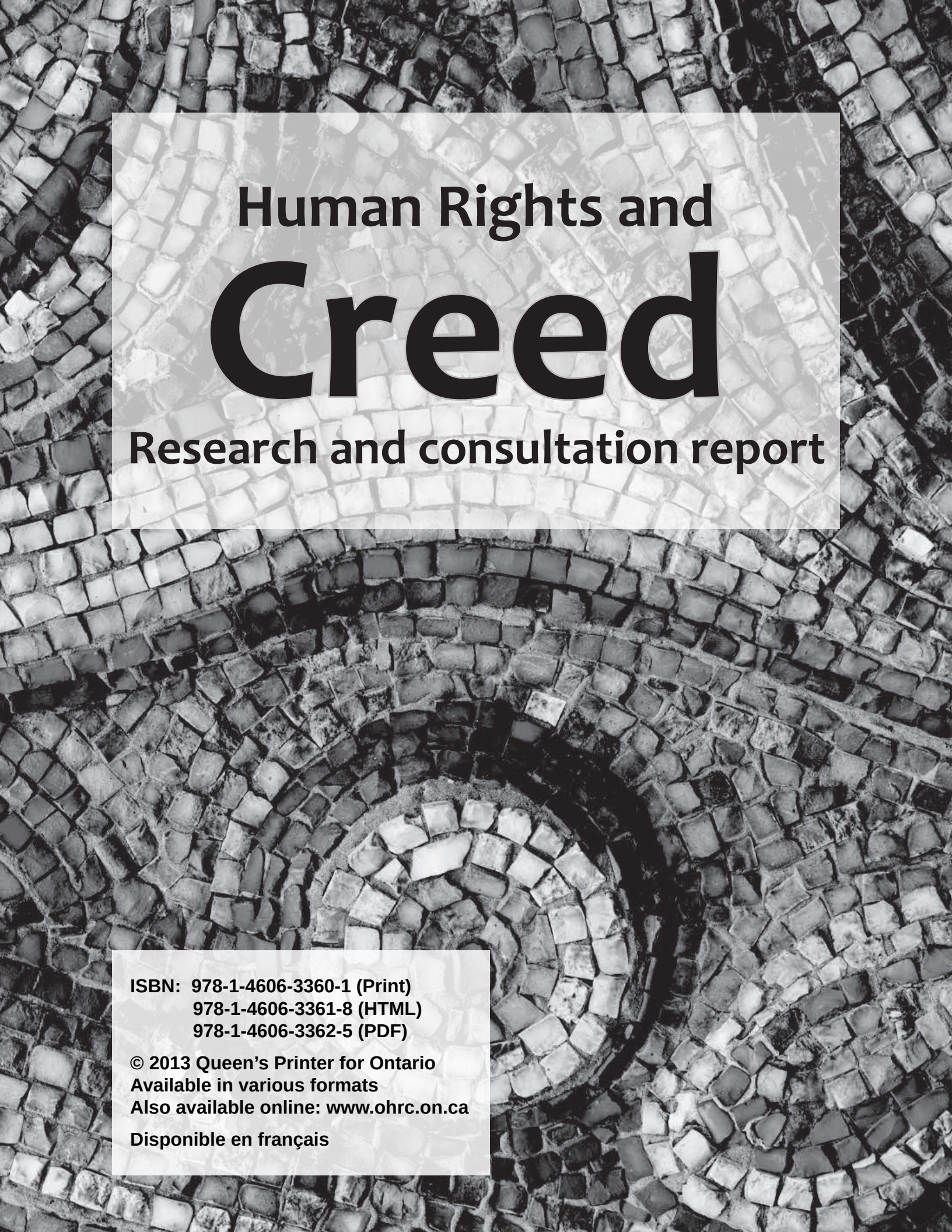

Human Rights and Creed

Research and consultation report

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I. Introduction

1. Setting the context

Since the Ontario Human Rights Commission (OHRC) published its *Policy on creed and the accommodation of religious observances (Policy on creed)* in 1996, there have been significant legal and social developments in Canada and internationally that have shaped the experiences of communities identified by creed. There is also extensive public debate about the appropriate scope and limits of human rights protections for religion and creed in Ontario society.

The OHRC is currently updating its 1996 *Policy on creed* to reflect these developments. The goal is to clarify the OHRC's interpretation of human rights based on creed under the Ontario *Human Rights Code* (the *Code*) and advance human rights understanding and good practice in this area. The update, which began in 2011, will take two to three years to finish. It will involve extensive research and consultation, and will draw on lessons learned from the OHRC's recent work on the *Policy on competing human rights*.

To date, the OHRC has hosted two major consultation events, including:

- A policy dialogue on human rights, creed and freedom of religion on January 12 – 13, 2012 at the University of Toronto's Multi-Faith Centre, in partnership with the University of Toronto's Religion in the Public Sphere Initiative and Law School

- A legal workshop on human rights, creed and freedom of religion on March 29 – 30, 2012 at York University's Osgoode Hall Law School, in partnership with York University's Osgoode Hall Law School, Centre for Public Policy and Law and the Centre for Human Rights.

We then published selected policy dialogue papers in a special issue of *Canadian Diversity*. These papers, along with those from the legal workshop, are available on the OHRC website at www.ohrc.on.ca.

The OHRC has also done extensive research internally, including:

- *A Creed case law review*
- An environmental scan and literature review
- Review and analysis of 2010/11 and 2011/12 fiscal year applications currently at the Human Rights Tribunal of Ontario (HRTO).

The OHRC will be engaging in further research and public consultation in 2013-2014, in part based on responses to the *Human Rights and Creed Survey* and feedback from this report.

2. The purpose of this report

The primary aim of this paper is to report on OHRC research and consultation findings and analysis to date on key creed-based human rights issues, options and debates. We hope that this will add further transparency to our creed policy update process, and help to increase general public awareness of creed-based human rights issues. Another goal is to develop a stronger contextual framework for understanding and addressing contemporary creed-based human rights issues.[1]

We welcome and encourage your feedback on the questions and content of this report. Please email your comments to creed@ohrc.on.ca. Your feedback is valued and will help to guide us as we update the creed policy in the coming year.

3. Criteria for assessing and developing human rights policy

When developing and assessing policy issues, options and positions, the OHRC considers the following criteria:

(a) An interpretation of the *Code* that protects, promotes and advances the purpose of human rights legislation in Ontario[2]

The Preamble to the Ontario *Human Rights Code* elaborates four key principle goals of the *Code*: (i) recognizing the dignity and worth of every person; (ii) providing equal rights and opportunities without discrimination that is contrary to law; (iii) creating a climate of understanding and mutual respect, so that; (iv) each person feels a part of the community and able to contribute fully to the development and well-being of the community and the province.

(b) The OHRC's mandate to promote and advance respect for human rights in Ontario, to protect human rights in Ontario, and to identify and promote the elimination of discriminatory practices[3]

The Commission strives for objective, principled and informed policy development.

(c) Canadian and international human rights law, legal decisions and principles for statutory interpretation[4]

OHRC policies may advance and broaden interpretations of *the Code*. However, they should not contradict clear legal precedents for interpreting *the Code* at the time of their publication.

II. Executive summary

Background trends

The Ontario *Human Rights Code* focuses on prohibiting discrimination in five protected social areas: employment; housing; goods, services and facilities; contracts; and vocational associations. Part of the OHRC's role is to create policies that give the details for making this vision a reality.

To create relevant and responsive human rights policy, the OHRC needs to identify and understand past and present social trends and dynamics that contribute to contemporary forms of discrimination based on creed. This understanding helps the OHRC combat prejudice and intolerance, reduce tension and conflict, and address the root causes of discrimination in Ontario.

Research shows that there is growing religious and creed diversity in Ontario. While most Ontarians continue to identify as Catholic or Protestant, census data reveals particularly significant growth among religious minority groups outside of the historical Christian (Catholic and liberal Protestant) mainstream churches. Immigration accounts for much of this deepening religious diversity.

A growing number of Ontarians also report that they have "no religion." As well, increasing numbers of people of all faiths are living and practicing their faith in more individualized ways, detached from institutional structures and conventions. For instance, it is becoming more common for individuals and families to practice two or more religious/creed-based belief systems. All of these broader trends are projected to accelerate in the future.

Some of these trends are fairly recent. At least up until the 1960s, Canada was commonly viewed as a "Christian nation." The state extended special privileges to a small number of Christian (mainly English Protestant and French Catholic) denominations. Christian Canadians played a central role in building many of Ontario's current institutions, which people of all faiths continue to benefit from today. However, over this same period, religious minority groups regularly faced persecution and discrimination. Perhaps the most egregious example of historical efforts to assimilate non-Christian "others" was the forced Christian residential schooling of Aboriginal children in Ontario (see the Canadian Truth and Reconciliation Commission's publication, *They Came for the Children*, available for download on the TRC website at www.trc.ca).

Since the 1960s, public policy and law has increasingly come to celebrate and embrace diversity, equality and non-discrimination. This has been accompanied by a new more secular approach in public life and state institutions. Many historic Christian privileges in public institutions have since been challenged and removed, as religion has generally become more privatized. At the same time, legal protections for creed and freedom of religion have increased since the Ontario *Human Rights Code* was introduced in 1962 and the Canadian *Charter of Rights and Freedoms* in 1982.

Hate crime statistics and social research show that prejudice and discrimination based on creed remain a stubborn problem in Ontario, and one that is growing in some cases. Over the past 20 years, newer forms of racism, antisemitism and Islamophobia have emerged, sometimes drawing on and reviving older (in some cases racialized) stereotypes. At times, this has led to the indiscriminate targeting of victims based on "perceived creed."

Discrimination and prejudice targeting Muslims has been particularly pronounced in the post-911 period. This is reflected in Human Rights Tribunal of Ontario (HRTO) complaints (called applications). Muslims were the most over-represented creed group among HRTO applicants, accounting for more than one-third (36%) of all HRTO applications citing creed in the 2011-12 fiscal year. Antisemitism, discrimination and hate crimes against Jewish people also continue to be a problem. A study by the League for Human Rights of B'nai Brith[5] said that antisemitic incidents more than doubled in the past 10 years. Some 10.7% of all HRTO complaints citing creed as a ground in the 2011-12 fiscal year involved persons self-identifying as Jewish (second highest among creed groups, when different Christian denominations are considered as separate groups).

Research also suggests that Aboriginal Peoples continue to face significant barriers practicing Ontario's longest standing spiritual traditions, which are often misunderstood or inadequately recognized by institutional authorities as warranting accommodation. Hindus, Buddhists and Sikhs also spoke of facing various barriers to their religious accommodation in OHRC consultations to date. Due to the actual and/or perceived close relationship between ethnicity and religion, experiences of creed discrimination by some members of these communities were sometimes compounded by various forms of racism and xenophobia. Members of newer, smaller and lesser-known faith communities, as well as atheists, agnostics and people without any religious affiliation, also spoke of facing various forms of stigma, prejudice and discrimination.

HRTO applications filed between 2010 and 2012 show that a majority of human rights applications involved claims of discrimination in employment. Most applications were filed in the central region, clustering around the Greater Toronto Area in particular. An overwhelming majority of HRTO applications citing creed over this period also cited a race-related ground (such as race, ancestry, colour, ethnic origin, place of origin) as an intersecting basis of discrimination. While applications citing creed accounted for 6.8% of all applications filed at the HRTO in the 2011-2012 fiscal year, this number likely does not reflect the full extent of discrimination based on creed actually occurring in Ontario over this period, due to such factors as under-reporting, mis-reporting and the unknown outcome of applications.

Religious and creed communities also continue to encounter less obvious, but equally significant, structural forms of discrimination and inequality. In some cases, this is a result of the differential impact on creed communities of past religious privileges and norms in society, as these play out in the present. In other cases, it is a result of newer and more aggressive and ideological "closed" forms of secularism that seek to shut out all forms of religion from public life, ironically in the name of keeping the public sphere

"neutral." In this context, a growing number of Christian Ontarians have spoken about feeling increasingly marginalized, as "minorities" in the current environment, including people affiliated with denominations that form a numeric majority in this province. This is reflected in HRTO complaints citing creed as a ground of discrimination. Over a third of these were filed by persons from Christian denominations in the 2011-12 fiscal year (next only to Muslims, among creed groups).[6]

While the reality on the ground can sometimes differ, Canadian courts have nevertheless made clear that the Canadian legal understanding of secular remains "open" and "inclusive" of religion, which means accommodating, and neither favouring nor disadvantaging or excluding, religion in the public sphere, in keeping with the *Charter* and *Code*.

What is creed?

"Creed" is one of the *Code*'s prohibited grounds of discrimination. The *Code* does not define it, but the OHRC defined the term creed in its 1996 *Policy on creed and the accommodation of religious observances* as "religious creed" or "religion," broadly conceived. While every Ontarian, according to the 1996 policy, has a right to be free from "discriminatory or harassing behaviour that is based on religion or which arises because the person who is the target of the behaviour does not share the same faith" (including atheists and agnostics), the same policy goes on to state that creed "does not include secular, moral or ethical beliefs or political convictions." The 1996 policy also states that creed human rights protections do "not extend to religions that incite hatred or violence against other individuals or groups, or to practices and observances that purport to have a religious basis but which contravene international human rights standards or criminal law."

Since the OHRC's 1996 policy, courts and tribunals have increasingly had to grapple with what qualifies for human rights protection on the ground of creed. Several recent cases have involved non-religious belief systems, including ethical veganism,[7] atheism[8] and political belief.[9] This and other legal considerations and social trends (including the significant growth of Ontarians identifying as having no religion,[10] and potentially deriving moral direction and meaning in life from non-religious belief systems) have helped to bring the question of defining creed to the forefront of the current policy update.

Most tribunal and court decisions have interpreted creed as the same as "religion," in keeping with the OHRC's 1996 policy position. However, other decisions have left open the possibility that non-religious beliefs may be a creed under the *Code*. Overall, the courts appear to be reluctant to offer any final, authoritative, definitive or closed definition of creed. Instead, they prefer a more organic, analogical ("if it looks like a duck, walks like a duck and quacks like a duck, it must be a duck") case-by-case assessment.

Courts and tribunals have also recognized a wide variety of religious and spiritual beliefs under human rights legislation and the *Charter*, including Aboriginal spiritual practices,[11] Wiccans,[12] Raelians[13] and Falun Gong[14] practitioners. There appears to be nothing in the *Code*-based case law that would prevent the OHRC from redefining creed more broadly and inclusively in its updated policy.

Indeed, the use of the term "creed" rather than "religion" in the *Code* may suggest that they are meant to have different meanings. The courts have nevertheless offered some guidelines on the outer limits of what they will recognize under the *Code* ground of creed (see the Creed case law review).

Creed accommodation

The duty to accommodate creed beliefs and practices is well established in Ontario human rights law. Organizations governed by the *Code* also have a responsibility to design services, programs and employment systems inclusively so that all Ontarians can equally benefit and take part in them. Putting such ideals into practice, however, can be challenging for organizations.

To comply with the *Code* duty to accommodate creed beliefs and practices, there are challenges when determining:

- sincerity of belief
- the extent and scope of the duty to accommodate, and to inclusively design for, creed beliefs and practices
- how to accommodate group-based creed observances
- appropriate accommodation arrangements, processes, roles and expectations for accommodation providers and seekers.

Common types of accommodation based on creed, where issues can arise, include:

- Providing days off for Sabbaths and religious holy days
- Providing time and space for prayer
- Modifying dress codes and safety requirements to accommodate religious attire and the wearing of religious objects (such as wearing a headscarf in sporting events)
- Providing exemptions and alternatives to photo and biometric identification
- Providing acceptable food options
- Exempting individual employees and service providers from tasks that violate their religious conscience (for example, serving alcohol, providing blood transfusions, etc.).

The OHRC is interested in hearing more about the practical challenges individuals and organizations face when accommodating creed beliefs and practices, and any other accommodation challenges you think should be addressed in the updated policy.

III. Background and context

This section examines broader underlying trends shaping contemporary forms of discrimination because of creed. While the OHRC seeks to combat prejudice and intolerance based on creed, and related -isms and -phobias, by educating the public, not all of the issues discussed below can be dealt with under the *Code*. The *Code* only prohibits incidents of discrimination and harassment based on creed in specified "social areas." These areas are:

(1) Contracts
(2) Employment
(3) Goods, services and facilities
(4) Housing
(5) Vocational associations and trade unions.

Intolerance vs. discrimination

Intolerance and prejudice refer to attitudes, values and beliefs. Discrimination refers to actions taken because of those attitudes, values and beliefs, as well as unfair treatment that may unintentionally result from seemingly neutral rules, norms, standards and practices that people can take legal action on under the Ontario *Human Rights Code* or Canadian *Charter of Rights and Freedoms*.

Key questions

- What are some of the significant factors and dynamics, past or present, that shape contemporary forms and experiences of discrimination based on creed in Ontario?
- What forms of exclusion and discrimination are communities in Ontario experiencing because of creed?
- Are there particular or prevalent ideologies, myths, and/or stereotypes underlying contemporary forms of discrimination based on creed that an OHRC policy should name and address?

1. Current social and demographic trends

1.1 Diversity of creed beliefs and practices

Canadian census-based demographic research on religious affiliation in Ontario shows a significant growth in religious and creed diversity. Two major trends are particularly notable. First, there is significant growth among religious minority groups of all kinds outside of the Christian (Catholic and liberal Protestant) mainstream (see Appendices 1-7) for statistical trends by religious affiliation in Ontario and Canada).[15] At the same time, there is notable growth in the numbers of Ontarians reporting that they have 'no religion' (see Appendices 1-5, 12-15)[16] and/or for whom religion is playing a decreasing

role in their lives (see Appendices 16-21). Both of these broader trends are projected to accelerate in the future,[17] due in part to immigration trends[18] and ongoing processes of secularization.

An overwhelming majority of Ontarians nevertheless remain, and are projected to remain, identified with the historically dominant Roman Catholic and Protestant (Anglican, United Church, Presbyterian, and Lutheran) churches in Ontario (see Appendix 3).[19] The face and practice of Canadian Christianity, however, is becoming increasingly more diverse, as the percentage of Christian Canadians born in non-Western countries continues to grow,[20] along with the numbers of adherents of minority Christian denominations favouring more public and collective expressions of Christianity.

Tracking religion in Ontario 1991 – 2001 - 2011

The largest population growth in Ontario between 1991 and 2001 censuses has been among Muslims (142.2% growth from 145,560 in 1991 to 352,530 in 2001), minority "Christian'" Protestant groups including people identifying as "Christians," "Evangelical," 'Born-again Christian" and "Apostolic" (121.2% growth from 136,515 in 1991 to 301,935 in 2001), Hindus (103.9% growth from 106,705 in 1991 to 217,560 in 2001), Sikhs (109.2% growth from 50,085 in 1991 to 104,785 in 2001) and Buddhists (96.4% growth from 65,325 in 1991 to 128,320 in 2001). The top five religious denominations in Ontario in 2001, in order of their numbers include: Protestant (3,935,745), Roman Catholic (3,866,350), No religion (1,809,535), Muslim (352,530), and Christian, including people identifying as minority Christian groups as listed above (301,935). National census data also reveals significant growth nationally, between 1991 and 2001, of people identifying with Aboriginal spirituality (+175%), or as "pagan" (+281%), although the actual number of adherents is not over 30,000 in these categories. [Source: Statistics Canada 2003a; see Appendices 1-11 for further profile and breakdown of Canadians by religious affiliation]

Though not entirely comparable with, or as reliable as, earlier census data, the 2011 National Household Survey shows continued significant growth, since 2001, of religious minorities, including Sikhs (72% growth from 104,785 in 2001 to 179,765 in 2011), Hindus (68% growth from 217,560 in 2001 to 366,720 in 2011), Muslims (65% growth from 352, 530 in 2001 to 581,950 in 2011), No religion (62% growth from 1,809,535 in 2001 to 2,927,790 in 2011), and Buddhists (28% growth from 128,320 to 163,750 in 2011).

Religious affiliation in Ontario in descending order by numbers and percentage (2011 National Household Survey)[21]

Religion	Population Number	Percentage
1. Catholic	3,976,610	31.43%
2. No religious affiliation	2,927,790	23.14%
3. Other Christian	1,224,300	9.68%
4. United Church	952,465	7.53%
5. Anglican	774,560	6.12%
6. Muslim	581,950	4.60%
7. Hindu	366,720	2.90%
8. Presbyterian	319,585	2.53%
9. Christian Orthodox	297,710	2.35%
10. Baptist	244,650	1.93%
11. Pentecostal	213,945	1.69%
12. Jewish	195,540	1.55%
13. Sikh	179,765	1.42%
14. Buddhist	163,750	1.29%
15. Lutheran	163,460	1.29%
16. Other religions	53,080	0.42%
17. Traditional (Aboriginal) Spirituality	15,905	0.13%
Total population in private households by religion	12,651,795	

Note: Unlike in previous decades, when a religion question was included in the census, in 2011 it was part of a voluntary survey among 4.5 million randomly selected households. Roughly 2.65 million households participated in the survey. Statistics Canada has indicated that some groups – immigrants, ethnic minorities, non-English or non-French speakers and Aboriginal Peoples – may be under-represented among participants in the voluntary survey. Despite these challenges, the 2011 National Household Survey (NHS) represents the best data source for religious affiliation in Canada in 2011 (Pew Forum 2013).

The total number of persons identifying as Christian (including all denominations) in the 2011 NHS was 8,167,295, or 64.55% of the total population. The number of persons identifying with Protestant denominations in the 2011 NHS, if we include “other Christian,” as well as United, Anglican, Presbyterian, Baptist, Pentecostal and Lutheran, was 3,892,965 or 30.77%. This would make Protestants the second largest religious grouping collectively, for the first time after Catholics.

1.2 Individual belief and practice

There is a debate in the social science literature about whether and to what extent religious conviction may be declining in Ontario (the "secularization debate"). Evidence exists to support various contending positions, showing both a general decline and, in some segments of the population, resurgence of religious conviction and identification (see Appendices 13-21 for various survey findings on the extent and importance of religious belief among Canadians).[22]

Ontarians, especially the younger generation, seem to be increasingly changing the way they interpret and live their professed religious and creed beliefs. Research suggests that many people now approach their religion or creed in a highly individual way, basing their beliefs and practices more on personal interpretations and experiences than on institutional expressions or traditional requirements of the faith.[23] This personalization of belief and practice has also contributed to a growing pattern of eclecticism – famously dubbed "Sheilaism"[24] by an American sociologist. This means that people increasingly "cobble together" their beliefs and practices from increasingly diverse sources and traditions in unique ways that can change with the context.[25]

This "de-institutionalization" of belief and practice is evident in the declining numbers of religiously-identified persons who are actively practising their faith in traditional institutional ways such as by attending regular worship (see Appendix 17).[26] The growth of persons self-identifying as "spiritual but not religious," combined with the growing trend of Ontario institutions rebranding chaplaincy programs and services as "spiritual" rather than "religious", are also among the indicators of this larger trend.

