

MA Master's Research Paper

PUBLIC FUNDING OF ONTARIO CATHOLIC SCHOOLS:
TO CAESAR WHAT IS CAESAR'S AND TO GOD WHAT IS GOD'S

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A Master's Research Paper submitted
in partial fulfillment of the requirements for the degree of
Master of Public Policy, Administration and Law

York University

Toronto, Ontario, Canada

21 July 2020

ABSTRACT

Section 93 of the *Constitution Act 1867*, the linchpin of the public funding of Catholic schools, conferred the right to public funding to Catholic schools (and Protestant schools) to protect religious minorities and to secure the Confederation. Since then, Catholic schools in Ontario have enjoyed this exclusive privilege despite the fact that Catholics are not a minority anymore and that Canada has evolved toward a secular, multicultural, and human rights based society.

Section 93 has perpetuated this discriminatory practice by a loophole that pits *Section 15* against *Section 93* of the constitution. Contrary to popular belief, the abrogation of *Section 93* can be accomplished through a straightforward legislative enactment, which has not been carried out due to a combination of political and societal factors, rather than legal and constitutional obstacles.

It is very difficult to expect that any politician in Ontario will advance a proposal to abrogate *Section 93* when a substantial part of Ontario's population still supports Catholic schools or their public funding; this is despite of polls showing that rejection for continued public funding is marginally superior to its support and despite the difference in academic performance between secular and Catholic schools being less than 7%. Therefore, the proposed "ecumenical" public schools herein may serve as a temporary compromise or as a first step to the complete secularization of Ontario's education system.

ACKNOWLEDGMENTS

I would first like to thank my supervisor, Dr. Sirvan Karimi, for his guidance; his solid knowledge of Constitutional Law and Political Science was instrumental in the success of this thesis. Dr. Karimi's willingness to answer all my questions and to graciously allow me to expand well beyond the thesis requirements are greatly appreciated.

I would also like to acknowledge, in no pre-established order, each of the following people who made key contributions to this thesis, resulting in its successful conclusion.

I would like to thank Dr. David Seljak whose timely answers and insights cleared the way for me every single time I hit a roadblock in my research.

Karen Holah, thank you for sharing your knowledge of Excel, especially the enormous help provided with the macros. Thank you, Lisa Hodgkinson, for putting up with all my comments, for providing me with contacts with whom I could consult, and for patiently answering all my questions about Catholicism and the Catholic Church. Peter Armstrong, thank you for allowing me to borrow your encyclopedic knowledge of Conservative Protestantism and the thoughtful conversations.

Dennis Colautti, thank you for generously committing your time to provide a meticulous proofreading as well as for the brainstorming.

Alec Blyth, Cynthia Doughty, Kiran Hammid, Jamie Matear, and Antoinette Sarpong: thank you for having taken the time to review part or the whole of my thesis, for your comments, and insights.

Liz Nash, your prompt and invaluable help providing me with all the statistical information I needed as well as your assistance navigating the StatsCan maze was impressive. A huge thank-you, Veronica Moreno, for so quickly providing me with all my annoying requests for references when I most needed them.

At last, my beloved M., never forget that all that I do, I do it thinking of you.

TABLE OF CONTENTS

1.0. INTRODUCTION	1
2.0. HISTORICAL EVOLUTION OF CATHOLIC SCHOOLS	3
2.1. <i>The beginnings, 1600 to 1650</i>	3
2.2. <i>1650 to 1800</i>	4
2.3. <i>1800 to 1840</i>	6
2.4. <i>1840 to 1867</i>	7
2.5. <i>1867</i>	12
2.6. <i>After 1867</i>	15
3.0. THE RELEVANCE OF THE CASES BILL 30 REFERENCE AND ADLER V. ONTARIO	20
3.1. <i>Bill 30</i>	21
3.2. <i>Adler</i>	22
3.2.1. Lower Court and Court of Appeal	23
3.2.2. Supreme Court	24
3.2.3. Discussion	27
4.0. AMENDMENT OF THE CONSTITUTION	30
4.1. <i>British Columbia</i>	30
4.2. <i>New Brunswick</i>	32
4.3. <i>Manitoba</i>	33
4.4. <i>Quebec</i>	36
4.5. <i>Newfoundland</i>	39
4.6. <i>Mechanism of change of the Constitution for Ontario</i>	40
4.6.1. Why the constitution must be changed	40
4.6.2. What must be changed in the constitution	45
4.6.3. How to carry out the change in the constitution	46
5.0. PUBLIC PERCEPTION OF CATHOLIC SCHOOLS AND THEIR PUBLIC FUNDING	48
5.1. <i>Polling</i>	50
5.2. <i>Perceived v. actual performance of Catholic schools</i>	53
5.2.1. Catholic Background	53
5.2.2. Academic Performance as informed by EQAO data	54
6.0. BUILDING POLITICAL SUBSTRATUM	63
6.1. <i>Catholic-Liberal marriage</i>	63
6.2. <i>Protestant Counterforce?</i>	68

6.3. MINORITIES	71
6.3.1. Muslims	71
6.3.2. Jews	73
6.3.3. The Rising Power of Secularism	74
6.4. Concluding Discussion	76
7.0. REFERENCES	81

TABLES

Table 1 – Polls 2017-2019 – Public funding of Catholic schools (%)	52
Table 2 – EQAO results for Grade 3, Toronto District Board and Toronto Catholic District Board – Period 2010 – 2019 (%).....	58
Table 3 – EQAO results for Grade 6, Toronto District Board and Toronto Catholic District Board – Period 2010 – 2019 (%).....	59
Table 3 – Attitudes (%) among non-Catholic Christians on public funding of Catholic schools, 2012-2015	70
Table 4 – Attitudes (%) of Ontarians on public funding of Catholic schools divided by religious group – 2011 projected to 2051	77

FIGURES

Figure 1. Percentage of Catholic and Protestant affiliation in Canada and Ontario between 1971 and 2011..	49
Figure 2. Trends in public attitudes toward public funding of Catholic schools..	52
Figure 3. Top: Percentage of schools in Toronto that have a percentage of Grade 3 students born in Canada. Bottom: Percentage of students whose first language learned at home was not English.	60
Figure 4. Top: Percentage of schools in Toronto that have a percentage of Grade 6 students born in Canada. Bottom: Percentage of students whose first language learned at home was not English.	61
Figure 5. Trend of Catholic support for Liberal party compared to that of the rest of Canadian voting population, 1968 – 2015.....	66
Figure 6. Trends of Evangelical Protestant and Mainline Protestant support for the Progressive Conservative party against the rest of Canada’s voting population, 1968 – 2015..	70
Figure 7. Trends of percentage growth of religious minorities in Ontario, period 1971 – 2011.....	72
Figure 8. Trend of growth of inhabitants unaffiliated to religions in Canada and Ontario, period 1921 - 2011.	74

APPENDICES

Appendix A - % of schools with % of grade 3/6 students attending school born in Canada – 2010 – 2019.
Appendix B - % of schools with % of grade 3/6 students attending school whose first language is English – 2010 – 2019.

1.0. INTRODUCTION

The public funding of Catholic schools has been a source of historical discord in Canadian society. It was born purely out of political reasons to secure the Confederation of Canadian provinces in 1867, by conferring exclusive funding to Catholic and Protestant schools. This discriminatory practice has been repeatedly contested at different levels of jurisprudence, nationally and internationally, by religious minorities seeking to expand public funding to sustain their own denominational schools. The Supreme Court of Canada (SCC) has invariably ruled against (e.g., *Adler, 1994 case*) by clarifying that, contrary to public perception, *Section 93* of the *BNA Act 1867*, the linchpin of the public funding of Catholic schools, cannot be treated as a Charter right because it is a special right conferred to Catholic and Protestants only; furthermore, the SCC ruling is reinforced by *Section 29* of the *Charter*. Therefore, it is not a freedom or right that can be impugned (and the SCC is not in position to derogate a Constitutional clause).

This thesis contends that *Section 93* is anachronistic and consequently discriminatory from a contemporary legal point of view. As a matter of fact, Catholicism in Ontario has ceased to be a minority and the province has evolved toward a secular, human rights-based society; therefore, the law must be interpreted in synchrony with the social frameworks of the time, according to the *Living Tree* legal doctrine fully embraced by the SCC and the mandate of state neutrality.

The Province of Ontario has been the main bastion of resistance of this exclusive privilege, enjoyed by the Catholic Church for more than 150 years. This thesis also contends that the successful and tenacious survival of this unfair privilege has been the

result of a combination of political and societal variables, not due to legal reasons. It will be demonstrated that the abrogation of s. 93 does not necessitate of a complicated constitutional amendment since it can be accomplished through legislative enactment.

Section 2 recounts the public funding of Catholic schools from historical perspective while Section 3 discusses judicial rulings on relevant legal cases. Section 4 discusses the process to abolish the public funding of Catholic schools: why it has to be changed, what has to be changed, and how it has to be changed. Section 5 argues that this modification of the Constitution has not been carried out due to the palpable influence of religion over politics. Religious attitudes pose a paradoxical sociological setup: the raise of secularism in Ontario has skyrocketed yet enrolment in Catholic schools has not plummeted. The main reason seems to be societal perceptions of better academic achievement and orderly functioning of Catholic schools. Aided by data from the Education Quality and Accountability Office, it is demonstrated that the public perception that Catholic schools perform academically better than secular schools is unfounded. Thus, Influenced by those societal perceptions, it will be very difficult for any politician to advance any proposal on the matter when a substantial part of Ontario's population supports Catholic schools (and its public funding); this in spite of polls showing that rejection for continued public funding is marginally superior to its support. Section 6 explores the complex interplay between political and religious inclinations and attitudes toward public funding of Catholic schools. Therefore, in addition to suggesting to work on some non-Catholic segments of the public to secure approval, this thesis advances a compromise with proposing "ecumenical" non-denominational, public

schools, either as a temporary measure or as a first step to complete secularization, as was the case of the Province of Quebec and Newfoundland.

2.0. HISTORICAL EVOLUTION OF CATHOLIC SCHOOLS

2.1. The beginnings, 1600 to 1650

One of the tenets of the Gallican French monarchy was that religion, specifically Catholicism, was not only a natural component of civil society but that it also had to be useful to it. This notion allowed the Catholic Church to sustain pervading influence in all aspects of French life and its French colonies during the XVII and XVIII centuries (Jaenen, 1984). As such, teaching, among other activities, fell under the Church's social responsibilities. It is not surprise then that the beginnings of education in post-contact Canada were intimately related to the activities of the Catholic Church in the colony. This is reflected in the wave of missionaries that arrived in New France in the early 1600s accompanying colonists and explorers. Although their main concern was the evangelization of natives, they provided rudimentary instruction essentially centered in catechism and complemented with few apprenticeship skills.

The first school was opened in 1620 by the Recollets for Native children (MET, 1994). Following Jaenen's (1984) account, the Recollets were succeeded by the Jesuits who arrived in 1625 and remained chief evangelizers in New France thereafter. The Jesuits opened the College des Jesuits in 1635, but the college did not provide elementary instruction until 1651. Around that time, in 1639 the Ursulines began teaching domestic skills to elite girls, which later broadened to all social strata; this effort was reinforced by

the opening of a girls school by the Sisters of the Congregation in 1657. Upon their arrival in Montreal in the same year, the Sulpicians opened a seminary in 1659; they also imparted rudimentary instruction and religion by means of small schools throughout Acadia until their expulsion in 1710. In 1663, Bishop Laval opened the Seminary of Foreign Missions in Quebec to train parish clergy and to further the evangelization among natives. The Charron Brothers in turn opened a school for orphans in Montreal in 1694 and continued apprenticeship teachings until 1745.

Protestants who arrived in the French colony throughout the XVII century were mainly of Huguenot faith (Jaenen, 1984), and although Protestants were not banned in general, unlike in Acadia, they nonetheless faced an open hostility from the Catholic Church.

2.2. 1650 to 1800

In the second half of the XVII century, a largely expanded French settlement and a less preponderant missionary role allowed a shift toward the education of white children through a network of small schools in the area (Magnuson, 1992). This development would continue until around 1760, as after the Seven Years War the number of schools would decrease throughout the XVIII century. The main reasons for these decrease appear to have been a concomitant reduction in clergy enrolment, given that the Jesuit, Recollet, and Sulpician orders were barred by the government to recruit new priests (Jaenen, 1984; Axelrod, 1997), as well as a diversion of government priorities to recovery from war.

At the end of the Seven Years War in 1763, the population of the Province of Quebec (renamed from New France) remained overwhelmingly Catholic French in spite of the

switch in power to British hands. This fact would come to the rescue of Catholicism, and consequently of Catholic education, in two prominent occasions, first at the *Royal Proclamation* in 1763 and second at the rendering of the *Durham Report* in 1839 (Lambton, 1839). In effect, the newly ruling Protestant British Crown in the Province of Quebec was forced to pass the *Quebec Act* in 1774 to backtrack on the assimilation terms of the *Royal Proclamation 1763* as a means to appease the French people and thereby to secure the continued flow of business in the province. The passing of the *Quebec Act 1774* conceded freedom of worshipping as well as the removal of reference to Protestant faith in the oath of allegiance in the province, among other prerogatives. This meant in practical terms that Catholics would not only be able to profess their faith but also to teach Catholic precepts in schools. These royalties were incorporated in the Upper Canada province created in 1791 from Lower Canada (renamed from the Province of Quebec). Note that no funding by the British Crown was part of the royalties given.

Poor schooling would seem to have continued well into XVIII century, as evidenced by the scathing account on education given by Lord Lambton (popularly known as Lord Durham) in his famous report to the British Crown in regards to the rebellions of 1837-1838 (Lambton, 1839). In it, Lambton explained that the colony suffered of a large ignorant population apathetic to better education, which where present was reserved for the elite and controlled solely by the Catholic Church; additionally, Protestant colleges were unavailable. It has been contended that many of Lambton's statements had apparently been fairly inaccurate if not biased; for example, his praise for the Catholic Church contradicted not only his comment on poor education, but also omitted the

educative work of many Protestant clergy at the time (Smith, 1928). Furthermore, Protestant schools had already been opened by the Anglican Church as well as by Methodist, Presbyterian, and Baptist orders in the beginning of the XVIII century (Putman, 1912). However, A. E. Talbot, a prominent citizen and a schoolmaster himself, lamented the utter ignorance of children and adults alike in a letter he wrote regarding education in Upper Canada in 1824 (Putman, 1912). Whatever the case, it appears that the real problem was not whether teaching existed but the quality of it; most schools were private and there was a large disparity of teaching quality between them.

2.3. 1800 to 1840

Regardless of the level of schooling achieved, it is clear that during the second half of the XVIII century there was genuine public concern for the provision of formal education for children (Di Mascio, 2010). Many schools were already operating before 1800, and by 1816 they exceeded two hundred in number (Putman, 1912), but because they were normally private, they were out of reach for most of the children in lower socioeconomical strata. The pressure for more accessible schooling continued to increase to the point that after failed attempts in 1804, 1805, and 1806, the government finally passed the *Grammar School Act* in 1807. This act partially subsidized one secondary school in each of the eight districts that constituted Upper Canada. It is worth noting that the act was not concerned with the quality or preparedness of the teachers, but only with the provision of education. Due to a generalized perception that this act served only the elite, the subsequent *Common School Act* passed in 1816 opened up public education for all socioeconomic strata by arranging the construction of a school in any town or village that requested it. The program, however, would not last long as the

government, reckoning it would not be able to satisfy the unprecedented demand for common schools, decided to terminate the program in 1820 (Di Mascio, 2010).

In 1823, the General Board of Education was established for Upper Canada that would direct all 'aided' schools. In the next two decades, basic education suffered from the economic impact of the War of 1812 and the consequent prioritizations taken by the government, given the top-down construction of the educational system in Upper Canada (Dupuis, 1952). Education mostly revolved around the creation of a higher education institution that could compete with those of the United States. After many government deliberations, the King's College, what would become the University of Toronto, was opened in 1827. These decades also saw concern and discontent regarding the increase of *de facto* educational control by the Anglican Church, which resulted in increasing calls for nondenominational education, if not for straight statization of education in Upper Canada. As a response to this Anglicanization of education, the Methodist order opened the Upper Canada Academy, open to all religions, in Cobourg in 1836. Schooling in Lower Canada evolved in a similar manner to that of Upper Canada, with the added tension from being under English rule (Axelrod, 1997); for example, the *Education Act 1801*, which intended to provide centralized, state-supported education, little served to the distrustful French population because the overseeing institution was Protestant (Boulianne, 1992).

2.4. 1840 to 1867

This period can be considered the true forging period of the public funding of Catholic schools. As shown below, *Section 93* of the *BNA 1867* that contains the provisions for education in Canada can be seen rather as a logical conclusion of a process that really

started with the *Union Act 1840*, continued with the *Taché Act 1855*, and finished with the *Scott Act 1863*.

The second pivotal moment for the assertion of the French Catholic Church in a dominant British Anglican environment came in 1837-1838, when the much more evolved social configuration in the colony encountered by Lord Lambton led him to find [sic] “*two nations warring in the bosom of a single state*” (Lambton, 1839; p.6). As per request of the British Crown, he created a report with suggestions for the improvement of the life and progress of both provinces. His most important suggestions were a) the fusion of both Upper and Lower Canada into a unified province which would be conducive to the assimilation of French people into an increasing British majority and b) the instauration of a responsible government. In particular, this would mean the rescission of the religious royalties previously gained by the Catholic French people. Lambton’s recommendations were fiercely condemned by the Catholic Church, while in other respects the report was not welcomed either by many others in the colonial territory (Smith, 1928).

In the end, the British Crown, taking quick action upon Lambton’s recommendations, created the United Province of Canada in the following year by passing the *Union Act* in 1840 (proclaimed in 1841). The British Crown, however, departed from Lambton’s recommendations and reaffirmed the existence of the Catholic Church in that act. In its *Section XLII, Ecclesiastical and Crown Rights, 14 G. 3, c. 83*, the act stated that any modification sought in regards to a) the dues and rights of the Catholic Church clergy; b) the exercise of any form of religious worship; and c) the dues, stipends, and monies of

any type of clerical authority, had to first pass the approval of the Parliament of the United Kingdom.

Given that any alteration to this clause would require approval of the British Parliament, in practice this meant a *de facto* protection of religious minorities by the British Crown in the colony. In truth, this clause was not new but a carry-over of *Section 42* of the *Constitution Act 1791*. The notable difference between both instances is that in 1791 the British Crown would have not dared to nullify the Catholic prerogatives; fifty years later, the British Crown could have done away with them but chose to do otherwise. As a consequence, a diminished Catholic Church in the colony not only survived for a second time but, interestingly, it also emerged with greater power. In effect, the clear assimilationist intention of the act provoked a nationalist response in the people of Lower Canada, who in turn saw in the Catholic Church a bastion of the preservation of the French identity and culture (GOQ, 2017).

Simultaneous with the proclamation of the *Union Act 1840*, the so-called *Day Act* was passed in September 1841. Among other important instructions, the act provided for a permanent fund to be used on common schools and ordered the appointment of a Superintendent of Education. In practice, the superintendent remained a figurehead that relied on two “assistant superintendents” (simply called superintendents), one for each part of the province, who were responsible for administering their respective education systems (Nelson, 1989). In 1843, the superintendent—who covered both provinces—would become replaced by the figure of a Chief Superintendent of Education for

Canada West (renamed from Upper Canada)¹. In addition, yielding to the strong pushes from the Roman Catholic bishops of Toronto, Kingston, and Quebec, the *Day Act* included the *Article XI* which allowed any number of inhabitants of a religious minority in any township or parish, to establish one or more Common schools and to receive proportional funding for it.

Thus, through *Article XI*, not only had religious minorities become protected by means of this subsequent act, but their education too had been placed on par with non-denominational education. This way, religious minority parents (Protestants and Catholics) could remove their children from common schools and establish their own schools—if requested by a minimum of ten family representatives—which would still be required to abide by the same condition and rules as the other common schools. These schools were going to be funded by the Government’s common school fund, proportional to the number of attendees. This decree would become the cornerstone for the existence and funding of Ontario Catholic schools up until today, since this ‘separation’ clause would continue until it morphed into the future *Section 93* of the *British North American Act 1867*.

Although the *Common Schools Act 1841* underwent later revisions, such as acts passed in 1843, 1846, and 1847, shepherded mostly by Egerton Ryerson, the most important gains by the Catholic Church came in revisions throughout the next decade. In 1850, a revision act offered the option to either charge extra school maintenance fees to parents or to cancel any charge and declare a school ‘free’; the second option was

¹ As a consequence of the revision act in 1843, both parts of the province developed their own school systems (Nelson, 1989).

adopted voluntarily over the years by most schools, so that virtually all schools were 'free' by the late 1870 (Ross, 1896).

