Again, a topic of this sort, given the many divergent viewpoints involved, would benefit from the possibilities a Constitutional Forum would present

1990's where diversity of belief was recognized as relevant to decisions made about streamlining Provincial health care delivery.

Involving community religious officials in public education (as well as in private education) could go some way both to improving the quality and breadth of education generally (parental guidance in terms of an “opt-in” to such programs would obviate concerns about indoctrination against family wishes).

On the other hand, concerns about sectarian isolation and civil fragmentation could be addressed if, under the rubric of multi-culturalism, care was given to focus upon a core civics program that would satisfy the general social concerns about, in the most general sense, the core moral components of citizenship. Rather than dismissing such a goal as unrealistic, which would call the whole enterprise of shared citizenship into question, it would seem sensible to embark on just such a study in Canada today; “what are the core conceptions of citizenship that we believe should and can be taught to all citizens?” Making the moral (in the widest sense) principles clear will go a long way to help us establish a better sense of what are the bases of Canadian citizenship itself.

What are the Hypothetical Challenges to the Desired Outcome as set out in this Paper and the Long-term Implications of What has been Recommended?

I have already dealt with specific objections to some of the Recommendations above and with suggested responses to those. As a general matter though, it might be useful to set out some general categories of challenges that might be anticipated to our more inclusive approaches.

The challenges to development and implementation of the richer framework of inclusion will arise from some quarters as soon as it is known that time is being spent on the idea that “religion” has *any* relevance to public policy. It may be assumed that the following present a partial list of objections to the desired outcome of inclusion set out above:

- **Prejudice:** Anticipating and overcoming prejudice, from the religious and non-religious citizens and their groups, about the nature of the state (law, politics and public education to name key aspects) based upon earlier dualistic language and philosophical constructs (i.e. “secular *just means* ‘non-religious’”) or an incipient or active secularism/laïcism that wishes to see religion marginalized from any public effect;
- Anticipating and overcoming *anti-religious animus from those who believe religion is inherently destructive* and seek, therefore, to restrict its cultural relevance (“secularism” and its current forms);

- Anticipating and overcoming the **fear of “the other”** based upon lack of knowledge or partial knowledge of other belief systems;
- Concerns regarding **threats to cultural homogeneity**. These sorts of concerns often ride tandem with “group recognition,” namely that national identity requires the subordination of “group” or “individual” beliefs to the collective (state or cultural norms) in order to maintain national coherence (fear of fragmentation, loss of cultural identity etc. - a particular response often identified in the Taylor/Bouchard Commission work);
- Anticipating **inappropriate use of the “private/public” divide** which is important but can be used improperly: see references to the Toronto printer Scott Brockie and how the Ontario Human Rights Tribunal, until overturned by the Court on review, attempted to place a province-wide policy of “visibility advancement” as a trump against his religious beliefs. Here the tribunal also suggested that his religious beliefs/viewpoints must be limited only to the private sphere and had no public relevance; this, too, was overturned on appeal.⁴⁷
- **Anticipating a soft (or hard) relativism** that assumes there cannot be public articulations of “the good” or “goods” so as to develop shared programs or policies. This conviction rides alongside (but is inconsistent with) our national longing for “Charter values” which we believe to have foundational meaning for all citizens. This is because when those who seek to have shared “values” implicitly suggest these are necessarily shared, they do so (in view of the rejection of shared goods generally) in a way inconsistent with their major premise (that there are no shared goods). Without a foundation to give them a strong base in education and citizenship formation our longing for shared purposes in nation-building and sustaining will be weak. Involving religious groups (leaders and councils etc.) in this task is important but the language to do so must be aware both of what religions share and what they do not as well as that there are “belief systems” that do not share the convictions of religious adherents, have their own suspicions regarding involvement and their own rights to be respected.

⁴⁷ For a detailed review of this decision, see T. Peter Pound & Iain T. Benson, *Court Overturns Key Aspect of Human Rights Board of Inquiry Decision: Religious Freedom Respected, but Narrowly*, Lex View, No. 51 (2002), <http://www.culturalrenewal.ca/qry/page.taf?id=53>.

- In the health care or education area, anticipating challenges based on a **reductionist conceptions of “health” or “education” so as to avoid any moral or religious discussions.** We can anticipate that Canadians (who have spent so much time nationally discussing health-care policy) will resist any extension of such national discussion to the spiritual/moral/religious aspects of citizenship. This fear of metaphysics is as unfortunate as it is predictable. Policy makers ought to be attentive to a cultural need that flows from a real issue above, namely, that there be some attempt made to articulate what shared norms are for Canadian citizens. These would include as necessary but not sufficient, commitment to a certain “human rights culture” and constitutional awareness but must go beyond this to seek out principles of “civic virtue” that cannot be based upon law alone. One question to address would be whether a “national core curriculum” or set of “national guidelines” is possible in a plural society? The writer believes that the development of such a national civics expectations or guidelines is essential for Canada in the future (see next section). Consider that if it is possible to have a national health care concept - - “national standards of delivery” for example, why should it not be possible in relation to the wider “health” of the country? Where the wider conception of health is concerned (call it “civic health”) and where our teaching on “civic virtue,” is related to that, why would it not be possible to begin serious discussions about the core civics education currently present or lacking in Canada? The long-term health of a country is, after all, about a lot more than just its physical well-being.