Spirituality vs. religion

Spirituality can be defined as "the search for meaning, purpose, and connection with self, others, the universe, and ultimate reality, however one understands it. It may, or may not, be expressed through religious forms or institutions." Religion, on the other hand, tends to be "an organized structured set of beliefs and practices shared by a ***community*** related to spirituality" (Sheridan, 2000, p. 20; emphasis added).

1.3 Policy and program trends

> *"The challenges Canada faces today are different from those we faced ten years ago. The most obvious change concerns the salience of religion in debates about Canadian diversity ..." (Will Kymlicka)*[27]

Despite increasing demands on Ontario institutions to better understand, respond to, and navigate the province's growing religious/creed diversity, researchers lament the general failure of Canadian public policy, programming and research to sufficiently grapple with it.[28] While a legislative framework for dealing with creed diversity in Canada is well established,[29] researchers note that the prevailing tendency in policy and programming has been to subsume and erase differences of religion and creed under ethnic, cultural and racial categories of social difference, particularly since multiculturalism was introduced as state policy over 30 years ago.[30]

As a consequence, it has primarily fallen to the courts and tribunals to set the framework for dealing with religious and creed-based diversity in Canadian society, within a zero-sum (win or lose) legal system. In this context, the current work and role of the OHRC in updating its policy on creed takes on additional importance in helping citizens and organizations to negotiate differences and conflicts relating to religion and creed in a pro-active, principled way.

2. Historical trends

2.1 Religion and state relations historically in Canada

Many scholars and commentators note a lack of historical awareness in current-day discussions of "reasonable accommodation" and "religion in public space." This is especially the case when looking at the evolving ways that Canada has negotiated religious diversity and set its current secular approach. Scholars chart at least three main phases in Canada's historic response to governing religious diversity. These move along a continuum from a single (Catholic and then Anglican) state-supported church with a virtual religious monopoly on public culture and institutions towards a more inclusive current-day secular, multicultural approach.

These eras have been generally described as:

> **1608-1841:** European Catholics and Protestants sought to transplant their forms of Christianity to Canada through a state-supported Christian church, with little religious freedom.
>
> **1841-1960:** Plural or shadow Christian establishment prevailed. While there was no official state church, there was a Christian culture and state cooperation with a limited number of "respectable" Christian churches (Anglican, Presbyterian, Methodist/United, Baptist and Roman Catholic churches).
>
> **1960-present:** Society became more secular, with greater "separation of church and state," and an overtly multicultural approach to religion.[31]

Early efforts to establish an official state church in Lower and Upper Canada were largely frustrated by: (1) the practical challenges of extending parish administrative control over a vast and diverse territory with limited resources; and (2) the need for strategic compromises and political concessions in the face of the stubborn reality of religious pluralism on the ground, which has been a permanent feature of the Canadian social landscape. [32]

The new dominion of Canada that confederated in 1867 joined the mainly English-Protestant Upper Canada (Ontario) with French-Catholic Lower Canada (Quebec). Under the *British North America Act*, *1867*, the new nation was bound by a uniquely Canadian compromise that remains with us today. This compromise does not establish any single state church, or require the separation of church and state.

Despite this early legal recognition of religious freedom in Ontario,[33] scholars have coined the term ”plural establishment”[34] or ”shadow establishment”[35] to describe the special privileges and government support and recognition extended to a limited number of mainline Anglo-Protestant (Anglican, Presbyterian and United) Churches and the French Roman Catholic Church. Other Christian denominations such as the Lutherans, Baptists and various evangelical groups also later joined the plural establishment's “circle of respectability,” as “junior partners.”[36]

Many of Ontario's most cherished contemporary institutions – including educational, healthcare and social service related – were created by Christian organizations in this era of “Christian Canada” (1841 – 1960). Today, many people do not recognize the central and formative role played by Christianity in building Ontario's social, moral, legal and institutional fabric. A more recent body of work has emerged to highlight the positive contributions of religious actors and associations in Canadian history and society, particularly in building civil society and generating and contributing to “social capital” in Canadian society.[37] This key role continues to the present, and has contributed to Canada having, by some estimates, the second largest voluntary sector in the world (the largest segment of which is religion-based).[38]

2.2 Historical forms of discrimination based on creed

> Advocating for the separation of Aboriginal children from their parents in Christian church-run residential schools, John A. Macdonald, Canada's first Prime Minister, explained to the House of Commons in1883: “When the school is on the reserve, the child lives with his parents who are savages; he is surrounded by savages, and though he may learn to read and write, his habits and training and mode of thought are Indian. He is simply a savage who can read and write.”
>
> – (Truth and Reconciliation Commission of Canada, 2012, p.6)

The history of the mainline Christian churches in Canada, however, also has a darker side that is sometimes forgotten. Scholars describe the emergence of a “Christian common sense” in Ontario between the mid-1800s and the 1960s, where “to be a (proper) Canadian, one had to be a (proper) Christian”.[39] Drawing such equations between race, religion, civilization and belonging led to extreme consequences, such as the assimilation policies and laws the Canadian government enacted to govern Aboriginal Peoples and cultures, particularly following the introduction of the *Indian Act* in 1876.[40]

Disparaging and legally suppressing Aboriginal spiritual practices and traditions was an integral part of the Canadian colonial project. Government and church authorities often worked hand in hand in this process. Only now, through the work of the Truth and Reconciliation Commission, are Canadians starting to grapple with the ongoing, intergenerational impact of the concerted effort to “Christianize and civilize” the Indigenous peoples of Canada, which culminated in the residential school system administered by Christian churches between 1620 and 1996.[41]

Residential schools in Canada

- **1831** Mohawk Indian Residential School opens in Brantford, Ontario; it became the longest-operated residential school, closing in 1969
- **1847**: Egerton Ryerson's study of Indian education recommends religion-based, government-funded industrial schools
- **1857**: Colonial government of Canada (including what is now Ontario and Quebec) passes *Act for the Gradual Civilization of the Indian Tribes in the Canadas*
- **1860s**: Assimilation of Aboriginal people through education becomes official policy
- **1876** Canada enacts first *Indian Act*
- **1884:** Canadian Parliament outlaws the potlatch, the primary social, economic and political expression of some Aboriginal cultures
- **1892:** Federal government and churches enter into partnership to run "Indian schools"
- **1951:** Responding to international criticism, Parliament amends the *Indian Act* to remove anti-potlatch and anti-land claims provisions
- **1963**: Federal government undertakes an "experimental" project by sending at least six Inuit children to Ottawa to study, to gauge how they would assimilate
- **1969**: Partnership between government and churches ends; government takes over residential school system, begins to transfer control to Indian Bands
- **1996**: Last government-run residential school closes
- **2008**: Government of Canada offers Residential School Apology.

While First Nation spiritual rituals were a primary target of colonizing efforts, racism and religious prejudice in Canada also took shape in persecution and discrimination against Sikhs, Hindus, Buddhists (among other Chinese and Japanese religious practitioners), Muslims, Jews and other non-conforming groups, including disfavoured Christian minorities, atheists and agnostics.

After Aboriginal Peoples, Jews formed the largest non-Christian religious minority group in Canada, historically. Jewish communities have experienced antisemitic[42] prejudice, discrimination and, in some cases, violence since their arrival in the 1700s. Some egregious examples of this history include:

- The expulsion of Ezekiel Hart (the first elected Jewish official) from the Ontario (Lower Canada) Legislative Assembly, despite his re-election to the Legislature of Lower Canada in 1807, because he could not take the oath of office "on the true faith of a Christian"[43]
- The extensive web of Jim Crow-like restrictions overtly barring Jewish people from various mainstream social, political, economic and cultural institutions in Ontario society well into the 20th century[44]
- Acts of hatred and violence against Jews, such as the well-known 1933 Christie Pits riots in Toronto. This conflict involved six hours of violence between Jewish and Christian youths, and was followed by setting Jewish synagogues on fire and other personal attacks against Jews in public spaces.

One of the lowest points in this Canadian history of antisemitism was Canada's rejection, in some cases with fatal consequences, of Jewish refugees fleeing Nazi Germany, due to widely held beliefs that Jews were racially and religiously inferior.[45] These beliefs led Canada to place Jews in "non-preferred" immigrant categories. Despite such treatment, the Canadian Jewish community persevered, and went on to rise to the forefront of the fight for human rights and anti-discrimination legislation in Ontario in the post-War era.[46]

Canadian immigration policy also proved to be a key tool in thwarting the entry of other "undesirable" ethno-racial and religious minorities in the 19th and 20th centuries, often through indirect and seemingly benign ways. Among the more famous examples are: the introduction of the Chinese head tax with the *Chinese Immigration Act*[47] of 1885 following Chinese labourers building of the Pacific Railway; and the passage of the *Continuous Journey Act*[48] in 1908, which, in effect, barred the immigration of "Hindoos" (as all Indians were called at the time, no matter what their religion). Discrimination and hostility towards these Asian immigrant groups, scholars note, had significant religious elements.[49]

Atheists, agnostics, humanists and the non-religious were also persecuted during the era of "Christian Canada." In one famous case, the citizenship applications of an avowed atheist immigrant family (Ernest and Cornelia Bergsma) from the Netherlands were twice denied before being successfully granted in a 1965 Ontario Court of Appeal ruling. The judge presiding over the initial citizenship hearing at the Haldimand County Court in Cayuga, Ontario, on April 3, 1963, deemed the Bergsmas to not be of sufficiently good character, or suited to life in a "Christian country," based on their professed atheism.[50] He also found them unable to comply with the required oath of allegiance.[51]

Scholars also note that a great deal of dominant group energy was expended battling enemies within the Christian camp – those deemed heterodox, at best, and heretical, at worst. In fact, for most of Canada's history, the main defining religious differences were between Christian denominations (Catholic and Protestant in particular). Christian minorities outside the plural establishment's "circle of respectability," such as Mennonites, Jehovah's Witnesses, Seventh Day Adventists, Hutterites, Eastern Orthodox and Evangelicals, also faced significant and persistent discrimination and prejudice.[52] This exclusion sometimes intersected with other forms of racism and prejudice against "less desirable" classes and "races" of European immigrants.[53]

2.3 Evolving policy and legal protections for religion and creed

Most historical accounts of the evolution of religious freedoms in Canada note a fundamental shift in law, policy and social discourse in the post-WWII era (see Appendix 22 which charts historical, legal, policy and demographic shifts over this era).[54] Public policy and law, particularly since the 1960s, has increasingly come to embrace values of diversity, equality and non-discrimination.[55] A new "secular" consensus has also contributed to the progressive privatization of religion and de-privileging (or "dis-establishment") of Christianity in public and state institutional life.[56] The introduction of the Ontario *Human Rights Code* (the *Code)* in 1962 and, some 20 years later, the Canadian *Charter of Rights and Freedoms* (the *Charter)*, both reflect and have helped to further entrench such "sea changes" in Canadian public values and culture.[57]

An example of the "sea change"

One historian captures this "sea change" in Canadian public culture by comparing the installation of the 19th and 27th Governors-General of Canada:

> On September 15, 1959, Georges Vanier was installed as Canada's 19th Governor-General, the Queen's formal representative in her Canadian dominion. Vanier, a much decorated general, diplomat, and active Roman Catholic, began his acceptance speech like this: "Mr. Prime Minister, my first words are a prayer. May Almighty God in his infinite wisdom and mercy bless the sacred mission which has been entrusted to me by Her Majesty the Queen and help me to fulfill it in all humility. In exchange for his strength, I offer him my weakness. May he give peace to this beloved land of ours and, to those who live in it, the grace of mutual understanding, respect and love."
>
> Fifty-six years later, on September 27, 2005, Michaëlle Jean became the 27th Governor-General. Jean, a multilingual, Haitian-born filmmaker and journalist, offered a forward-looking address that stressed, as had Vanier's, the importance of mutual tolerance for Canada's social well-being. Otherwise, however, there were no themes in common, for Jean's primary concern supporting individual liberty; for her, Canadian history "speaks powerfully about the freedom to invent a new world." In this speech there was no mention of the deity.[58]

Benchmarks in the evolution of religious freedom and equality rights in Canadian case law since the 1960s include adopting and applying "reasonable accommodation" approaches to creed and freedom of religion cases under the *Code* and *Charter* in the 1970s. This supported the right to not only non-interference or freedom from religious coercion, but also a positive right or entitlement to have one's religion/creed beliefs and practices accommodated to the point of undue hardship.[59]

Legal scholars note a further evolution of creed rights in recent years. "Adverse-effect" discrimination claims have increasingly challenged systemic forms of discrimination and the way "things have always been done." For example, Bhabha (2012) argues that the new "transformative vision of religious freedom" is about more than seeking exceptions to rules and norms in public space (as accommodation has traditionally been conceived). It is also about engaging to redefine and reconstruct public space itself.[60] Despite such significant advances, various forms of discrimination continue in today's more secular world. The next section explores some of these.

3. Current discrimination trends

3.1 Profile of HRTO creed applications (2010-2012)

The OHRC reviewed all applications (formerly known as "complaints") filed with the Human Rights Tribunal of Ontario (HRTO) citing creed as a ground of discrimination in the 2010-11 fiscal year (April 1, 2010 to March 31, 2011), and 2011-12 fiscal year (April 1, 2011 to March 31, 2012). We started with a list of applications that the HRTO collated from its case management database, and ended up including 179 applications for review in 2010-11, and 140 for review in 2011-12.[61]

Applications citing creed accounted for 6.8% of all HRTO applications filed in the 2011-12 fiscal year, up slightly from 6% in 2010-11 (see the Chart below and Appendix 22.1 for breakdown of HRTO applications filed in the 2011-12 and 2010-11 fiscal years by ground). While this number appears relatively low, it may not reflect the actual extent of discrimination experienced by various communities in Ontario, due to such factors as under-reporting, mis-reporting, and the unknown outcome of applications alleging discrimination.[62] HRTO application statistics reported on here provide a description of the number and nature of applications citing creed as a ground of discrimination filed at the HRTO. It is difficult to gauge how much this may reflect broader trends, in part for the above-mentioned factors.

2011-2012 HRTO applications by ground

Ground	Totals*
Disability	54.4%
Reprisal	25.5%
Sex, pregnancy and gender identity	24.9%
Race	29.2%
Colour	13.5%
Age	13.6%
Ethnic origin	15.5%
Place of origin	12.6%
Family status	8.4%
Ancestry	9.1%
Sexual solicitation or advances	5.2%
Creed	6.8%
Marital status	7.8%
Sexual orientation	4.0%
Association	2.6%
Citizenship	3.7%
Record of offences	3.0%
Receipt of public assistance	1.0%
No grounds	2.6%

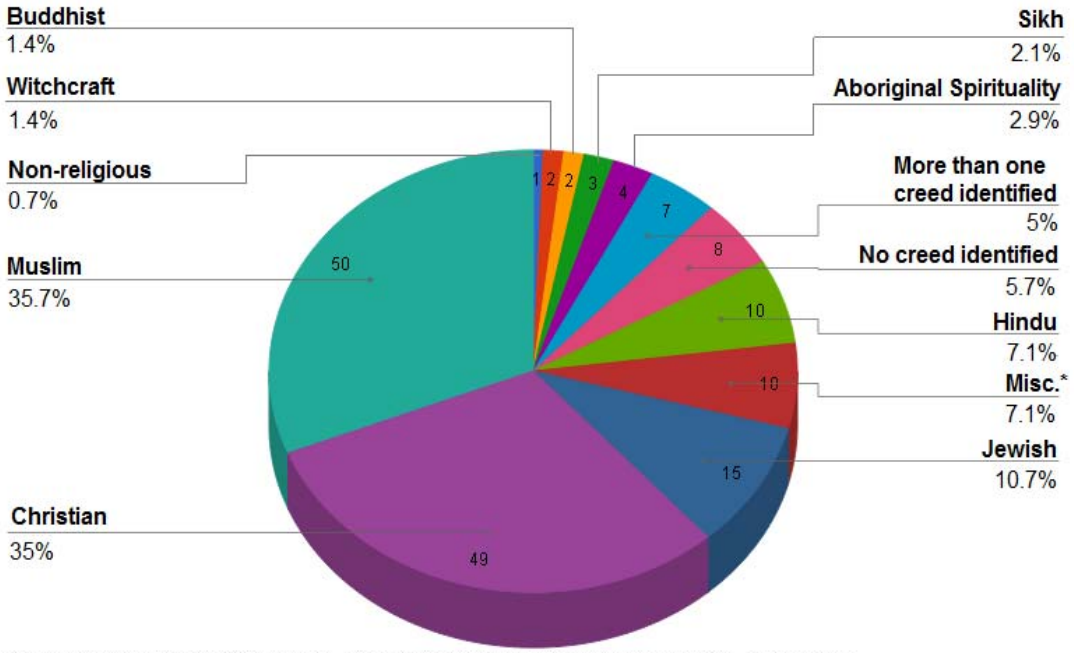
Source: HRTO, retrieved June 21, 2013, from www.hrto.ca/hrto/?q=en/node/152

*The above chart shows the percentage of applications in which each prohibited ground under the *Code* is raised. Because many applications claim discrimination based on more than one ground, the totals in the chart far exceed the total number of applications received.

3.1.2 Applications by creed affiliation

In both the 2010-11 and 2011-12 fiscal years, Muslims accounted for the highest number of HRTO applications citing creed as a ground of discrimination, closely followed by Christians (of all denominations). According to the 2011 National Household Survey, Muslims made up 4.6% of Ontario's population in 2011. Relative to their population size, Muslims were highly over-represented among HRTO applicants, accounting for more than one-third (36%) of all HRTO creed applications in 2011-12 and 31.8% in 2010-11 (see Appendix 22.2 and 22.5 for further details). This finding is consistent with research on the growth of Islamophobia and other discriminatory trends affecting Muslim communities, particularly following 9/11, as noted in Section 3.2.5 below. The review of HRTO applications, moreover, revealed that Muslims were not the only target of such trends. Several applications involved claims of discrimination by non-Muslims who alleged they were targeted because they were wrongly perceived to be Muslim.[63] This may show that race is a factor in anti-Muslim discrimination, when victims are discriminated against because of their outward appearance, rather than their actual beliefs (as discussed in Sections 3.2.3 and 3.2.5 below).

Number and percentage of HRTO applications citing creed by creed affiliation (2011-2012 fiscal year)



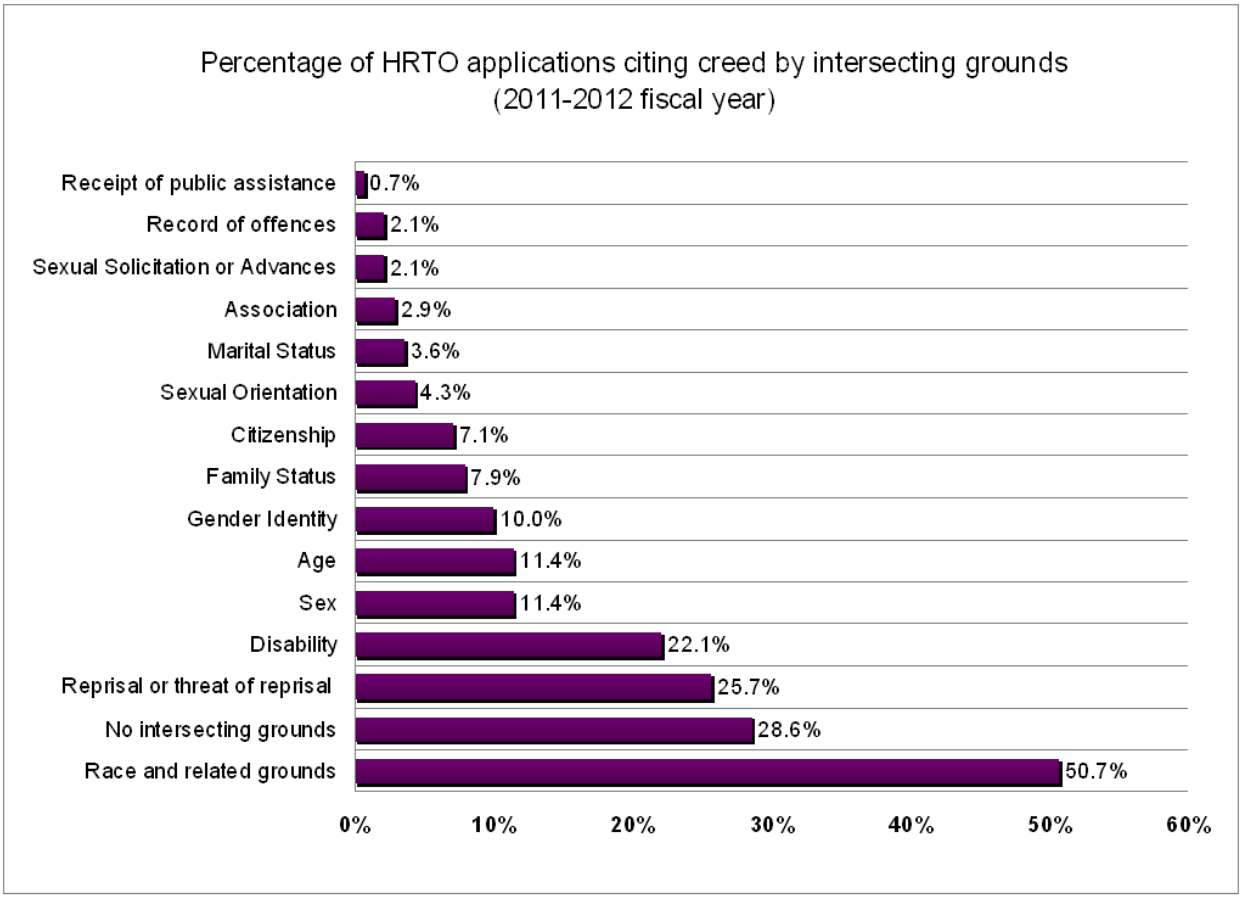
*Miscellaneous: Elemental magic, Ethical veganism, Kabala, Membership in law society of Canada, Rastafarian, Taoism, Wiccan, Yoga system & cosmology, Zen, Zoroastrianism

While Christians overall are not over-represented among applicant groups relative to their population size,[64] they are involved in a significant number of HRTO cases, lending some credence to the perception that Christians may also feel like "minorities" at times in Ontario's increasingly secular society (in some cases, despite being a majority). Among creed groups, Christians (of all denominations) [65] accounted for the second highest number of HRTO applications citing creed as a ground of discrimination, in both the 2010-11 and 2011-12 fiscal years. Some 35% of HRTO creed-based applications filed in 2011-12, and 26.8% filed in 2010-11, were from persons identifying with various Christian denominations (see Appendices 22.2, 22.3, 22.5, and 22.6 for further breakdown of applications by creed affiliation). Applicants self-identifying as "Roman Catholic" (9.3%) and simply "Christian" (9.3%) made up the largest number of Christian applicants in the 2011-12 fiscal year, followed by those identifying as Seventh Day Adventist (5.7%) and Christian Orthodox (2.9%) (see Appendix 22.3 for 2011-2012 breakdown of creed applications by Christian denominational affiliation). A similar pattern was evident in HRTO creed-based applications in the 2010-11 fiscal year (see Appendix 22.6).