Despite Ryerson believing in a free, public, and progressive education for all children, and despite his push in that direction as much as his position of Chief Superintendent allowed it, in an act of political compromise from the Government (Putman, 1912), the *Act 1850* brought Separate schools into existence: these schools would not need to subscribe to the public system and would become denominational. The Catholic Church also gained an improvement on funding, which would be allocated by average attendance instead of average enrolment; even so, supporters of Separate schools were still affected by taxation in support of common schools. With the foot already in the door, the passing of *1853 Act* notably enhanced Separate schools' funding: first, they would now share a prorated share of the common schools fund, same as public schools, and second, the monies would also be exempted from taxation. As if all these gains had not been enough, the final bargain would come in the next revision, the *Taché Act 1855*. Moved forward after heavy lobbying carried out by Catholic bishops of Canada West and won by the sheer number of Canada East votes² in Parliament (Putman, 1912), the *Taché Act 1855* allowed the establishment of Roman Catholic Separate schools anywhere it was petitioned by ten Roman Catholic taxpayers. It also provided Catholic schools with Separate School Board, its own Superintendent, exemption of municipal tax for schools, and prorated share of government common school fund. This act was deemed exclusively applicable to Canada West.

² Although the Durham Report recommended representation for Canada East and West based on their respective populations, the *Union Act 1840* gave both the same number of seats, despite their totally disproportional numbers at the time.

A decade later, the revision *Act 1863* was passed, aided again by the Canada East votes. Dubbed *Scott Act 1863*, this act brought the final push to complete the absolute separation of Separate schools from the public system by granting Roman Catholic school trustees total control in all respects of their schools, such as curricula, finances, governance, etc. Separate schools were also permitted to expand to rural areas but, later in 1899, Catholic families would become able to create Separate schools even though no public school may exist yet, thus as pointed by Stamp (1985) violating the principle of “separating from”.

2.5. 1867

By the late third of the century, the Separate school system had accomplished its detachment from the public system to become a completely parallel, autonomous school system. The logical next step for the Catholic Church would be securing its continuation in the long term. The opportunity came in 1867 with the passing of the *British North America Act 1867*. Its *Section 93* opens with the statement (*B.N.A.*

1867, p37):

“In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:”

This is both a recognition and an investing of each province with exclusive jurisdiction over education. This power is subjected to four conditions. The first two are (*B.N.A.*

1867, p37):

“(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union”.

“(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen’s Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen’s Protestant and Roman Catholic Subjects in Quebec”.

These two clauses which comprise the core of *Section 93* were a political compromise in order to secure confederation of the four provinces (Ontario, Quebec, New Brunswick, and Nova Scotia). By the time of the *Scott Act 1863*, advanced conversations about confederation were already being held. The new constitution contemplated the creation of two levels of government with separate jurisdictions, which would give the provinces exclusive control over education. Given that by then there was a visible Catholic minority in Canada West (to be renamed Ontario), the Archbishop of Toronto and Irish politician Thomas D’Arcy McGee began securing privileges for Catholic schools (McGowan, 2015). A visible minority of Protestants in Canada East (to be renamed Quebec) also existed; in a *quid pro quo*, if those privileges were to be protected then it had to be on both sides. This is reflected in the words of C. Tupper (1896; p.4):

“Without this guarantee for the rights of minorities being embodied in that new constitution, we should have been unable to obtain any Confederation whatever”.

Section 93 continues with another two clauses (*B.N.A. 1867*, p37):

“(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen’s Subjects in relation to Education”.

“(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section”.

The reason for the inclusion of these two clauses related to the issue of public schools in New Brunswick. As explained by Toner (1970), in 1864 Nova Scotia had suppressed all education that was of religious character and that was not instructed in English.

Concerned by the threat that a similar situation might have arisen in New Brunswick, the Archbishop of Halifax, Thomas Connolly, lobbied delegates of the London Conference 1866, seeking the extension of the Canadian system of separate schools to the Maritimes, such that Protestant taxpayers would support Protestant schools and Catholics would support theirs, through public taxation. He reasoned that this could be done only by giving the federal government control over education (Toner, 1970). While he encountered firm rejection from the delegates of Canada East, he obtained some protection for Catholic schools in New Brunswick through Galt’s amendment of s.93:

“...that but for the consent to the proposal of the Hon. Sir Alexander Galt, who represented especially the Protestants of the great province of Quebec on that occasion, but for the assent of that conference to the proposal of Sir Alexander Galt, that in the Confederation Act should be embodied a clause which would protect the rights of minorities, whether Catholic or Protestant in this country, there would have been no confederation” (C. Tupper, 1896; p.3).

Section 93 is very important because it departs from the content of other acts. Contrary to Acts 1840 to 1863, Section 93 conferred the status of constitutional rights to what had

been initially considered and granted as mere privileges. Putman (1912) pointed out that Separate schools were reluctantly granted as privileges or concessions solely born out of political compromises; they never meant to be seen as rights, notwithstanding that they empirically served the Separate schools as vantage-ground to attract more privileges and cement them as rights. This intent can be attested to as well throughout the many discourses of E. Ryerson as Chief Superintendent of Education.

2.6. After 1867

If the pre-confederation battle ground was the common schools, the post-confederation battle ground moved to the grammar schools. In 1871, Ryerson pushed for a revision act that renamed common schools as public schools while grammar schools were renamed as high schools (as well as collegiate institutes) bringing them fully under the public system. This meant that all taxpayers, regardless of their support of Separate schools, were now required to support high schools. Pre-confederation Grammar school profiles remained diffuse and the boundary between them and common schools was all too often not clearly delineated. This persisted after the passing of the *School Act 1871*, as it failed to provide a differentiation between both.

The pre-confederation common-grammar school system had already been teaching for years what was called the Fifth Book (or Fifth Book Classes or Fifth Form); this corresponded somewhat to Grades 9 and 10 of current education in Ontario (Stamp 1985). With the passing of the *School Act 1899*, Separate schools gained the right to operate as high schools—to be called “continuation classes”—in the absence of high schools in a municipality. By 1908, a new act divided continuation classes into Fifth Book classes and Continuation schools (Ontario’s current Grade 12) where no high

school was available. The Government always regarded Separate school lessons as primary level, despite that they taught up to Grades 9 and 10 under the hospice of Separate common schools; therefore, Government's funds for the Separate schools were given at the primary rather than secondary rate. The fact that the Province of Quebec had extended public funding to Protestant high schools prompted the Catholic Church in Ontario to demand funding for continuation classes. After unsuccessfully lobbying the Government, the Catholic Church took legal course with *Tiny v. King, 1925* climbing all the judicial echelons. In 1928, the Judicial Committee of the Privy Council (JCPC) decided that Separate schools could claim Government funds for Grades 9 and 10 only, in accord with the privileges conferred by the *BNA 1867*; Separate schools could not claim funds for Grades 11 or higher because they did not have constitutional rights to support the claim.

A former act that had been passed in 1886 and amended in 1913 had permitted tenants not only to destine their property rental taxes to support Separate schools, but it also allowed business corporations to destine a share of their municipal taxes to support Separate schools, which would be proportional to the percentage of Catholic shareholders (Stamp, 1985). The Catholic Taxpayer Association pushed enough to make this contribution mandatory so that in 1936 it was approved via the *Tax Assessment Act*. Riddled with the legal and accounting issues incurred by corporations, the bill was repealed the next year, but provided provincial grants remained: Ontario's Separate schools received an average of ¢7.3 per day per student, as compared with ¢5.6 for public schools (Stamp, 1985).

In 1962, the Catholic Church petitioned again for more corporate taxes as well as provincial funding for all high school grades. Although the Conservative government with W. Davis as Minister of Education did not acquiesce to those specific demands, *in lieu* it moved forward the Tax Foundation Plan in 1964, which ramped up provincial grants. Throughout the late sixties and early seventies, government rebuffs were overcome by more lobbying from the Catholic Church, resulting in an increase in the weights of provincial grants for Grades 9 and 10 from 1.10 in 1978 to 1.23 in 1985, thus bridging the gap with high schools from 22% to 10% (Stamp, 1985).

The beginning of the 1980s was marked by enactment of the *Canadian Charter of Rights and Freedoms 1982* under the Liberal government of P. Trudeau. In what was an open contradiction to the *leitmotiv* of the *Charter*, the authors of the *Charter* included a section (s.29) that constitutionally shielded the preferential treatments received by Catholic (and Protestant) schools by virtue of s.93 of the *BNA 1867*. *Section 29* reads “*nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools*”. It is not clear whether the authors included this clause to circumvent any liability in regards to the long controversy of funding for denominational schools; Van Dyck (2000) suggested that the authors may have decided to include the clause to avoid responsibility on challenging the *Constitution Act 1867*. Whatever the case may be, the Special Joint Committee in charge of drafting the *Charter of Rights and Freedoms* seems to have yielded to the strong pressures from denominational groups, in particular of Catholic groups such as the Conference of Catholic Bishops of Ontario and the Canadian Catholic School Trustees Association, who worried that other

sections of the *Charter*, in particular *Sections 2 and 15*, would trump *Section 93* (Dodek, 2018). It is important to note that the Catholic Church and denominational groups were quite aware of the inequality of rights that *Section 93* created. For example, Mr. P. Hammel, President of the Canadian Catholic School Trustees Association, lamented on the endangerment of *Section 93* were it be confronted with *Section 25* (s.25 as of 1980-81 draft; current s.52(1) – *Supremacy clause*) in future judicial interpretations and judgements because of the patent inconsistencies of s.93 with other sections of the Charter (Kodek, 2018; p.377). Mr. Hammel was implicitly alluding that s.93 would clearly have no effect as dictated by s.52(1) because of its inconsistency with s.15 and any other sections. Thus, denominational groups sought expressed reassurance from the Special Joint Committee in securing the perpetuation of *Section 93* by adding a clause, which in the end became *Section 29*.

The inclusion of constitutional rights in the *Constitution Act 1982*, which had not been granted in the *Constitution Act 1867*, opened the possibility for citizens to claim equality of rights in regards to denominational schools. The first movement in that direction came in 1987. Retiring Conservative Premier W. Davis had announced in 1984 the Government's intention to complete funding to senior grades of Catholic schools progressively, starting with Grade 11 in 1985 and finishing with Grade 13 in 1987. This initiative rapidly created turmoil in the public school system, and the Government responded by referring to the Courts the question whether the introduction of *Bill 30 - An Act to Amend the Education Act* was constitutional. The Supreme Court (SCC) answered in the positive: it acknowledged the existence of religious discrimination, but also acknowledged that the constitution protected it. Although the reference question

was finally upheld in 1987, the yearned funding for Separate schools would not be fully achieved until 1997 with the introduction of *Bill 160* (McCowan, 2015).

Five years later, Sussy Adler and other citizens reasoned that it was not only unfair but also unconstitutional that some denominational schools were funded whereas others were not. They argued that Bill 160 was in violation of ss. 2 and 15(1) of the *Charter*, and took it to the Courts (*Adler v. Ontario, 1992; Appeal, 1994; SCC, 1996*). The SCC answered in the negative; in short, they responded that the Government's unbalanced funding was not incompatible with the equality of rights given that s.29 exempted s.93 from any challenge. Probably finding it pointless to petition the SCC given its ruling on *Bill 30*, Arieh Waldman resorted to making his case before the United Nations Human Rights Committee directly. In *Waldman v. Canada (1996-) 1999*, he argued that current legislation on denominational schools made parents of Jewish private schools fall into financial hardship, thus violating *Articles 2, 17, 18, and 26* of the *International Covenant on Civil and Political Rights*. Predictably, the UN-HRC readily acknowledged the evident violation of *Article 26* of the *Covenant*. The decisions of the SCC in this case and in *Bill 30* as well as the arguments they posed to support their decisions are of utter significance for the denominational schools and thereby they are commented in more detail in Section 3.0.

At the end of 1997, the Conservative Government of Ontario shook the foundations of the public educational system by proposing *Bill 160*, known as *Education Quality Improvement Act*. The act called for a radical change to the public education system of Ontario. Among the many measures proposed, it intended to transfer funding control from local school trustees to the Provincial Government, to cut budgets drastically,

override both collective agreements and right to strike, seize principals' authority and teachers' working conditions, and to allow non-certified instructors to teach some programs, which some contended essentially would result in schools being run like private companies (Anderson and Ben Jaafar, 2003; OSSTF-Toronto, 2017). The terms of the act were considered so draconian for public education workers that 126,000 teachers, including principals and vice principals, went on a strike closing more than 5,000 schools in Ontario for ten days (OSSTF, 2017; OSSTF-Toronto, 2017). In the end, even though education workers were able to substantially dilute the final version of *Bill 160* (OSSTF, 2017), they were not able to stop the bill. The act retained the transfer of absolute control of educational funds to the Provincial Government, resulting in a huge loss for communities and boards. Conversely, for Separate schools *Bill 160* became a blessing. They had finally achieved the funding equality they had sought for so long. From 1997 until the present, funds for education are raised through government money complemented by both personal and commercial property tax revenues; these are then accumulated in one common pool of money by the Provincial Government, and in turn redistributed using a funding formula to the four variants of schools in Ontario: English and French, public and Catholic boards.

3.0. THE RELEVANCE OF THE CASES BILL 30 REFERENCE AND ADLER V. ONTARIO

Both *Bill 30* and the *Adler* case have been paramount in the modern jurisprudence on the intersection between education and religion, in particular on how s.93 of the *Constitution Act 1867* and s.29 of the *Constitution Act 1982* are interpreted by the

courts. Despite this importance, as noted by Berger (2019), *Adler* has remained relegated to boutique significance in legal circles. The following paragraphs revisit the relevance of *Bill 30* and *Adler* to the funding of Catholic schools.

3.1. Bill 30

Bill 30 Reference question was first heard by the Court of Appeal. The Majority (Zuber, Cory, Tarnopolsky JJ.) straightforwardly acknowledged that s.93 conflicts with equality of rights (s. 15), while s. 29 of the *Charter* impedes its abrogation. The trial judge commented:

“.....these educational rights, granted specifically to the Protestants in Quebec and the Roman Catholics in Ontario, make it impossible to treat all Canadians equally. The country was founded upon the recognition of special or unequal educational rights for specific religious groups in Ontario and Quebec. The incorporation of the Charter into the Constitution Act 1982 does not change the original Confederation bargain. A specific constitutional amendment would be required to accomplish that. Section 29 of the Charter makes it clear that the minority education rights (and essential condition of the Confederation) are not abrogated by ss. 2(a) or 15” (Bill 30, 1986; p.86).

As if the Majority’s opinion that s.93 violates s. 15 of the *Charter* were not completely clear, Howland and Robins JJ., opining as the minority, left no room for doubt with their response:

“Bill 30 is inconsistent with s. 15(1) of the Charter If this right is to mean anything, it must mean at least that the followers of one religion are not to be the beneficiaries of greater benefits provided by law than the followers of other religions. Bill 30 provides benefits on the basis of religion to one religious group only and is therefore in direct conflict with this right. Nor has Bill 30 been justified as a reasonable limit under s. 1 of the Charter. Although one can sympathize with Roman Catholic parents who must pay both public school taxes and denominational school fees, the same holds true for members of other

religions who send their children to religious schools. Ontario today is a multicultural and pluralistic society composed of people of many diverse social, ethnic, racial and religious backgrounds. Religion is a dominant feature of their multicultural heritage and, by the very terms of s. 27 of the Charter, the multicultural heritage of Canadians is to be preserved and enhanced. Therefore, Bill 30 is unconstitutional and would be of no force or effect if enacted” (Bill 30, 1986; p.5). (A very similar discourse of great eloquence is found in page 59 of the case document).

In the end, *Bill 30* was found to be constitutional by the Majority and the case was appealed before the SCC. Wilson J. speaking for the SCC majority (Dickson, McIntyre, Wilson, and La Forest JJ.), admitted very discretely the inequality of rights created by s.93 by asserting that Catholic schools were the subject of a special treatment guaranteed by the constitution. However, he added that despite being at odds with the Charter’s concept of equality, it was not impaired by it because the Charter was not intended to repeal other constitutional provisions (*Bill 30, 1987; p.1197*).

Estey J. in turn was much more direct in his assertion:

“.....It is axiomatic (and many counsel before this Court conceded the point) that if the Charter has any application to Bill 30, this Bill would be found discriminatory and in violation of s. 2(a) and s. 15 of the Charter of Rights.....” (Bill 30, 1987; p.1206).

3.2. Adler

Adler and others sued the Government of Canada in 1996 claiming that funding Catholic schools but not Jewish schools violated ss. 2 and 15 of the *Charter* because a) the Province of Ontario had a duty to fund independent denominational schools in order to guarantee freedom of religion under *Section 2(a)*; and b) by simultaneously funding

Public and Catholic schools while denying funding to independent denominational schools amounted to discrimination of the latter on the basis of religion under s.15(1).

3.2.1. Lower Court and Court of Appeal

Anderson J. of the Ontario Court of Justice based his reasoning on the SCC decision on *Bill 30 Reference question*. He held that the appellants' rights had been infringed under ss. 2(a) and 15 because s.21 of the *Education Act* made school attendance mandatory, consequently forcing the appellants to spend for private religious school. Yet he justified this infringement by concluding that it was “*within permissible limits*” under s. 1, for the benefits of the legislation were proportionate to its adverse effects on the appellants. He also opined that the funding of Roman Catholic separate schools in Ontario was a “*constitutional anomaly*” perceived as social inequality that should be fixed (*Adler v. Ontario, 1992*). Anderson J.'s reasoning means that funding of Catholic schools must be left aside because is constitutionally protected, and yes, there is inequality with respect to other religious schools, but it is a necessary evil prescribed by s. 1.

Dubin J. of Ontario Court of Appeal, speaking for the Majority, upheld Anderson's ruling but not for the same reasons. He stated that Anderson J. had erred and no rights had been violated. The 'inaction' of the government by not funding private religious schools was actually the proper 'action', since it complied with the constitution (s.93 of *Act 1867* and s.29 of the *Act 1982*) (*Adler v. Ontario, 1994*). Dubin's ruling is straightforward: this is what the law says and it has to be complied with. Indeed, for him, there is no room for further discussion on the matter because it is not up to the courts to debate policy but only to assess constitutionality:

“it is important to stress that it is not the role of the court to determine whether, as a matter of policy, public funding of private, religious-based independent schools is or is not desirable. That is for the legislature to decide. The sole issue before us is whether the absence of such funding is consistent with the Constitution of Canada” (Adler v. Ontario, 1994, p11).

3.2.2. Supreme Court

The SCC rejected the claim by almost unanimous vote. L'Heureux-Dubé J. dissented on both questions while McLachlin J. dissented partly on the first question and fully on the second. The SCC rejected the s.2 claim by asserting that any educational funding had to ascribe to s.93. Furthermore, s.93 obligates the Province of Ontario to fund Catholic schools. Because this is a constitutional imposition that is protected by the *Charter*, it cannot then be submitted to scrutiny. The SCC reasoned similarly for s.15; the ‘inaction’ of the Provincial government was actually an action imposed by s.93 which was in turn shielded by the *Charter’s* s.29.

Iacobucci, Lamer, La Forest, Gonthier, and Cory Justices reasoned in the same vein of Dubin J., that is, s.93 is, regardless whether fair or unfair, “*immune*” of *Charter* review” or protected “*against constitutional or Charter attack*”; therefore, there is no matter left to discuss. Although, in itself this argument uses a trivial logic, what it is not trivial is the following comment that they used to support the former. Iacobucci J., speaking for the Majority, stated that “.....*One part of the Constitution cannot be used to interfere with the rights protected by a different part of that same document*” (Adler, 1996; p.612). This is probably the first time in Canadian legal history in which one part of the constitution is pitted against another part of it. There is an inequality of rights mandated by s.93 of Act

1867 that conflicts with s. 15 of the Act 1982, but simultaneously the same Act 1982 has a clause (s.29) that protects this inequality, thus contravening s. 15.

In any case, in *Adler*, the SCC judges limited themselves to cryptically assert that one section cannot challenge another section of the constitution, in some sort of *prima facie* constitutional principle. This is actually a carry-over from *Bill 30*, where the Court of Appeal held that a part of the constitution cannot be paramount over another. The Court of Appeal conveniently did not trouble itself in advancing any justification on why this legal incongruence is possible if acceptable at all, nor did they provide comments on what has to be done to deal with this type of situation in the future. This type of omission may be acceptable in a mid-ranked court, but not so for the SCC. The SCC clearly missed not only an opportunity but its duty by not offering a clarification on such an important matter.

Sopinka and Major JJ. opining as the minority coincided with the SCC majority in that there was not infringement of rights, but their reasoning was different:

“no government action compelled the appellants to send their children to private, religious-based independent schools. They were free to send their children to secular public schools maintained at public expense. Their decision not to do so was solely a response to their religious beliefs and not a result of any government action” (Adler, 1996; p.614).