Conclusion: Long-term implications of the promising new solutions for the policies discussed in this paper.

This paper has suggested that a new paradigm of “inclusion and respectful engagement” (using the language of “accommodation”) is the appropriate direction to go for public policy in the area of “religion within the State.” The search for a core curriculum in public, or state-funded or assisted private education, is one that must include religious communities and their leaders. The search for a core-curriculum for “civics” should include religions as it is from within religions that some of the most important conceptions (such as dignity of the human person) emerged and will be frequently maintained within religious communities.⁴⁸

⁴⁸ David Novak, *Covenantal Rights: A Study in Jewish Political Theory* (Princeton: Princeton University Press, 2000) shows, from a Jewish perspective, how “rights” and duties may be understood as emanating from the Jewish religious tradition; James E. Wood Jr. “A Apologia for Religious Human Rights” in John Witte Jr. and Johan van der Vyver eds. *Religious Human Rights in Global Perspective* (The Hague: Martinus Nijhoff, 1996) 455 – 483 traces central human rights concepts through the teachings of major religions including Hinduism, Buddhism, Christianity, Islam, Sikhism and Judaism.

Another example of the application of a new inclusive paradigm would be whether and how public services (such as the Canadian memorial after 9/11) might include reference to the Divine or “spiritual beliefs” or “prayers” so as to show that such metaphysical/theological categories are not pre-emptively ruled out of our common life in Canada as “untouchable” or irrelevant when they continue to be of such formative and sustaining relevance for Canadian citizens across a wide variety of religious faith commitments. This question is all the more pressing in Canada given the growing academic comment and criticism of the manner in which the Preamble to the Canadian Charter “whereas Canada is based upon principles that recognize the Supremacy of God and the Rule of Law” has been ignored since 1982.⁴⁹

Where civic fragmentation has been raised, as in the recent Ontario elections (2007), as a grounds for retrenching to “one size fits all” educational models, it is clear that a move to bridge the language and culture divides can only succeed with the involvement of those who do not believe their own belief constructs will be undercut by such a general program. At the same time, we ought not to accept the idea that education (public or private) can function without attention to core principles that must govern our common-lives as citizens. Because religious beliefs are foundational to many citizens it is important to consider how these beliefs may be included in public policy analysis and civic programs whether religious or not, “independent” or not. With governmental financial support a certain measure of compliance with “civic” measures of responsibility may rightly be demanded – but when such demands are placed upon denominational groups (for example) these requirements must be maximally respectful of diversity while they attempt the difficult task of seeking “core” conceptions requisite for shared citizenship.⁵⁰

Quite apart from the ethnic fragmentation question presented by separate schools, we also have, at the moment, widespread concerns about the “thin-ness” of contemporary education

⁴⁹ There has been a general tendency to view the Preamble as “a dead letter.” David Brown, *Freedom From or Freedom For?: Religion as a Case Study as Defining the Content of Charter Rights*, 33 U.B.C. L.Rev. 551, 558–63 (2000) at 562 (quoting *R v. Sharpe*, [1999] 22 C.R. (5th) 129 (B.C. S.C.)). Against this school of thought is the obvious fact that if the Preamble’s reference to the Supremacy of God is a “dead letter,” then, being conjunctive with “the rule of law”, one might ask whether that is also a dead letter? The courts have not viewed the “rule of law” statement as irrelevant; recent commentators who have made strong arguments for a deeper consideration of the meaning and importance of the Preamble include the following: Lorne Sossin, *The “Supremacy of God,” Human Dignity and the Charter of Rights and Freedoms*, 52 U.N.B. L.J. 227, 232 (2003); Jonathon W. Penney & Robert J. Danay, *The Embarrassing Preamble?: Understanding the Supremacy of God and the Charter*, 39(2) U.B.C. L. Rev. 287, 331 (2006).

⁵⁰ See: the “Illustrations of the Tao” Appendix to C.S. Lewis’ important study of education written years ago in England but still relevant today; *The Abolition of Man* (New York: MacMillan, 1943). That set of “core principles” or illustrations drew from a wide variety of world religions and ethical traditions and something like it (or work on the cardinal virtues of “justice”, “courage”, “wisdom” and “moderation”) needs to be reformulated today in preference to “values” models often identified as deficient.

itself. This is not new and a variety of books over the last half century in Canada have focussed upon the weak foundations of contemporary curricula. Strategies which seek to address the grounds for “civic virtue” by examining the “virtues” tradition in the West and asking whether distinctions within that (between “cardinal” and “theological” virtues) offer some guidance that could be of use in Canada; these will necessarily have to examine religious traditions. One noted commentator on education in Canada, writing some years ago, observed that what she called “the Revival of Civilization” would depend upon a “renewal of faith.” Hilda Neatby writes that:

Our western society, it is often said, is a product of Judaic morality, of Christian love, of Greek philosophy, of Roman law, of modern humanism. But we are increasingly an unconscious product of these things. In the excitement of the modern age and the pursuit of rationalism, democracy and materialism we have forgotten where we come from and what we believed in. Ours has become a rootless as well as a faithless society (326).