Relative to their population size,[66] members of the Jewish (15 or 10.7%), Hindu (10 or 7.1%), Traditional Aboriginal (4 or 2.9%) and Sikh (3 or 2.1%) faiths accounted for a disproportionate number of 2011-2012 HRTO creed applications, as did a number of lesser known creed groups (e.g. Rastafarians, Raelians, and others grouped as "miscellaneous" in the graphs reporting on 2010-11 and 2011-12 HRTO creed applications; see Appendices 22.2 and 22.5 for for further details). People identifying as non-religious – whether atheist, agnostic or simply non-religious – accounted for a relatively small number (2 or 1.4%) of HRTO creed applications in 2011-12, but a larger portion (some 5%) in 2010-2011. In both fiscal years, a significant number of applicants did not identify with any particular creed (19 or 10.6% of creed applications in 2010-11 and 8 or 5.7% of creed applications in 2011-12).

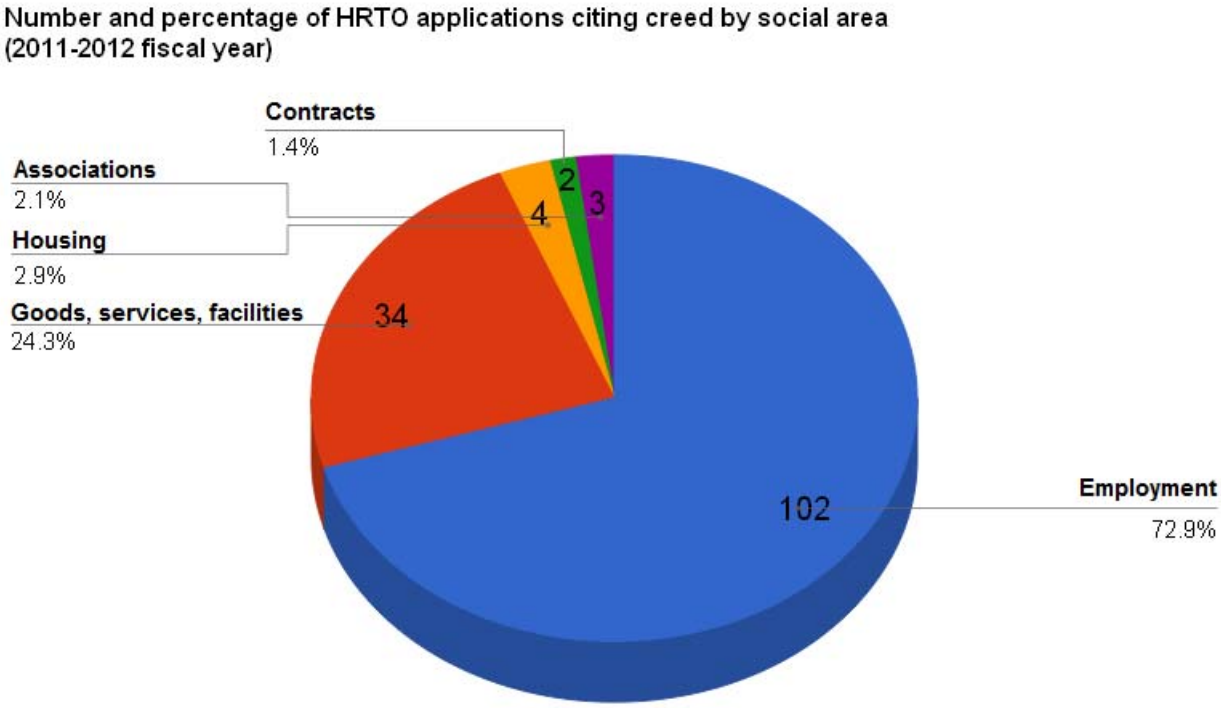
The earlier discussed trend of increasing individualism, hybridity, and eclecticism in patterns of contemporary creed belief and practice was in part evident in the significant number of HRTO creed applications – some 5% or 7 in 2011-12 – in which the applicant identified with more than one creed (see Section 1.2 above and Appendix 22.4). There was also an observed tendency among some some applicants, particularly in 2011-12, to elevate what may appear to be more isolated opinions and beliefs to the level of a creed (e.g. belief in "being truthful", "good business practice", "fairness", "respect and dignity for hard work" etc.) (see Appendix 22.5).

Intersecting grounds

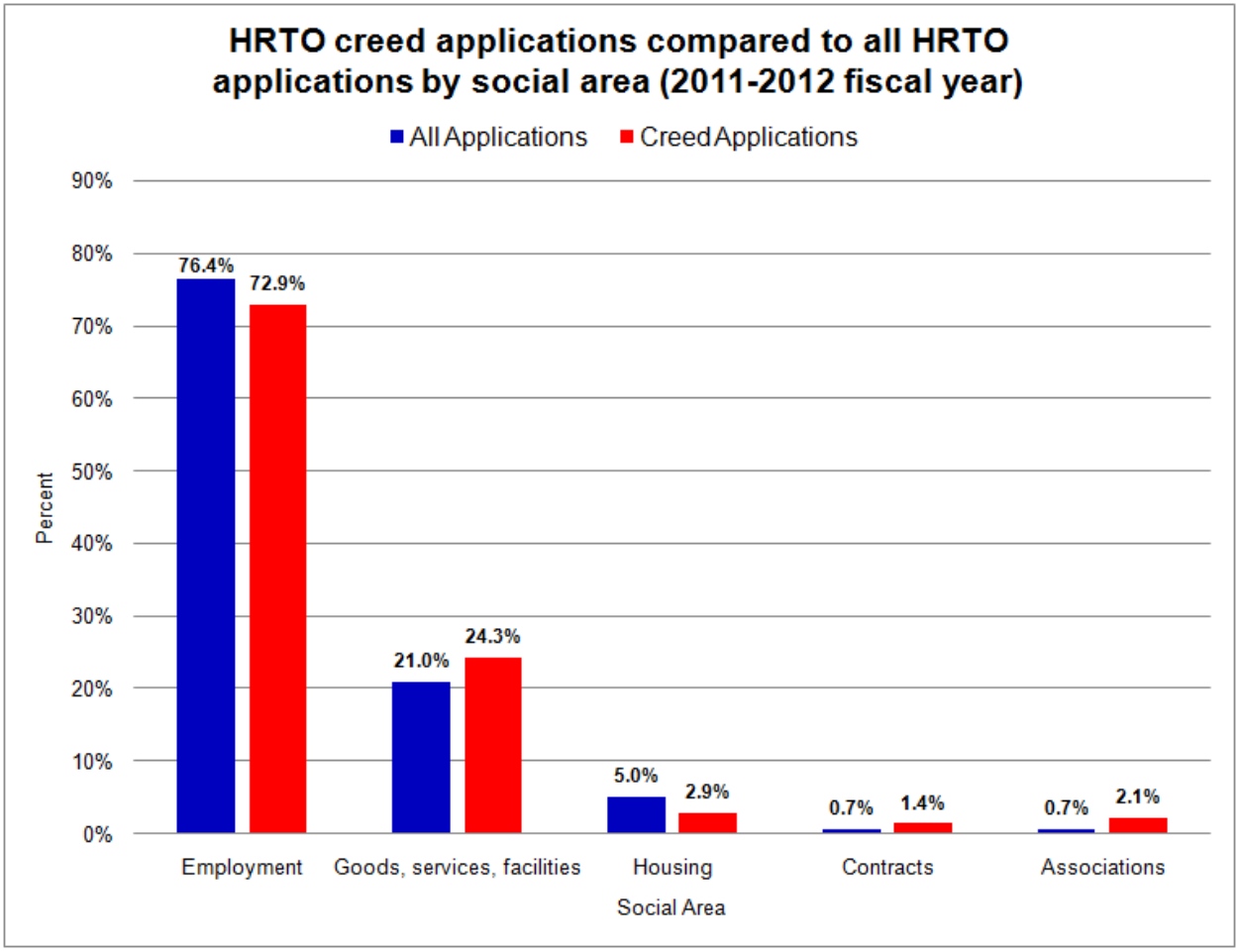


A majority of HRTO creed applications – 50.7% in 2011-12, and 60.3% in 2010-11 – also cited a race-related ground in addition to creed (in order of frequency, eth76-22.10). Only 14% of HRTO creed applications in 2011-2012, and just over one-quarter (or 28.6%) in 2011-2012, only cited creed as a ground of discrimination. Such findings are consistent with research on the significant intersecting impact of ethnic and racial dynamics in discrimination based on creed (see section 3.2.3 for more discussion).

3.1.3 Social areas



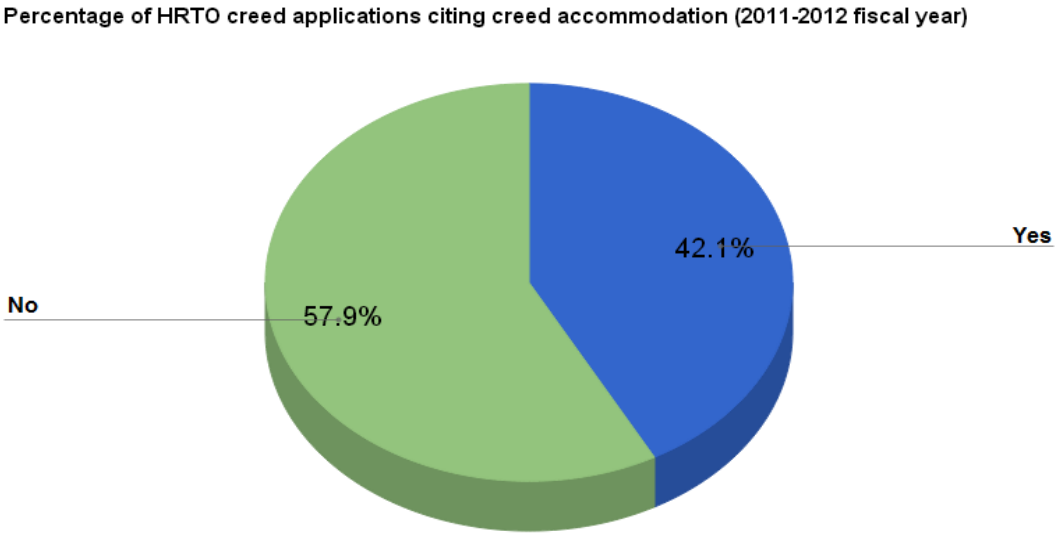
All human rights applications must cite a *Code* "social area" as well as a prohibited ground of discrimination. Almost 73% of all 2011-2012 HRTO applications citing creed, and 62% of 2010-2011 HRTO creed applications, identified employment as the social area. The area of services, goods and facilities was cited in 24.3% of 2011-12 creed applications, and housing accounted for almost 3%.



The distribution of creed applications across social areas is broadly consistent with larger trends in HRTO applications. While most creed applications, like all HRTO applications, occur in the social area of employment, when compared to all applications in this period, creed applications are slightly over-represented in the area of services[67] and under-represented in employment (see above graph and Appendix 22.11, 22.12). This discrepancy is even greater in 2010-2011 applications (see Appendix 22.13 and 22.14).

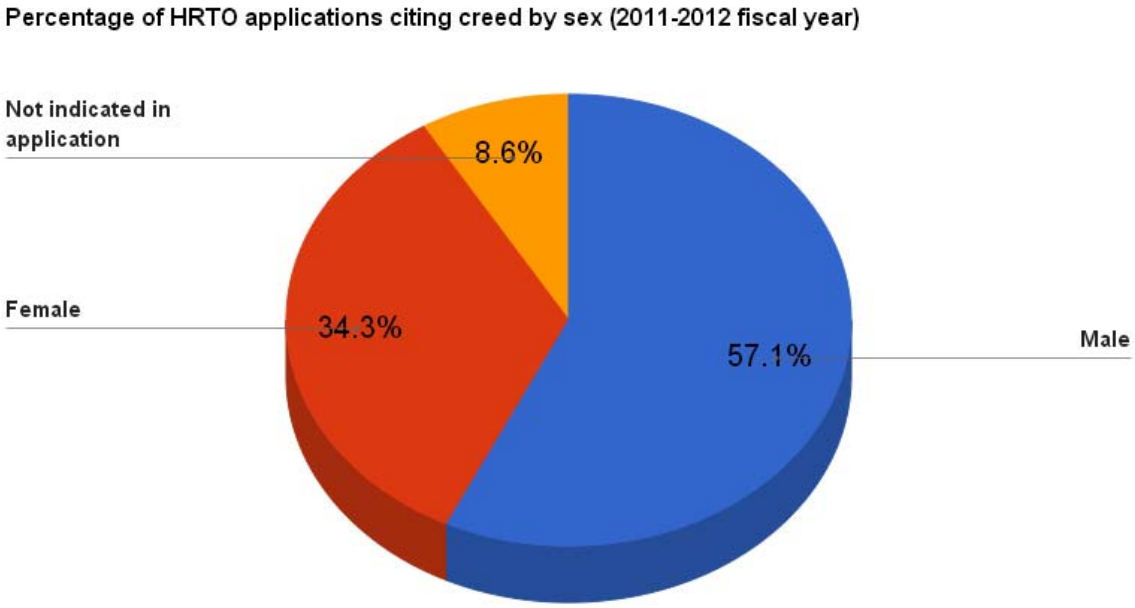
3.1.4 Accommodation

Our review of the 2011-2012 HRTO creed applications revealed that religious accommodation issues, mostly in employment contexts, featured prominently (in just over 42% of creed applications) among the kinds of discrimination issues alleged in applications (see the graph below). Though not systematically tracked in the same way, incidents of harassment and differential/prejudicial treatment based on creed were also fairly commonly alleged in creed applications.



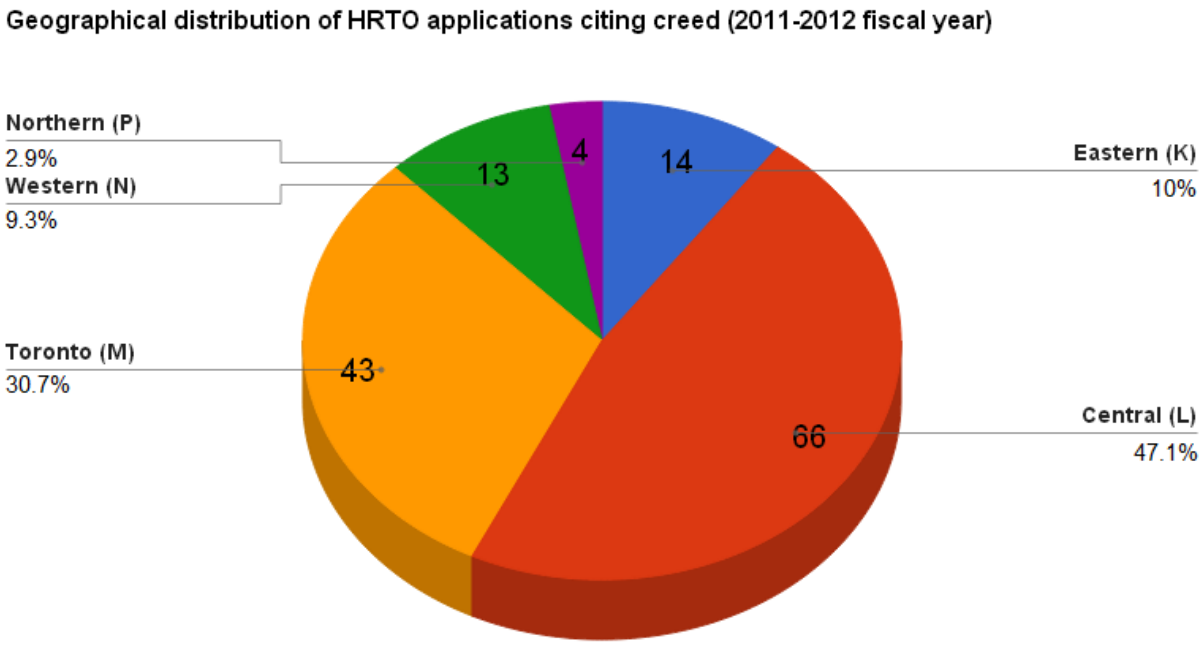
3.1.5 Sex

The 2011-2012 review of HRTO creed applications tracked applications by the sex of applicants (where indicated, based on self-identification) and found that a greater number of these applicants were male (57.1%) compared to female (34.3%). It is difficult to infer the extent to which this may reflect wider trends in creed discrimination. Such differences in the numbers of applications filed by males compared to females could reflect a variety of causes (including, potentially, the greater propensity for men to report alleged incidents of discrimination). The extent to which this pattern in reporting is unique, or similar to wider trends in HRTO applications, cannot currently be determined, since the HRTO does not track demographic information on the sex of applicant groups.



3.1.4 Geographical distribution

Most applications citing creed were from applicants in the central (47.1%) and Toronto (30.7%) region, perhaps reflecting, at least in part, the greater ethnic and religious diversity in these regions, compared to other regions (see graph below, and Appendix 22.16). The top five locations for 2010-11 creed-based HRTO applications were: Toronto (accounting for 45% of all applications); Mississauga (8.3%); Ottawa (4.7%); Brampton (4.1%), and London and Richmond Hill, which each accounted for 2.3% of all 2010-11 HRTO creed applications (see Appendix 22.18).[68]



Relative to the geographical distribution of all HRTO applications, a disproportionate number of creed applications in both 2010-11 and 2011-12 were from applicants in the Toronto and Central Ontario region (see Appendices 22.17 and 22.18).[69]

3.2 Underlying trends in research and consultation

3.2.1 Increase of religion-based hate crime

Hate crime statistics offer another source of information about religious discrimination and intolerance. However, this data is limited because, among other reasons, it is estimated that two-thirds of hate crime victims do not report them to authorities. The numbers of people reporting crimes, moreover, varies between communities, and there are differences in how victimization is reported and understood. For example, it can be hard to distinguish whether a hate crime is based on race, ethnicity or religion.[70]

Statistics Canada released two national studies of hate crime, based on 2009 and 2010 hate crime data.[71] In 2009, religion was the second most cited reason for hate crime (29%), compared to 54% for race or ethnicity (the leading factor reported in hate crimes year over year). In 2009, hate crimes based on religion increased more than any other category, rising by 55% nationally from the previous year. In 2010, hate crime motivated by religion and race or ethnicity declined 17% from 2009, while crimes based on race or ethnicity declined 20%.

In 2009, similar to trends in previous years, 70% of all religion-based hate crimes in Canada were committed against the Jewish faith (283, a 71% rise from 2008). The largest increase of hate crimes based on race involved hate crimes against Arabs or West Asians[72], which doubled from 37 incidents in 2008 to 75 in 2009.

The number of Canadian police-reported hate crimes against the Jewish faith accounted for just over half of all religion-based incidents in 2010 (204 in total) – a decline of 38% from the previous year – while increases were reported for hate crimes against the Muslim (+26%) and Catholic (+32%) faiths. Arabs or West Asians (11%) and South Asians (10%) remained the second and third most targeted race or ethnic group after Blacks, who continued to be the primary victims of all hate crimes committed in 2010.

The extent that Islamophobia (defined in section 3.2.5 below) plays a factor in hate crimes against Arabs, West Asians or South Asians is difficult to discern, because of variations in how hate crime victimization may be perceived and reported. Longer-range comparative studies of hate crime data show a general upsurge in crimes motivated by religion post-9/11, particularly against Muslim and Jewish Canadians.[73] The 2003 Ethnic Diversity Survey nevertheless found that only 0.9% of Jews and 0.54% of Muslims reported being a victim of a hate crime based on religion between 1998 and 2003.[74] Other research suggests, however, that people may under-report religion as a factor in hate crimes and discrimination more generally, in part due to difficulties in disentangling religion from race or ethnicity in many cases.[75]

3.2.2 Polarization of public debate

Some researchers have noted an increase of “us” versus “them” contrasts in mainstream media and public discussion about religion post-9/11.[76] Some argue that the mainstream media and public discussion linking new religious diversity with immigration and threats to national security has “fostered resentment against immigration, multiculturalism and accommodation of the needs of religious minorities” more generally.[77] As well, opinion polls suggest that while Canadians may generally support diversity and immigration, many increasingly favour assimilation over accommodation and diversity approaches, particularly when it comes to dealing with religious diversity (see Appendices 24, 25, 26, for more information on opinion polls).[78]

3.2.3 Racializing creed discrimination and prejudice

Scholars have noted that it is hard to disentangle religious-based prejudice and discrimination from that based on racism, xenophobia and ethnocentrism. The close relationship between religion, race and ethnicity for many creed communities, and the visibility of such differences (ethnic, racial and religious) from the mainstream, have exposed many ethno-religious minority Ontarian communities to intersecting forms of discrimination and harassment.[79] After 9/11, this intersectional prejudice and animosity has at times resulted in the broad targeting of visible minority communities associated with Islam (e.g. Arabs and South Asians), regardless of actual religious affiliations.

One of the first hate crimes following 9/11 involved the fire-bombing of a Hindu temple in Hamilton, which the perpretrator apparently mistook for a mosque. There are also numerous other instances involving members of the Sikh faith or non-Muslim individuals of Arab or South or West Asian background, who have been victimized as “Muslims” owing to their outward appearance, language and visibility.

Only a few studies measure levels or types of discrimination faced by religious minorities.[80] Some research suggests that visible minority status is a stronger predictor of disadvantage and discrimination than religion.[81] Other studies, however, suggest that people of certain religious backgrounds (Muslims in particular) are more vulnerable to low income and unemployment across generations, in spite of their generally higher education levels.[82]

Many theorists have explored how differences of religion, culture and ethnicity can be “racialized” in a way that leads to more hardened positions and “justifications” for discriminating against ethnic and religious minorities. This has variously been referred to as the ”new racism” or ”neo-racism” (racism without race), which is different from historically dominant forms of racism based on biology and skin colour.[83] Religion can become “racialized”[84] when religious differences are viewed and treated as fixed and unchanging, and as the only determinant behind individual thought and behaviour. Like traditional forms of racism, the new racism ascribes views and behaviours to religious persons based on their perceived (in this case religious) group affiliation. Internal differences within religious groups are obscured and overlooked in the process. This racialization of religion often occurs because of perceived identifiable signs or markers of religious difference (such as ethnic, racial, religious, linguistic, cultural, etc.).