In other words, there is a public-school system available to everyone, and it is a personal choice when one chooses not to use it and fund a private school instead. This is a valid argument as long as the privileges of s.93 are kept out of the argument. And that is precisely where the logic of Sopinka and Major JJ. loses consistency because they take into account the disequilibrating effect of s.93 implicit in their reasoning, yet

conveniently omit it as if it were not needed nor relevant in the discussion. If the same manner of thinking were to be applied to Catholic supporters and schools under a hypothetical subtraction of the privileges stated by s.93, it is likely that Catholic supporters would endure the same burden (i.e., that of Jewish schools) of having to choose between funding their own private school or “dilute their belief” in the public system. Now, when the privileges of s.93 are given back to Catholics, one or more religious groups are left disadvantaged. An example of this ambiguous, simultaneous omission and tacit presence of the s.93 privileges is found in a comment of Sopinka and Major JJ. They distinguish between public, funded institutions and private, non-funded institutions, and point out that no religion is given preferential treatment within the system (*Adler, 1996; p.615*).

Thus, Sopinka and Major JJ. conveniently omit that Catholic schools are part of the public system, when the reality is that strictly speaking Catholic schools should belong to the private system. Having them within the public system creates a sort of Frankenstein public system. Both justices also hint at a fix of s.93 when they state “*nothing in s.93(3) restricts extending funding to others*” (*Adler, 1996; p.613*). This comment is in line with one of the popular solutions to the funding of Catholic schools controversy, which is to give the benefits to all denominational schools (as opposed to the alternative of not giving benefits to anyone). Although this is not the solution proposed in this thesis, it maintains current constitutionality of s.93, while fixing the violation of s.15.

The same type of lack of concern and trivialization of s.93 privileges seen in other judges’ comments can be found in McLachlin J.’s comment. She correctly asserts that

“freedom of religion does not entitle one to state support for one’s religion” (Adler, 1996; p.616), but when this premise is used to impugn Catholic school privileges, s.29 is immediately invoked as though this shielding suffices to morally fix the extant inequality. After all, in a logic difficult to follow, she thinks s.1 saves the implicated inequality for the advancement of a “more tolerant harmonious multicultural society” (Adler, 1996; p.719). In their dissenting opinion, Howland and Robins JJ. of the Court of Appeal interestingly refer to a multicultural society in arguing that *Bill 30* is unconstitutional.

L'Heureux-Dubé J.'s comment is probably the most grounded of all comments provided by the SCC in *Adler*. She was of the opinion that the *Education Act* funding scheme infringed *prima facie* on rights of equal benefits under s.15, in particular by following a similar line of thought used by Howland and Robins JJ. of the Court of Appeal on *Bill 30*, in which the financial hardship imposed on the appellants threatens the preservation of the multicultural heritage of Canadians (s.27).

3.2.3. Discussion

The paragraphs above have shown three main elements: a) s.93 clearly brings an inequality of rights, since a religious group receives some benefits that other religious groups do not receive, whether by political compromise or another biased reason; b) The courts insist on promoting a perceptual normalization of this inequality; c) as a corollary of this normalization, in *Adler's* ruling (supported by *Bill 30's* ruling, used by all judges in *Adler* for their reasonings) the judicial system has by *de facto* shut down any legal way to remedy the inequality of rights, and it must therefore be done through political recourse. A recent claim filed by Reva Landau in 2012 was dismissed by the Ontario Superior Court of Justice for different reasons, particularly her lack of any direct

connection to, or impact from, the claim. This might also be the reason why Waldman (Waldman v. Canada, 1996-1999), knowing that his claim was already doomed in the Canadian justice system, filed a claim directly to the UN-HRC.

The general reasoning of the majority of judges reveals a disquieting feeling of resignation: from Anderson calling s.93 “*a historical compromise*” and “*constitutional anomaly*”, to Iacobucci’s “*historical compromise crucial to Confederation*” and “*a child born out of historical exigency*” to McLachlin J.’s invoking s. 1 to justify that this inequality is necessary for, paradoxically, the promotion of “*a more tolerant harmonious multicultural society*”. The message is that s.93 and its protection with s.29 should be accepted submissively. Laskin J., already retired (he represented Adler in his appeal), also conveys this sentiment of abdication when he commented in 2004, “*Appellate judges feel a duty to the law as well as a duty to justice. And we will do our utmost to satisfy both wherever possible. But the truth is, few cases demand that we reach a legal result that seems unjust*” (Laskin, 2004).

One cannot help then but wonder why instead of pointing to the obvious societal unfairness derived from the current constitutional entanglement and advise legislative correction, the SCC contents itself with reminding that a) s.29 protects this unfairness; and b) the Provincial government has exclusive power on education but that this cannot overreach the bounds of s.93. The answer is simple: the SCC cannot do more than this. It cannot assess the fairness of public funding to Catholic schools; it can only assess its constitutionality, as aptly pointed out by Dubin J in *Adler*. This argument may be the only way to explain the stoic attitude of the judiciary before the repeated admonishment of the UN-HRC for violating the *Covenant*. In 1999, the Committee stated that “*the fact*

that a distinction is enshrined in the Constitution does not render it reasonable and objective" (*Waldman v. Canada*, 1999, Par. 10.4). The Committee repeated its concern in 2005 by observing that Canada had failed to "*adopt steps in order to eliminate discrimination on the basis of religion in the funding of schools in Ontario*" (HRC, 2005; p.38). The judiciary's silence was broken only by the Ontario Superior Court in *Landau v. Ontario* 2013, when Corbett J. observed that:

"The United Nations jurisprudence may be of persuasive authority in Canadian courts, but it cannot be used to amend or repeal constitutional provisions. Rather, it is a signal from the United Nations that s. 93 of the Canadian constitution offends international human rights norms. Solving that problem, if it is thought to be a problem, is a matter of political action: constitutional amendment, as was done in Quebec and Newfoundland" (*Landau v. Ontario* 2013, section 34).

Notwithstanding the judiciary's constraint, among all the judges involved in *Bill 30* and for *Adler*, the SCC could have clearly done better by more strongly signalling a need to correct said injustice/unfairness by way of constitutional change. Only Anderson J. and Dubin J. advanced observations on the matter, as well as Corbett J. in *Landau*.

Anderson J. feebly exhorted the Parliament and provincial legislatures by reminding them not only of their authority and responsibility in education, but that they are also responsible for upholding the Charter rights. As such, he asserted that:

"Legislative action in the important and complex field of education is much to be preferred to judicial intervention" (*Adler v. Ontario*, 1992; p26).

In contrast, Dubin J. and Corbett J. were more direct. While the Former asserted that "*it is important to stress that it is not the role of the court to determine whether, as a matter of policy, public funding of private, religious-based independent schools is or is not desirable. That*

is for the legislature to decide.” (Adler v. Ontario, 1994, p11); the latter stated that “amending or repealing constitutional provisions was a matter of political action” (Landau v. Ontario 2013, s.34).

4.0. AMENDMENT OF THE CONSTITUTION

The preceding sections have introduced the history of the funding of Catholic schools and the legal framework in which it is sustained. From the arguments of the judiciary presented in Section 3.0, it follows that to rectify the unfairness derived from the public funding of Catholic schools, the constitution must be modified and this can be accomplished only by legislative recourse. In this section, first the mechanisms some provinces put in place to modify their funding of Catholic schools are succinctly revisited. This is followed by a discussion of the mechanism needed to change the constitution for the abrogation of s.93 in Ontario.

4.1. British Columbia

The first schools in the non-Indigenous settlements of the late 1840s were Anglican for the wealthier employees of the Hudson Bay Company, and Catholic for their servants and the working class. The Hudson Bay Company did not exempt them from taxation, at least for Catholic schools (Down, 1983). Demography in the colony changed explosively with the Fraser River Gold Rush of 1858 followed by the Caribou Gold Rush. The large influx of immigrants, especially of Americans either attracted by the gold rush or escaping the U.S. Civil War, increased the demand for schools and seemed to have been the driving force for keeping religion out of schools. The reasons are varied: not

only the migrating population was remarkably heterogeneous in nationality and language (Barman, 2020), but most importantly many Americans had come from gold-rush California, where free, publicly supported schooling was already well established (Hendrick, 2000). In addition, newcomers from Ontario and the Maritimes mostly belonged to Non-Conformist and Evangelical Protestantism, which had long advocated for more state intervention in education (Barman, 2003). In fact, Methodist John Jesop spearheaded the non-sectarian common school system in British Columbia, inspired by Ryerson's work in Ontario (Johnson, 1971).

Almost-free, strictly non-denominational common schools became so popular in 1864, that one year later popular pressure forced the government to pass the *Common Schools Act 1865*, which established a system of free, tax-supported, non-religious public schools (McNally, 1999). This act was later repealed by the *Common School Ordinance 1869*, which somewhat slightly relaxed—yet maintained--the non-sectarian character of schools with the allowance of clergy visits before and after school hours and the allowance to “*impart such religious instruction as he may think proper to the children of his denomination*”. Thus, it is safe to say that British Columbia entered confederation in 1871 with a non-denominational school system; in fact, the *British Columbia Act* does not make any reference at all to education or schools, other than an implicit allusion in s.10, which asserted that the provisions of the *BNA 1867* would only apply to British Columbia in the same way they were applied to the other Provinces of the Dominion. Therefore, by default, s.93 of the *BNA Act 1867* was rendered ineffectual. To completely eradicate religion from the province's schools, which was still permitted under the *Schools Act 1869*, and in keeping the spirit of the *School Act 1865* (Barman,

2003), the government passed the *Public School Act of 1872*, which in the section *General Provisions* states that “*All Public Schools established under the provisions of this Act, shall be conducted upon strictly non-sectarian principles. The highest morality shall be inculcated, but no religious dogmas or creed shall be taught. All Judges, Clergymen, Members of the Legislature, and others interested in education, shall be school visitors*”.

The school system in the province remained immovably non-denominational until 1978 despite the repeated complains of both Anglican and Catholic Churches. The change in government position appears to have been influenced by the influx of conservative Christian immigrants after WWII, especially Dutch Calvinists and Evangelicals (McNally, 1999).

4.2. New Brunswick

Education in New Brunswick had remained largely neglected, limited to a handful of parochial schools until the beginning of the XIX century, when the colonial government began contributing to education. A feeble provincial Board of Education created in 1847 would begin to effectively govern all schools only a decade later under the *Parish Schools Act 1858*. This nominal one-school system would continue until 1871, with the entrance of New Brunswick to the confederation, despite the fact that in practice they were mostly denominational church-governed schools to which the government limited itself to help with funding. To eliminate the informal system of parish schools and its poor performance, the government passed the *Common Schools Act 1871*. This act stripped all schools of their denominational status, except for some Bible readings and morning Lords’s prayers, and removed all public subsidies.

A predictable legal challenge did not take long; in *Maher v Town Council of Portland, 1874* (and a similar variant of it but related to taxation in *Ex Parte Renaud, 1873*) the question at heart was whether the s.93 rights of denominational schools had been transgressed with the new act. The challenge was rejected at all judicial levels, including the JCPC. All denied any violation arguing that the act affected common schools only; it did not affect denominational schools before and at the time of confederation because these were voluntary undertakings that did not enjoy legal status. J. A. Macdonald, acting as Minister of Justice at the time, explained that the *1871 Act* in question related to common schools. It did not make reference to separate and denominational schools, for which he could not find a statute that would give them legal status. (Sessional papers 63, 1891; p.58).

4.3. Manitoba

The abrogation of Catholic school funding privileges in Manitoba unfolded in a span of six years, between 1890 and 1896. This period of time was characterized not only by tensions between the SCC and the JCPC, but also by a ferocious lobbying from the Catholic Church, who fustigated a federal government for being more prone to diffuse and delay than to face its constitutional responsibility. The government's strategy translated into a war of attrition lost by the Catholic Church. When Manitoba became a province of Canada in 1870, s.22 of the *Manitoba Act* emulated s.93 of the *BNA 1867* by guaranteeing the continuity of privileges to denominational schools as well as remedial action from the federal government in case of violation. The following account largely based on Bélanger (2000) gives a quick view of the unfolding of the process.

A consequence of the McCarthy's national immigration policy directed to the West in the 1880s (Verrette, 2018) was the drastic decrease in francophone population in Manitoba, which by 1890 had plummeted to a 7% while the Catholic population counted 13% (Bale, 1985). In March of the same year, three bills were introduced by the Manitoba Legislature. First, French language lost its official status. The federal government refused to disallow it, arguing it was a decision of the Courts. Second, the bills "*An Act Respecting Public Schools*" and "*An Act respecting the Department of Education*" were passed; days later they received royal assent. With the latter bills, Catholic schools had been removed from the public educational system, including all funding granted up to that point. Archbishop Taché immediately requested both the federal government and the Governor General to disallow both bills.

The Manitoba legislature also passed a law in September, 1891, which conveniently or not, gave all disputes on education matters to the judiciary. Thus, in October, the SCC ruled the *Manitoba Schools Act* unconstitutional, reversing previous decisions from both the Manitoba's lower court judge and its upholding by the Court of Queen's Bench. The JCPC in turn reversed the SCC decision declaring the *Manitoba Schools Act* constitutional.

In 1893, the federal government asked the SCC six questions, known as the *Brophy case*. One of the questions was whether rights had been affected by the act and whether the federal government had the power to take remedial action. The SCC sided on previous rulings from the JCPC on related cases (*Barrett v. Winnipeg* and *Logan v. Winnipeg*), answering that no constitutional rights had been prejudicially affected by the *Manitoba School Act* on existing rights at the time of Union. Again, the case was

appealed to the JCPC. Meanwhile, the revision act *An Act to Amend the Public Schools* was passed in 1894, prompting the episcopacy to request the disallowance of all schools acts by the federal government, who in an evasive manner responded that it hoped the Manitoba government would take their complaints into consideration. The Manitoba government in turn replied that the public schools were non-sectarian.

The JCPC decision on the *Brophy case* came in January, 1895, reversing the SCC ruling and stating that rights established by law, after the Union with Canada, had been prejudicially affected; it also mandated the federal government to take remedial action “if needed” (Belanger, 2000). A Remedial Order was issued in March to the Manitoba government requesting reinstating the privileges removed. Manitoba refused to act, pointing out the inefficiency of the Catholic schools, the hampering of the educational system if other religious orders were to follow suit, and most importantly, that the federal government did not have the constitutional right to force the province to spend money in ways it did not agree with. In July, the federal government nudged the Manitoba government again, who reacted diffusing the nudge by arguing financial difficulties and the aforementioned inefficiencies. With the incoming passing of the Remedial Law in January 1896, a final effort was made to negotiate a settlement, but Manitoba rejected it. The Remedial Law was debated in April 1896 by the House of Commons, but was deferred due to the obstruction plotted by W. Laurier’s Opposition. He was torn between a law he considered unconstitutional and undemocratic and a firm view that education was an exclusive matter of the province (MVC, 2020), but also very aware of the political gains. In effect, once he became prime minister, he reached a compromise (Laurier-Greenway Compromise) between both legislatures, which allowed teaching of

religion at the end of the day for some limited time as well as French language instruction if there was a critical number of students.

4.4. Quebec

The abolition of s.93 of the *Constitution Act 1867* by Quebec's National Assembly in 1997 was characterized by a process marked by very different conditions than those in Manitoba. After confederation and until the 1960s, Quebec remained under the smoldering patronage of a Catholic Church that intervened in virtually all aspects of Quebecers' daily lives, either as main actor, as for example in education, or as an influencer, for example by making very difficult to obtain marital divorce. Nevertheless, in 1960 Quebec began a radical and profound transformation called the "Quiet Revolution", by which the state took control of all civic responsibilities, especially those of health, welfare, and education. One of the most important consequences of Quebec's modernization was the withdrawal of the Catholic Church as the main controller of Quebec civic life.

Benefited by a thriving post-war economy, the social transformative process gained momentum with the many broad reforms initiated under the Liberal government of J. Lasage. In 1961, Lasage created the Royal Commission of Inquiry on Education, popularly known as the "Parent Commission", whose objective was to scrutinize the education system in Quebec and provide recommendations for its modernization. Quebec population was one of the least educated in Canada at the time: only 13% of French-speaking students finished 11th year and only 4% attended university compared to 11% of English-speaking students (Gauvreau, 2013). The findings of the Parent Commission came in 1964 in five brick-thick volumes that recommended, among many

other things, the unification and democratization of the education system through the creation of a Ministry of Education, as well as the gutting of the system by creating a new child-centered grade-progression education system.

In 1984, the government unsuccessfully tried to introduce *Bill 3*, which aimed to move from a denominational- to a linguistic-based education system. Partial success was achieved later with the final approval of *Bill 107* in 1993. *Bill 107*, which would become the *Quebec Education Act*, contemplated English-language, and French-language schools, but provided the right to dissent and to create their own religious schools. In this configuration, the system remained overloaded until the late 1990s. Forced to comply with constitutional privileges of s.93, Montreal and Quebec City had to accommodate four school boards: a French language school board and an English language school board; a Catholic school board in charge of a network of French schools and a network of English schools; a Protestant school board with a network of French schools and a network of English schools. Outside of these two cities, there would be again: a French language school board and an English language school board; a dissenting school board with a network of French schools and a network of Catholic English schools, or a dissenting Protestant school board with also a network of English schools and a network of French schools (SJQS, 1997a). Furthermore, it was easy for denominational minorities to separate from existing school boards and create new denominational boards (Young and Bezeau, 2003).

Another important revision was carried out in 1995 by the Commission for the Estates General on Education. One of the critical recommendations included in their report “The State of Education in Québec” was the need to eliminate all subsidies to religious

schools. The decision was guided by the two tenets of non-discrimination and equality before the law, in spite of their admitted lack of public consensus—only 22% were in favor of secularization (CRIPE, 2008). The Commission for the Estates General on Education also pointed out two additional important negative consequences of the subsidies to religious schools. First they promoted fragmentation and creation of ghettos as well as hindering of immigrant social integration (MEQ, 1996); second, the educational system had become overloaded from unnecessary bureaucratic duplication and needed an urgent depressurization. The report revealed that s.93 was holding back the betterment of Quebec education, prompting the Quebec Education Minister, Pauline Marois, to spearhead the process to amend s.93 (through *Bill 109*) in order to end religious boards. The National Assembly approved *Bill 109* unanimously in April 1997. The Parliament was supportive of the amendment but being cognizant that opinions among Quebecers were divided (Smith et al., 1999), it formed a Special Joint Committee that held a series of public hearings.

In October 1997, the Joint Committee concluded in its "*Report of the Special Joint Committee to amend Section 93 of the Constitution Act, 1867*" (SJQS, 1997b) that there was a critical majority supportive of the change. Quebec invoked *Section 43* of the Charter, which states that any amendment to the constitution applying to one or more provinces, but not all, may be made once approved by the provincial legislative assembly and authorized by the House of Commons and the Senate. Vote came in November 1997: 204-59 in the House of Commons and 51-17 in the Senate. The approved bill received royal assent in December 1997. In July 1998, all denominational schools were replaced by linguistic ones, and the option between the courses Moral and

Religious Education (MRE), Catholic Religious Instruction (CRI), or Moral Education (ME) was offered. Religious “animators” in Catholic and Protestant schools were retained. Nowadays, religion in schools have largely disappeared due to lack of student interest.

4.5. Newfoundland

Increasing unrest in Newfoundland society in regards to denominational schools during the second half of the XX century led to a first Royal Commission on Education 1967-1968 (*Report of the Royal Commission on Education and Youth (Province of Newfoundland and Labrador, 1967 and 1968)*), and later to its sequel in 1990. This second *Royal Commission of Inquiry into Education* held extensive public hearings and meetings. The many and varied education stakeholders and interested parties involved repeatedly voiced complaints against an expensive, ineffective, and undemocratic denominational system (Higgins, 2011). The Commission also carried out a provincial survey that showed 79% support for a single school system. The Commission released its report *Our Children Our Future* in 1992, in which it recommended adopting a single inter-denominational education system.

To change the education system, the government had to amend *Term 17* of the *Newfoundland Act*, which acted in lieu of s.93 of the *BNA 1867*. After three years of unsuccessful discussions with denominational representatives, the government held a referendum in 1995, which resulted in 54.4% support for the amendment and the creation of a single inter-denominational education system (Gov. NL, 1997a). In this scheme, the four separate denominational school system would stay—Integrated (combination of Anglican, Presbyterian, Salvation Army and United Church),

Pentecostal, Catholic, and Seventh Day Adventist—but would allow the provincial government to organize and administer education in the province (Gov. NL, 1997b).

The amendment of *Term 17* was approved by Parliament in December 1996, redesigning denominational schools into inter-denominational schools. However, the system proved untenable; the denominational composition of boards made it impossible to reach consensus on the organization of schools and either closure or consolidation of schools resulted in legal action (Gov. NL, 1997b). In effect, in a judicial injunction in July 1997, the Superior Court of Newfoundland ruled that the province did not have the right to abolish nor to modify denominational schools without consent of their boards.

Learning from the denominational roadblocks that hindered the normal operation of the inter-denominational system, the provincial government decided to hold a second referendum proposing a non-denominational system. In this scheme, with “*just schools where children learn and teachers teach*” as stated in the Q&A of the referendum (Gov.NL, 1997a), the education system would be wholly controlled by the state and would allow optional religion instruction. Held in September 1997, 73% of Newfoundlanders supported the amendment of the *Term 17*. Parliament approved the amendment in January, 1998. Later judicial challenges by the Catholic Church were dismissed.