Of course, in following the argument of the first part of this paper it is clear that ours is anything but a “faithless society” as Dr. Neatby suggests; on the contrary, it is a society filled with all sorts of faiths. The problem is or might be that these newer faiths provide less satisfaction or different satisfactions than other contenders.⁵¹ The point is worth greater and sustained discussion.

Critiques of the insufficiency and corrosive nature of “values” language should be noted as that language is often used in Canada today by judges, politicians and educators. The seriousness of the problem is touched upon in a work that traces the origins of “values” language in Nietzsche’s thought. Professor Edward Andrew of the University of Toronto notes a fact that, in our current cultural malaise, ought to be widely known by those who think “values” improve culture or who speak easily about such things as so-called “*Charter values*”.

He writes: “...there has been only partial awareness [in the Western academy] that the language of values entails that nothing is intrinsically good and nobody is intrinsically worthy.”⁵² George Grant once said, in a Canadian Broadcasting Corporation interview, that

⁵¹ See, for example, Hilda Neatby, *So Little for the Mind: An Indictment of Canadian Education*, (Toronto: Clark, Irwin & Co., 1953) at 324 ff. It is important to note, in this area, the powerful cautions about the teaching of religion in public schools written by George Grant almost half a century ago: see “Religion and the State” in *Technology and Empire* (Toronto: Anansi, 1969) 43 – 60.

⁵² E.G. Andrew, *The Genealogy of Values* (Lanham: Rowman and Littlefield, 1995) at 170. For a fuller treatment of the problems with “values language” see: Iain T. Benson, *Notes Towards a (Re)Definition of the Secular*, 33 U.B.C. L. Rev., 520–38 (2000) at 531 – 533.

values language is “...an obscuring language for morality used when the idea of purpose has been destroyed...and that is why it is so wide-spread in North America.”⁵³

In sum, therefore, this paper has sought to show that a new paradigm for religion and public policy, religion and the State, is not only necessary but has already begun to be formed. The *Chamberlain* decision of the Supreme Court of Canada marks the beginning of a sea-change in law and politics at every level once the settled idea of the “secular” as “non-religious” has been turned on its head with religious inclusivity.

It is hoped that this set of reflections is of assistance in that most necessary re-formulation. I would like to conclude with a quotation from the Chief Rabbi of England - - Jonathan Sacks, that emphasizes the need for the language analysis and changes I have called for in this paper and sounds a warning should this not occur:

Crises happen when we attempt to meet the challenges of today with the concepts of yesterday. That is why nothing less than a paradigm shift may be needed to prevent a global age becoming the scene of intermittent but destructive wars....As systems of meaning and purpose the great world faiths have never been surpassed. As a substitute for politics, however, they are full of danger...”⁵⁴

⁵³ G. Grant, Transcript “The Moving Image of Eternity” *Ideas* (Toronto: CBC, 1986) producer David Cayley. See also, an important essay by Joseph F. Power, “Grant’s Critique of Values Language” in Larry Schmidt, ed. *George Grant in Process* (Toronto: Anansi, 1978) at 90 – 98.

⁵⁴ Rabbi Jonathan Sacks, *The Dignity of Difference: How to Avoid the Clash of Civilizations* (London: Continuum, 2002) 23.

Endnotes

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ⁱ There is a tendency to view "the State" as something that stands free and apart from the citizens and communities that make it up. I believe this can be a misleading characterization. In this paper I discuss the State as primarily composed of "law" and "politics" as the formal means of controlling the public realm. I suggest, however, that there is necessarily an integral relationship between the State and individual citizens and their communities and that it skews analysis of the inter-relationship to view it as something that it can, in fact, become: an isolation between the two levels or groupings. For the State (or public realm) to be "religiously inclusive" means that all aspects of it must be co-penetrated by the influences of the beliefs of religious citizens just as they are co-penetrated by the beliefs of non-religious citizens. It is this understanding that has been lost through the largely bi-furcative uses of "secular" and its correlates over the last few centuries.

The reference point of this paper, therefore, is holistic of State, Individual and Community but suggests that a plurality of viewpoints (on such matters as the nature of equality, the relations between men and women, what sorts of moral views are tolerable etc.) is both unavoidable and necessary in a free and democratic society which recognizes that diverse forms of life are part and parcel of contemporary existence and liberal constitutional government properly understood

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