3.2.4 Antisemitism

Antisemitism is perhaps the prototypical model of racialized religion. The very term antisemitism, coined in the 1870s by people promoting race-based hatred of Jews, reflects a transition from religion (or “anti-Judaism”) to race as a basis for discrimination, hatred and violence against Jews.[85] Definitions of antisemitism range from “acts or attitudes based on ‘the stereotypical construction of ‘the Jew’”[86] to more concrete descriptions that feature specific examples such as are adopted in the recent *Ottawa Protocol on Combatting Antisemitism*.[87] The European Monitoring Centre on Racism and Xenophobia (EUMC) defines antisemitism (in contradistinction to “anti-Semitism”)[88]

in its formative 2002-2003 Report as “anti-Jewish thinking as well as attitudes and acts of prejudice and/or hostility against Jews (as Jews) after 1945” (p.11).The Canadian Race Relations Foundation (2013a) defines antisemitism more broadly as

> [l]atent or overt hostility or hatred directed towards, or discrimination against individual Jews or the Jewish people for reasons connected to their religion, ethnicity, and their cultural, historical, intellectual and religious heritage. Manifestations of antisemitism can range from individual acts of physical violence, vandalism and hatred, to organized efforts to destroy entire communities and genocide.

There is still significant debate about the definition and scope of antisemitism, including whether and to what extent historical forms of anti-Judaism,[89] and more contemporary forms of anti-Zionism, should be included. When considering anti-Zionism, concerns have been raised about the rise of a “new anti-Semitism”[90] that is framed more on politics and religion than on race.[91] More recent authoritative accounts and definitions prefer to use the notation of “antisemitism” over “anti-Semitism,” in part in an effort to challenge the very notion of the existence of a “Semitic race,” as well as the reduction of antisemitism to a form of racism.[92]

Antisemitism remains one of the most longstanding and extreme forms of creed-based prejudice and discrimination in Ontario history (as discussed in Section 2.2 above). However defined, Jewish communities in Ontario continue to face the problem of antisemitism, as shown in the earlier discussion of hate-crime data.[93]

The League for Human Rights of B'nai Brith monitors antisemitic hate crime incidents and prepares an annual audit, available on their website. B’nai-Brith’s 2011 Audit of Antisemitic Incidents in the Ontario Region, shows that “the Jewish community is victimized by hate- and bias-motivated crime at a rate that, from 2002-2008, ranged from 15 to 25 times higher than the overall population.”[94] According to their 2012 Audit, there were 726 antisemitic incidents reported to the League in Ontario that year. This was the highest of any Canadian province and an increase of 2.5% over the 708 cases documented in Ontario in 2011 (see the table below for breakdown of incidents by region). Over the past decade, incidents have more than doubled.[95]

A global study by the Roth Institute for the Study of Contemporary Antisemitism and Racism at Tel Aviv University places Canada as third in the world (with 44), in terms of the number of “major violent antisemitic incidents” reported in 2005, next only to France (65) and the United Kingdom (89).[96]

Year 2012	Number of Incidents				% of total incidents for Region		
Region	Incidents	Harassment	Vandalism	Violence	Harassment	Vandalism	Violence
Atlantic	27	22	5		81.5%	18.5%	
Quebec	337	279	54	4	82.8%	16.0%	1.2%
Ontario	730	540	182	8	74.0%	24.9%	1.1%
Maintoba	56	39	16	1	69.6%	28.6%	1.8%
Saskatchewan	16	12	4		75.0%	25.0%	
Alberta	75	47	28		62.7%	37.3%	
British	103	73	30		70.9%	29.1%	
North	1	1			100.0%		
Canada	1345	1013	319	13	75.3%	23.7%	1.0%

*Atlantic Region: Newfoundland and Labrador, Prince Edward Island, New Brunswick and Nova Scotia

**North Region: Yukon, North West Territories and Nunavut

Source: B'nai Brith 2012 Audit of Antisemitic Incidents, Retrieved July 24, 2013, from www.bnaibrith.ca/audit2012

3.2.5 Islamophobia

Islamophobia is a term of contested historical origin and more recent public profile that has also been used to draw attention to the ways hostility towards Islam as a religion can sometimes overlap with more racialized and xenophobic forms of hostility towards Muslims "as a people." While the linguistic origin of the term signifies "fear" of "Islam," definitions of Islamophobia generally go beyond this to include both anti-Muslim (group of people) and anti-Islam (the religion) sentiments and behaviour. Definitions of Islamophobia include:

- "stereotypes, bias or acts of hostility towards individual Muslims or followers of Islam in general"[97]
- "any ideology or pattern of thought and/or behaviour in which [Muslims] are excluded from positions, rights, possibilities in (parts of) society because of their believed or actual Islamic background [and] positioned and treated as (imagined/real) representatives of Islam in general or (imagined/ real) Islamic groups instead of their capacities as individuals";[98]
- "the dread, hatred, hostility towards Islam and Muslims perpetrated by a series of closed views that imply and attribute negative and derogatory stereotypes and beliefs to Muslims".[99]

Chris Allen's (2010) work provides one of the more rigorous and comprehensive definitions of Islamophobia to date, detailing the diverse "modes of operation" for sustaining and perpetuating Islamophobia.[100]

> The (1997) British Runnymede Trust Report, *Islamophobia: A Challenge for Us All*, is most widely credited with giving the term prominence and profile in public policy and discussion. Often cited for its definition, this report outlines eight recurring "closed views" of Islam that characterize Islamophobia:
>
> (1) seeing Islam "as a monolithic bloc, static and unresponsive to change"
>
> (2) seeing Islam "as separate and 'other'" without "values in common with other cultures," being neither affected by them nor having any influence on them
>
> (3) seeing Islam as "inferior to the West," more specifically, "as barbaric, irrational, primitive and sexist"
>
> (4) seeing Islam "as violent, aggressive, threatening, supportive of terrorism and engaged in a 'clash of civilisations'"
>
> (5) seeing Islam "as a political ideology...used for political or military advantage"
>
> (6) "reject[ing] out of hand" criticisms made of the West by Islam
>
> (7) using "hostility towards Islam...to justify discriminatory practices towards Muslims and exclusion of Muslims from mainstream society"
>
> (8) seeing anti-Muslim hostility "as natural or normal."

There is considerable debate on defining Islamophobia. Examples of areas of debate include:

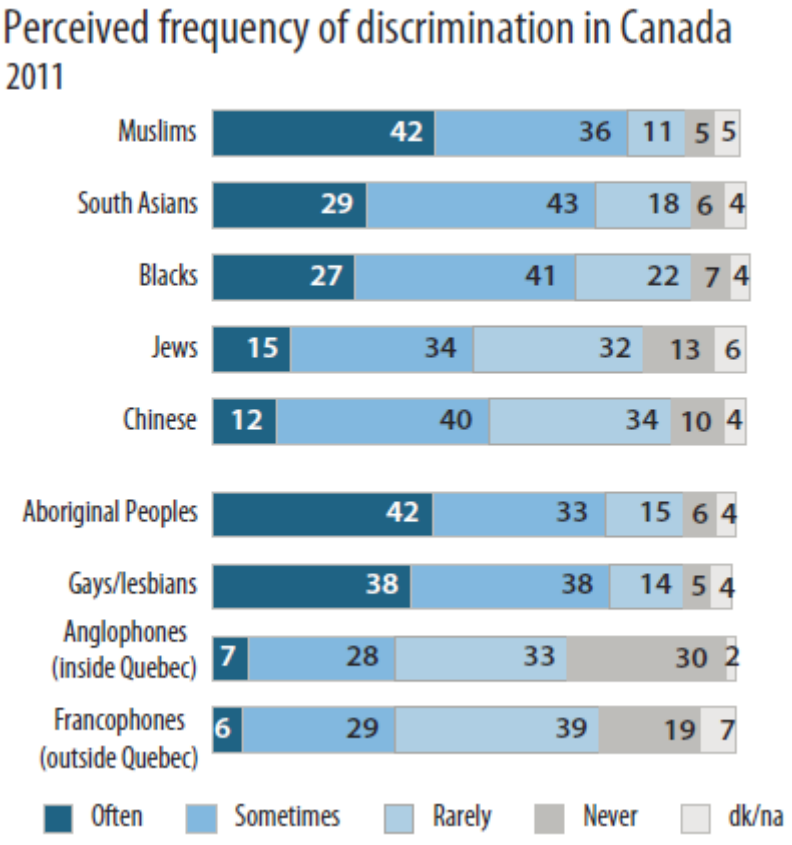
- whether the term focuses overly on "beliefs" versus more institutional and structural forms of discrimination[101]
- whether Islamophobia is simply a form of racism and/or something unique and distinct on its own[102]
- whether it is a distinctly contemporary phenomenon and/or a long-standing feature of Euro-western civilization.[103]

Some people also question the very existence of something called Islamophobia.

Nevertheless, research shows that anti-Muslim prejudice, or Islamophobia, exists and has grown in Ontario since 9/11.[104] Various participants at the OHRC policy dialogue for instance drew attention to the existence of prejudicial ("closed") views of Muslims and Islam in the Ontario context.[105] Opinion polls and surveys in particular reveal a pattern

of distrust, fear and animosity towards Muslims in Canada in the post-9/11 era.[106] The apparent persistence and growth of this trend over time lends some support to the view that Islamophobia is becoming increasingly socially acceptable over time, as has been observed in other jurisdictions.[107]

While Canadians generally envision themselves as more "tolerant" of diversity than other western nations, this same body of research suggests that this is not the reality when it comes to accommodating such things as Muslim headscarves in public life.[108] Antipathy to the Muslim headscarf, which is particularly pronounced in Quebec, still extends well beyond Quebec. The breadth of public support for a ban on niqabs (full-face veil) is particularly pronounced. For instance, one Canada-wide Angus-Reid Poll in 2010 surveyed Canadians' attitudes towards Quebec's proposed Bill 94,[109] which would essentially require, among other things, all public sector employees and people using government or public services (such as schools, libraries, health care services, social and childcare services) to show their face at all times. This would in effect ban the niqab (the full-face veil that only reveals the eyes). The survey found support outside Quebec to be highest in Alberta (82 %) and Ontario (77 %).[110] Explanations for public discomfort with the Muslim headscarf vary, from concerns with women's equality, to more general concerns with security, and conformity with "Canadian ways of life."



Source: The Environics Institute. *Focus Canada 2011*, p. 28.[111]

As well, Environics Canada's (2006) comprehensive *Focus Canada* survey of Canadian Muslims found that perceived levels of experienced discrimination among Muslims were not noticeably lower in Canada than in other western countries (see Appendix 32).[112] This survey found that Muslim Canadians were most concerned about effects of discrimination (67%) and unemployment (64%) on Muslim life in Canada. Other survey research shows how 9/11 has had a formative effect on anti-Muslim discrimination trends.[113]

Qualitative research shows that while Canadian Muslims generally have a favourable view of how Canadian policy and law protects religious freedoms and supports diversity, there is still a growing sense of alienation ("a feeling of not belonging") in segments of the community. In part, this is a consequence of ongoing day-to-day encounters with Islamophobia in Canadian workplaces, media, and society.[114] One analyst thus cautions: "If people are constantly reminded that they do not belong, whether on the crude level of the rhetoric of far-right discourse or media or the day-to-day discrimination, subtle or otherwise, that they may face, or when the government fails to listen to their concerns and request for needs, it is only a matter of time before they will feel alienated and lose the desire to belong".[115]

Some critics have argued that definitions of "new antisemitism" and/or "Islamophobia" are over-reaching, and used in ways that stifle healthy debate by shielding religion and politics (for example, the policy and conduct of the state of Israel or other Islamic state and non-state actors) from legitimate critique. While a human rights approach will not resolve such disputes, to the extent that these go beyond the "discrimination" lens and purview of human rights legislation, there are some points to consider. From a human rights legal perspective, religion-based racism, bigotry and prejudice can become actionable under the *Code* as "discriminatory" if and where it can be shown that persons have been treated unequally in one of the *Code*'s five social areas (employment, services and facilities, housing, contracts, vocational associations) solely, primarily, or even partly because of their religious or creed affiliation.

3.2.6 Globalization

One of the distinguishing features of contemporary forms of religious/creed intolerance and discrimination is the global scope and impact of relations shaping it. Current forms of Islamophobia and antisemitism especially show how global issues shape local ones, and vice versa.[116] In some cases, overseas ethnic, religious and political conflicts are played out in Ontario and elsewhere, albeit in locally conditioned ways. Some examples in the news and case law (see OHRC *Creed case law review*) include local conflicts and confrontations connected to:

- Israel-Palestine conflict
- Bosnian-Serbian war
- Sudanese partition

- other internal overseas national conflicts, such as between Tamils and the Sri Lankan government, the Chinese government and Falun Gong
- internal disputes among Sikhs regarding the pursuit of an independent homeland in the Punjab.

The resurgence of religion globally, as documented by international religious observers, along with intensifying globalization, may increase such trends in the future.[117]

3.2.7 Anti-religion

One Canadian social trend, shaped in part by trends in other western liberal democracies, has been a hardening of "secular" positions, and growth of a hostile attitude towards religion more generally in some segments. Some Canadian sociologists believe that this is especially the case among Canadian social and political elites. In the past, scholars observe, faith was assumed, and differences among (mostly Christian) religious believers formed the primary axis of religious/creed conflict. "Today the issue is often faith itself,"[118] with conflicts increasingly flowing along religious versus non-religious lines.

Anti-religious sentiment or "anti-religionism" has drawn strength from a variety of sources that generally share a stereotypical view of religion as inherently or "essentially unenlightened, tribal, anti-egalitarian, and potentially violent."[119] In some cases, these anti-religious sentiments are reinforced by anti-immigrant prejudice, racism and xenophobia.[120] In other cases, sentiments are based on various secular ideologies that have come to challenge historically dominant Christian mores and institutions.

In yet other cases, these two streams of anti-religionism have overlapped. An example is public backlash initially directed against accommodating a particular religious minority group, that leads to withdrawing or questioning accommodation arrangements for all religious groups.[121] In this context, some have argued that actively practicing Christians (including people from the historically mainline denominations) are increasingly becoming marginalized "minorities" in their own right.[122]

3.2.8 Inter and intra creed disputes and intersections

Religious/creed adherents have been victims – and also perpetrators – of prejudice and discrimination against various minorities, both internal and external. Research and case law shows many ways that intersectional identities and power dynamics can operate internally within creed communities, leading to targeting and marginalizing religious, gender, disabled and sexual minorities. For example, research suggests that female religious adherents often face a double burden: gender-based discrimination from within, and ethnic and religious-based disadvantage and discrimination from without. In some cases, this is in part due to their greater socio-economic vulnerability, and/or visibility, as in the case of hijab-wearing Muslim women Hindu or Sikh women who wear

traditional attire.[123] While many recent competing rights scenarios have pitted religious individuals against women or sexual minorities, scholars nevertheless emphasize the importance of not homogenizing, or assuming mutually exclusive, antagonistic relations between such communities and identities.[124]

Confessional and doctrinal disputes among members of the same faith and between members of differing faiths are also not uncommon in the case law.[125] Researchers moreover note growing ethno-racial diversity within historically dominant Christian denominations.[126] In some cases, this "de-Europeanization of Christianity" has contributed to tensions and conflicts around status quo arrangements within and between Christian organizations, to the extent that these continue to privilege historically dominant expressions of Christianity and do not reflect new (non-western) culturally inspired ones.[127]

4. Systemic faithism

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

4.1 Residual Christianity and systemic faithism

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

Among the most obvious examples of residual Christianity in Ontario are the two statutory holidays organized around the Christian high holy days (Christmas and Easter), and public funding in Ontario of Roman Catholic separate schools, but not other religion-based schools.[132] Scholars have highlighted many other examples, both

symbolic[133] and institutional.[134] One example in Ontario law is the Ontario *Education Act*'s provision in section 264(1) – under the subheading "*Duties of teachers*" – which explicitly states, in subsection (c) on "*religion and morals*" that it is the duty of the teacher or temporary teacher to:

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

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

Some legal scholars argue that the very laws that serve to protect religion and creed – including defining what is protected as such – reflect modern, western, liberal understandings of religion, in particular as shaped by historical liberal Protestant Christianity in Canada.[137] Among the defining features of this alleged dominant approach to religion in Canadian law and jurisprudence is a privileging of individual autonomy and private (textual-focused) belief over more public and collective forms of worship, practice and identity. The more individuals' and communities' religious/creed beliefs and practices resemble this norm, such scholars argue, the more likely they are to be recognized and accommodated by law and society.[138]

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

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

Differences between definitions of religion in law, and how "religion" is traditionally conceived (if at all) and practiced in various religious minority communities (including, among others, Muslim, Jewish, Hindu,[143] Buddhist,[144] Sikh, and Chinese[145] Canadian communities) have also been shown to contribute to the unequal access to, and recognition of religious minorities' religion/creed equality rights and freedoms.[146] Also, Christians who practice their faith in more public and collective ways may find themselves disadvantaged by this dominant understanding of religion in law and society. However, there are also many case law examples of diverse belief systems and practices protected under the *Code* ground of creed, even where practitioners do not consider themselves to be practicing religion per se.[147]

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

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

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

Newer religious movements (NRMs)[150] and "para-religious groups"– both of which are on the rise[151] – have also been vulnerable to stigmatization, social exclusion, prejudice and discrimination, in some cases because of stereotypes and assumptions from the Christian past.[152] Such stigma was evident in the public outcry and media coverage of a recent proposal to fund a Wiccan chaplain in a federal prison, which led the federal government to review and then retract funding for all part-time prison chaplains. Many of these creed communities have a highly non-central and individualistic character, and include beliefs and practices that do not always fit neatly within the terms and definitions of established legal protections for religion, creed or conscience (see Section III for more on this challenge).

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

4.2 Closed secularism and systemic faithism

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

4.2.1 History, definition and goals of the secular

Many scholars and commentators have noted the cloud of confusion often surrounding uses and understandings of the "secular" in contemporary public discourse and debate about religion in public space.[155] Early uses of the term secular, dating back to the 14th century, simply meant attention to things of this world as distinct from eternal matters.[156] The positivist movement later adopted the term and developed it as a full-fledged ideology.[157] This movement sought to free politics and society of all religious conceptions in favour of a new morality exclusively concerned with human well-being in the present life based on science and rationality. While aspects of this broader ideology have tacitly shaped modern political uses of the term,[158] contemporary scholars nevertheless distinguish between "secularism" as an ideology, and "secular" (or secularity) as "the modus operandi of a society that does not look to any particular religious tradition for the validation of its political authority".[159]

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

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

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

These goals can and do conflict with one another. Scholars point out that understanding secularity as a “multi-value doctrine,” with at times conflicting constitutive values, is to acknowledge the need to continually and contextually reconcile and balance these competing goals, on a case-by-case basis, without recourse to a general (argument-stopping) abstract rule or principle.[163] How societies choose to balance and weigh each of these goals will shape the particular character and form of their secular arrangements.[164]

4.2.2 Secular models: open versus closed

Existing secular institutional arrangements generally range along a continuum from anti-religious models, which seek to completely remove religion from the public sphere, to liberal and pluralistic models, which are more inclusive of religion in public life.[165] Though all models generally uphold some commitment to “principled distance” of the state vis-à-vis any one moral orientation or belief system, these can nevertheless be usefully contrasted and categorized into two main types: open and closed secular models (see Appendix 31 for contrast of open versus closed models of secularism).[166]

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

4.2.3 The Canadian model

Despite popular perceptions to the contrary, the Canadian Constitution itself does not explicitly affirm secularism as an autonomous legal principle, nor require separation of church and state, or state religious neutrality.[170] Statutes explicitly mentioning ”secular” are few and far between.[171] However, most would agree that the general contemporary social, political and legal consensus in Canada is “secular without being secularist”.[172] This affirms the need for the state and public institutions to retain a sufficient degree of “principled distance” from any particular religion or belief, to not privilege or impose any one over any other. Yet, at the same time, this consensus does not impose a “new secular morality” or require people of faith to check their faith at the door.[173] Legal and political analysts generally agree that the Canadian approach to governing religious diversity – although regionally and administratively diverse[174] – is mostly the open secular model described earlier. This is widely seen to be affirmed in religious freedom and equality case law,[175] and as being most consistent with Canada’s legal and policy commitments to diversity and multiculturalism.[176]

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

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

Since the *Chamberlain* decision in 2002, the courts have largely upheld this view. They have recognized, in accord with the first precedent-setting freedom of religion case under the *Charter* - *R. v. Big M Drug Mart*[181] - individuals' right to believe as they choose, and also their “right to declare religion *openly* and without fear of hindrance or reprisal, and…to manifest belief by worship and practice or by teaching and dissemination”, whether in private or in public.[182] This approach was recently reconfirmed in a much publicized (Dec. 20, 2012) Supreme Court of Canada decision, *R. v. N.S*.[183], involving the right of a Muslim women to wear the niqab (full face veil) while testifying in a criminal proceeding. Writing on behalf of the majority, Chief Justice McLachlin wrote:

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

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

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

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

Limitations on freedom of religion in the public sphere

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

However, views vary on where to draw the line on limiting religious practices in the public sphere. Positions tend to range along a continuum from tolerating no religion in public space (closed secularism) to advocating no limits on expressing and manifesting religion in public space. Neither of these positions are legally tenable in the Canadian legal context, which recognizes that a right to express and practice religion in public exists, albeit subject to limitations and balancing with other competing rights.

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

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

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

For instance, some people have argued that gender equality is or should be a non-negotiable "Canadian value" that should automatically trump religious freedoms in the public sphere.[190] *Charter* jurisprudence, however, generally suggests that no right is absolute, and that there is no hierarchy of rights.[191] The secular ideal of state neutrality is also sometimes used to defend a maximal view of limitations on religion in public life (as is discussed further below).