4.6. Mechanism of change of the Constitution for Ontario

4.6.1. Why the constitution must be changed

Today’s Ontario’s school system resembles Quebec’s school system of 1997. It is an overloaded system supporting four types of school board and a total 72 school boards,

comprising 31 English and 4 French secular boards; 29 English Catholic and 8 French Catholic boards; 1 Protestant board; and 7 school authorities for children with special needs (data from OME, 2020). As detailed in the reasons listed below, similarly to Quebec's education system in 1997, Ontario's education system is in need of an urgent reform.

4.6.1.1. Constitutional Point of View

- 1) Preceding sections have demonstrated that the funding of Catholic schools in Ontario is nominally constitutional; the reality is that it is unconstitutional and survives only thanks to a loophole in the Canadian constitution.
- 2) *Section 93* was incorporated to protect the right of a Catholic minority in Ontario (and that of Protestants in Quebec), as explained in Section 2.5. As it will be detailed in Section 5.0, Catholics in Ontario do not constitute a minority anymore; nowadays they have actually become a majority.
- 3) Catholic schools can discriminate enrolment of students in several discretionary ways: a) primary students can be discriminated for/against by requiring the possession of baptism sacrament; b) by having the guardian supporting the Catholic system with their taxes; c) all students must undergo an interview with the school principal who, at his or her sole discretion, can reject the student enrolment application. Additionally, discrimination against homosexual students, attempt to force non-Catholic students to attend mass, and other practices have occurred. Catholic schools can also discriminate against non-Catholic teachers by *de facto* shutting them out of one third of the job market (e.g., Rotstein, 2018).

4.6.1.2. Economic Point of View

- 4) Having a secular system and a Catholic system teaching separately the same curriculum is an unnecessary duplication of resources of every type. Furthermore, it burdens the Ontario Ministry of Education with unnecessary bureaucracy.
- 5) The Ontario Ministry of Education gathers all monies from income taxes in a common pool, which is then redistributed as grants to school boards of all types according to a complex formula. Approximately 40.3% and 43.1% of this provincial funding goes to English Catholic and English public school boards, respectively (FCSS, 2019); this way, both systems receive almost the same funding, but, ironically, the Catholic network educates only one third of the whole student population (OECTA, 2018).
- 6) A merging of systems would translate into an immediate increase in the quality of physical classrooms and material. Not only would the number of portable classrooms decrease but in general the average utilization of Ontario school facilities would increase above 90% and 95% from the current 84% and 90% for primary and secondary level, respectively (Phillips, 2012).
- 7) Most notably, if all Catholic schools were converted to secular schools without redistributing student population among schools, Ontario's education system would remain economically the same in a worst case; the only actual change would be the removal of religion indoctrination. More realistically, it would mean savings, given that the funding formula pays more for children in Catholic schools than those in secular schools. These savings could be reused to improve the system. In fact, Ontario's education system could save between \$1.27 and \$1.60 billion, according to a recent study done by the Federation of Urban Neighbourhoods of Ontario Inc. (Phillips,

2012), which could translate to investing that amount to improve Ontario's education system.

- 8) The Province of Ontario already has troubles meeting the economic costs of a 4-board school system. It simply cannot afford to support an even more complex school system hosting more denominational schools.
- 9) Even if the Ontario government were able to extend funding to religious minorities, Australia's school system may offer a cautionary tale. The Australian federal government pays non-governmental schools three times the amount per student, it does to public schools. Yet, there is no evidence that private schools fare better than public schools. As a consequence, the Australian school system has become one of the most unequal and privatized school systems among developed countries (Toronto Star, 2019). Newfoundland also moved along with an inter-denominational education system that proved to be unmanageable.

4.6.1.3. Social point of view

- 10) Even if, hypothetically, the system could economically sustain a more complex model, it remains the question about who would receive public funds and who would not. There would be more resources, but they would not be unlimited. Would the public funding be extended to religions only or would also be extended to parareligions and spiritual groups? As can be seen, this hypothetical configuration may become difficult to constrain.
- 11) Assuming it would only extend to religions, the typologies of Islam, Judaism, and in particular that of Conservative Protestantism can be equally or more complex than

that of Catholicism and Mainline Protestantism. As an example, Conservative Protestantism in Ontario alone comprised some 80 congregations in the 2011 census. Therefore, it is too simplistic—and may be offensive—to believe that the system could be expanded to include four general religious minorities only (Catholicism, Protestantism, Islam and Judaism), lumping many granular creeds under one of the four general categories. Furthermore, if in this simplistic scheme Protestantism were allowed to receive funding for example, it would remain ambiguous to which denominational group: to Mainline only, to Conservative only, to any? For all would become unfeasible; for some but not for others would be unfair.

12) In the same line of Point 11, in a hypothetical scenario in which public funding were extended to all religions that requested it, it would be simply impossible for the Ministry of Education to manage so many boards.

13) Extending funding to religious minorities will only promote social fragmentation instead of inclusiveness, building a patchwork of insulated religious schools with little socialization with children of other faiths (Paquette, 2009). This is evidenced in the 2018 Survey of Jews in Canada, which shows that the longer a student attends Jewish schools, the less the integration to the mainstream culture (Environics, 2018).

4.6.1.4. Religious point of view

14) Despite Catholic schools having to comply with the Education Act by teaching the Ontario curriculum, there is no real warranty that Catholic school teachers actually do teach important topics such as sex education, biology and natural science, and evolution; and if they do, there is no assurance it is done in an objective and relevant way.

15) There have been 15 years of sustained 6.2% enrolment decline at Anglophone Catholic schools between 2000 and 2015 (MacLeod, 2017). In turn, a recent Globe and Mail analysis shows that the non-Catholic student population at Ontario English Catholic school boards has increased at a rate 4% annually between 2014-15 and 2016-17, with respective overall non-Catholic student populations of 7.5%, 7.9% and 8.3% for said academic years; in some Catholic boards the non-Catholic student population is dramatically higher, in excess of 25% (Globe and Mail, 2016). This constant trend will progressively make religion in classes more irrelevant.

16) There seems to be a sort of binary thinking that, to be good people must have religious beliefs, which are to be inculcated in school; otherwise one will be morally deranged. This is far from the truth; dogmatism is only one area of the pantheon of philosophical currents and can be taught in philosophy courses in secondary education.

4.6.2. What must be changed in the constitution

Section 93(2) of the Constitution Act, 1867 requires modification given that this clause is the source of the privileges enjoyed by the Catholic schools (and Protestant schools).

The modification to be carried out is simple, only requiring either the addition of a clause similar to *s.93A “Paragraphs (1) to (4) of section 93 do not apply to Quebec”*, that would read as *s.93B “Paragraphs (1) to (4) of section 93 do not apply to Ontario”*.

Section 29 of the Constitution Act 1982 is limited to protect s.93 from any challenge from another section in the *Charter*—“*Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in*

respect of denominational, separate or dissentient schools”—therefore, there is no need to modify this clause.

4.6.3. How to carry out the change in the constitution

The *Constitution Act 1867* was created without an amendment formula. This formula was included in the *Constitution Act 1982 through ss. 38-49 and ss.50-61*. Depending on the section in question and the type of modification sought, one or another section of the group of ss.38-61 applies. s.43 of the *Charter* states that:

“An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including

(a) any alteration to boundaries between provinces, and

(b) any amendment to any provision that relates to the use of the English or the French language within a province,

may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies”.

Section 43 indicates that the required modification of the constitution necessitates only a resolution from the Legislative Assembly of Ontario as a first step. The second step is for that motion to pass the House of Commons and the Senate. In theory, once the first step is taken both legislative chambers should approve the motion expediently. The reality, however, may be quite different. The modification of the constitution will actually depend on factors such as the diversity and type of political ideologies in the Legislative Assembly, the willingness of politicians to advance the motion, and the public opinion

about both the resolution and the Catholic schools themselves, which in turn will influence the politicians' willingness.

Passing the bill in the Legislative Assembly of Ontario under a majority government is not a requisite, but it would undoubtedly make it much easier than under a minority government. But even under the extraordinary scenario of unanimity at the Legislative Assembly of Ontario—as was the case in the Quebec Legislative Assembly when they passed the resolution in 1997, or when Newfoundland House of Assembly passed a resolution to amend *Term 17* in 1997—it is expected that the Parliament will still request evidence of public support. Public support would have to be raised through a combination of negotiations with the Catholic Church and a probable endorsement from this and other churches, as they did in Quebec when they provided letters of support to the Quebec Legislative Assembly (SJQS, 1997c,d); by public consultations and royal commissions; or from a referendum as happened in Newfoundland. Public support would protect the resolution from any potential, if not very likely, legal challenge (Newfoundland's case).

A situation might occur in which the motion to abrogate s.93 in Ontario passed all legislative scrutiny and had reasonable public support yet still were stopped due to legal challenges. This situation happened in Newfoundland (Quebec also had legal challenges but the claims were not directly related to freedom of religion). A challenge of this nature would likely be framed in terms of violation of s.2(a), freedom of religion, and s. 15(1), religion discrimination. Although s.33 of the *Charter* cannot be used to impugn s.29, it does apply to s.2 and ss.7 to 15. Thus, there is always the option, as a last recourse, of invoking *Section 33*. Although the genesis and use of this constitutional

clause has a controversial record, its use would be more than justified in this last scenario. The Quebec National Assembly was well aware of this recourse in 1997 but they prudently considered it as a last recourse, too (SJQS, 1997a, at 1740).

5.0. PUBLIC PERCEPTION OF CATHOLIC SCHOOLS AND THEIR PUBLIC FUNDING

Catholic affiliation has sustained a steady decline of 8% between 1981 and 2011, reaching 39% in Canada, as shown in Figure 1. In Ontario, the decrease in the same period has been gentler, by approximately 4%, reaching 31.4%. In particular the decrease has been more pronounced between 2001 and 2011. Protestantism in Canada has decreased 13% between 1981 and 2011, and currently sits at 28%. In Ontario, the decrease of approximately 4% during the same period has brought the Protestant population to 31.1%³. Membership of Mainline Protestants—United, Anglican, Presbyterian, and Lutheran Churches—has imploded throughout the last five decades to 14% in Canada and 17% in Ontario 2011¹. Nevertheless, they still retain the strongest presence among the total population of Protestants in Ontario at 56%, whereas 21% of the total are Conservative Protestants. The remaining 22% do not ascribe formally to either of these but still identify as non-Catholic Christian.

This data offers an insight on the undeniable influence that religion, in particular Catholicism, continues to exert on Canadian politics in general and on Ontario's politics

³ Numbers for Protestantism and Protestant faiths in Ontario in 2011 were calculated using the Statistics Canada 2011 census data. In 2010, Stephen Harper's Conservative government replaced the mandatory long-form census of 2011 with a voluntary National Household Survey making difficult comparisons between data from other censuses.

in particular. Because the affiliate percentage still has the capacity to create political imbalances, politicians have to be careful navigating religious waters. In effect, during the last decades, high flying Ontarian politicians without exception have circumvented with surgical care anything that may vaguely relate to the topic of Catholic schools. Politicians know it is a minefield that equates to political suicide. It was the likely reason for PC leader Frank Miller's defeat in the 1985 election when he hinted at a reversal in the proposed extension of funding to Catholic high schools.

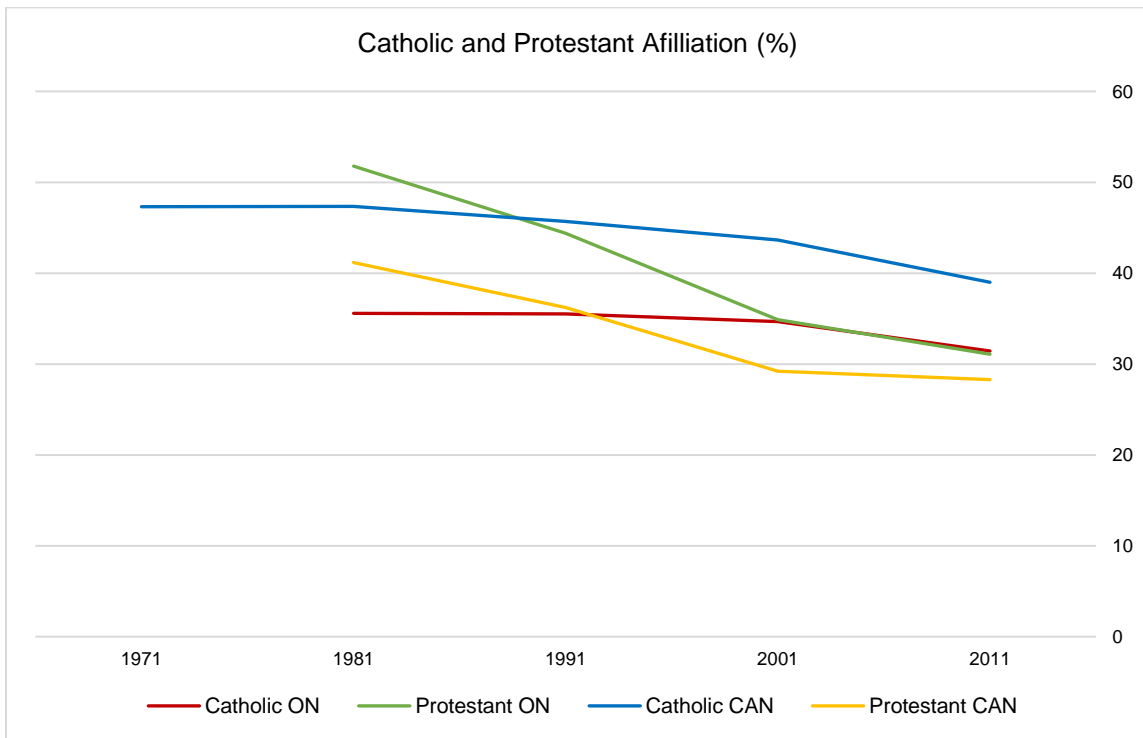


Figure 1. Percentage of Catholic and Protestant affiliation in Canada and Ontario between 1971 and 2011. Data source: Statistic Canada 1971, 1981, 1991, 2001, 2011 censuses. Numbers for Protestantism in Ontario in 2011 were calculated using the Statistic Canada 2011 Census data.

The well-known disaster of John Tory's 2007 provincial election campaign is an iconic example. Tory's platform item of extending academic funding to religious minorities received a barrage of vitriolic attacks that ended up in his easy defeat to Katherine Wynne. Wynne, in turn, learned the lesson very well, so that when she became Ontario's Premier not only did she continue the status quo but also went as far as to reassure the public when her spokesperson asserted "*We've always said that our education system is rooted in our past and rooted in the Constitution in the formation of the country; we will not be reopening that*". A decade later, Tory's lesson was solidly alive as evidenced by the same extreme caution that candidates took in the 2018 provincial election. Doug Ford anticipated that "*I'll make no changes to the existing system if elected on June 7*" while a spokesperson for NDP's Andrea Horwath said she had made it clear that a change was not under consideration (Global News, 2018). More recently, Liberal MPP candidate Alvin Tedjo was vocal about abolishing Catholic schools, but this motion was rapidly intercepted by Liberal MPP candidate Michael Coteau, who asserted "*I want to assure Ontario's 2.25 million Catholic families that under my leadership, the Ontario Liberal party will never abandon, diminish or compromise Catholic education*" (Tedjo did not win a seat; Coteau did). As public support becomes highly influential in the approval of a legislative bill to abolish s.93, the next sections discuss the public perception on Catholic schools and their public funding.

5.1. Polling

Polls patently show that support for public funding of Catholic schools has been a long lingering social cleavage in Ontario. The historical record of the Ontario Institute for Studies in Education (OISE) on public attitudes toward this issue shows a waning

dominance of support throughout the 1980s, as seen in Figure 2. From the early 1990s until present, there is a marked and persistent cleavage on this issue. During this time, rejection and support for public funding have steadily averaged 34% and 36%, respectively, both fluctuating up to 8% and 5%. Rejection has marginally increased in recent years, while support has done the opposite, sitting at 42% and 37%, respectively, in 2017. Opinion of people who either do not know, do favor extending funding to all private religious schools only, or to all private schools, averages 30% fluctuating up to 9%.

Other long-tracking polling, albeit not as long as that of OISE, has been carried out by Forum Research Inc. The period 2012-2015 covered by their data shows somewhat different results to those of OISE: rejection is visibly dominant over support, averaging 51% and 42%, respectively, while these respective numbers fluctuate up to 3% and 4%. Forum Research did not provide an option for extending funding to private education institutions, which may have partially influenced the resulting very low average of 7% of participants who answered 'do not know' (Forum Research, 2012a,b,c,d,e; 2013a,b; 2015). More recent polling carried out by Angus Reid Institute (2017), Ipsos (2018), and Dart-Maru/Blue (2019) has found a bigger gap between support and rejection of public funding to Catholic schools. As shown in Table 1, rejection is both consistently increasing and higher than support. Dart-Maru/Blue's poll did not include a third option for answer (option do not know) but, even so, rejection would still remain noticeably higher than support. Taken at face value, these data suggest a recent shift in attitude, namely toward having only one educational system.

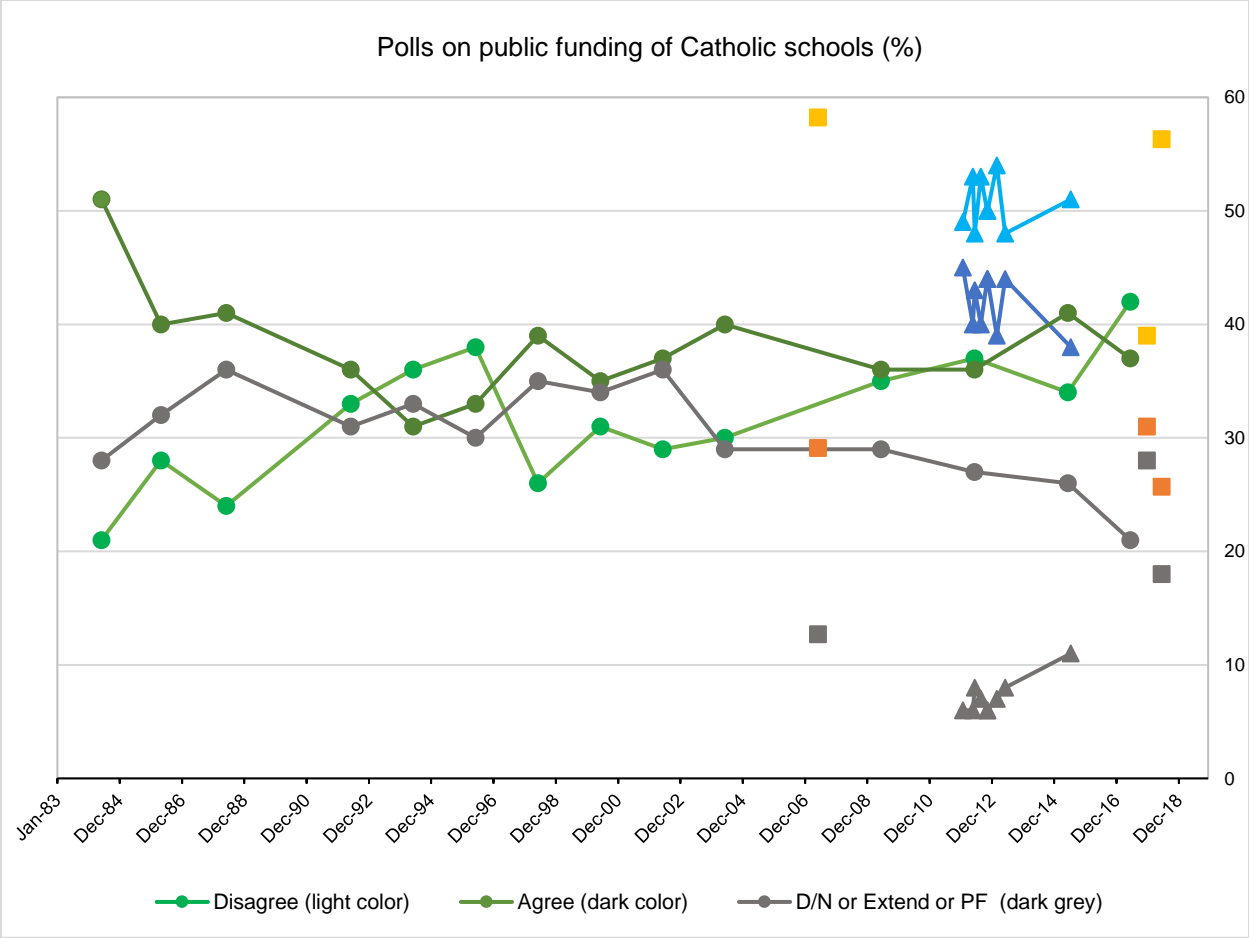


Figure 2. Trends in public attitudes toward public funding of Catholic schools. Each poll separated by same symbol. D/N: does not know; PF: supports Partial Funding. Data source: Forum Research (2012a,b,c,d,e; 2013a,b; 2015); Angus Reid Institute (2017); Ipsos (2018); OIES (2018); Dart-Mar/Blue (2019).

Table 1 – Polls 2017-2019 – Public funding of Catholic schools (%)

Date	Source	Reject	Support	Other
Dec 9, 2019	Dart-Mar/Blue	71	29	No additional option.
Jun 4, 2018	Ipsos	56	26	18
Dec 14, 2017	Angus Reid Institute	39	31	28 – Extend funding to other education institutions.

5.2. Perceived v. actual performance of Catholic schools

5.2.1. Catholic Background

There seems to be a widespread public perception that Catholic schools perform academically better than secular schools in Ontario and elsewhere. One probable main reason is the large influx of Catholic immigrants as well as of immigrants coming from Catholic countries. Approximately 397,000 Irish migrated to Canada between 1870 and 1978, making up approximately 4% of the total migration into Canada in that period. By 1961, not only did people of Irish ancestry or origin make up 9.6% of Canada's population, but between 50% and 65% of them had settled in Ontario (Wilson, 1989). After WWII, waves of Italians, Spaniards, and Polish arrived in Ontario, followed by Latin American immigration between the 1950s and 1970s and by Philipino and South Asians (Matta, 1985; Rayside et al., 2017, p141). Although South Asian countries are not Catholic, a considerable number of immigrants are Catholic affiliates. The rest of the countries, all have dominant Catholic populations whose education systems have, until recent decades, been pervasively dominated by Catholic Orders, such as Jesuits, Ignatians, Salesians, etc. It is safe to expect that these immigrants, having been educated in Catholic schools and cognizant of the precariousness of the public schools in their home countries, perpetuate that biased good perception by casting a favorable prejudice on Canadian Catholic schools.

Latin America is a good example to illustrate this point, given that it homes nearly 40% of the world's Catholic population (PEW, 2014). Although the Catholic Church's dominance in Latin American education has been declining during the last decades, it still retains a strong presence. Overall, in 2015, 13% of Latin American children studied

in Catholic primary schools, while 8.3% did it in Catholic secondary schools (Medero, 2018). These numbers can vary depending on the particular region considered and the types of education systems included because in most Latin American countries there usually exist two education systems, a network of private schools with varying degrees of state subsidies providing quality education and a usually underfunded public system attended by people who cannot afford to pay a private school go. For example, although 15% of schools in Chile are Catholic-based (Passalacqua, 2006), this percentage increases to 36% for subsidized Catholic private schools in the capital city (EMOL, 2019), a no minor concentration considering that approximately 40% of Chilean population lives in the capital city. Additionally, the Catholic Church still manages to retain prestige among public perception in Latin America; for example, parents in Argentina refer to Catholic schools as “transcendental institutions for their children” (Bustamante, 2010), while parents in Chile who chose Catholic schools do it out of consideration for the values inculcated or its prestige (Madero and Madero, 2012).

5.2.2. Academic Performance as informed by EQAO data

A superior academic performance of Catholic schools could warrant a possible defence for the legitimization of their public funding. Based on data from EQAO test for the past ten years, the validity of this popular belief can be assessed. The Education Quality and Accountability Office (EQAO) is a provincial government agency tasked with monitoring the quality of education in Ontario. The EQAO runs annual tests on numeracy and literacy mainly for Grade 3 and Grade 6, categorizing results on mathematics, reading, and writing in four levels of achievement. Although the EQAO tests have not been

exempt of criticism, it is still widely considered a valid, mainstream measuring instrument with a long track record.

Tables 2 and 3 compare percentages of students performing at the four levels of achievement between secular and Catholic schools of the City of Toronto, for the period from 2010 - 2019. Each subject matter level in these tables corresponds to the EQAO's overall percentage of students with achievement in that subject matter. The City of Toronto was chosen because it offered comparatively better statistical conditions, such as dense population, a large number of schools for both Toronto Catholic District School Board (TCSB) and Toronto District School Board (TSB), better funding, less probability of statistical outliers, and better provincial representation (Ontario's biggest city). The EQAO result shown in Tables 2 and 3 reveal that Catholic schools and public schools perform academically very similarly for both Grade 3 and Grade 6; in effect, the difference in any of the ten years considered does not exceed 6.9%. Sometimes one school board is better, sometimes the other one, in a specific year, in one or more subjects and levels. These results challenge and belie the popular belief that Catholic schools have better academic performance, at least for schools in Toronto.

It could be posited that the reported results might be biased by student populations whose numeracy and literacy are subpar with respect to those of their Canadian peers. Figure 3 presents the histograms for Grades 3 and 6 of both school systems whereby it is shown the percentage of schools whose associated percentage of students is born in Canada for the year 2018⁴. Figure 3 shows that with relative similarity the majority of

⁴ Only examples for both grades in year 2018 are displayed; charts for the rest of the years are included in Appendix A.

school populations in Toronto comprise students born in Canada, with student population varying between approximately 55% and 100% across most schools of both boards, but generally peaking around 90%. Therefore, if there were a potential disparity in quality between the Canadian education and that of other countries, it is not a relevant bias in the case of the EQAO data analyzed. These results also allow to infer that the majority of students in each school in Toronto have relatively similar academic backgrounds within the context of the Ontario education curriculum.

Figure 4 shows the percentage of Toronto schools in which English is not the first language learned at home for a percentage of its students for the year 2018⁵; in other words, Figure 4 display the percentage of schools with its associated percentages of ESL students⁶. For example, in Figure 4, English is not the first language of 30% of Grade 3 students in 4.3% of Toronto Catholic schools, whereas English is not the first language of 30% of Grade 3 students in only 1.5% of Toronto secular schools. The EQAO data, as shown in Figure 4, reveal that secular schools have a much flatter curve than that of Catholic schools and reaches noticeably higher percentages of ESL students than those reached by Catholic schools. Conversely, the Catholic system has more schools with lower percentages of ESL students (in the range 0-40% approximately).

The lower percentage of students whose first language is not English (curve skews toward the left end) in Catholic schools, can be interpreted as Catholic schools being

⁵ Only examples for both grades in year 2018 are displayed; charts for the rest of the years are included in Appendix B.

⁶ ESL: English as Secondary Language.

less ethnoculturally diverse than secular schools. This pattern may be partly explained by the right of Catholic schools to discriminate against enrollment of students who are not compatible with the Catholic faith. This restriction will likely apply to many students with ties to many Middle East and Asian countries whose faiths are Muslim, Hindu, Sikh, etc. Another factor that may contribute to explain the pattern may come from anecdotal evidence obtained by the author while researching for his thesis, in which families choose to enroll their children in Catholic schools precisely because these are less ethnoculturally diverse, thus contributing to the apparent decreased ethnocultural diversity in Catholic schools.

This anecdotal evidence could be understood as an “Ethnocultural Educational Flight”, in a sort of variation of the sociological phenomenon “White Flight” or “White Exodus”. The White Flight phenomenon has been extensively studied in U.S., mostly in the context of large exodus of white people from urban centres to avoid racially diverse neighborhoods, in particular where black people live (e.g., Boustan, 2010; Kye, 2018). Research has also extended toward the existence of White Flight in U.S. schools (e.g., Rossell, 1976; Susheela, 1987; Fairlie and Resch, 2002; Renzulli, L.A. and L. Evans. 2005). Interestingly, Fairlie (2002) described the additional existence of a “Latino Flight” in U.S., in which Latinos were transferring into private schools in response to black schoolchildren.

The rapid increase of south Asian population and the dwindling of white people population in Brampton (The Globe and Mail, 2016) as well as the increase in immigrants with a the dwindling of white population in Metro Vancouver (Vancouver Sun, 2014) have been pointed as examples of White Flight existence in Canada.

Table 2 – EQAO results for Grade 3, Toronto District Board and Toronto Catholic District Board – Period 2010 – 2019 (%)

G3	Board	Read L4 ¹	Read L3	Read L2	Read L1	Write L4	Write L3	Write L2	Write L1	Math L4	Math L3	Math L2	Math L1	Max Diff
2019	TCDSB	19.3	59.8	19.7	1.1	3.9	73.5	21.6	0.9	11.4	47.6	34.1	6.1	4.3
	TDSB	22.4	56.2	18.9	2.0	4.2	70.7	23.4	1.1	15.6	47.0	29.8	6.6	
	Diff ²	3.1	3.6	0.8	0.9	0.4	2.9	1.9	0.2	4.2	0.6	4.3	0.4	
2018	TCDSB	17.6	59.4	20.4	2.1	3.6	72.6	22.0	1.1	11.5	47.9	33.6	5.8	5.7
	TDSB	23.4	55.1	17.6	2.8	5.0	71.9	21.4	1.2	15.9	47.7	28.5	6.3	
	Diff	5.7	4.3	2.8	0.7	1.4	0.7	0.6	0.1	4.4	0.2	5.1	0.5	
2017	TCDSB	18.6	59.4	19.4	2.1	3.9	77.1	17.8	0.7	13.7	50.9	30.3	4.6	4.7
	TDSB	21.9	55.2	18.1	3.8	5.1	72.4	20.6	1.2	17.9	48.2	27.5	5.5	
	Diff	3.3	4.2	1.3	1.7	1.2	4.7	2.8	0.6	4.2	2.6	2.9	0.9	
2016	TCDSB ³													
	TDSB	21.8	54.2	19.5	3.5	6.6	72.4	19.5	1.1	17.2	50.9	25.2	5.3	
2015	TCDSB	14.5	57.2	24.8	3.0	6.8	74.8	17.3	0.8	13.3	53.0	29.6	3.7	
	TDSB ³													
2014	TCDSB	11.7	60.0	24.4	3.2	7.7	75.5	16.2	0.5	12.3	55.9	28.0	3.5	6.5
	TDSB	16.8	56.8	21.1	3.8	8.8	73.6	16.4	0.9	18.9	53.1	23.4	4.0	
	Diff	5.1	3.2	3.3	0.6	1.1	1.9	0.2	0.4	6.5	2.8	4.6	0.5	
2013	TCDSB	11.6	57.1	25.8	5.0	7.1	74.0	18.1	0.7	12.8	55.5	29.1	2.5	4.7
	TDSB	15.8	54.4	22.1	6.3	9.4	70.6	18.6	1.1	17.1	54.0	24.4	3.9	
	Diff	4.2	2.6	3.7	1.3	2.3	3.5	0.5	0.4	4.3	1.5	4.7	1.5	
2012	TCDSB	11.4	56.6	24.8	6.5	7.8	73.0	19.0	0.0	13.7	56.0	26.1	3.7	3.7
	TDSB	12.3	55.5	23.3	6.9	8.4	71.8	19.6	0.1	17.4	54.4	22.9	4.2	
	Diff	0.8	1.0	1.5	0.5	0.6	1.3	0.6	0.0	3.7	1.7	3.2	0.5	
2011	TCDSB	8.3	58.1	26.2	6.5	5.6	72.3	21.8	0.1	13.1	56.5	27.2	2.9	4.1
	TDSB	9.5	57.5	23.9	7.3	6.2	70.7	22.7	0.2	17.2	54.6	23.9	4.0	
	Diff	1.1	0.6	2.3	0.8	0.7	1.6	0.9	0.1	4.1	1.8	3.3	1.1	
2010	TCDSB	9.3	53.4	27.4	8.2	5.3	69.6	24.9	0.0	13.1	58.3	25.3	3.1	4.1
	TDSB	9.9	54.6	24.7	8.5	5.6	68.7	25.5	0.1	17.2	57.5	21.7	3.0	
	Diff	0.6	1.2	2.8	0.3	0.3	1.0	0.5	0.1	4.1	0.8	3.6	0.1	

Notes:

1. Read L4, Write L3, Math L2, etc., correspond to the percentage of students with overall achievement in that subject matter. L4 and L1 are highest and lowest achievements, respectively.
2. Diff: difference between overall percentage EQAO data for the TCDSB in 2016 and for the TDSB in 2015 are not available.
3. EQAO data for the TCDSB in 2016 and for the TDSB in 2015 are not available.

Table 3 – EQAO results for Grade 6, Toronto District Board and Toronto Catholic District Board – Period 2010 – 2019 (%)

G6	Board	Read L4 ¹	Read L3	Read L2	Read L1	Write L4	Write L3	Write L2	Write L1	Math L4	Math L3	Math L2	Math L1	Max Diff
2019	TCDSB	11.3	69.5	18.1	1.0	24.1	61.7	13.2	0.7	12.0	34.1	32.1	21.2	5.4
	TDSB	16.2	67.4	14.4	1.8	26.3	59.0	12.9	1.2	17.3	36.2	26.7	18.6	
	Diff ²	5.0	2.1	3.7	0.7	2.2	2.7	0.3	0.6	5.4	2.1	5.3	2.6	
2018	TCDSB	11.0	69.5	17.8	1.4	21.8	60.7	15.9	1.2	11.8	36.2	30.5	20.8	4.9
	TDSB	15.9	68.0	13.8	1.9	23.8	58.9	15.2	1.6	15.7	36.8	27.4	19.0	
	Diff	4.9	1.5	3.9	0.5	2.0	1.8	0.7	0.3	3.9	0.5	3.1	1.8	
2017	TCDSB	13.3	68.7	16.9	0.9	19.3	64.5	15.1	0.8	12.3	37.1	31.6	18.5	4.9
	TDSB	16.9	66.6	14.7	1.4	20.8	61.7	15.5	1.4	16.3	38.4	26.7	17.7	
	Diff	3.6	2.1	2.2	0.5	1.6	2.8	0.3	0.6	4.0	1.2	4.9	0.8	
2016	TCDSB ³													
	TDSB	17.4	64.8	15.0	2.5	22.4	60.7	15.4	1.0	17.4	38.1	26.6	17.0	
2015	TCDSB	11.5	68.8	17.9	1.5	17.6	64.7	16.6	0.9	15.6	38.3	31.3	14.5	
	TDSB ³													
2014	TCDSB	10.2	65.3	21.5	3.0	13.6	69.0	16.4	0.8	12.5	42.3	31.4	13.6	6.1
	TDSB	16.2	63.0	16.5	3.8	16.2	65.4	16.6	1.3	18.6	40.9	25.6	14.0	
	Diff	6.0	2.3	5.0	0.8	2.6	3.6	0.2	0.5	6.1	1.4	5.8	0.4	
2013	TCDSB	12.4	62.1	22.5	2.9	14.0	66.6	18.4	0.8	13.1	42.9	31.1	12.5	6.9
	TDSB	16.7	62.7	17.0	3.1	16.5	64.8	16.9	1.1	19.9	44.1	24.2	11.2	
	Diff	4.3	0.6	5.5	0.2	2.5	1.8	1.5	0.4	6.8	1.2	6.9	1.3	
2012	TCDSB	13.2	60.5	22.6	3.5	13.3	64.9	21.4	0.3	14.7	45.2	29.1	10.7	5.3
	TDSB	16.8	59.8	18.5	4.2	15.5	62.8	20.9	0.5	19.9	44.8	23.8	10.9	
	Diff	3.6	0.7	4.2	0.7	2.2	2.0	0.6	0.2	5.1	0.3	5.3	0.1	
2011	TCDSB	10.8	62.0	22.5	4.4	11.3	66.0	22.2	0.4	14.7	44.9	29.6	10.7	5.2
	TDSB	15.1	61.9	18.1	4.2	13.4	64.8	21.2	0.4	19.2	45.8	24.4	10.0	
	Diff	4.4	0.1	4.3	0.2	2.1	1.2	1.0	0.0	4.5	0.9	5.2	0.7	
2010	TCDSB	10.8	57.6	23.6	7.5	9.9	63.6	25.9	0.6	14.5	45.0	31.8	8.3	6.8
	TDSB	14.6	60.4	18.9	5.3	11.8	64.6	22.9	0.5	20.3	47.5	25.1	6.7	
	Diff	3.8	2.9	4.7	2.2	1.9	1.0	2.9	0.1	5.7	2.5	6.8	1.6	

Notes:

1. Read L4, Write L3, Math L2, etc., correspond to the percentage of students with achievement in that subject matter. L4 and L1 are highest and lowest achievements, respectively.
2. Diff: difference between overall percentage
3. EQAO data for the TCDSB in 2016 and for the TDSB in 2015 are not available.

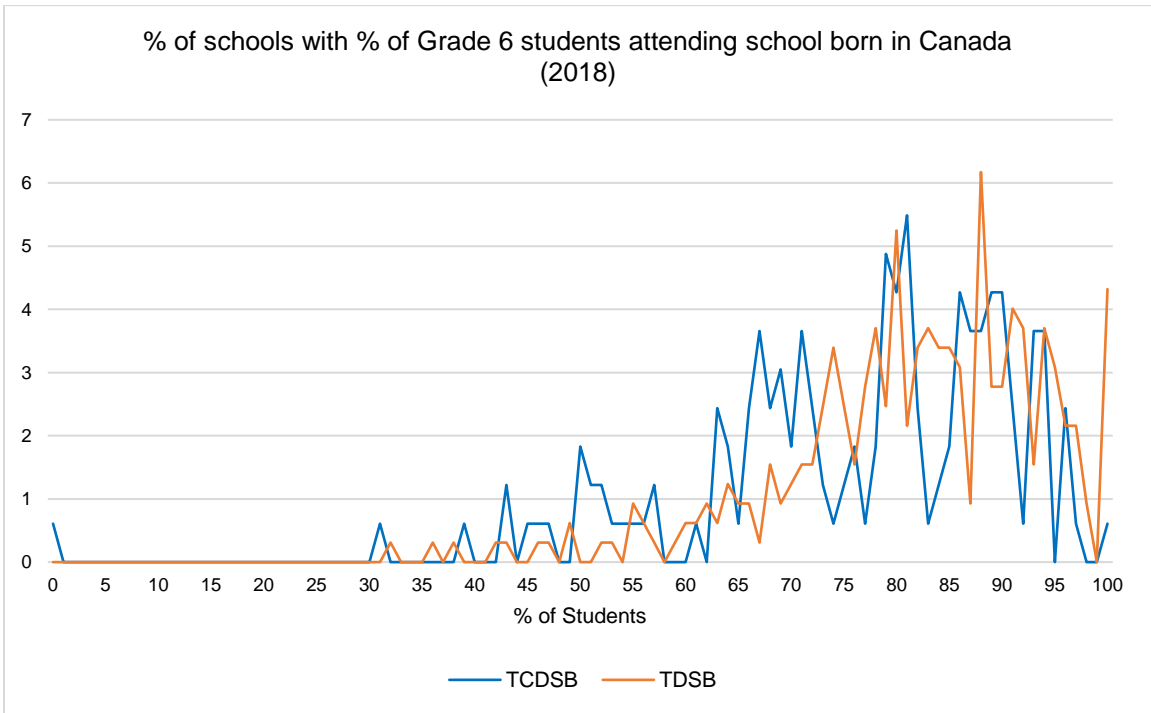
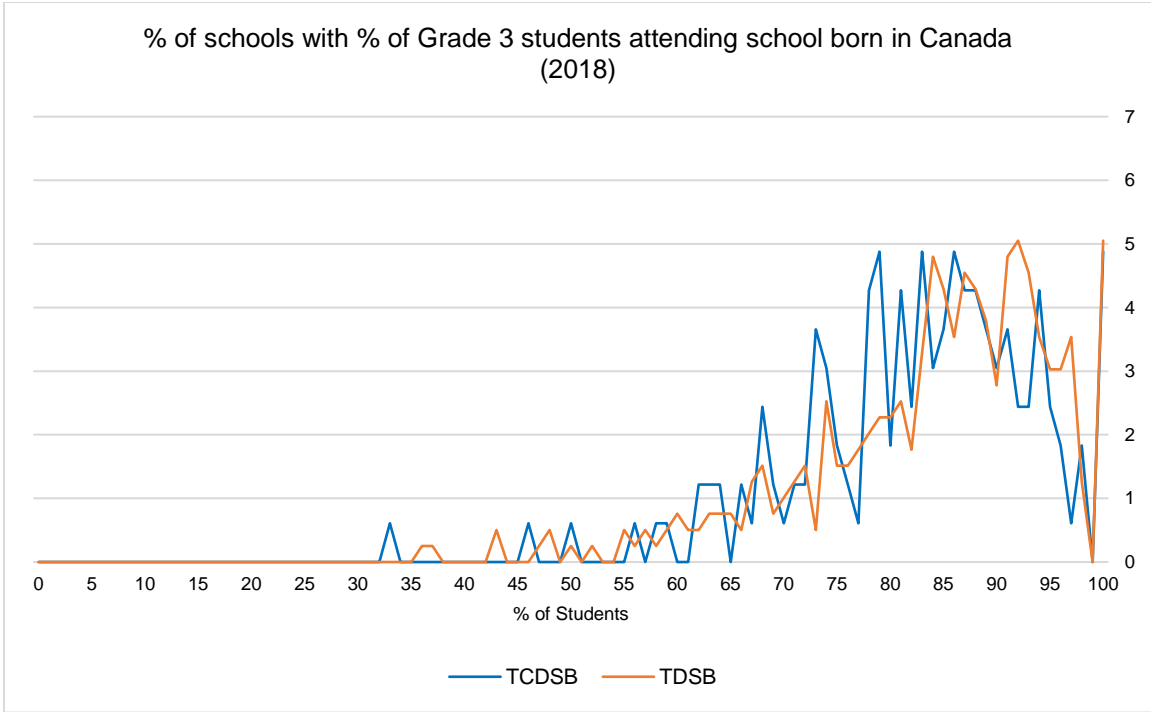


Figure 3. Top: Percentage of schools in Toronto that have a percentage of Grade 3 students born in Canada. Bottom: Percentage of students whose first language learned at home was not English. Data source: Education Quality and Accountability Office.