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

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

Neutrality and its limits

It is common for proponents of more closed secularism models to advocate for complete banning of religious expressions in public life to maintain "neutrality" in public affairs. For example, this perspective is evident in arguments that because something is public or publically funded, it must exclude religion or religious sensibilities to remain neutral or secular.[198] However, critics argue that the idea that taking religion out of the public sphere renders it neutral or secular fails to acknowledge how this can inadvertently privilege agnostic and atheist perspectives in the public square and thus put religious believers at a distinct disadvantage "compared to other bearers of comprehensive viewpoints."[199] "[W]e are all believers," Benson argues in this respect, "it is not a question of whether we believe, but what we believe in."[200]

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

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

> In my view, Saunders J. below erred in her assumption that "secular" effectively meant "non-religious." This is incorrect since nothing in the *Charter*, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy. I note that the preamble to the *Charter* itself establishes that "…Canada is founded upon principles that recognize the supremacy of God and the rule of law." According to the reasoning espoused by Saunders, J., if one's moral view manifests from a religiously grounded faith, it is not to be heard in the public square, but if it does not, then it is publicly acceptable. The problem with this approach is that everyone has "belief" or "faith" in something, be it atheistic, agnostic or religious. To construe the "secular" as the realm of the "unbelief" is therefore erroneous. Given this, why, then, should the religiously informed conscience be placed at a public disadvantage or disqualification? To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of pluralism. The key is that people will disagree about important issues, and such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of a modern pluralism.[203]

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

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

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

- The need to maintain liberty (i.e. non-compulsion in matters of religion and belief)
- The need to maintain equality and non-discrimination – to not privilege or endorse any one faith (religious or non-religious) over any other
- The impact on the competing rights of others and the need to protect public safety, order, health and core constitutional values.

From this human rights-based perspective, religion is a fully legitimate part of public life and it is also a necessary part of a fully inclusive public sphere.[207]

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

> If secularism or agnosticism constitutes a position, worldview, or cultural identity equivalent to religious adherence, then its proponents may feel excluded or marginalized when the state supports even the most ecumenical religious practices. But by the same token, the complete removal of religion from the public sphere may be experienced by religious adherents as the exclusion of their worldview and the affirmation of a non-religious or secular perspective...
>
> ...Ironically, then, as the exclusion of religion from public life, in the name of religious freedom and equality, has become more complete, the secular has begun to appear less neutral and more partisan. With the growth of agnosticism and atheism, religious neutrality in the public sphere may have become impossible. What for some is the neutral ground on which freedom of religion and conscience depends is for others a partisan anti-spiritual perspective.[211]

While the court ultimately maintained that the state should still strive to be as neutral as possible, such neutrality was explicitly inclusively conceived,[212] in terms of religion, as "show[ing] respect for all postures towards religion, including that of having no religious beliefs whatsoever, while taking into account the competing constitutional rights of the affected individuals." Nevertheless, there are countervailing court decisions that, some have argued, appear to equate secularism (qua absence of religion) with "neutrality," "non-discrimination," "tolerance" and "non-sectarianism."[213]

4.3. Consequences of systemic faithism

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

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

IV. Defining creed

This section looks at arguments for and against expanding the current definition of creed in the updated OHRC policy. It also considers potential outer limits and conditions for qualifying as a creed for human rights protections. This section also looks at the potential impact of an expanded definition of creed for organizations responsible for upholding the *Code*. Although many of the arguments explored in each section could be immediately rebutted with counter-arguments, these are engaged in separate sections, wherever possible, allowing each perspective to be stated in positive terms. This is done so the reader can assess the strength of arguments on their own merit.

Key questions

- Should the OHRC define creed in the updated policy? If so, how?
- What does the case law, and principles of statutory interpretation, tell us about how creed should be understood?
- What, if anything, might distinguish a "creed" from other beliefs (e.g. opinions, preferences, etc.) and associated practices?
- What are some of the practical implications and consequences of an expanded definition of "creed" for those with responsibilities under the *Code*?

1. Context

1.1 Current OHRC policy definition

Creed is one of the prohibited grounds of discrimination under the Ontario *Human Rights Code*. The *Code* does not provide a definition of creed, but in the 1996 OHRC *Policy on creed and the accommodation of religious observances*, it was defined as:

> Creed is interpreted to mean "religious creed" or "religion." It is defined as a professed system and confession of faith, including both beliefs and observances or worship. A belief in a God or gods, or a single supreme being or deity is not a requisite.[220]

The 1996 *Policy* conceives of religion broadly "to include, for example, non-deistic bodies of faith, such as the spiritual faiths/practices of aboriginal cultures, as well as bona fide newer religions (assessed on a case by case basis)".[221] Nevertheless, it drew a clear line at religion, explicitly stating that "[c]reed does not include secular, moral or ethical beliefs or political convictions".[222] The *Policy* also stated that it "does not extend to religions that incite hatred or violence against other individuals or groups, or to practices and observances that purport to have a religious basis but which contravene international human rights standards or criminal law".[223]

Since the 1996 *Policy*, the courts and HRTO have increasingly had to grapple with what legitimately qualifies for human rights protection on the *Code* ground of creed (as discussed below). Several recent cases have involved non-religious belief systems, including ethical veganism,[224] atheism[225] and political belief.[226] Cases like these,

combined with other legal developments and broader social trends (including the growth of non-religious forms of belief and affiliation) have helped to bring the question of how to define creed to the forefront of the current policy update.

1.2 Developments in law

Most HRTO and court decisions based on the *Code* have interpreted creed to mean religion, as defined in the OHRC's (1996) policy position.[227] *Black's Law Dictionary* equates creed with religion when it defines creed as a "confession of articles of faith, formal declaration of religious belief, any formula or confession of religious faith, and a system of religious belief."[228] Similarly, Tarnopolsky and Pentney's *Discrimination and the Law* states that creed and religion are "essentially synonymous" terms.[229]

However, there are notable exceptions to this trend. In *R.C. v. District School Board of Niagara*,[230] the HRTO found that protection against discrimination based on creed extends to atheism. The HRTO stated that prohibiting discrimination because of creed includes "ensuring that individuals do not experience discrimination in employment, services and the other social areas in the *Code* because one rejects one, many or all religions' beliefs and practices or believes there is no deity."[231]

Various other cases have left open the possibility that non-religious belief may constitute a creed under the *Code* (as discussed below). Overall, the courts appear to be reluctant to offer any final, authoritative, definitive or closed definition of creed, preferring a more organic, analogical ("if it looks like a duck, walks like a duck and quacks like a duck, it must be a duck")[232] case-by-case assessment. This has yielded a variety of results. Courts and tribunals have recognized a wide variety of subjectively defined religious and spiritual beliefs within the meaning of creed under the *Code* and religion under the *Charter*, including:

- Aboriginal spiritual practices[233]
- Wiccans[234]
- Hutterian Bretheren[235]
- Raelians[236]
- Practitioners of Falun Gong[237]
- Members of the Worldwide Church of God[238]
- Rocky Mountain Mystery School.[239]

There is nothing in the case law that would prohibit redefining "creed" more broadly and include secular ethical and moral beliefs. Therefore, the question of what should constitute a creed in terms of the right to be free from discrimination under the Ontario *Code* – in particular with respect to secular, moral or ethical beliefs – remains an open one. In fact, this is a central question being considered in the current creed policy update. At the same time, the courts have offered some guidelines around the outer limits of what they will recognize as meriting protection under the *Code* ground of creed (as discussed below).

As well, applying principles of statutory interpretation, it can be argued that creed and religion can and do mean different things (for further discussion, see OHRC *Case law review* and Section 3 below).

2. Arguments for not limiting the definition of creed to religion and including secular ethical and moral beliefs

2.1. Principles of statutory construction and interpretation

Some of the main arguments for not limiting the OHRC policy definition of creed to religion are derived from principles of statutory construction and interpretation. Among those discussed below include:

- Presumption against tautology
- Presumption of consistency
- Avoiding logical absurdities
- Equal standing of French and English language version of the *Code*
- Interpretation consistent with the *Charter.*

2.1.1 Presumption against tautology and of consistent expression

One key aid to considering the statutory interpretation of the meaning of creed in the *Code* is the "presumption against tautology." This presumption assumes that the legislature has carefully chosen each word of a statute so it will not be confused with other similar words, or be redundant or superfluous.[240] Similarly, the "presumption of consistent expression" assumes that the legislature uses language carefully and consistently so that identical words in a statute have the same meaning and different words have different meanings.[241]

However, there are some exceptions to these rules, both in the case of the presumption of consistency and the presumption against tautology.[242]

Statutes from other jurisdictions within Canada that deal with similar subject matter can also be considered as an aid to statutory interpretation. [243] For example, in *B. v. Ontario (Human Rights Commission)*, the Supreme Court noted, in the context of interpreting the meaning of the ground of marital status in Ontario: "we agree that statutory language from other jurisdictions may aid in the interpretation process…"[244] The Court was considering the impact of the definition of marital status under Saskatchewan's human rights legislation, which expressly excluded the particular identity of a person's spouse from the ground of marital status (while Ontario's *Code* does not). The Court said: "the express exclusion of particular identity in the Saskatchewan *Code* and the absence of that exclusion in the Ontario *Code* lends itself more easily to the conclusion that the broader meaning of status was, in fact, intended in Ontario."[245] In other words, the fact that the Saskatchewan *Code* defined marital status differently than Ontario's *Code* weighed in favour of a conclusion that the Ontario *Code* intended something different.

The Ontario *Code* prohibits discrimination based on creed, but does not list religion as a prohibited ground. The word "religion" does not appear in the *Code*. However, the word "religious" is used in sections that deal with statutory defences for special interest organizations (s.18) and special employment (s. 24). In addition to creed, the terms "religion," "religious belief" or "religious creed," and "political belief" appear in other Canadian human rights statutes (see Figure 3 below, listing creed-related terms in use around the country, as affirmed in human rights statutes and/or case law).

Figure 3: Creed-related prohibited grounds of discrimination in human rights legislation and case law

Legislation	Prohibited grounds
Canadian Human Rights Act (1977)	religion
British Columbia *Human Rights Code* (1969)	religion and political belief
Alberta Human Rights Act (1966)	religion and political belief
Saskatchewan Human Rights Code (1979)	religious creed and political belief
Manitoba *Human Rights Code* (1970)	religion or creed, or religious belief, religious association or religious activity
Ontario *Human Rights Code* (1962)	creed
Quebec *Charter of Human Rights and Freedoms* (1975)	religion, political convictions NB: Also affirms freedom of conscience, freedom of religion, [246] and freedom of opinion among other freedoms in Ch.1(3)
Nova Scotia *Human Rights Act* (1963)	religion, creed, and political belief, affiliation or activity
New Brunswick *Human Rights Act* (1967)	religion and political belief and activity
Newfoundland *Human Rights Act* (1969)	religious creed, religion and political opinion
Prince Edward Island *Human Rights Act* (1968)	religion, creed and political belief
Yukon *Human Rights Act* (1987)	religion or creed, or religious belief, religious association or religious activity and political belief
Nunavut *Human Rights Act (2003)*	creed, religion

Note: Dates refer to first year enacted, not to terms in existence at that time.

Research into interpreting such varied terms used across the country found that, much as in Ontario, there are very few definitions in statutes, policies and case law. Exceptions are the definition of religion (drawing on *Syndicat Northcrest v. Amselem*,[247] and P.E.I.'s definition of "political belief" as referring only to beliefs of parties as defined in their Elections Act. In *Wali v. Jace Holdings Ltd*.[248], the British Columbia Human Rights Tribunal grappled with the definition of political belief. It suggested that not just any political belief would be covered, but rather beliefs in respect of a system of "social cooperation".It found that the applicant had experienced discrimination based on his political beliefs, because he was dismissed in part because of his personal political position on the regulation of pharmacy technicians by the College of Pharmacists.[249]

Applying the aids to statutory interpretation discussed above, it may be argued that the terms religion and creed mean different things in Ontario and Canadian human rights law, since:

(1) Creed, instead of religion, appears in the Ontario *Code*
(2) The terms creed and religion were both known to the Ontario Legislature at the time the *Code* was drafted, but creed was chosen
(3) Other human rights statutes use religion, religious creed and, even both religion and creed.

2.1.2 Avoiding logical absurdities

The principle of avoiding logical absurdities and absurd consequences when trying to resolve cases of statutory ambiguity may arguably be another relevant aid to statutory interpretation.[250] While some scholars have noted the potential for absurdity, it is by no means clear that this interpretative principle provides much help in interpreting the meaning of creed.

Labchuck (2012) and Szytbel (2012) suggest that one absurdity that may result from confining creed protections to religion is that nearly identical but differently sourced beliefs in ethical veganism will be protected differently.[251] Labchuck provides the example of four different types of ethical vegans:

(1) A Jain follower, who is vegan for religious reasons
(2) A practicing Christian who sees veganism as a religious duty
(3) A Christian who is vegan, but is a vegan for secular moral reasons relating to animal welfare
(4) An atheist who is an ethical vegan for strictly secular moral reasons.

Interpreting creed in a way that excludes secular beliefs, Labchuk argues, would result in the apparent logical absurdity of only extending human rights protection under the *Code* to the first two, even though they may all be equally committed to the same ethical vegan beliefs (or even members of the same organization).

Legal analysts have highlighted other possible logical absurdities, inconsistencies and exclusions that inevitably result from any effort to universally define, and delimit for the purposes of law, what constitutes a religion.[252] Others have pointed to further logical

contradictions in the OHRC's (1996) *Policy* definition of creed as excluding "secular, moral or ethical beliefs." This appears to suggest that both secular and moral or ethical beliefs more generally are excluded from protection. Critics argue that divorcing religious beliefs (which are protected) from "moral or ethical beliefs" or "political beliefs" for that matter (both of which are not protected according to the wording of the policy) is illogical since morals and ethics are often derived from religion, among other potential sources (including secular ones).[253]

2.1.3 Equal standing of French and English language versions of the *Code*

Another principle of statutory interpretation is the equal standing and regard that must be given to both the English and French language version of the *Code* in determining its appropriate interpretation. When interpreting a bilingual statute, the first step is to search for the shared meaning of the English and French versions; in this case, "creed" and "la croyance." Second, it is necessary to determine whether the shared meaning is consistent with Parliament's intent.[254] If one language version gives better effect to the purpose of the *Code*, that version should be selected, even if a narrower meaning would be common to both versions.[255]

The French language version of the Ontario *Human Rights Code* uses "la croyance." This term is often translated into English as "belief," rather than more narrowly as "religion," suggesting the potential for a broader interpretation of creed beyond religion, as affirmed by the HRTO in *R.C. v. District School Board of Niagara.* [256]

2.1.4 Interpreting the *Code* consistently with the *Charter*

Proponents of expanding the definition of creed beyond religion argue that the *Code* should be interpreted harmoniously with Section 2(a) of the *Charter*, which includes both freedom of religion and freedom of conscience. The OHRC's review of the case law on freedom of conscience reveals that although there has been no majority decision where the Supreme Court has defined "freedom of conscience" as *distinct from* "freedom of religion," the courts have generally interpreted conscience in ways that encompass conscientiously-held non-religious beliefs, whether grounded in "'secular morality,"[257] the positions of "atheists, agnostics, sceptics and the unconcerned,"[258] or "profoundly personal beliefs that govern one's perception of oneself, humankind, nature and, in some cases, a higher or different order of being."[259]

For example, in *Roach v Canada (Minister of State for Multiculturalism and Culture)*, [260] Charles Roach, the claimant, unsuccessfully challenged the requirement that new citizens declare an oath or affirmation of allegiance to the Monarch, on the basis that it would violate his freedom of conscience under section 2(a) of the *Charter*. In his decision, Linden, JA distinguished between freedom of conscience and freedom of religion:

> It seems…that freedom of conscience is broader than freedom of religion. The latter relates more to religious views derived from established religious institutions, whereas the former is aimed at protecting views based on *strongly*

> *held moral ideas of right and wrong, not necessarily founded on any organized religious principles*. These are serious matters of conscience. Consequently the appellant is not limited to challenging the oath or affirmation on the basis of a belief grounded in religion in order to rely on freedom of conscience under para. 2(*a*) of the *Charter*...However, as Madame Justice Wilson indicated, "conscience" and "religion" have related meanings in that they both describe the location of profound moral and ethical beliefs, as distinguished from political or other beliefs which are protected by para 2(*b*) [freedom of expression]. (Emphasis added; see also Justice Wilson's concurring decision in *R. v Morgentaler*[261]).

Given the overlapping objectives of the *Charter* and the *Code*, and the fully (versus quasi) constitutional status of the *Charter*, some argue, citing Human Rights Tribunal of Ontario (HRTO) and court decisions,[262] that interpretations of the *Code*, particularly in cases of statutory ambiguity, should be made congruent with the interpretations, values and terms of the *Charter*. This was recently affirmed in an October 9, 2012 HRTO decision in *McKenzie v. Isla*, where the Vice-chair stated:

> The Tribunal has emphasized that ambiguity in the scope of *Code* rights should be resolved in favour of protecting matters at the core of the rights and freedoms in the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act, 1982* (U.K.), c. 11 (the "*Charter*").[263]

Labchuck and Chiodo argue that including secular moral and ethical beliefs under "creed" in the *Code* is consistent with giving full effect to the more fundamental right to freedom of religion *and* conscience under Section 2(a) of the *Charter*.[264]

At the same time, the extent that the aims and purposes of "equality" jurisprudence under the *Code* ground of creed are, or should be, consistent with the aims and purposes of liberty jurisprudence under section 2(a) of the *Charter* remains a contested point. Some scholars caution against "*Charter* imperialism"[265] and the conflation of these two distinct purposes and analyses in recent court decisions. In *Freitag v. Penetanguishene (Town) 2013 HRTO 893 (CanLII)*, the Tribunal clearly distinguished between *Charter* and *Code* protections for religion and creed in its decision.[266]

One could also argue that the *Code*'s anti-discrimination provisions on the ground of creed bear a closer relationship to, and are therefore best compared and harmonized with, the *Charter* right under Section 15(1) to "equality before and under the law... without discrimination based on...religion."[267] Notably absent, in such *Charter* s.15 provisions, are matters of conscience and belief extending beyond religion, from which one could argue interpretations of the *Code* should take their cue.[268] The OHRC is not aware of conscience being recognized as an analogous ground.

The OHRC's 1996 *Policy on creed* states: "Freedom of religion is the basic principle that informs the right to equal treatment under the *Code* on the ground of creed" (p.5). In an accompanying endnote, it derives this interpretation from a reading of the *Code*'s

Preamble.[269] Much appears to hinge on how one interprets the purpose of the *Code*, in particular how one balances the overlapping goals of protecting *individual dignity* and broader social purposes such as creating a "climate of mutual respect" and advancing "equal rights and opportunities without discrimination."[270] While the language of the Preamble is clearly central in this consideration, the courts have made it clear that one must also consider how the higher courts have interpreted the purposes of human rights statutes across jurisdictions in the case law.[271]

2.1.5 Liberal and purposive interpretation of the *Code*

Some legal analysts and scholars argue that including secular ethical and moral beliefs for human rights protection under the *Code* ground of creed is most consistent with a liberal and purposive reading of the *Code*, as called for by its "quasi-constitutional" status.[272] They cite supporting court decisions affirming that:

1. Human rights legislation should be given a liberal and purposive interpretation, in keeping with its quasi-constitutional status[273]
2. Perceived ambiguities (such as the scope of the definition of creed) should be resolved in a way that promotes the anti-discriminatory goals of the legislation.[274]

Mindful of the progressive function and mandate of the OHRC,[275] some analysts argue that is entirely within the spirit and mandate of the *Code* and OHRC to help to "ensure that similar beliefs are granted similar degrees of protection – regardless of whether they are rooted in religion or a secular basis."[276]

This view finds support in the HRTO's (2013) decision on whether atheism counts as a creed protected by the *Human Rights Code*, in which the adjudicator, Associate Chair David Wright, conclusively found in the applicant's favour that "a liberal and purposive interpretation of the prohibition on discrimination because of 'creed' includes atheism and that discrimination because a person is atheist is prohibited by the *Code*."[277]

2.2 Social trends: secularization and the evolving nature of beliefs

> *"I think there is a strong argument for creed going beyond religion when you've got similar beliefs occupying a place of similar importance for non-religious persons."*
>
> – March 2012 Legal Workshop participant

”[T]he distinction [between religious creeds, which receive full *Code* protection, and secular moral or ethical belief systems, which do not] appears to many observers to be arbitrary, and implies that familiar or favoured creeds are “real” beliefs, while different or new creeds are not beliefs or are only pseudo-beliefs”.[278]

Another main argument for expanding the definition of creed to include secular ethical and moral beliefs concerns transformations in society and belief in the contemporary era. How people make sense and meaning of their lives and the world today has changed significantly in the modern era,[279] particularly since the 1960s. Observers argue that religion is no longer the only, or primary, arbiter of morality and identity, but rather one among many others in the contemporary era. These observers think it is particularly important to equally recognize religious and non-religious bases for belief and moral action in the current social environment of diversifying and individualizing belief systems, declining significance and centrality of religion for, and the growing numbers of people professing deeply held non-religious beliefs (as explored in Background Section III above).

The idea that only religions have a deep social or communal basis, or anchoring in social relations of inequality (thus uniquely meriting protection and remedying under the *Code*) was also contested. One Legal Workshop participant argued, noting similarities between deeply held secular and religious beliefs and matters of conscience:

> If you think about things that overlap but are not identical, you get to those deeply held beliefs that cannot be changed – or only at deeply personal cost. We’re not here to protect the frivolous. We’re here to protect the marginalized, and atheists and pacifists have historically been marginalized in our society.