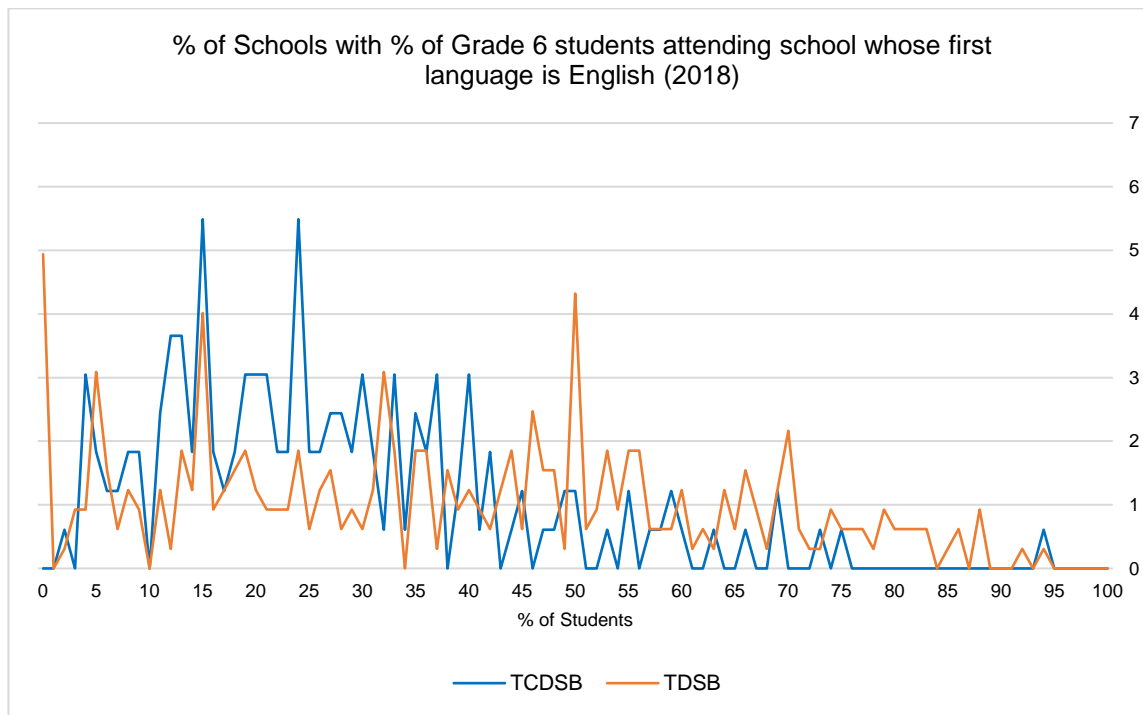
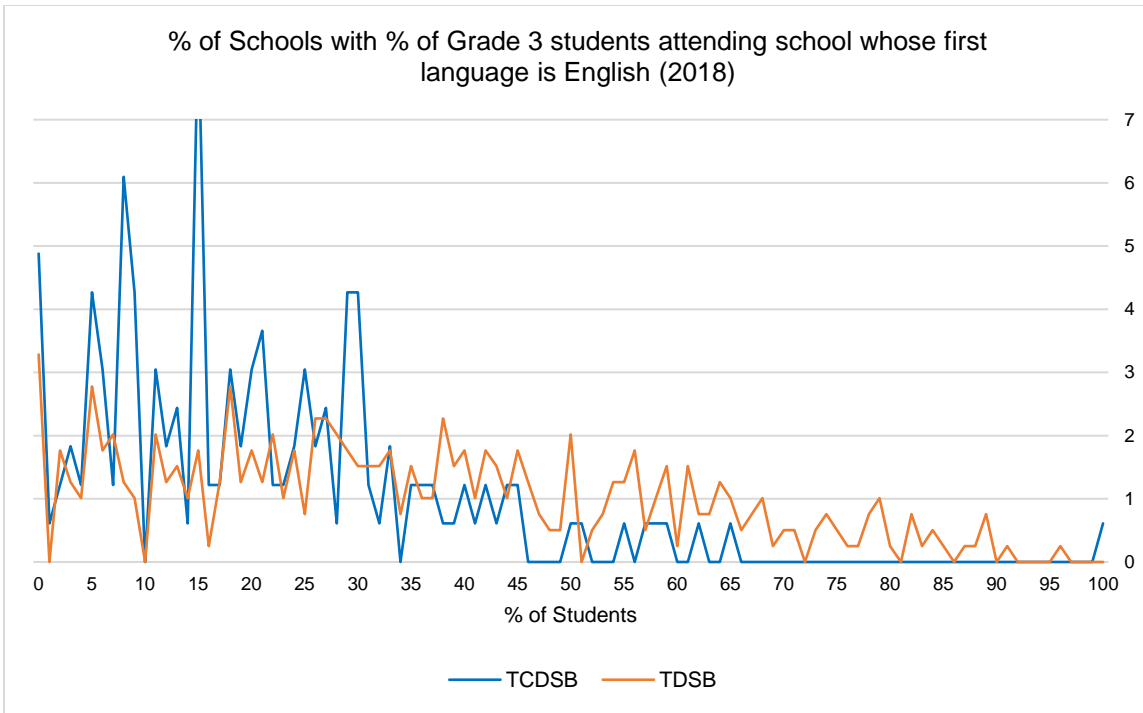


Figure 4. Top: Percentage of schools in Toronto that have a percentage of Grade 6 students born in Canada. Bottom: Percentage of students whose first language learned at home was not English. Data source: Education Quality and Accountability Office.

In the aforementioned anecdotal evidence gathered, not only a number of Canadian and immigrant Catholic families, but also non-Catholic families, chose to enroll their children in Catholic schools because these tend to have a larger population of students with non-Indigenous Western background, in particular of Anglosaxon or Western European backgrounds. Theoretically, in this depicted Anglosaxon or Western European background children are portrayed as displaying more conservative values, orderly habits, more sophisticated manners, etc. These characteristics provide an emotional safety for parents who consider these attributes either similar or superior to their own. Examples of comments gathered by the author were “*I don’t want my daughters to play with ‘them’ (some racialized children) because they play too rough*” or “*immigrants are racist and don’t like other immigrants*”. In the popular digital forum Reddit, someone commented in the thread “Why are white people leaving Toronto?”, “*Living in Toronto is great until you have kids. Then by the time the kids reach school age then you move to a whiter community. No one (except the loonie left) wants their kids to be a minority at school*” (Reddit, 2019). Barman (2007) pointed out that most parents who send their children to Catholic schools in British Columbia, of whom more than 50% are not Catholic, do it mostly for nonreligious reasons such as smaller classes, less fear of drugs and pre-marital sex, and even classism, thus seemingly relegating religious instruction to a secondary plane. At the extreme of this phenomenon might be families who afford to enroll their children in religious and non-religious independent schools, where soft-capital embossed in words such as safe, nurturing environment, or trustworthy curriculum are seen as exclusive of their views (Cardus, 2019).

6.0. BUILDING POLITICAL SUBSTRATUM

6.1. *Catholic-Liberal marriage*

In 1956, John Meisel found that 83% of Catholics in Kingston had voted for a Liberal candidate in both the federal and provincial elections of 1953 and 1955. Since then, there has been a plethora of scholarship devoted to finding the relationship between religion and voting behavior (e.g., Irvine, 1974; McKee, 1988; Gidengil et al., 1999; Guth and Fraser 2001; Stephenson, 2004). The most conspicuous finding is the long-standing Liberal support among Catholics as compared to the rest of the population. Despite several hypotheses having been advanced to explain this link, the Holy Grail of a generally accepted explanation has remained elusive. For example, it has been posited that the link owes to a familial transmission of political position (Irvine, 1974) and its continued stoking through live social forces outside of the family (Johnston, 1985). Also, when Catholics' demographic density is substantial, the political cleavage appears to shift to religious grounds, polarizing Catholics toward Liberals; if Catholic density is low, class takes precedence (Johnston, 1991; Bélanger and Eagles, 2006). Probably the most popular explanation is that Liberal principles such as individual rights, limited government, as well as its approach to social issues resonate among Catholics. It should also be mentioned that the Liberal Party established its political traction among Quebecers—Catholics overall—when vouched for Quebec's rights in the 1990's (e.g., Allaire Report).

In some way, this belief resembles the Michigan model by which individuals have a party identity in the way of a psychological attachment to it, preferentially cast by parental influence (Campbell et al., 1960). This explanation has received criticism from

commentators who have found that religion and moral positions have not been influential in Catholic support for Liberal candidates (e.g., Meisel, 1956; Blais, 2005; Stephenson, 2010); even disagreement on same-sex marriage, for example, did not deter Catholics from voting Liberal in the 2004 and 2006 elections.

Although finding an explanation for the linked Catholic-Liberal vote is beyond the purpose of this thesis, a few additional points can be advanced given the importance of the link in assessing future support for abolition of public funding of Catholic schools. As usual, it is probable that a feasible explanation lie between the already offered explanations. It is speculated here that Catholics vote Liberal mainly because it is the “lesser evil”, without disregarding a natural attraction to Liberal principles as well as the existence of familial influence in building a skewed conceptualization of politics.

Canadian Catholic voters have been long married to the strong U.S.’ anti-left-wing rhetoric, in particular anti-communism (e.g., Dunn, 1982; Chamedes, 2016), to the point of internalizing it as a natural aversion to anything socialist. This rhetoric has been buttressed for many decades by the strong influences of Catholic authorities. This sentiment is made very clear in the arch-popular words of Pope Pius XI, who in 1931 said “*no one can at the same time be a sincere Catholic and a true socialist*”⁷. Another example is the letter of Canadian Archbishop Gauthier in 1934 (Ballantyne, 1963), condemning the CCF Party, which was the NDP predecessor. When the CCF was given “clearance” by the Canadian Bishops in their Declaration of 1943 (Ballantyne, 1963), a great turmoil was created within the Catholic Church. More recently influences have

⁷ Encyclical Quadragesimo Anno. Item 120. http://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html

come from very conservative popes like John Paul II and Benedict XVI. One consequence of this is an NDP having too much of a “leftist taste” for the Canadian Catholic voter’s appetite. Moreover, older voters may still not be ready to forgive the NDP for the “Bob Rae era” that led to the bankruptcy of Ontario, resulting in a disaffection that may be passed to newer generations. With such political configuration, it is not that surprising that Liberals will garner a majority of votes. On the other hand, in the last decades, the Canadian Conservative Party has progressively hardened its political stance on social and moral issues, probably enough as to avert many Catholics. There is no question that Liberals have profited from the Catholic vote to stay in power for long periods, earning them the name “Canada’s natural governing party”. However, as shown in Figure 5, this long support steadily dwindled during the earlier 2000s. By 2008, not only had the Liberal core had diminished, but also the loyalty of the extant support. Liberals, therefore, should not take the Catholic vote for granted (Gindegit et al., 2009). Although Stephenson (2010) showed that the weakening of Catholic loyalty was not due to generational change in the relationship with the Liberal Party, the sound resurgence of Catholic loyalty in the 2015 election (47%) puts in question that finding. It is plausible that younger Catholic generations, in a reflection of more progressive social attitudes, may have felt more attracted to a Trudeau platform more attuned to hyper-accelerated societal changes concerning issues such as gender equality, LBGTQ2S+, sex education curriculum, and inclusiveness in general. In Ontario, Catholic support for the Liberal Party remained at 40% in the 2011 provincial election (CPEP, 2011)⁸.

⁸ Data source: Canada Provincial Election Project (*in* Rayside et al., 2017).

What type of conflict could be so impairing as to erode the Catholic-Liberal marriage? Apparently neither same-sex marriage (Blais, 2005) nor abortion have been enough. While in the 2000 Canadian Election Study 63% of Catholics supported easy abortion access, 77% disagreed with banning abortion in 2011 (Rayside et al., 2017, p360-13), which speaks of the divergence in present-day attitudes between a more progressive Catholic rank and file and its conservative ecclesiastic leaders. Neither is the Quebec sponsorship scandal, which although Catholics castigated (by secular, not religious, motives) with a large drop in Liberal vote, it was not harsh enough to destabilize a sizable support for the Liberal Party (Stephenson, 2010). Could then the abolition of public funding of Catholic Schools become too onerous in the Liberal-Catholic relationship? As Walter Pitman pointed out in 1975, “no issue has had a more pervasive

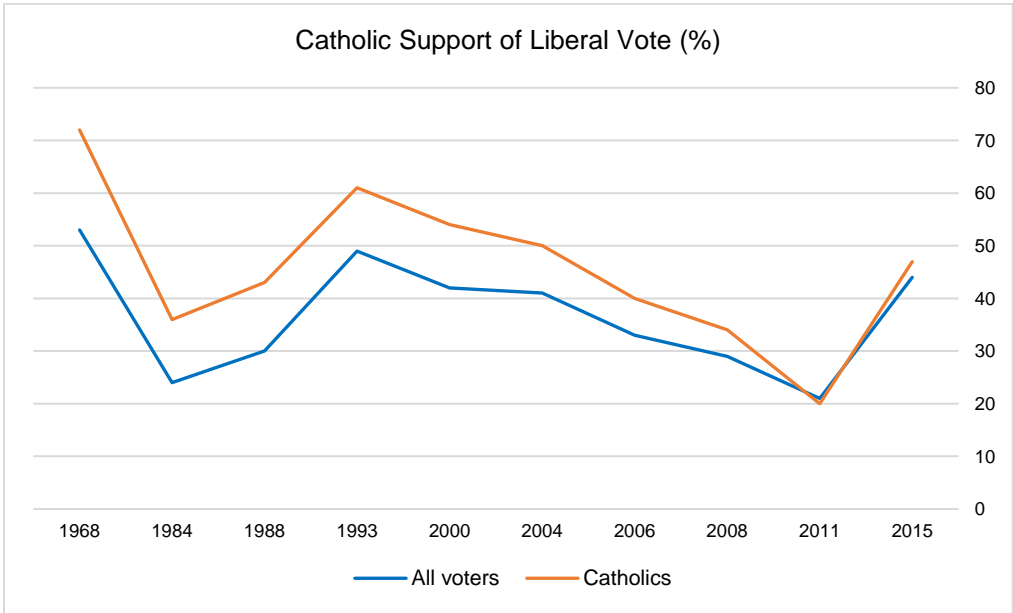


Figure 5. Trend of Catholic support for Liberal party compared to that of the rest of Canadian voting population, 1968 – 2015. Data source: Canadian Election Studies (in Religion and Canadian Party Politics; Rayside et al., 2017).

influence on the politics of Ontario than the controversy over the role of the separate school system” (Rayside et al., 2017). A division of opinions among Catholics in Ontario is not unexpected. Resistance could be found at an individual scale and at an institutional scale. Many Catholics will attest to the success of Catholic schools given that they are the product of them; thus they may believe that ‘more of the same’ is good. Polls done in 2012-2013 indicate a strong average 69% of support for continued funding among people who attended Catholic schools (Forum Research 2012c,d; 2013a). At the same time, the Catholic Church (as well as other religious groups) have insisted on maintaining a public presence, refusing to meet a Canada that has become increasingly secular, multicultural, and rights-oriented (Bramadat and Seljak, 2008; Seljak, 2016).

An 85% of Quebecers identified themselves Catholic in 1997⁹. This meant that the withdrawal of the Catholic Church (in particular from education) from Quebec’s public sphere did not become a “those secular people against us Catholics”. In fact, many of the critics of the Church establishment and proponents of its modernization were clericals themselves, such as Father Levesque and Bishop Charbonneau, or influential devouts such as Pierre Trudeau, Maurice Lamontagne, and Jacques Hébert. The secularization process in Quebec took place at a time when the Catholic Church was rethinking itself in the world through the Second Vatican Council accepting the autonomy of the state, religious pluralism, and individual religious liberty. This synchrony allowed Catholics to transgress old parameters of social behavior once reprehensible, and still remain good Catholics (Seljak, 1996).

⁹ Calculated using data from Statistics Canada 1991 and 2001 censuses.

In many respects, the current Catholic Church has been living another round of reassessment with Pope Francis and his overhauling of the institution's views on many social issues including LBGTQ2S+, massive sexual abuses of children gone unpunished, women's role in the Church, etc. Catholic affiliation in Ontario, in comparison to that of Quebec in 1997, is 31.4%, which shows that Ontario's Catholic schools have not produced church-goers, as happened with Quebec's Catholic schools in spite of substantial investments in religious education (Seljak 2020, Personal Comm.) As pointed out by Seljak (2016), with increased secularization, public religion has become more of a liability than an asset, in which an inherited Christian privilege is increasingly felt more as an injustice than a trivial occurrence. As shown in Section 5.1, polls demonstrate a large, stable segment of Canadians who choosing to remain Christians understand that the last stronghold of their privileged establishment needs to end. Polls done in 2012-2013 indicate that an average of 20% of Catholics reject public funding of Catholic schools, and an average of 5% neither supports nor rejects (Forum Research 2012c; 2013a,b).

6.2. Protestant Counterforce?

Protestants in Canada have historically preferred the now-dissolved Reform Party and later have leaned toward the Alliance. That conservative trend has continued, as can be seen from the high percentages of Protestant support for the Conservative Party in the last elections, shown in Figure 6. In Ontario, 43% of Mainline Protestants and 57% of Conservative Protestants supported the Progressive Conservative party in 2011 (CPEP,

2011)¹⁰. Although the historical vote of Mainline Protestants seems to have been marked by an anti-Catholicism/anti-French mentality until mid-1900s (Meisel, 1956; Rayside et al., 2017), it has likely died with the generations that held those sentiments. Figure 6 shows that new Mainline generations seem to keep a high regard for more traditional views in line with those of S. Harper's government (who himself was Evangelical). Conservative Protestants have long advocated for funding of religious minorities; they even formed the Ontario Association of Alternative and Independent Schools in 1974 to press for provincial funding of independent schools (Rayside et al., 2017). John Tory supported this type of funding, whereas Stephen Harper stated that he was not willing to increase any funding to anyone, more in line with the Conservatives' characteristic fiscal austerity.

Although Conservative Protestants may sneer at Catholics for their perceived lax form of Christianity, they would probably support the abolition of public funding of Catholic schools more out of fairness than religious motives and would probably join Mainline Protestants seeking fiscal efficiency. As mentioned in Section 5.0, Protestantism in Ontario currently sits at 31.1%. Mainline Protestants still retain the strongest presence in Ontario at 56%, whereas 21% of the total are Conservative Protestants and the remaining 22% do not ascribe formally to either, but still identify as non-Catholic Christian. Table 4 shows that, notwithstanding a lack of consensus among Protestants on public funding of Catholic schools, there is a strong attitude, more than half of them on average, rejecting the continued public funding of Catholic schools.

¹⁰ Data source: Canada Provincial Election Project (*in* Rayside et al., 2017).

It is important to note that each of the Catholic and Protestant faiths have reached 31% of the Ontario’s population, such that in a referendum on the public funding, polarization of the two group votes would result in a cancelling out effect.

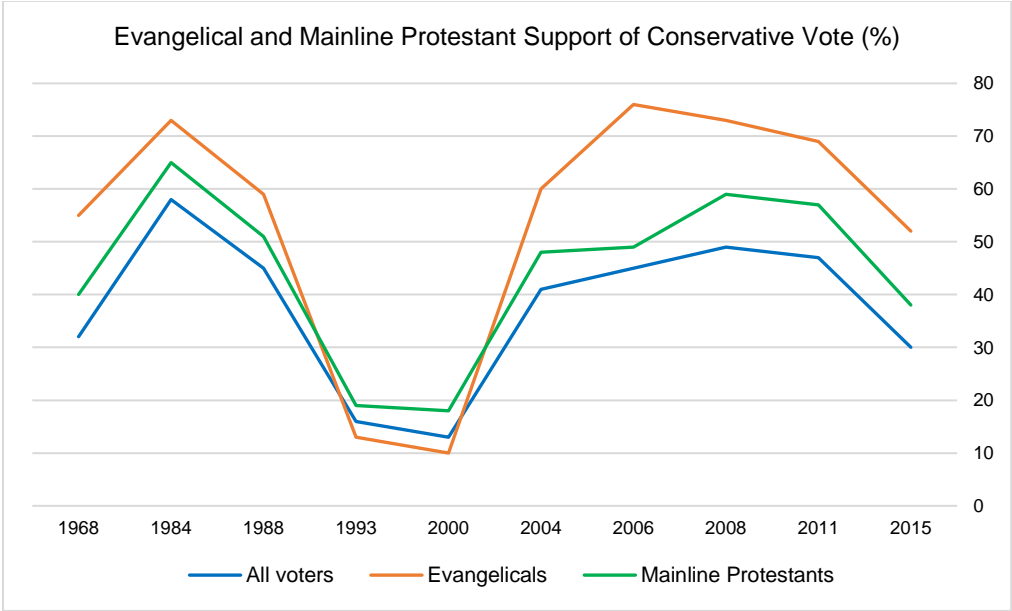


Figure 6. Trends of Evangelical Protestant and Mainline Protestant support for the Progressive Conservative party against the rest of Canada’s voting population, 1968 – 2015. Data source: Canadian Election Studies (in Religion and Canadian Party Politics; Rayside et al., 2017).

Table 4 – Attitudes (%) among non-Catholic Christians on public funding of Catholic schools, 2012-2015

Religion	Support	Reject	Don’t know
Mainline Protestant	34	58	8
Evangelical Protestant	38	45	17
Other Protestant/Christian	37	51	11

Notes:

1. Average values for period 2012 – 2015.
2. Data source: Forum Research (2012a,b,c,d,e; 2013a,b; 2015).

6.3. MINORITIES

6.3.1. Muslims

The Muslim community not only dramatically increased its population in Canada and Ontario to 3.2% and 4.6%, respectively, by 2011 (StatCan, 2011), but as shown in Figure 7, it also increased its voting presence, as evidenced, for example, in the 79% in the 2015 federal election and 67% in the 2018 provincial election (Mainstreet Research, 2018). According to an Environics survey in 2016, 65% of participants voted Liberal, 10% NDP, and only 2% PC (Environics, 2016). Both the strong Liberal support and the almost-null PC support from this strongly morally conservative group of immigrants points to a rejection to a pro-Israel foreign policy, anti-Muslim security speech, and the niqab banning controversy (Rayside et al. 2017, p51; Globe and Mail, 2018). Therefore, from a political angle, Muslim support for abolition of public funding of Catholic schools would have to come from a Liberal initiative.

According to the Environics Survey 2016, the most pressing issues for Muslims nowadays are the country's economy (34%) and unemployment (18%). Only 3% find sex education to be a pressing concern. A majority of Muslim children go to either secular or Catholic schools. Memon (2006) reported that only 7% of the total Muslim student population in Canada attended Muslim schools¹¹. The reasons appear to be either lack of enough Muslim schools or because the latter are unaffordable. Memon (2011) reported the existence of approximately 55 Islamic schools in Canada around 2010, most of which are private (Memon, 2010). For example, the minimum annual

¹¹ Some commentators and some Muslim people make distinction over the terms Islamic schools and Muslim schools, while others use them indistinctively. Both as interchangeable terms have been used herein.

tuition of an Islamic school is around \$3,000 (OurKids, 2020). Additionally, Zine (2008) pointed out that many children are put on waiting lists at birth, with some Islamic schools having waiting lists of 650 or more.

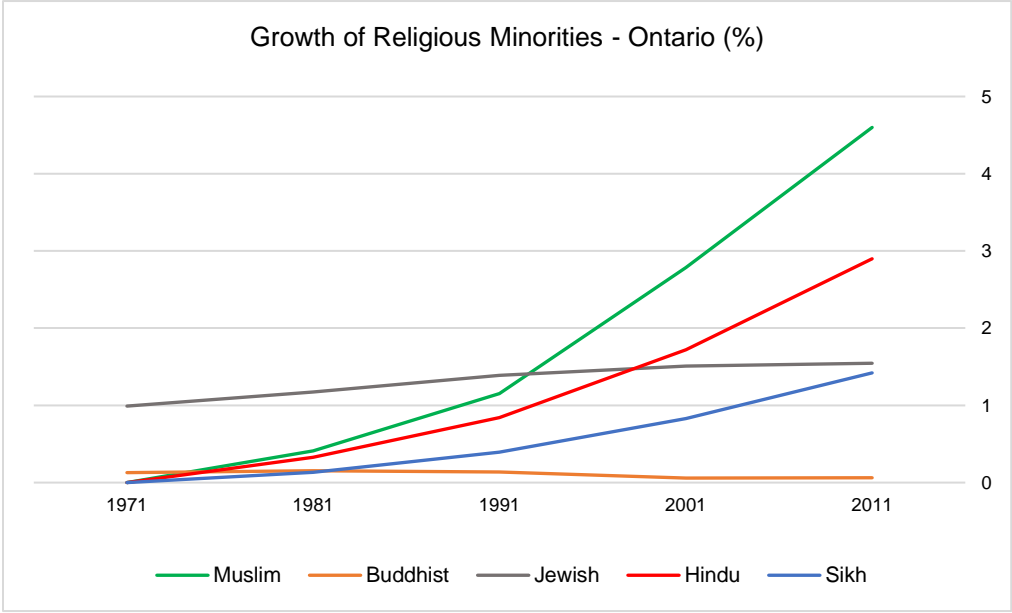


Figure 7. Trends of percentage growth of religious minorities in Ontario, period 1971 – 2011. Data source: Statistics Canada 1971, 1981, 1991, 2001, 2011 censuses.

The Environics survey also indicates a 75% support for the right of students to pray in schools (Environics, 2016), which may tacitly translate to a noticeable 25% supporting secularization of schools. Also, a 24% of the survey participants thought Muslim women should not have the right to wear niqabs while receiving public services whereas 15% thought it depended on the situation. These numbers show a more diverse Muslim community than the conservative stereotype. Despite this somewhat novel Muslim ethos suggesting a possible substantial support for the abolition of funding of Catholic

schools, fairness would be expected to be the main motivator, as with Conservative Protestants.

6.3.2. Jews

The Jewish community made up about 1% and 1.5% of Canada's and Ontario's religious affiliations, respectively in 2011 (StatsCan, 2011) (Figure 7), with almost half of Canada's population concentrating in Toronto. Although the Jewish community has long sided with Liberal policies, their PC support jumped from 20% in 2006 to 52% in 2011 according to an Ipsos-Reid poll of the same year (although the survey was questioned for the bias of the statistical sample; CJNews, 2019). This strong support has generally been ascribed to Harper's aggressive pro-Israel foreign policy. The 2018 Survey of Jews in Canada (Environics, 2018) showed 36% support for Liberals and 32% for PCs. All in all, it seems that in recent decades the vote of Jewish Canadians has followed pro-Israel agendas (Rayside et al., 2017).

In regard to education, the Environics survey found that a salient 43% of Jewish Canadians have attended private day schools for an average of 9 years, while another 67% have participated in other Jewish educational programs. 34% of Montreal's Jews consider important attendance to Jewish day schools. 33% of Winnipeg's community assign priority to education whereas 45% disagree or do not know (Environics, 2018). The Jewish community has long advocated for funding of their schools, as explained in Section 3.0, in particular with the Adler legal case; therefore, again, the expectation is that the Jewish community would support abolition of public funding to Catholic schools mostly out of fairness.

6.3.3. The Rising Power of Secularism

Since the 1960s, the Canadian society has undergone a remarkable secularization, defined by the gradual loss of the all-encompassing influence of religion in the social sphere, retreating to an individual realm (Terrien, 2009). If attendance of weekly religious service in 1947 was 67%, by 2015 it had plunged to 14% (Rayside et al., 2017). Conversely, no-religious affiliation, understood as either the individual disaffiliation from an institutional religion or the lack of affiliation to one, has been on the rise. Figure 8 shows how no-religious affiliation in Canada steadily increased from approximately 4% in 1971 to 24% in 2011, a trend that has been mirrored in Ontario.

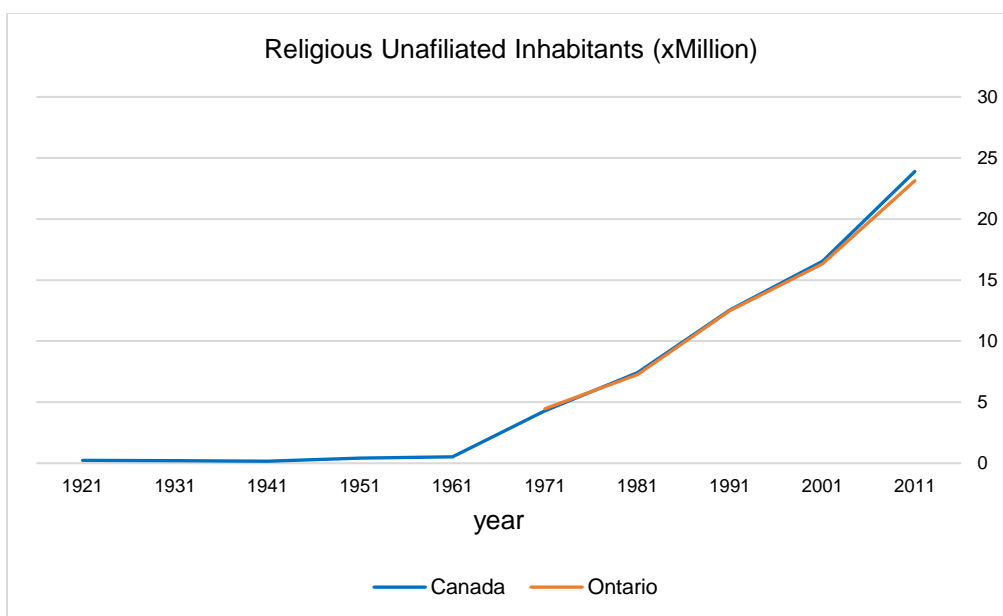


Figure 8. Trend of growth of inhabitants unaffiliated to religions in Canada and Ontario, period 1921 - 2011. Data source: Statistics Canada 1971, 1981, 1991, 2001, 2011 censuses.

In fairness, disaffiliation in this case is mostly applicable to the dominant Catholic and Protestant religions because minority religions have increased up to about 11% during the same period (PEW, 2013). In the case of no religious affiliation, this does not mean necessarily that everyone is atheist or similar. Unaffiliated people can be part of the phenomenon known as “spiritual but not religious”. Bibby (2002), for example, found that in 2000 40% of the unaffiliated participants in his Project Canada surveys believed in a god.

The increased levels of secularization in Canada are reflected in the decrease of religious affiliation in Ontario. As pointed out by Seljak (2016), a culture of equality rights has permeated the Canadian social fabric since the establishment of the *Charter of Bills 1960* and the *Charter of Rights 1982*, by which the public has become more sensitive to the discrimination of some traditional arrangements and practices, in particular the state protection of Christian privilege. Hence it is safe to assert that secular people either favor or believe in a neutral state that does not favor any religion in particular, which would very likely result in a support for the abolition of public funding to Catholic schools.

Unaffiliated people, who include civic positions such as agnosticism, atheism, humanism, no religion, or any other personal belief not included in either traditionally recognized religions or parareligions, divided their political support as 48% Liberal, 23% PC, and 30% NDP, according to the Canada Provincial Election Project (2011)¹². Additionally, according to polls between 2012 and 2013, an average 26% of unaffiliated

¹² Data source: Canada Provincial Election Project (*in* Rayside et al., 2017).

people expressed support for the public funding of Catholic schools, while an average 66% rejected it (Forum Research 2012c; 2013a,b).

6.4. Concluding Discussion

In spite of the quite complex relationship between religion, politics, and stance on public funding of Catholic schools, polls show (Figure 2) that more Ontarians support the withdrawal of public funding for Catholic schools than its continuation. However, the difference between both options is quite variable, from 5% to 42%, depending on the survey selected. Table 5 (upper table) summarizes the attitudes of support and rejection among Ontarians discussed in preceding sections, using the poll data for the period 2012-2015 and the attitudes of Ontario's population in main religious categories. The rejection of continued funding averages 48% and support averages 44%, while an average 9% could favor either option. Such margin of difference and uncertainty is a clearly risky configuration for a provincial government—and much riskier for a provincial election candidate—to propose a bill abrogating the application of s.93 in Ontario.

In order to increase this difference and bring out the abolition of s.93 in Ontario, while minimizing political risk, a first brute-force strategy is to focus on changing the mindset of the 24% of Catholic supporters, albeit in a likely futile effort (75% of Catholics and 69% of graduated from Catholic schools support continued funding). Another brute-force strategy would be to wait about 30 years¹³ for the slow, further decline of this group, in order to obtain an approximate projected 14% (Table 5, lower table). This would lead to an unbeatable projected 55% even if the whole projected 10% of

¹³ Counting from 2020.

ambivalent voters supported the continued funding. A better strategy is to try to work with the current 9% of “Don’t knows” as well as the 6% of Mainline Protestants and 6% of Seculars to secure a majority of support for the abrogation of s.93 much earlier than 30 years.

Table 5 – Attitudes (%) of Ontarians on public funding of Catholic schools divided by religious group – 2011 projected to 2051

2011	Catholic	P. Mainline	P. Conserv.	Christian	Minorities	Secular	Other	Total
% Ontario's population	0.31 ²	0.17 ³	0.07	0.07	0.06 ⁴	0.24	0.07	0.99 ⁶
Support ¹	0.24	0.06	0.03	0.03	0.02	0.06	0.02	0.44
Reject	0.06	0.10	0.03	0.04	0.04	0.17	0.04	0.48
Don't know	0.02	0.01	0.01	0.01	0.01	0.02	0.01	0.09
2051 ⁵	Catholic	P. Mainline	P. Conserv.	Christian	Minorities	Secular	Other	Total
% Ontario's population	0.18	0.09	0.03	0.03	0.13	0.44	0.07	0.98
Support	0.14	0.03	0.01	0.01	0.03	0.11	0.02	0.35
Reject	0.04	0.05	0.01	0.02	0.08	0.31	0.04	0.55
Don't know	0.01	0.01	0.01	0.00	0.02	0.04	0.01	0.10

Notes:

1. Data source for attitude of religious segments: Forum Research (2012c, 2013a,b).
2. Data source for percentage proportions of Ontario's religious groups: Statistics Canada 1971, 1981, 1991, 2001, 2011 censuses.
3. Percentages for Protestant Mainline and Conservative faiths and Christians in Ontario in 2011 were calculated using the Statistics Canada 2011 census data.
4. Minorities represented by Islam and Judaism.
5. Linear extrapolations to 2051.
6. Percentages not 100% due to StatsCan random rounding and error propagation from successive averaging and rounding.

During Quebec's Quiet Revolution, the Catholic Church did not devolve into a "Catholic ghetto"; on the contrary, it knew how to adapt to the changing times (Seljak, 1996).

Unfortunately, the Ontario's Catholic Church's reaction to the new social trends such as

same sex marriage, abortion, human rights, and others, has not been in kind, but rather of resistance. Ideally, the long-dragging issue of public funding to Catholic schools in Ontario should be resolved by a constructive dialogue between the Ontario's Catholic Church and the provincial government conducive to a protracted withdrawal of the Catholic Church from the public educational system. However, with the extant *de facto* political power of the Catholic Church in Ontario despite Ontario's population progressive secularization, this solution becomes more and more distant. Thus, the issue of public funding is likely to be ultimately either resolved by or at least will require of a provincial referendum, in the same way it happened for Quebec, Newfoundland, and New Brunswick.

With a substantial portion of Ontarians still supporting Catholic schools and the cautious silence of politicians, it seems unlikely that a derogation of s.93 will occur in the near future, unless some strong push from other societal sectors changed course drastically (for example, protest movements). In consequence, the provincial government should seek to persuade certain non-Catholic religious segments, as suggested above, in order to secure better support for a potential referendum.

The provincial government should also engage the Ontario's Catholic Church to work on a solution. Instead of extending funding to any interested religious group, which is not possible for reasons already presented, a compromise might be reached by implementing a temporary solution with what could be considered as "ecumenical" schools. The main characteristics of these schools can be outlined as follows:

- a. Only public non-denominational schools would be funded with tax-payer monies. Catholic schools would become private institutions. Those Catholic schools wanting to convert to ecumenical schools must become public non-denominational.
- b. Public non-denominational schools would provide the resources for spiritual beliefs as requested by students. These resources would include one or more shared worship rooms and ad-hoc spiritual facilitators.
- c. The worshipping activities would be provided as extra-curricular activities only, which would take place during specified time slots that do not interfere with regular academic curricula (would likely be allowed in afternoons after last class block).
- d. Secondary schools would incorporate a learning module on religions of the world in the Philosophy course. In addition, 11-12 Graders would also have a mandatory Ethics course.

These characteristics show that the proposed ecumenical schools would not follow the ecumenical trend of many education systems in Europe, in which awareness of religious diversity is incorporated in the everyday instruction. In Quebec's path to educational secularization, religion was removed from the class, and secondary students were given the choice between three courses, Moral and Religious Education (MRE), Catholic Religious Instruction (CRI), or Moral Education (ME). A similar path was followed by Newfoundland where the schools became "*just schools where children learn and teachers teach*" (Gov.NL, 1997a). The proposed ecumenical schools, as explained in point (d), would not provide CRI option, but would swap the MRE with a learning module in the Philosophy course, and would add an ME course.

Although the main objective of these proposed ecumenical schools is to provide a compromise to the issue of the public funding of Catholic schools for the time being, these ecumenical schools may well serve as a first protracted step toward Ontario's educational secularization, same way British Columbia, Quebec, New Brunswick, and Newfoundland did without further negative consequences; in fact, nowadays they have thriving education systems. Furthermore, Quebec continues to be an overwhelmingly Catholic society, yet religion in Quebec's classrooms has totally disappeared.

In the end, it should be understood that the overriding reason behind the entrenchment of *Section 93* in the *1867 Constitution Act* was to accommodate Quebec, since Catholicism was the dominant force in Quebec society at that particular period of time. However, with the gradual decline of Catholic authority in Quebec since the 1960s and the recent decision by the Quebec government to remove religion from the classroom, the *raison d'être* for retaining *Section 93* has become questionable.

In Ontario, secularization has led to a gradual eclipse of religion as a horizon of significance while human rights has gradually come to establish themselves as the social norm. The *Living Tree* constitutional doctrine, championed by McLachlin J., sees the law as an organic entity that evolves according to societal views (Makin, 2018). Therefore, since *Section 93* no longer serves its original purpose, it is in line with the *Living Tree* doctrine to terminate public funding for religious denominational schools in Ontario.