Others, including some religion studies scholars, argued that distinctions between religious and non-religious beliefs and practices are fast blurring, as exemplified in the increasing individualism and fluidity of religious and non-religious belief, identity and affiliation, and declining importance and significance of stable and enduring forms of community. “Secular beliefs may play a fundamental role in a believer’s life that is nearly indistinguishable from the role religion plays in the lives of others,” Labchuck also argues, pointing to the difficulty of drawing a “hard and fast boundary between religious and other beliefs.” She argues:

> Both refer to orienting commitments that help give meaning and direction to life. Secular beliefs may be the ethical and moral equivalent of religious beliefs. They may play an equally or more profound role in the lives of believers than religion plays in the lives of those who attend church but may pay mere lip service to the ideals preached at their place of worship.[280]

“Recognizing that non-religious viewpoints can also constitute comprehensive claims to the truth,” and function in ways very similar to religion, Chiodo further argues, may help “change our perspective on many [secular] worldviews that are incorrectly perceived as neutral”.[281]

While many argued that extending creed protections to non-religious beliefs was simply a sensible or good thing to do given current social trends, others offered a stronger legal onus to do so. Some argued that the principle of interpreting the *Code* liberally and purposively, in keeping with its quasi-constitutional status, assumes that the courts will interpret human rights organically and progressively in accord with such evolving social trends, values and conceptions within society. [282]

2.2.1 Leaving creed definition open-ended allows us to adapt anti-discrimination legislation to evolving trends in society

> *"Beginning a court proceeding on the basis of a distinction between legitimate and illegitimate belief is an offensive way to start a court process."*
>
> – January 2012 OHRC Policy Dialogue participant

The OHRC heard many arguments for leaving the definition of creed open-ended – neither continuing to commit to the existing closed definition of creed as religion, nor positively stating what other kinds of (non-religious) beliefs may qualify for human rights protection. People argued that leaving the definition of creed open-ended – but with some threshold criteria as already determined by the courts – will enable rights protections to adapt and evolve in tune with emerging societal developments, patterns of inequality and discrimination, and the evolving and dynamic nature of belief and practice in the modern era. Some argued that not defining creed will also free persons of various minority beliefs and faiths – e.g. practitioners of Aboriginal spirituality – from having to force fit their beliefs and practices into a predefined, and for some, alien, western categorical mold (such as religion).[283]

In his (2012) paper for the January 2012 OHRC Policy Dialogue, "Trying to Put an Ocean in a Paper Cup: An Argument for the Un-definition of Religion," Howard Kislowicz argues that "because the lived religious experiences of individuals and communities are so diverse" and continually evolving, "a more appropriate response may be to refuse to adopt a comprehensive, *a priori* definition of religion altogether," to avoid having the ironic impact of stifling religious freedom in its name.[284]

The same could be said about creed. Kislowicz ultimately argues for "keeping with the common law approach of dealing with cases as they arise"[285], based on contextual analogical reasoning ("if it looks like a duck, walks like a duck and quacks like a duck, it must be a duck") rather than opting for abstract definition. Reasoning by analogy, he argued, is already an embedded principle in law and thus should not be feared.

2.3 Consistency with domestic and international law and jurisprudence

2.3.1 International human rights law

People arguing for an expanded definition of creed that includes secular ethical and moral beliefs cite domestic and international human rights case law and jurisprudence to support their position. Though not legally binding unless implemented by statute, international human rights laws and instruments set standards for domestic human rights law and policy. They can and have been explicitly cited by domestic courts to guide legal decision making, particularly when there is ambiguity about appropriately interpreting a domestic human rights statute. [286]

Article 18 of the *Universal Declaration of Human Rights* states:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Bundling together the rights to freedom of thought, conscience, religion and belief in international law – also done in the *International Covenant of Civil and Political Rights* (ICCPR),1966[287] and the *Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief*, 1981,[288] to which Canada is a signatory – can be interpreted to suggest that national legislation (as called for in Article 7 of the Declaration)[289] as well as provincial human rights statutes should extend this same breadth of rights.[290] Also, international human rights law and resolutions show a hesitancy to single out or distinguish between differing kinds of belief systems warranting protection, or to override subjective definitions of these.[291]

The HRTO explicitly affirmed the relevance of international human rights law and jurisprudence, in these respects, in *R.C. v. District School Board of Niagara*.[292]

In addition to noting such trends in international law, advocates for including non-religious beliefs within the scope of *Code* protections point to examples in other jurisdictions around the world. For instance, England protects “religion and belief” as prohibited grounds of discrimination in their *Equality Act 2010*, following *the European Convention on Human Rights* (ECHR, Article 9, 14) and international law (see section 4.1 below).[293] New Zealand and some U.S. states also extend protections to non-religious belief systems, such as ethical veganism.[294]

2.3.2 Domestic case law

While much *Code*-based case law continues to equate creed with religion (as discussed earlier), there are notable exceptions to this trend. Various cases have affirmed or left open the possibility that non-religious belief may constitute a creed under the *Code*.

Indeed, overall, the courts appear to be reluctant to offer any final, authoritative, definitive or closed definition of creed. Instead, they prefer a more organic, analogical[295] case-by-case assessment, which has yielded a variety of results (see *Creed case law review*).

Courts and tribunals have had no difficulty recognizing a wide variety of subjectively defined religious and spiritual beliefs within the meaning of the *Code*, including Aboriginal spiritual practices,[296] Wiccans,[297] Hutterian Bretheren,[298] Raelians,[299] Falun Gong practitioners, [300] and members of the Worldwide Church of God[301] and Rocky Mountain Mystery School.[302] More importantly, there is nothing in the case law that would prohibit redefining creed more broadly to include secular ethical and moral beliefs. However, there are guidelines around the outer limits of what the courts will recognize under creed (see threshold criteria section below).

Among the notable case law examples where a broader definition of creed is contemplated by decision-makers is *R.C. v. District School Board of Niagara*,[303] and *Hendrickson Spring Stratford Operations v USWA, Local 8773*. In the latter case, the decision-maker held that:

> The term ”creed” in the [Human Rights] *Code* has a wide meaning and can “be taken to include almost any belief system that encompasses a set of particular religious beliefs but, as well, many other philosophical, secular and personal beliefs – the ”isms” (such as are bound up in words like ”environmentalism,” ”conservatism,” “liberalism” or “socialism”).[304]

In *Rand v. Sealy Eastern Ltd.*, the Tribunal also contemplated the possibility of including non-religious beliefs, favourably citing Webster’s New International Dictionary definition of creed as “sometimes a summary of principles or a set of opinions professed or adhered to in science or politics.”[305]

In another formative 1998 decision, *Jazairi v Ontario (Human Rights Commission),*[306] the Ontario Divisional Court upheld the OHRC’s decision not to refer a complaint to a Board of Inquiry because “political opinions on a single issue” – in this case the claimant’s views on the matter of the Israel-Palestine conflict – did not amount to a creed under the *Code*. However, the Court acknowledged that there was a diversity of dictionary definitions of creed, some of which included secular belief systems.[307] The Divisional Court stated that although the term creed is capable of including a comprehensive set of principles, its ordinary meaning requires an element of religious belief. However, the Court went on to explicitly not rule out the possibility that a “political perspective, such as communism, made up of a recognizable cohesive belief system or structure,” could amount to a creed, though this question did not need to be decided in this case.[308] The Ontario Court of Appeal upheld the decision. It confirmed the importance of assessing each creed claim on its own facts and noted that whether or not some other political perspective that is made up of a cohesive belief system could amount to a “creed” was not before it. The Court of Appeal commented that it would be a mistake to deal with such important issues in the abstract.[309]

The tendency in several decisions to not rule on the definition of creed, and instead jump to a *prima facie* discrimination analysis on the assumption that the belief or practice in question could be a creed, may be one indication of the courts' reluctance to define creed formally.[310]

Religion is more clearly defined in Canadian case law. The leading Supreme Court of Canada decision interpreting what is meant by "religion" is the decision in *Amselem.* The court adopted a broad definition of religion stating:

> Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.[311]

Amselem clearly states that when dealing with religious freedom, only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected under the Quebec or Canadian *Charter*.[312]

The Court in *Amselem* went on to note that the content of an individual's right to freedom of religion under the *Charter* is expansive and revolves around the notion of personal choice and individual autonomy and freedom. Some argue that, given the courts' emphasis on personal choice and individual autonomy as the key underlying value and rationale for according rights to religion, there is no reason not to extend such rights to other kinds of beliefs (including beliefs of one), in the name of those very same values. Others further argue that the emphasis in *Amselem* and later decisions on the individual and subjective nature of religion – which downplay its distinctive communal, associational aspects – have blurred the lines between religion, creed and individual conscience, making the distinction between religious and non-religious convictions "increasingly hard to justify."[313] Moon argues, "The focus on individual belief raises the question of why religious beliefs should be treated differently from other beliefs[?]"[314]

3. Arguments for maintaining the OHRC's 1996 policy definition of creed as "religion"

3.1 Equality focus and purpose of human rights legislation

Many of the arguments heard to date by the OHRC in support of maintaining the current definition of creed as "religion" revolve around anxieties about potentially "watering down" the purpose and focus of human rights legislation. Proponents of this view reminded us of the importance of returning to the original purpose of human rights protections when considering the question of definition. For instance, people argued that the main purpose of human rights legislation is to combat discrimination that is

based on, and reproduces, social inequality, social exclusion and historical disadvantage faced by vulnerable, marginalized groups in society. One participant at the Legal Workshop commented:

> I don't want to water this down so that people in power who enjoy privilege use this to protect the power they already have. We want to be open, but not to the extent that we take the prohibited grounds to apply to everyone and anyone...If you water down the policy [definition], you put yourself on a slippery slope of having to deal with issues for which *Human Rights Code*s were not intended. Then, you will no longer have a vehicle to protect and promote the rights of marginalized, vulnerable identifiable groups.[315]

Proponents of this view tended to emphasize the group basis of social disadvantage and stereotyping faced by existing *Code*-protected groups, as a key condition of their protection under the *Code*. They argued that the move in recent human rights jurisprudence away from abstract formal analyses of *prima facie* discrimination – centering on human dignity or comparator group analyses – towards more contextual and purposive understandings of discrimination, mindful of social and historical relations of power and inequality, provides some support for this view.[316]

However, one could argue that not all religious communities currently covered by the *Code* ground of creed are socially disadvantaged. In fact, as discussed earlier in the background section, some religious communities may have structural advantages and privileges in Ontario society, at least in certain respects. In any case, if the OHRC expands its policy definition of creed, cases brought before the courts and HRTO would still need to meet the test of *prima facie* discrimination, which may consider past or present social disadvantage and sensitivity to contexts of social inequality.[317]

Some legal scholars emphasize a distinction between the goal of equality rights legislation (for example, protecting against discrimination based on creed under the *Code*), and the goal of liberty rights legislation (for example, protecting freedom of religion under section 2(a) of the *Charter*).[318] The former, they argue, addresses social and historic disadvantage and inequality, necessarily assessing broader social dynamics of power and inequity in its effort to prohibit and remedy discrimination and unequal treatment.[319] The latter tends to put more emphasis on the right of individuals to be free from state coercion or interference in matters of religion and conscience,[320] regardless of whether such interference or coercion is based on social inequality or group disadvantage or stereotyping.

While the courts have recognized an equality dimension to freedom of religion under the *Charter*, [321] some legal scholars note the disproportionate weight accorded to the liberty dimension in s. 2(a) jurisprudence.[322] Taking issue with the tendency of the higher courts to conflate and confuse *equality rights* relating to creed and religion

under the *Code* and s.15 of the *Charter* with religious *freedom rights* under s.2(a) of the *Charter*, Ryder, among others, emphasized the importance of distinguishing between the two overlapping but distinct aims of these laws, advising the OHRC to keep the unique purposes of human rights legislation in view when assessing policy options for defining creed.[323]

3.2 Uniqueness of religion merits distinct protections

Others argue that religion is distinct from other kinds of belief systems, and that to fail to distinguish between, for instance, political and ethical beliefs, conscience and religion, is a categorical error and potentially a legal one, since different kinds of belief warrant different kinds of legal protections (e.g. freedom of expression versus freedom of religion versus freedom of conscience), in accord with their unique status and functioning in the lives of individuals. One participant at the Legal Workshop, warned of the danger of trying to "fit square pegs into round holes":

> A few distinctions may help us. There is a long tradition of protecting religions as collectives, as institutional forces in our society. The new [square] pegs are these new forms of identity – there is an individual autonomy that is different from the collective aspect of religions. That is why they should be seen as differently.

This collective dimension of religion and creed has been discussed in legal decisions.[324] For instance, in *407 ETR Concession Company v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, CAW-Canada*, a labour Arbitrator states: "A creed implies some level of association between those of like mind. It contemplates a set of shared beliefs. It implies some professed system of faith."[325] In his dissenting judgement in *Hutterian Brethren*,[326] Justice LeBel also emphasized the importance of recognizing the communal and collective aspect of religion:

> [Freedom of religion] incorporates a right to establish and maintain a *community* of faith that shares a common understanding…Religion is about religious beliefs, but also about religious relationships…[This case] raises issues… about the maintenance of *communities* of faith".[327]

Chief Justice McLachlin, in her majority decision, and Justice Rosalie Abella also accepted that religious freedom has both individual and collective aspects. However, Chief Justice McLachlin rejected the view that that the community impact transformed the essential claim of the Colony – that of the individual claimants for photo-free licences – into an assertion of a group right.

The 1996 *Policy* similarly recognizes this group aspect of religion in speaking about the need to assess and accommodate the "needs of the religious group to which an individual belongs" (see section V subsection 3.2 for further discussion on "the needs of the group").[328] This is consistent with s. 11 of the *Code*, dealing with constructive discrimination, which also refers to the needs of the group of which the individual is a member.

Many legal scholars have taken issue with the erasure of this communal dimension of religion in the *Charter* s. 2(a) freedom of religion jurisprudence, particularly since *Amselem*.[329] For example, Moon observes:

> The particular significance of religious practice to the individual must rest in part on its collective character – that a practice such as residing in a succah connects the individual to a community of believers and is part of a shared system of norms...[R]eligious accommodation may be motivated at least in part by a desire to avoid the marginalization of identity groups [330]

Others pointed to other ways that religion (as opposed to other kinds of beliefs) is unique and distinct in ways meriting special legal consideration and protection of its own particular kind. For instance, some people highlighted the depth and comprehensiveness of religious commitment, and the absolute and transcendent nature of its truth claims, which by definition can pose unique challenges to the authority of the liberal state in ways that are not similar to other kinds of (less encompassing or absolute) beliefs.[331]

3.3 Distinction between rights based on conscience and religion and existing protections irrespective of belief

We also heard from several people that matters of “religion” should be distinguished from matters of ”conscience,” in part for the reasons discussed earlier. Warning about the dangers of conflating these interconnected but distinct phenomena under a single category of “creed,” one participant argued:

> We know from the history of religion that there is an inherent group component – identifying with religion means identifying with a group and set of internal permissions that one negotiates...I see conscience as an individual element of religion. I may have a dispute with members of a religious group, and rely on my conscience. Conscience can be the antithesis to a religious belief. I’m increasingly persuaded that the new religions should be under conscience rather than religion.

The same participant went on to explain how two different types of legal rights protections – one, a negative right (freedom from coercion), the other a positive right (implying a duty to accommodate) – may not necessarily apply equally to both kinds of beliefs. He observed:

> We have less trouble saying people shouldn’t be coerced with conscience, but it is more complicated with accommodation. Ethical veganism is a good case – it is more about conscience than membership in community, but for accommodation...Should conscience be accommodated the same way as religion? This is an important question, and a hard question.

Some held that the existing 1996 OHRC *Policy* already extended sufficient (albeit negative, i.e. “freedom from”) rights to persons with non-religious creeds. For instance, this policy states:

> It is the OHRC's position that every person has the right to be free from discriminatory or harassing behaviour that is based on religion or which arises because the person who is the target of the behaviour does not share the same faith. This principle extends to situations where the person who is the target of such behaviour has no religious beliefs whatsoever, including atheists and agnostics who may, in these circumstances, benefit from the protection set out in the *Code*.[332]

This brings within the scope of human rights protection situations where individuals are harassed, or face other discriminatory treatment for not having a particular creed or religious belief (e.g. for being non-religious, atheist, agnostic or secular humanist), and/or where a person of religious faith imposes their faith in some way on a person who does not share that faith, regardless of what their beliefs are.[333] It may not, however, impose on organizations any positive duty to accommodate persons with deeply held non-religious beliefs. Some argue that this restriction of the duty to accommodate is justifiable, since it flows, in large part, from society’s recognition of an unequal (social, institutional, structural) playing field for “minority group” members (thus ruling out accommodations for people not facing such constructive forms of disadvantage). Of course, non-religious creed group members may also face group disadvantage (as explored above).

Noting the distinction between religion and conscience in section 2(a) *Charter* case law (see section 2.1.4 above), some argued that rather than expanding the scope of creed through policy development, the OHRC should advocate for the Legislature to add “conscience” to the *Code*, if indeed it believes a broader range of individual beliefs should be included within the scope of its protections. This would enable two separate and distinct streams of jurisprudence (the right to be free from discrimination based on creed and the right to be free from discrimination based on conscience) to be maintained. To not do this, some argued, would be tantamount to mixing apples and oranges under a single confused (“creed”) category, which could lead to decision makers simply overlooking the OHRC’s policy, due to its potential to run against the grain of judicial interpretation.

3.4 Floodgate and impact arguments

The OHRC also often heard “floodgate”-type arguments – if the policy widens the definition of creed, organizations governed by the *Code* will be flooded and overcome with demands to accommodate all manner of sincerely held beliefs, compromising their ability to function and fulfill their essential purpose.[334] Concerns about potentially having to deal with a flood of creed claims were at times connected to organizational anxieties around having only a “subjective-sincerity” test to hold back such claims.

Others drew attention to the much broader jurisdiction of the *Code*, as compared to the *Charter*, and the potential significant impact that bringing matters of individual conscience (currently governed by the *Charter* which applies only to government) under the *Code* could have for Ontario organizations. One policy dialogue participant concluded: "Creed analysis under the *Code* should not be unthinkingly borrowing from the *Charter* when the impact of the *Code* is so much greater with employers and citizens than the *Charter*."[335]

Some would nevertheless challenge the idea that opening up the definition of creed beyond religion in an OHRC policy will necessarily lead to an avalanche of frivolous claims. There is already ample scope for a multitude of (in some cases frivolous and vexatious) claims based on religion in current law, due to the broad and subjective definition of religion in *Amselem*.[336] As well, the current policy definition of creed has not prevented claims from being advanced at the HRTO under the ground of creed by people who would not likely fall within the current policy definition.

Furthermore, while OHRC policies are considered persuasive and often given great weight by the HRTO and courts, a change to the policy would not necessarily bind decision makers in individual cases. In any case, from a human rights perspective, withholding current human rights and accommodations based on prospective future challenges (e.g. anticipation of future undue hardship) is not a legally defensible position. Undue hardship analyses in accommodation cases, for instance, must proceed based on current (empirically demonstrable) organizational realities and constraints.

3.5 Legislative intent

Principles of statutory interpretation affirm that the intention of the legislature is a factor in interpreting legislation,[337] as is "[t]he legislative evolution and history of a provision".[338] The OHRC heard anecdotal evidence based on an oral interview with a leading human rights activist around at the time of the *Code*'s creation, that only religious creeds were contemplated by Parliament when it introduced creed as a ground of human rights protection in 1962. Others have suggested that the language of "creed" evolved out of the historically dominant Christian lexicon, and assumed religious meaning.[339]

Despite this, the OHRC need not be bound strictly by 1962 interpretations. The *Code* has since been updated many times since its 1962 enactment, most recently in 2008, and has not been amended to replace "creed" with "religion" or "religious creed". As well, as noted earlier, human rights legislation has quasi-constitutional status. This means that human rights legislation is given a liberal and purposive interpretation, so it may better fulfill its objectives, with protected rights receiving a broad interpretation. However, as also earlier noted (see *supra* note 337), any such broad "interpretation of the text of the statute" should also be one "which respects the words chosen by Parliament."[340]

Further, in responding to general terms and concepts, the approach is organic and flexible. The key provisions of the legislation may be adapted to changing social conditions and also to evolving conceptions of human rights. According to Sullivan and Driedger:

> Courts are bound to respect the meaning of words used by the legislature, but given the plastic character of language, especially the general language typically found in human rights codes, this constraint does not prevent the courts from taking a flexible and adaptive approach.
>
> In practice, the Supreme Court of Canada has consistently taken a flexible and adaptive approach to the resolution of issues under human rights legislation. This is evident in the willingness of the court to adopt and develop novel concepts within the framework of these Acts. Although the new concepts may be loosely tied to particular provisions of the Act, the main justification for introducing them is that they accord with and tend to promote the general policies and goals of the Act.[341]

This liberal and purposive approach to interpreting the law is in evidence in the OHRC's reading of gender identity, pregnancy and breastfeeding into the *Code* ground of sex, even though the legislation was initially silent on such inter-related grounds and concepts.

Looking at the history of the selection of "creed" as a prohibited ground of discrimination has been of limited assistance, as historical legal and archival research by the OHRC to date has been unable to definitively determine any precise operative definition of creed at the time of the term's first appearance in the original *Code* in 1962. When the *Human Rights Code* was introduced in a bill on December 14, 1961 by the Hon W.K. Warrender, he emphasized that there were no new principles in the bill. The bill, he suggested, simply incorporated into the *Human Rights Code* various anti-discrimination Acts which the Ontario Legislature had already approved in the past.[342]

The OHRC's own research into the legislative history of anti-discrimination statutes predating but later shaping the *Human Rights Code* revealed that in the initial draft of the first general anti-discrimination bill introduced to the Ontario Legislature on March 19, 1943, both "creed" and "religion" were listed alongside "race" as prohibited grounds of discrimination.[343] The bill, however, did not pass second reading on March 23, 1943.[344] When another anti-discrimination bill more narrowly prohibiting discriminatory publications and displays (leading to the *Racial Discrimination Act*) was introduced a year later on March 3, 1944, it passed all three readings.[345] The final version of the *Racial Discrimination Act* given royal assent March 14th, 1944 prohibited discriminatory publications and displays "for any purpose because of the race or creed of such person or class of persons." Notably absent in the final draft of this key Act predating the *Code* was "religion" as an independent ground distinct from "creed." While it is clear that creed included religion in the *Racial Discrimination Act*, the reason for moving from religion *and* creed in the initial draft bill to just creed in the *Racial Discrimination Act* is not discussed in the archival records researched by the OHRC.[346]

4. Potential threshold criteria for qualifying as a creed

Whatever policy definition is eventually adopted, leaving the definition of creed completely open-ended, without any threshold criteria, could impose too onerous a burden on Ontario organizations to determine what constitutes a creed meriting protection under the *Code*. It would also fail to recognize the few limits and guidelines that have been set out in existing case law. Even those, such as the Ontario Humanist Society, arguing for an expanded definition of creed acknowledged that such protections should extend, not just to any belief or opinion, but to "a substantial belief system akin to the beliefs or tenets of a religion," which, "influences the way you live."[347]

The OHRC's (2012) *Creed case law review* notes that, while creed is defined subjectively, there are also necessary objective elements to a creed claim (see Section V 3.3 for more on these elements). For example, accommodation providers may be within their right to seek evidence of the existence of a particular and cohesive system of belief, and its sincere observance. For newer or less understood creeds, this may be shown by using expert evidence (see for example *Huang v. 1233065 Ontario*[348] and *Re O.P.S.E.U. and Forer*[349]). The decisions in *Jazairi*[350] and, in the context of section 2(a) conscience rights, *Roach* [351] also exclude isolated political opinions from creed and conscience protections. These decisions, however, do not preclude the possibility of political beliefs being connected to a broader and deeper cohesive moral or ethical belief system that does warrant legal protection, as contemplated by the Court in *Jazairi*.

Some argue that when thinking about the nature and scope of non-religious beliefs potentially meriting protection under an expanded creed category in the *Code,* the OHRC and courts should look to the threshold and framework of analysis already elaborated by the courts in the context of the section 2(a) right to freedom of religion.[352] Potential criteria include that the conscientiously-held belief (irrespective of whether it is connected to the religious or divine):

- Be sincere[353]
- Be "freely and deeply held" and "integrally linked to one's self-definition and... fulfilment"[354]
- Be part of a comprehensive moral or ethical worldview[355]
- Consist of an "overarching array of beliefs that coalesce to provide the believer with answers to many, if not most, of the problems and concerns that confront humans"[356]
- Bear some nexus to the official doctrine of an organization or community, although the beliefs or practices do not have to be required by such a doctrine.[357]

While such threshold criteria for what could constitute a creed under the *Code* would "filter out a considerable number of conscientious objector claims," Chiodo argues, "this is as it should be: religion is protected because it presents an alternative authority to that of the state, commands an individual's utmost loyalty, and pervades every aspect of his or her life."[358] She argues that for claims of individual conscience and belief, or non-religious belief more generally, to merit the same protection as religion, they should meet the same requirements.

Political perspectives that are connected to more comprehensive moral or ethical worldviews, from the above expanded conditional perspective, could potentially constitute a creed, according to this analytical framework. Just how one would distinguish a political belief rooted in a broader belief system, however, poses challenges of its own. Principles of statutory interpretation – the presumption against tautology and of consistency – may pose another potential barrier to including political beliefs within the ambit of the meaning of creed under the *Code* (as discussed in section IV 2.1.1 above).

4.1 United Kingdom example: the *Grainger* test

The inclusion of "beliefs" of a non-religious nature, albeit with conditions, in British human rights law may be instructive for how the OHRC and courts might consider distinguishing beliefs meriting human rights protection. UK equality legislation, recently consolidated under the the *Equality Act* of 2010, explicitly prohibits discrimination based either on religious belief or on philosophical belief. For example, both veganism (in *Hashman v. Milton Park*)[359] and science-based belief systems (in *Grainger Plc v. Nicholson)*[360] have been ruled to warrant protection under UK equal treatment legislation. Many belief systems have also been accepted under Article 9 of the *European Convention on Human Rights* (ECHR) [361] including pacifism, veganism, Scientology, the Moon sect, the Divine Light centrum, Druidism and Krishna consciousness.

Grainger Plc v Nicholson[362] is perhaps the most formative UK case offering criteria to assess beliefs meriting protection.[363] Nicholson, the plaintiff in this case, argued that his belief system on climate change was a philosophical and science-based one in line with the (2003) UK Employment Equality regulations pertaining to *religion or belief*, as well as legislation under the *European Convention on Human Rights* (article 9, protocol 1, article 2). In his ruling, Judge Burton held that a conviction in the existence of climate change was a protected belief under the legislation and that a belief could also be protected if it was founded on science, provided the belief system relates to a "substantial aspect of human life and behaviour," and attains "a certain level of cogency, seriousness, cohesion and importance."[364]

Grainger is a noteworthy case, because it established the *Grainger* test, which has since functioned as the main standard for assessing claimants' rights to protection on the ground of *belief*. The *Grainger* test – as elaborated in a 2011 case (*Hashman v. Milton Park)*[365] involving an ethical-vegan, anti-foxhunting activist who successfully claimed discriminatory termination of employment as a gardener as a consequence of his views – states that a philosophical belief system (distinct from a religious one) warrants protection as long as it fulfills certain conditions. These include that the philosophical belief system in question:

(1) be genuinely held
(2) be a belief system rather than a mere opinion or viewpoint based on the present state of information available[366]
(3) be related to a weighty and substantial aspect of human life and behaviour

(4) obtain a certain level of respect in a democratic society, by not being incompatible with human dignity or conflicting with the fundamental rights of others.[367]

The court in *Hashman* also referenced the case of *Williamson*,[368] where Lord Nichols specified that "the belief must also be coherent in the sense of being intelligible and capable of being understood".[369] As long as these conditions are fulfilled, the courts also affirm in *Granger* and *Hashman*[370] that the belief system may be:

(1) a one off belief (meaning that it does not have to be shared by others)
(2) based on a political doctrine, or
(3) based on science, e.g. Darwinism.

One could argue that since philosophical beliefs and religion do not share the same exact test, under the prohibited ground of *religion or belief* in *the UK Equality Protection Act* of 2010, one may prudently avoid conflating unique phenomena (for instance by those recommending distinguishing conscientiously held individual beliefs from religion), while at the same time holding out equal protection for both closely related grounds. The question here is whether two distinct tests (one for religion, one for conscientiously held individual beliefs) should be posited under a single expanded *Code* ground of creed, in this light, or a single one as suggested above by Chiodo.[371]

Some, in the UK context, have criticized the distinction in law between religious belief and philosophical belief as arbitrary and prone to potential abuse. They argue that this encourages a two-tiered approach where philosophical beliefs may in effect be more strictly scrutinized as "mere opinions" compared to religious beliefs.[372] In its elaboration of the *Grainger* test in *Hashman*, the Court, nevertheless, clearly affirms that "these threshold requirements should not be set at a level which will deprive minority beliefs of the protection they are intended to have under the convention".[373]

5. Possible impact and repercussions of expanding the definition of creed

Extending *Code* protection to non-religious beliefs and practices could affect employers and other organizations in Ontario in many ways.[374]

This could, for instance, increase administrative challenges for employers and organizations in determining whether, and to what extent and in what respects, less well known "beliefs" may merit legal protection. Challenges would extend beyond merely determining what is a creed, to also distinguishing and assessing core and peripheral aspects of little known beliefs and practices to determine appropriate potential accommodations. Organizations, and the courts in some instances, are already struggling to deal with claims of interference with religious and creed rights (including determining what counts as "creed" and "religion" and what practices merit accommodation) under existing terms and interpretations of the *Code* and *Charter*, post *Amselem*.[375] Such struggles will likely expand if the definition of creed expands.

An expanded definition of creed could also increase the number and volume of creed claims brought forward, in organizations and at the Tribunal (in part merely as a consequence of the publicity that a change in interpretations of creed under the *Code* could generate). This could also expand the scope of organizations' duty to accommodate creeds short of undue hardship, affecting organizational costs and effective organizational functioning (albeit short of undue hardship).[376] For example, a large organization may be asked to refurnish an office, change a uniform, food offerings, etc. to accommodate an ethical vegan's deeply held aversion to the use of animal products, including leather.

Finally, the implications of applying statutory defences under Section 18 (special interest organizations) and Section 24 (special employment) would need to be carefully considered.

V. Creed accommodation and inclusive design

Key questions

- What, if anything, is unique or specific to creed accommodation and its analyses?
- What aspects of creed accommodation require further discussion and clarification?
- How far does the duty to accommodate and inclusively design for creed beliefs and practice extend?
- When and under what circumstances may one limit or deny creed accommodations?

1. Context

The concept of accommodation, in the context of religion and creed, is not a new one in Ontario or Canada. Neither is it one attributable to the demands and aspirations of an expanding, multicultural, immigrant population since the 1970s. Canadian law has long recognized a degree of religious pluralism and religious freedom in Canada, and the compromises that this inevitably requires. What is arguably new in more recent years is applying and adapting this accommodating approach to an increasingly diverse range and depth of religious/creed differences in Ontario society,[377] which can pose challenges to established norms and ways of doing things.

1.1 Purpose and aim of accommodation

It is common to hear comments that creed accommodation-seekers are seeking "special privileges" from society and its institutions.[378] In this context, clarifying the underlying goals and aims of accommodation is pertinent.[379] Far from imparting special privileges and advantages, the aim of accommodation is the reverse. Accommodation aims to facilitate equality of treatment by addressing and seeking to remedy the disadvantages encountered by minority group members in society (in the case of creed,

relating to its practice) as a consequence of structuring institutions and services in ways that (often inadvertently) better meet the needs of dominant group members.[380] This is known as ”adverse effect” or “constructive discrimination.”[381]

Much contemporary resistance to accommodation appears to stem from a failure to:

(1) Recognize the ways status quo arrangements may be unequal (as discussed above, adding to the importance of developing a contextual framework for understanding creed discrimination)
(2) Appreciate how (substantive versus formal) equality sometimes requires measures to level the playing field.[382]

Rather than advancing “alien values or practices on Canadian soil,” as is sometimes suggested in situations of creed accommodation, those seeking and providing accommodations (religious or otherwise) are in fact affirming and giving expression to Canada’s most deeply held values of equality and non-discrimination, as enshrined in the *Charter* and in provincial human rights statutes. Some argue that shifting the discourse from “accommodation” back to its underlying value of “equality” can put public conversation around such issues on the right foot. As one scholar put it: “While it is easy to talk about ‘too much accommodation,’ ‘too much equality’ is less comprehensible [or acceptable] in our current constitutional and social contexts”.[383]

2. Legal framework

Court decisions such as “*O’Malley*”[384] have established that organizations governed by the *Code* have a duty to accommodate individuals’ creed observances up to the point of undue hardship, regardless of whether established organizational norms, standards, rules or requirements adversely affect creed adherents’ ability to follow the tenets of their creed *by design, intent or simply effect*. The courts have also affirmed that the claimant has the onus to first establish a *prima facie* claim of discrimination, before the onus shifts to the respondent to show that it has taken steps to accommodate to the point of undue hardship.

The duty to accommodate creed rights arises in contexts of “constructive discrimination,” also known as “adverse effect discrimination.” Under the heading of “constructive discrimination,” section 11(1) of the *Code* states:

> A right of a person under Part I[385] is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, **except where**,
>
> (a) **the requirement, qualification or factor is reasonable and *bona fide* in the circumstances** (emphasis added);

Section 11(2) immediately qualifies this "*bona fide* requirement" (BFR) defence for adverse effect discrimination by stating:

> The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances **unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship** on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any (emphasis added).

For a requirement to be found reasonable and *bona fide*, the organization will have to show that it has accommodated creed observances to the point of undue hardship.

There nevertheless remain some questions and tensions in creed accommodation analyses. This section explores some of those tensions.

2.1 *Prima facie* discrimination and appropriateness analysis

Before assessing whether a creed accommodation is required and whether such accommodation would constitute an undue hardship for an organization, *prima facie* discrimination must first exist.

Courts have affirmed that people seeking accommodation must first establish that they have a *prima facie* claim of discrimination, and must show that:

(1) They have a characteristic protected from discrimination under the *Code*
(2) They experienced an adverse impact with respect to a service, employment etc.
(3) The protected characteristic was a factor in the adverse impact. [386]

Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. For example, an organization can argue that it accommodated the needs of the person to the point of undue hardship. In Ontario, the *Code* states that the factors in assessing undue hardship are cost, outside sources of funding (if any) and health and safety.

Leaving aside the issue of undue hardship, is it always "appropriate" for a service with a transient public, such as a restaurant or bus service, to accommodate the potential wide variety of creed observances of its service-using public? Is undue hardship the only potential line of defence for not accommodating a *bona fide* creed observance, where an adverse impact can be shown? Or might there be another preliminary point of analysis having to do with the "appropriateness" of creed accommodations in particular service contexts, considering the essential nature of the service being offered?

For example, might it be defensibly argued that owing to the transient nature of the service clients, in specific contexts, it is reasonable and not discriminatory to not accommodate service users' creed observances (depending on what they are), also in part because of the potential ability of service users to fulfill their creed observances elsewhere (in not unduly burdensome ways)?

If this is the case, it may help to develop guidelines outlining potential circumstances where this "appropriateness analysis" may arise, and the ingredients of such an analysis. This is something that may need to be considered in the policy update.

However, existing *prima facie* discrimination and undue hardship analyses may already provide sufficient tools to respond to these scenarios.

For example, with claims under section 2(a) of the *Charter*, the courts have determined that even where religious rights are triggered, not everything that interferes with them will constitute discrimination or an infringement of a right under the *Charter.* The Supreme Court has affirmed, in section 2(a) cases, that an interference with a religious right must go beyond the "trivial and insubstantial." "Trivial or insubstantial" interference is interference that does not threaten actual religious beliefs or conduct.[387] While analyses of discrimination and human rights protections flowing from the *Code* are distinct from the *Charter*, decisions based on the *Code* have also distinguished between core and peripheral dimensions of rights meriting protection.

Some examples explored in the *Creed case law review* of decisions under the *Charter* and/or *Code* where a practice connected to a religion or creed was deemed not to warrant legal protection or a duty to accommodate include:

- Volunteer activities at church, in this case relating to staffing a fundraising day camp (HRTO held not protected under the *Code* in *Eldary v. Songbirds Montessori School Inc.*)[388]
- Social and community activities connected to religion (*Hendrickson*)[389]
- Installation of a satellite dish, against condominium bylaws, to receive international religious and cultural programming (deemed not to be a right sufficiently connected to creed in *Assal v. Halifax Condominium Corp. No. 4*)[390]
- Giving out religion-based gifts (pens with religious inscriptions)[391]
- Special leave to attend land claim selection meetings as a part of ancestral and religious duties.[392]

As part of assessing whether a right is infringed and warrants protection, organizations may need to look at the extent to which a person's belief may allow for exceptions.[393] The case of *Saadi v. Audmax*[394] is particularly interesting on this point, as the Court distinguished between what was required by the faith (in this case relating to religious attire) and the rights claimant's subjective "style" preferences.[395]

2.2. Critiques of "accommodation" discourse and framework

> *"People don't want to be accommodated or tolerated, but respected."*
>
> – January 2012 OHRC Policy Dialogue participant

Accommodation may be perceived as entailing the "granting of an exception" to a person or a group of persons upon whom a universal (facially neutral) rule would otherwise have a discriminatory effect on grounds prohibited by the *Charter* and/or *Code*. This notion of accommodation has been critiqued by advocates of a deeper equality for failing to go far enough – for not challenging the "privileged norm" disadvantaging minorities in the first place, and instead only granting individuals an "exception" to it.[396] Scholars contrast "accommodation"/"tolerance" approaches versus more radically pluralist "equality" approaches as competing frameworks for thinking about religious diversity in Canada.[397]

For example, Lori Beaman highlights the implicit hierarchies of belonging and "normalcy" that a discourse of "tolerance" and "accommodation" inevitably creates, "wherein majorities confer benefits on minorities" and unilaterally determine the limits (reasonableness) of this tolerance.[398] "My worry" she explains, "is that these terms fix us in place in a way that does not ever quite reach equality. They don't force a rethinking of structural inequality in a way that laying bare difference and a requirement to achieve substantive equality may facilitate".[399]

> *"The term accommodation itself carries a power dynamic. We are discussing a policy that is trying to give people the freedom to be fully themselves, but discussed in a framework of power imbalance. I don't have a solution, just observation, but I get a trigger every time I hear the word 'accommodation.'"*
>
> – January 2012 OHRC Policy Dialogue participant

2.3 Continuum of accommodation: from systemic to individual

There is nevertheless room and precedent within existing human rights law for a fuller and more transformative concept of accommodation that moves beyond exceptions towards scrutinizing the norm. Subsection 11(2) of the *Code* explicitly calls for inclusive design based on the "needs of the group" as the most appropriate first response to constructive discrimination, unless this creates undue hardship. Supreme Court of Canada jurisprudence also supports this.[400]

In a 2012 article, “Accommodation in the 21st Century”, published by the Canadian Human Rights Commission, Brodsky, Day and Peters trace the legal evolution of a more proactive (versus “after the fact”), systemic (versus individual) and transformative (versus based on exceptions) approach to addressing constructive discrimination back to the landmark (1999) Supreme Court of Canada decision in *British Columbia (Public Service Employee Relations Commission) v BCGSEU* ("*Meiorin*").[401] Before *Meiorin*, respondents were only required to make individual adjustments or exceptions to the rule in cases of adverse effect discrimination. There was no onus to justify the universal rule or standard. Recognizing the ways this approach was obstructing and undermining “the promise of substantive equality” in society called for under human rights legislation, Justice McLachlin (as she then was), writing for a unanimous Court, quoted the following passage with approval:

> The difficulty with this paradigm is that it does not challenge the imbalances of power, or the discourses of dominance, such as racism, able-bodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves “normal” to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are “accommodated.”
>
> Accommodation, conceived this way, appears to be rooted in the formal model of equality. As a formula, different treatment for “different” people is merely the flip side of like treatment for likes. Accommodation does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed. Accommodation seems to mean that we do not change procedures or services, we simply “accommodate” those who do not quite fit. We make some concessions to those who are “different”, rather than abandoning the idea of “normal” and working for genuine inclusiveness.
>
> In this way, accommodation seems to allow formal equality to be the dominant paradigm, as long as some adjustments can be made, sometimes, to deal with unequal effects. Accommodation, conceived of in this way does not challenge deep-seated beliefs about the intrinsic superiority of such characteristics as mobility and sightedness. In short, accommodation is assimilationist. Its goal is to try to make “different” people fit into existing systems.[402]

She went on to state: “The right to be free from discrimination is reduced to a question of whether the ’mainstream‘ can afford to confer proper treatment on those adversely affected, within the confines of its existing formal standard. If it cannot, the edifice of systemic discrimination receives the law’s approval. This cannot be right.”[403]

The Supreme Court set out a new[404] analysis for justifying a *bona fide* requirement (or BFR), requiring respondents to review and inclusively redesign adversely impacting rules, qualifications or standards *short of undue hardship*. The Court pushed organizations to “build conceptions of equality into workplace standards” (and by

extension services) themselves.[405] In this way, the focus of accommodation, at the outset, was quite radically shifted, from the individual adversely affected to the standard having the adverse impact.[406] To recap this legal implication of *Meiorin*: once *a prima facie* case of (adverse effect) discrimination has been successfully made out, organizations have a legal responsibility to explore a range of possible accommodation arrangements, including the possibility of beginning with what some have called "systemic accommodation"[407] (changing the standard for all). Only after this systemic accommodation has been shown to create undue hardship can an organization move on to examine possible individual accommodation arrangements short of undue hardship.

OHRC policies and guidelines also recommend that organizations design their programs, services and workplaces inclusively. Like systemic accommodation, the human rights ideal of "inclusive design" can force organizations to scrutinize and redesign established ways of doing things (status quo norms, rules and standards). Inclusive design need not be (indeed ideally is not) complaint-driven, or dependent on accommodation requests or claims of *prima facie* (adverse-effect) discrimination.

2.4 Accommodation and competing rights

There is often a need to consider the rights of others in creed accommodations (the rights of other *Code* protected groups, or general interests of society in public order, health, safety, democracy, etc.). Rights can and often do come into competition with one another, particularly on the ground of creed, as is explored in the OHRC's *Policy on competing human rights* and *The shadow of the law: Surveying the case law dealing with competing rights claims*. The recognition in human rights law at all levels that the right to hold beliefs is broader than the right to act on those beliefs (religious or otherwise) is in large part in recognition of the potential impact of actions on others.[408]

Some of the more difficult contemporary competing rights cases have involved creed-based conscientious objections to providing services (e.g. abortion, same-sex marriage, women's haircut) and/or to performing job functions while on the job (e.g. patient referral for abortion, serving alcohol, putting out a Christmas display). For how to best handle and think through such scenarios, the OHRC directs readers to the OHRC's *Policy on competing human rights*, which outlines a framework for dealing with them. The policy affirms several key principles, including:

- There is no hierarchy of rights
- No right is absolute
- Context is critical
- Rights have core and peripheral dimensions, and rights balancing will tilt towards upholding rights that are infringed at their core
- Search for "constructive compromises", "accommodations" and measures to minimize potential harm to each right.

3. Issues unique to creed accommodation

While the notion of accommodation has been most developed in the context of disability, it is not new to creed. There are unique accommodation issues specific to creed that arise, in part due to the unique nature of religion and creed as a form and basis of social difference. Creed practices and observances, particularly those connected to religion, for instance, generally include collective dimensions and expressions, which can grate against the grain of widely accepted accommodation norms and principles (e.g. accommodation calls for an individualized assessment) honed in the context of disability (see Section V. 3.2 below for more in this regard).

This final section highlights accommodation issues and analyses unique to creed, and some of the points of tension and ambiguity that can surround such issues as determining sincerity of belief, the existence of a creed, and/or creed practices meriting human rights protection. It also looks at questions and challenges for accommodating collective expressions of creed.

3.1 Unique dimensions of creed: perspectives from the ground

One distinctive feature of creed as a human rights ground is its potential mutability – that is, its rooting in subjective belief and identity, in ways distinguishing creed from other *Code* grounds which are less subject to change (if not immutable). In part due to the mutability of creed and religion – its element of conscious choice versus involuntary ascription – some people feel it is fair game for intolerance. Drawing attention more specifically to how the chosen nature of religious belief can lead to resistance among individuals and organizations to accommodate creed, one presenter at the OHRC Policy Dialogue on Creed commented:

> Religious accommodation is viewed differently than other types of accommodation. The attitude is that you 'chose' to do this, not that you need to do this. Yes—I chose this—but I also need it.[409]

Some take this logic further to argue that religion and creed should not have the same degree of legal protections as other grounds such as gender, race or sexual orientation, precisely because these latter forms of social difference are largely ascribed and involuntary, versus chosen[410] as in the case of creed. It is important to note that arguments that a person can avoid discrimination or intolerance by modifying their behaviours and making different choices has been clearly rejected as a justification for discriminatory behaviour (see most recently the Supreme Court of Canada decision in Quebec (Attorney General) v. A.[411] As well, see the OHRC's *Policy on competing human rights* for more on the opposing position, largely upheld by the courts, that there is no such "hierarchy of rights" in Canada.

Another presenter at the January 2012 Policy Dialogue pointed out how religious/ creed beliefs may be more subject to questioning and hostility, and compared to other grounds, may more often conflict with or pose challenges to other peoples' identities

and beliefs. Cautioning against overlooking key differences between religion and disability in the sphere of accommodation, he observed:

> In a social context, comparing disability and religion doesn't always work because some people's religions overtly challenge other people, for example, their sexual orientation... We also can not ignore the fact that some people hate other people's religions… Other categories don't always raise those same issues. It is for instance commonly agreed and accepted that we should make society accessible for people with disabilities. But with religion, it challenges peoples' beliefs and people don't always *want* to make that accommodation.[412]

3.2 Collective creed accommodations: accommodating the needs of the group

Another unique aspect of creed, and religion more specifically, is its collective dimension and potential form of expression.[413] It is a widely accepted human rights principle, particularly in disability contexts, that to achieve equality, accommodation may need to be individualized; that is based on individualized (case-by-case) assessments of individuals' actual accommodation needs. Creed accommodations can pose challenges to this general principle, where there may be a need to accommodate acts of worship and ritual observances based on "the needs of the group." One example would be accommodating congregational acts of worship, as recently seen in a Toronto area middle school.[414]

Some argued during consultations that accommodation, by definition, is necessarily individual in nature, and should not be extended to group observances or collective acts of worship (due to the potential to contravene individual rights and needs). However, the analysis above concerning "systemic accommodation" based on the needs of the group shows that accommodation need not be exclusively conceived as dealing only with individual needs. There are many examples, even in the disability context, where an accommodation arrangement may benefit an entire group (for example, calling out transit stops for persons with vision-related disabilities).