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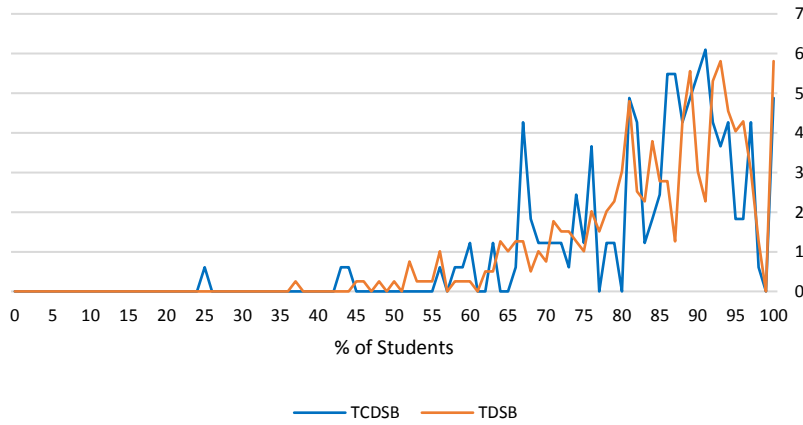
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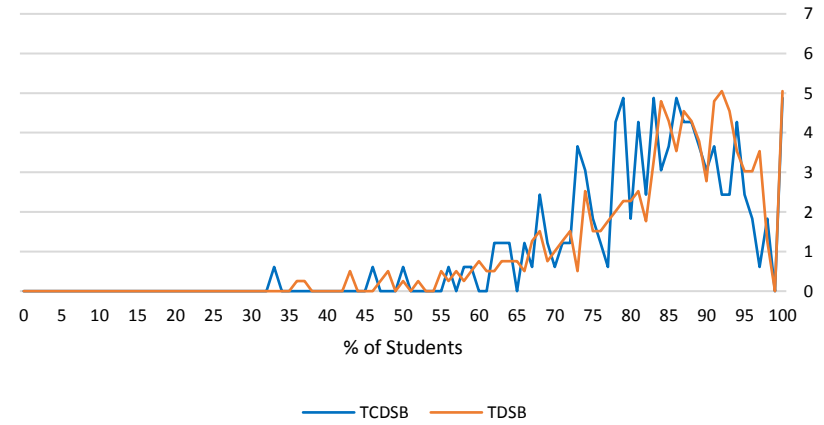
APPENDIX A

**% OF SCHOOLS WITH % OF GRADE 3 STUDENTS ATTENDING
SCHOOL BORN IN CANADA – 2010 - 2019**

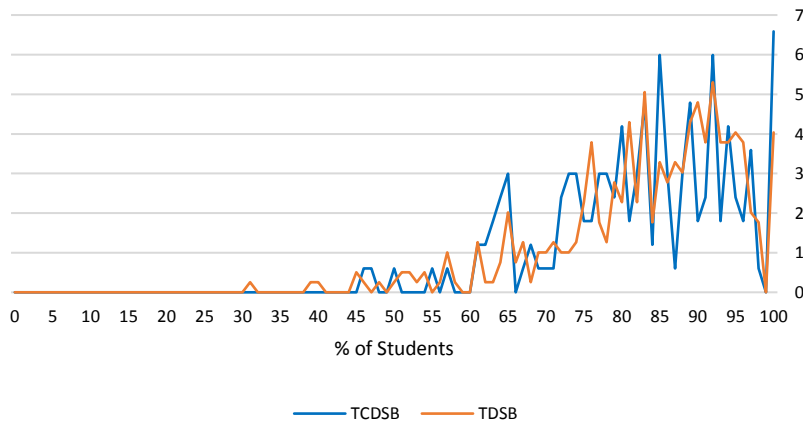
% of schools with % of Grade 3 students attending school born in Canada (2019)



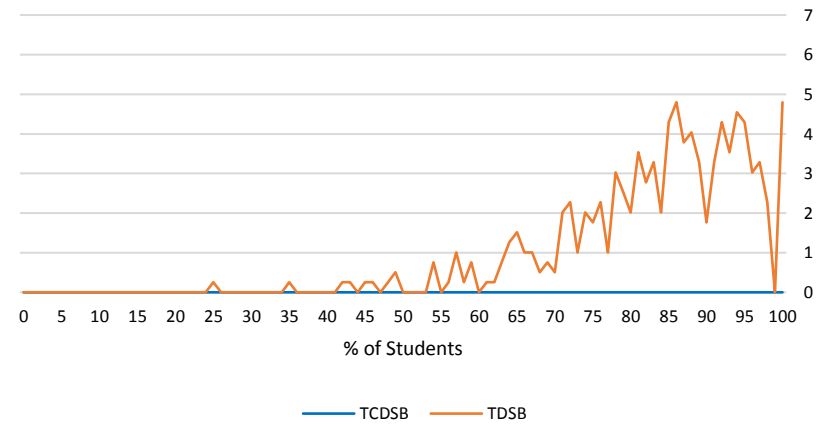
% of schools with % of Grade 3 students attending school born in Canada (2018)



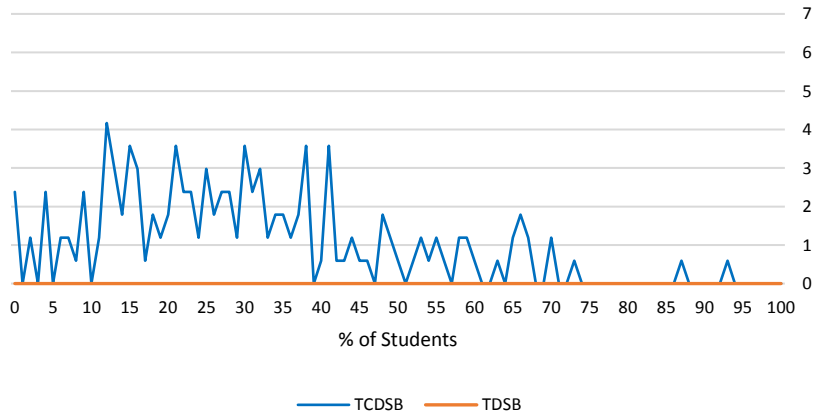
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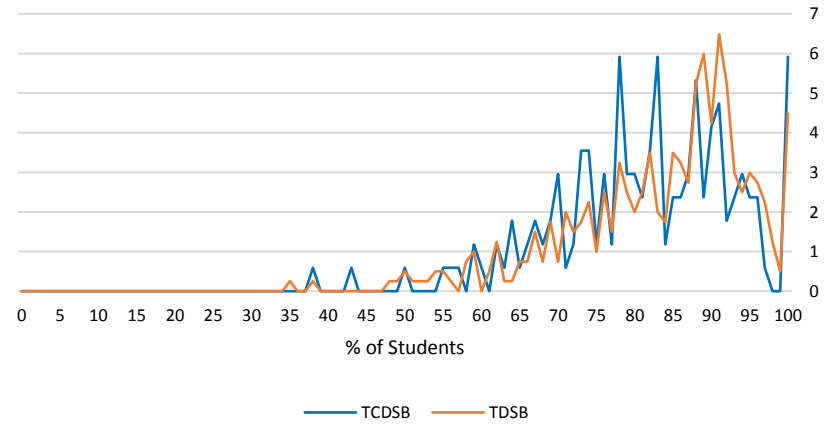
% of schools with % of Grade 3 students attending school born in Canada (2016)



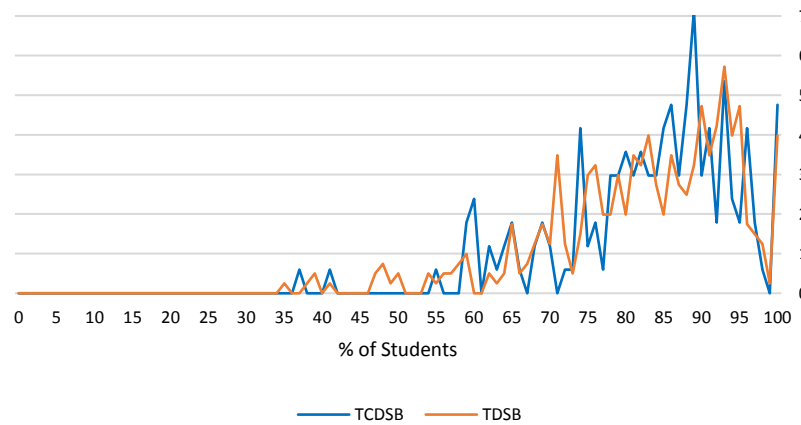
% of schools with % of Grade 3 students attending school born in Canada (2015)



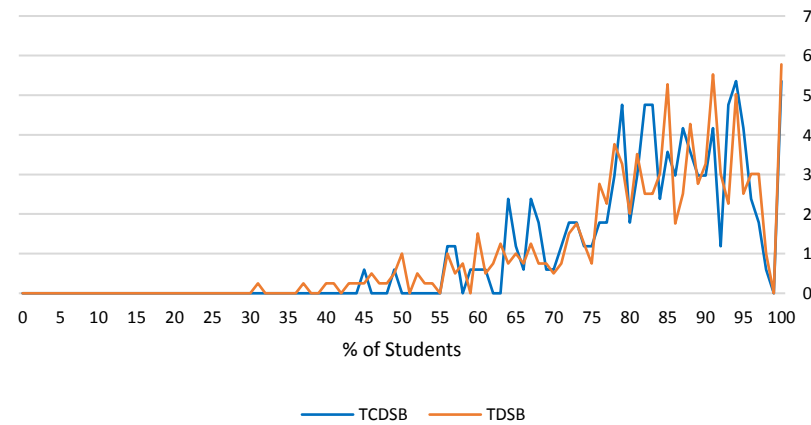
% of schools with % of Grade 3 students attending school born in Canada (2014)



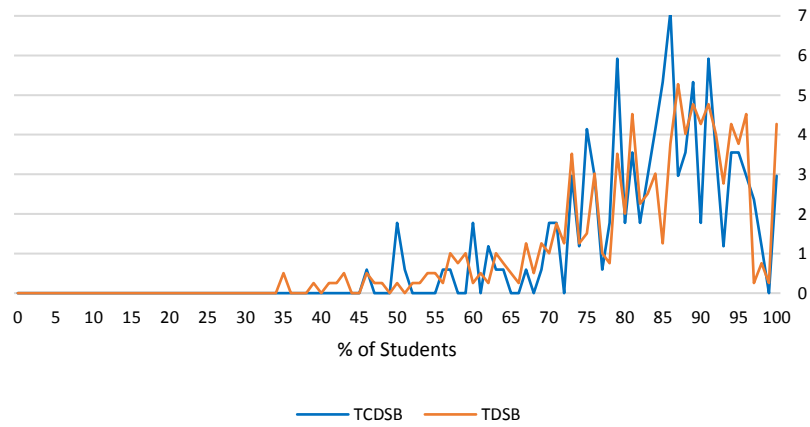
% of schools with % of Grade 3 students attending school born in Canada (2013)



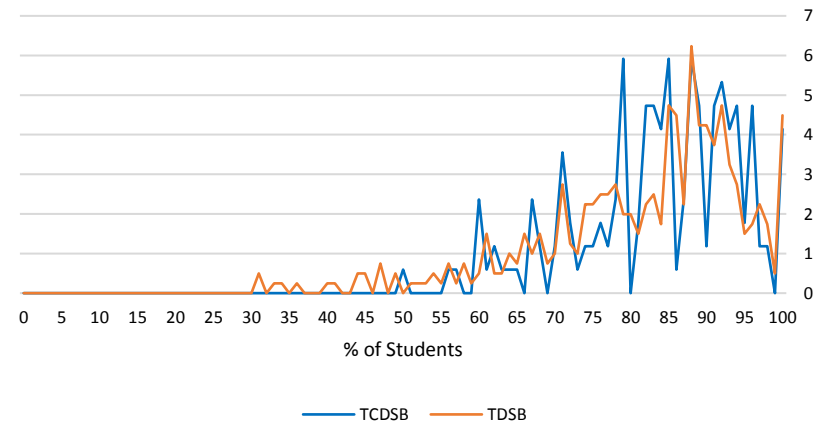
% of schools with % of Grade 3 students attending school born in Canada (2012)



% of schools with % of Grade 3 students attending school born in Canada (2011)



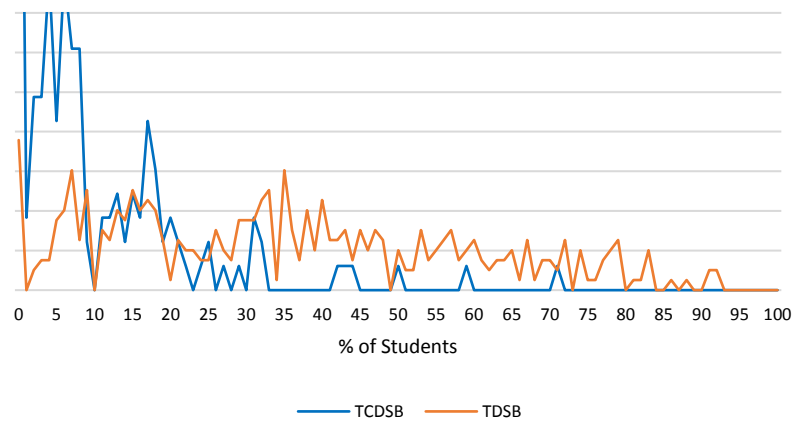
% of schools with % of Grade 3 students attending school born in Canada (2010)



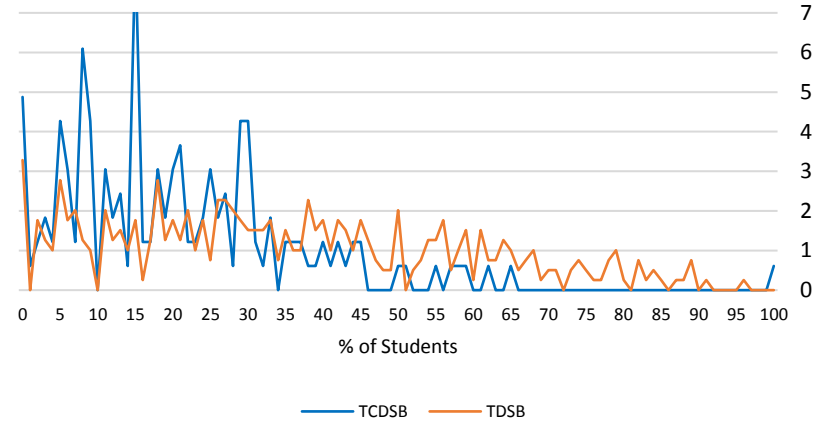
APPENDIX B

**% OF SCHOOLS WITH % OF GRADE 3 STUDENTS ATTENDING
SCHOOL WHOSE FIRST LANGUAGE IS ENGLISH – 2010 - 2019**

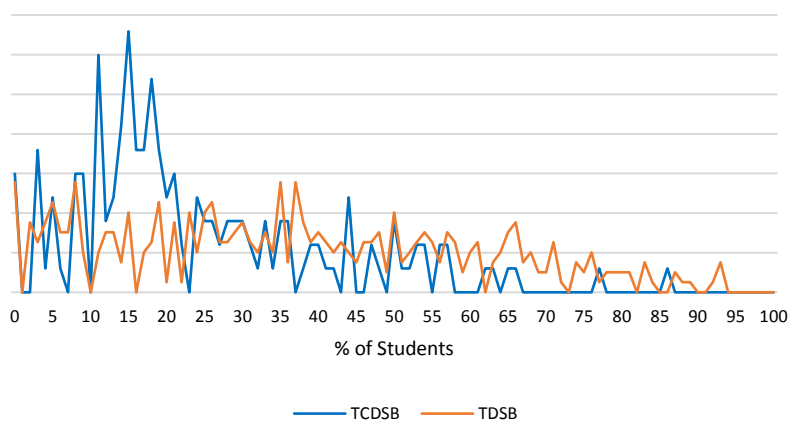
% of Schools with % of Grade 3 students attending school whose first language is English (2019)



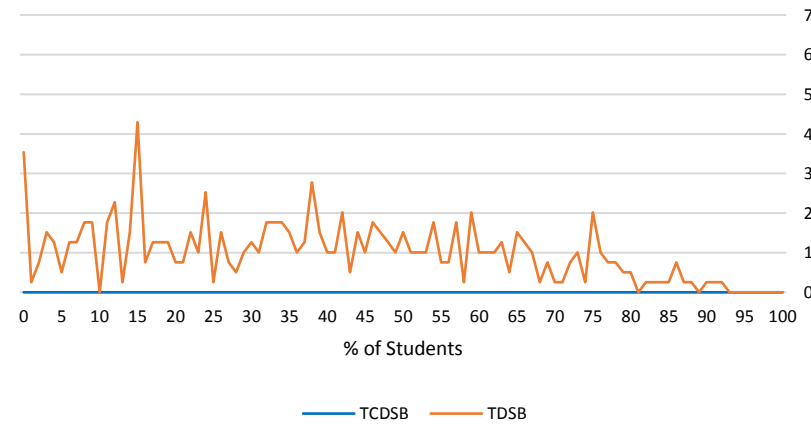
% of Schools with % of Grade 3 students attending school whose first language is English (2018)



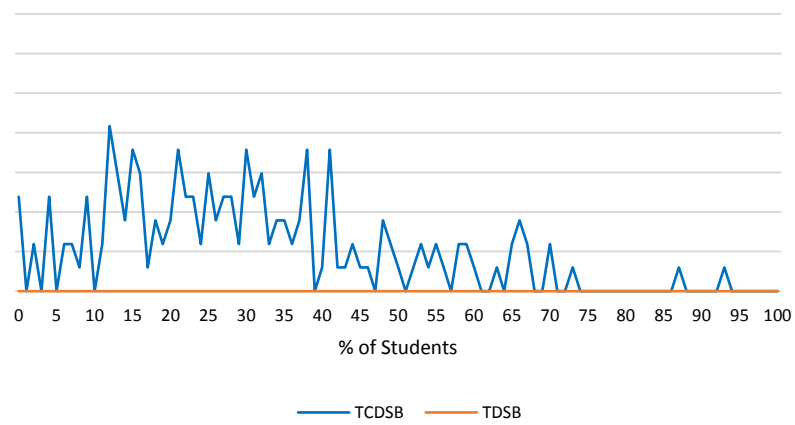
% of Schools with % of Grade 3 students attending school whose first language is English (2017)



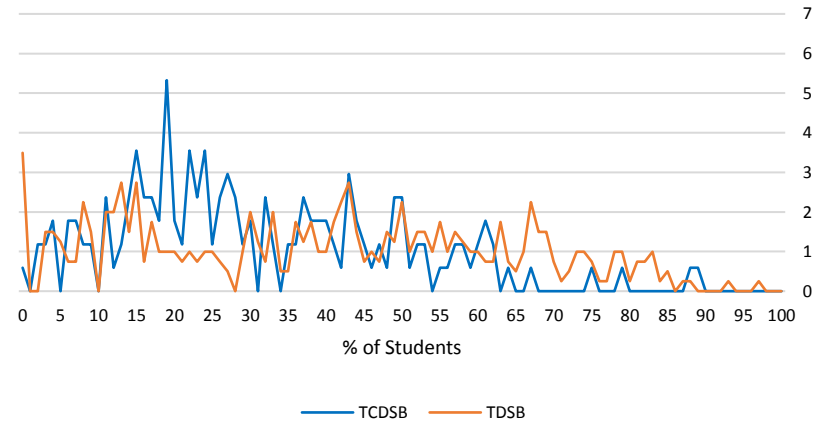
% of Schools with % of Grade 3 students attending school whose first language is English (2016)



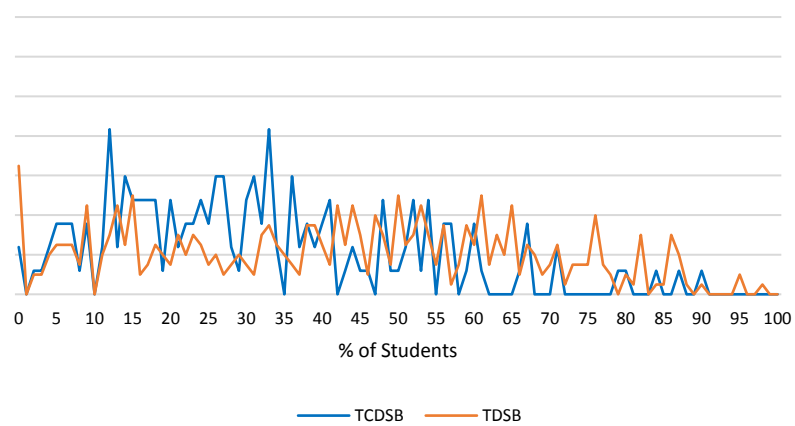
% of Schools with % of Grade 3 students attending school whose first language is English (2015)



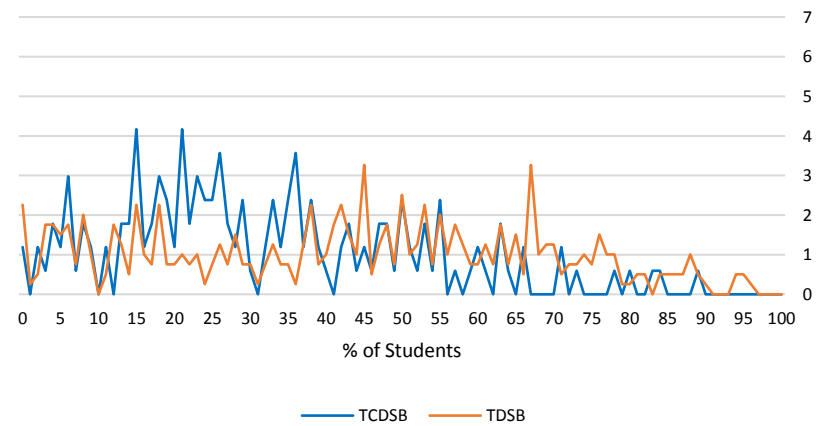
% of Schools with % of Grade 3 students attending school whose first language is English (2014)



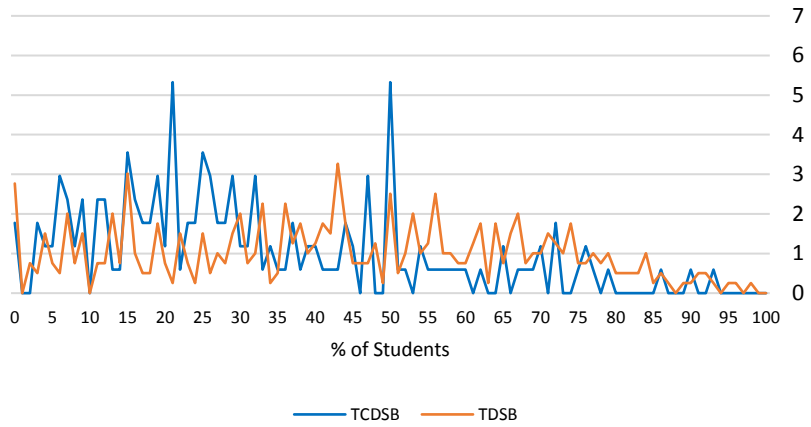
% of Schools with % of Grade 3 students attending school whose first language is English (2013)



% of Schools with % of Grade 3 students attending school whose first language is English (2012)



% of Schools with % of Grade 3 students attending school whose first language is English (2011)



% of Schools with % of Grade 3 students attending school whose first language is English (2010)