There nevertheless remain difficult questions that can arise in the effort to design inclusively in a way that does not privilege or disadvantage any particular member of the faith community. The current creed policy update will need to include guidance for organizations that need to accommodate a collective creed observance.

When faced with the possibility of designing and providing a collective creed accommodation, organizations need to consider points and principles such as:

- Maintain an environment free of compulsion in matters of religion and belief[415]
- Equally respect and accommodate differing belief orientations (neither privileging nor disadvantaging, endorsing nor condoning any one over another)
- Be as inclusive as possible by consulting with as many affected parties as possible when inclusively designing or systemically accommodating the "needs of the group"

- Consider and balance any competing rights (per the OHRC's *Policy on competing human rights*)
- Be attentive to internal group differences in accommodation needs
- Consider sector/context-specific factors, laws and policies.

Another question that may arise, and needs to be considered as part of the current policy update, is:

- To what extent may, or should, accommodation providers regulate, monitor, and/or intervene in the internal practices and collective observances of creed communities, if at all, where these may contradict human rights principles or equality ideals?

Individual creed community members have a right to associate, and collectively worship, with others, generally in a manner that they deem fit, provided that they may freely enter and exit the community in question, in keeping with constitutionally enshrined rights and protections for freedom of religion and freedom of association. Existing jurisprudence generally suggests that organizations should not interfere in the collective faith observances of creed communities. However, where collective observances are accommodated in public space, organizations may need to be mindful of potential competing rights, and consider forms of accommodation that most respect and fulfill the rights of all parties (for more on balancing rights, see the OHRC's *Policy on competing human rights)*.

The existing *Policy on creed*, moreover, contains a provision that would in effect nullify legal protections for "religions that incite hatred or violence," and/or for "practices and observances that purport to have a religious basis but which contravene international human rights standards or criminal law." The implications of this provision will need to be considered as part of the current policy update.

3.3 Establishing the existence of a creed

In most cases, it will not be necessary or reasonable to question whether a creed exists that gives rise to a duty to accommodate.[416] However, if there is some question, when faced with an accommodation request, a potential accommodation provider may need to assess whether there is a sincerely held belief or practice meriting accommodation under the law.

Though there is no set sequence in terms of whether determining the existence of a creed should happen before or after determining sincerity of belief, the question may need to be asked: Does the rights claimant have a creed that is protected by the *Code*?

Existing case law makes it clear that the claimant's subjective or personal understanding of his or her creed is the focus, as opposed to the actual obligations of the faith or what others of the same faith believe or practice. The OHRC's 1996 *Policy* affirms this point in many places, for instance stating: "Individuals may [legitimately] seek accommodation for religious practices or observances that do

not conform to established dogma, or they may seek to observe a practice that is not shared by all members of the creed".[417] Though not legally binding on the courts or Human Rights Tribunal of Ontario, how the OHRC decides to define creed in its updated policy will have a bearing on what may be deemed to constitute a creed under the *Code*. There are also other "objective" criteria that organizations may use when seeking to establish the existence of a creed (e.g. its nexus to a system of belief that is comprehensive, overarching, etc.), as discussed in the section on definition (see in particular Section IV subsection 1.1, but note that the OHRC is still formulating and clarifying potential criteria).

3.4. Observances versus practices

Distinguishing between core and peripheral dimensions of a religion or creed can be further complicated by the fact that, unlike the trend in parts of Europe where a stronger distinction between "observances" and "practices" has been maintained,[418] the Canadian jurisprudence generally holds that a practice may be accommodated even if it is not an "obligation," "act of worship" or "requirement of the faith." Given the noted distinction between *practices* and *observances* internationally,[419] the OHRC may want to review whether it wishes to retain the existing terminology and use of observances in its existing 1996 policy title (*Policy on creed and the accommodation of religious observances*). The *Policy* does not define "observances" or make any notable distinction between observances and practices. One of the few references states that "[creed] is defined as a professed system and confession of faith, including *both beliefs and observances or worship*" (p.4; emphasis added).

However, the distinction between practices connected to a creed and observances mandated by a creed may not be of much significance, in domestic courts, in light of the subjective approach adopted in *Amselem* (in which a practice need not be "officially" mandated by a religion to warrant protection under the law).

3.5 Applying *Charter* analyses in the *Code* context

There is some support in the case law for more narrowly restricting religious practices meriting legal protection to core religious observances, particularly in the jurisprudence based on *Charter* sections (1) and 2(a). As noted above, the courts have determined in section 2(a) jurisprudence that "trivial or insubstantial" interference with the right to freedom of religion is interference that does not threaten actual religious beliefs or conduct.[420] Similarly, according to the "*Oakes* test" under section 1 of the *Charter*, a limitation on a constitutional right or freedom (such as freedom of religion) may be deemed appropriate "if it can be established that: (i) the legislative objective is pressing and substantial; (ii) there is a rational connection between the legislative means chosen and the objectives sought; and finally (iii) the infringement is a *minimal impairment on the right or freedom* in question" (Emphasis added).[421]

Legal scholars have noted the higher courts increasingly relying on section 1 limitations in religious rights cases.[422] Some state that this is a result of the highly subjective definition of religion in *Amselem*, which significantly decreases the potential scope of internal ("objective") limits on this right. Many argue that the *Oakes* test for limiting rights under section 1 of the *Charter* allows wide scope for interpretation, and, at least when applied to religious freedom cases to date, has not exercised the same kind of force for substantive equality as accommodation analysis under statutory human rights legislation. Some analysts argue that in such religious rights cases as *Wilson Colony*,[423] and *R. v. Badesha*, [424] the courts "have adopted in practice a very weak standard of justification under section 1, so that the right protects only a limited form of liberty".[425] Both of these decisions appear to suggest that under the *Charter*, an interference with someone's religious rights will only be considered substantial if the person would be required to choose between taking part in an activity (e.g. driving a vehicle or motorcycle) and their religion.[426] The apparent absence in such decisions of any requirement for respondents to examine ways of more inclusively designing or achieving legislative purposes[427] in the interests of advancing substantive equality shows the potential drawbacks and tensions of simply importing *Charter* minimal infringement analyses into creed human rights jurisprudence (see Section IV 2.1.4 for more on *Code-Charter* relation).

While the *Charter* analysis has tended to focus on individual liberty and allow for wide scope of interpretation of what constitutes minimal infringement, the human rights approach focuses on goals of equality and equal access to and enjoyment of societal goods, benefits and services, imposing a duty to accommodate limited by undue hardship.[428]

3.6 Religions that incite hatred or violence or contravene international human rights law

One other limitation on creed rights flows from the qualification stated in the 1996 OHRC *Policy on creed*:

> This policy does not extend to religions that incite hatred or violence against other individuals or groups, or to practices and observances that purport to have a religious basis but which contravene international human rights standards or criminal law (p.5).

This point may require further clarification in the updated policy.

In *Huang*[429] the HRTO rejected the argument that a belief system that is inconsistent with the *Charter* should be rejected. The HRTO distinguished between excluding the religion altogether and placing limits on the practice of the religion where that causes harm to others (at paras. 31-32):

> In other words, *Charter* values are relevant to determining the scope of religious freedom protected under constitutional or quasi-constitutional statute. It is not, however, appropriate to exclude from the scope of the *Code* a belief system that, itself, may not be consistent with the *Charter*.

> There is, in my view, a difference between placing limits on the exercise of a religious freedom because it interferes with others' rights and refusing to recognize a religious movement as a "creed" because some of its beliefs may be inconsistent with the values expressed in the *Charter.*

3.7 Establishing sincerity of belief

> "In terms of on the ground experience, people are often faced with the need for authority confirming that individuals need spiritual accommodation. For example, I recently had a case where a limo company requested that a driver trim his beard. The individual would not do this, but the company pointed to other Sikh drivers who had done so. The company said to bring a letter from a priest and then we will accommodate you. This arises in schools as well, where students who would like to bring a kirpan are still being asked to bring a letter from a priest. We need to make sure that, in the new creed policy, it is clearly about individual spiritual beliefs and sincerity of beliefs. I'm not seeing that on the ground."
>
> – Balpreet Singh Bopari, presentation at January 2012 Policy Dialogue on Creed

The Supreme Court has confirmed that, in Section 2(a) freedom of religion cases under the *Charter*, the claimant's subjective or personal understanding of his or her religion is the focus, not the actual obligations of the faith or what others of the same faith believe or practice. The Court's stated purpose for adopting this subjective definition of religion revolves around its disinterest in entering into theological debates. Decisions under the *Code* have also confirmed this subjective approach to creed, and corresponding focus on sincerity of belief.[430]

In assessing the sincerity of a person's creed belief, organizations may seek to establish that the asserted creed belief "is in good faith, neither fictitious nor capricious, and that it is not an artifice."[431] It is a generally accepted principle in disability accommodation case law that one should accept the sincerity of the claim and assume good faith, unless there is reason to think otherwise (for example, based on a previous history of false or vexatious claims). Whether, or how and to what extent this default "good faith" standard applies in creed accommodation cases must be examined.

Cases to date indicate that organizations may be within their right to examine the sincerity and credibility of the claimant's creed claims or accommodation needs.[432] However, in measuring the sincerity of an asserted creed belief or practice, it is not appropriate to assume that if a person has made exceptions to, or has failed to follow, his or her creed beliefs in the past, his or her present beliefs are not valid or sincere. As stated by the Ontario Court of Appeal in *R. v. N.S.*: "Past perfection is not a prerequisite

to the exercise of one's constitutional right to religious freedom."[433] This point was reconfirmed in the recent Supreme Court decision in *R. v. N.S.,* where the court held that "strength of belief" is a separate issue from "sincerity of belief."[434] Also, note that while *consistency* of practice is one possible criterion of sincerity affirmed in the case law, organizations need to be sensitive to the reality and growing trend in contemporary religious/creed life of eclecticism, individualism and syncretism (as discussed in the background section III. 1.2).[435] Although not a sufficient determinant on its own, sincerity of belief may also be partially confirmed, particularly in cases of lesser known creeds, by establishing the objective existence of a creed and corresponding community of belief, to which the rights claimant evidently subscribes and belongs.

Given the centrality of sincerity of belief as a criterion in affirming the existence of a creed right, the policy update process will need to consider further principles and guidelines for assessing sincerity of belief, as this is often sought by organizations.

3.8 Religious leave

When an employee requests time off to observe a holy day, the employer has an obligation to accommodate the employee. While the need to accommodate time off for religious holidays, Sabbaths and prayers has been repeatedly confirmed, what has been more complex is determining if the employee is entitled to the time off with pay. The extent of the accommodation required is an issue that comes up often. Does the person have to be paid? Until what point? What about unpaid leave?

The OHRC's 1996 Policy on Creed established the following general principles, based on case law at the time (based primarily on *Chambly)*[436]:

1. The employer has a duty to consider and grant requests for religious leave, including paid religious leave, unless to do so will cause undue hardship.
2. Equality of treatment requires at a minimum that employees receive paid religious days off, to the extent of the number of religious Christian days that are also statutory holidays, namely two days (Christmas and Good Friday).
3. The number of paid days may be three under some collective agreements which also make Easter Monday a holiday.
4. Beyond this point (*i.e.* two or three days), individuals may still seek accommodation. For example, measures might include additional paid leave days such as floating days or compassionate leave days, if such exist under company policy or collective agreements, or through unpaid leave.
5. The standard for *all* accommodation requests is undue hardship, which places a specific burden on the employer to produce evidence to the standard of undueness of the hardship and of its effect.[437]

These principles relied significantly on the Supreme Court of Canada decision in *Chambly.* [438] In this case, the Court considered a request by Jewish teachers for access to the special purpose paid-leave provision in their collective agreement that would have allowed them to have Yom Kippur off with pay. They were told they could take the day off, without pay. [439] The Court noted that Christian holy days of Christmas and Good

Friday are provided for in the school calendar. Therefore, Christian employees were able to observe their religious holidays with pay. As this was not the case for the Jewish teachers, in the absence of some accommodation by the employer, the effect would be discriminatory.[440] In this case, accommodation through scheduling changes was not an available option as a teacher can only work when schools are open and students are in attendance. Therefore, the employer was required to give paid days off.

Later decision-makers have not accepted that the *Chambly* decision requires all employers to provide the same number of religious holidays *with pay* as Christian employees receive. In *Ontario (Ministry of Community and Social Services) v. Grievance Settlement Board,*[441] the Ontario Court of Appeal considered the grievance of a member of the Worldwide Church of God who required 11 days off per year for religious holidays. The employer's policy allowed two days off with pay and then allowed employees to fulfill remaining religious obligations through scheduling changes. The employee was presented with a variety of proposals to meet his religious requirements but he rejected them arguing that he was entitled to the 11 days off with pay.

The Court of Appeal found that the employer's policy appropriately reflected the obligation to accommodate. The scheduling options provided for in the policy were: "a viable means of accommodation for employees requiring extra days off over and above the two paid leave days already provided for. It enabled them to schedule their required hours of work in a way that relieved them from having to choose between losing wages or encroaching on pre-existing earned entitlements [i.e. vacation days] and observing their religious holy days."

The Court noted that in *Chambly*[442] the Supreme Court found that it was significant that it would be impossible for a teacher to make up the religious holiday by working an extra day. Therefore, the Court concluded that employers can fulfill their duty to accommodate by offering appropriate scheduling changes, without first having to show that granting a leave of absence with pay would result in undue economic or other hardship.

In *Markovic v. Autocom Manufacturing Ltd.,*[443] the HRTO considered a situation where the employer did not provide two days off with pay to correspond to the number of Christian religious days that are statutory holidays. Rather, the employer's policy provided a "menu of options" for accommodation which included making up the time, switching shifts with another employee, working on a secular holiday when the facility is in operation (subject to the *Employment Standards Act)*, adjusting shift schedules, using vacation days and taking an unpaid leave of absence. Mr. Markovic complained that Autocom's failure to provide him with a paid day off to celebrate Serbian Orthodox Christmas was discriminatory.

The HRTO concluded that by providing a process for employees to arrange for time off for religious observances through options for scheduling changes, without loss of pay, the policy was appropriate and not discriminatory. The HRTO found the circumstances

were different than the Supreme Court of Canada's decision in *Chambly,* where scheduling changes were not available due to the nature of the (school) workplace and although the collective agreement allowed for three days of special leave with pay, the employer took the position that they could not be used for religious observances.

However, the HRTO did note in *Markovic*[444] that there may be individuals for whom none of the scheduling options in the policy would be suitable, and stated that in such cases other accommodations must be explored. The HRTO left open the possibility that in a given circumstance, the outcome might be days off with pay.

This approach of enabling employers, particularly in employment contexts with flexible scheduling options, to fulfill their duty to accommodate through a variety of possible means other than paid leave was also affirmed by the HRTO in *Koroll v. Automodular Corp.*[445] In these cases, the courts appear to suggest that they will not make a finding of adverse effect discrimination as long as the search for solutions permits time off to observe religious holy days without *significant* negative employment consequences (such as loss of pay). However, there is considerable scope for differences in determining what constitutes a negative employment consequence (equal to adverse effect discrimination).[446] This will need to be reviewed and further clarified as part of the current policy update.

Appendices

1. Major religious denominations, Ontario, 1991 and 2001

Major religious denominations, Ontario, 1991[1] and 2001

	2001		1991		Percentage change 1991-2001
	Number	%	Number	%	
Roman Catholic	3,866,350	34.3	3,506,820	35.1	10.3
Protestant	3,935,745	34.9	4,291,785	43.0	-8.3
Christian Orthodox	264,055	2.3	187,905	1.9	40.5
Christian, not included elsewhere[2]	301,935	2.7	136,515	1.4	121.2
Muslim	352,530	3.1	145,560	1.5	142.2
Jewish	190,800	1.7	175,650	1.8	8.6
Buddhist	128,320	1.1	65,325	0.7	96.4
Hindu	217,560	1.9	106,705	1.1	103.9
Sikh	104,785	0.9	50,085	0.5	109.2
No religion	1,809,535	16.0	1,226,300	12.3	47.6

[1] *For comparability purposes, 1991 data are presented according to 2001 boundaries.*
[2] *Includes persons who report "Christian", as well as those who report "Apostolic", "Born-again Christian" and "Evangelical".*

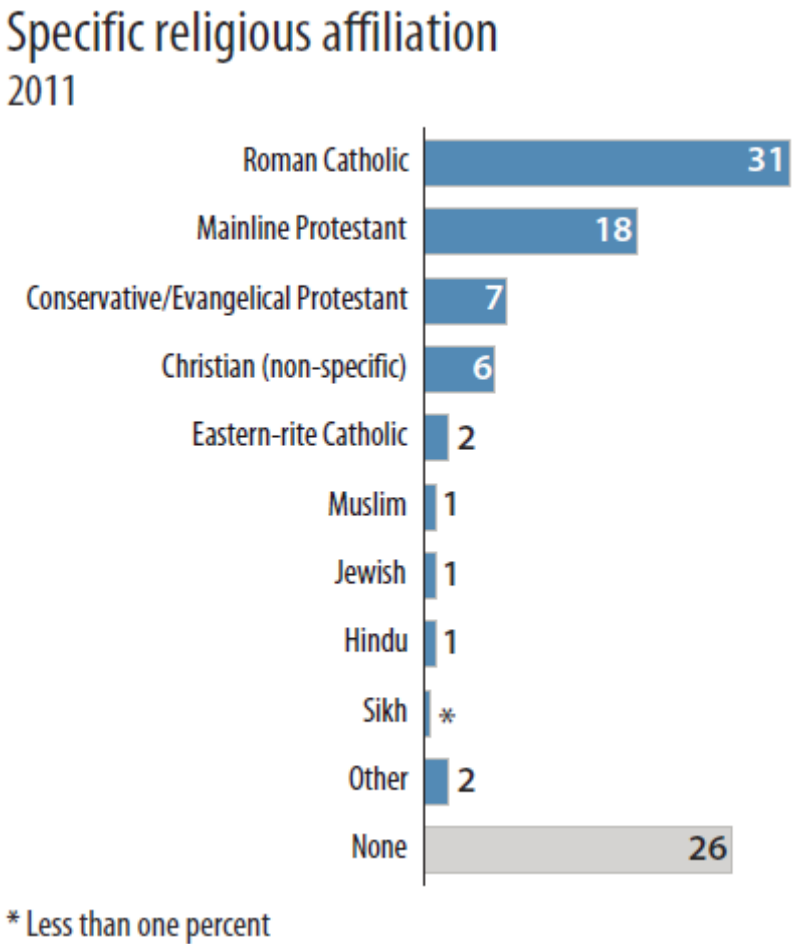
Source: Statistics Canada, 2003a.

2. Major religious denominations, Canada, 1991 and 2001

	2001		1991		Percentage change 1991-2001
	Number	%	Number	%	
Roman Catholic	12,793,125	43.2	12,203,625	45.2	4.8
Protestant	8,654,845	29.2	9,427,675	34.9	-8.2
Christian Orthodox	479,620	1.6	387,395	1.4	23.8
Christian, not included elsewhere**	780,450	2.6	353,040	1.3	121.1
Muslim	579,640	2.0	253,265	0.9	128.9
Jewish	329,995	1.1	318,185	1.2	3.7
Buddhist	300,345	1.0	163,415	0.6	83.8
Hindu	297,200	1.0	157,015	0.6	89.3
Sikh	278,415	0.9	147,440	0.5	88.8
No religion	4,796,325	16.2	3,333,245	12.3	43.9
*Note: Aboriginal spirituality (+175%), pagan (+281%) and Serbian Orthodox (+109%) communities grew significantly in this period, but the actual number of adherents is not over 30,000 in any of the three categories.					
**Includes persons who report "Christian," "Apostolic," "Born-again Christian" and "Evangelical."					

Source: Seljak et al., 2007, p.22. Adapted from a Statistics Canada table available at: www12.statcan.ca/english/census01/Products/Analytic/companion/rel/canada.cfm

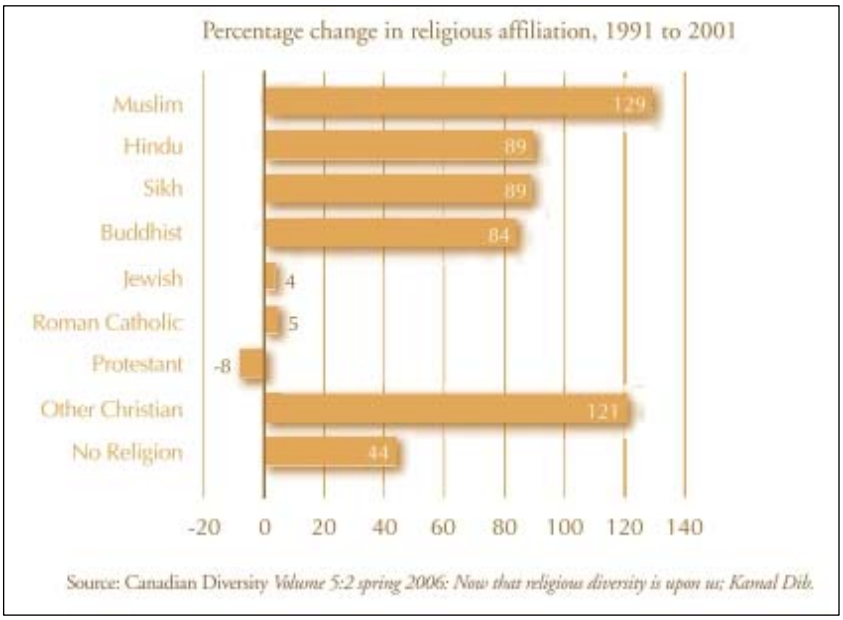
3. Environics Institute Focus Canada Survey Findings on specific religious affiliation in Canada in 2011



Source: Environics Institute (2011), *Focus Canada 2011 Survey*, p. 39.

Summary:
A 2011 *Focus Canada* survey conducted by the Environics Institute reveals that, of Canadians who identify with a specific religious affiliation, 31% identify as Roman Catholic, 18% Mainline Protestant, 7% Conservative/Evangelical Protestant, 6% identify as Christian (non-specific), 2% Eastern-rite Catholic, 1% each Muslim, Jewish, and Hindu respectively. Less than 1% identify as Sikh, and 2% identify as Other. Canadians who do not affiliate with a specific religion total 26%.

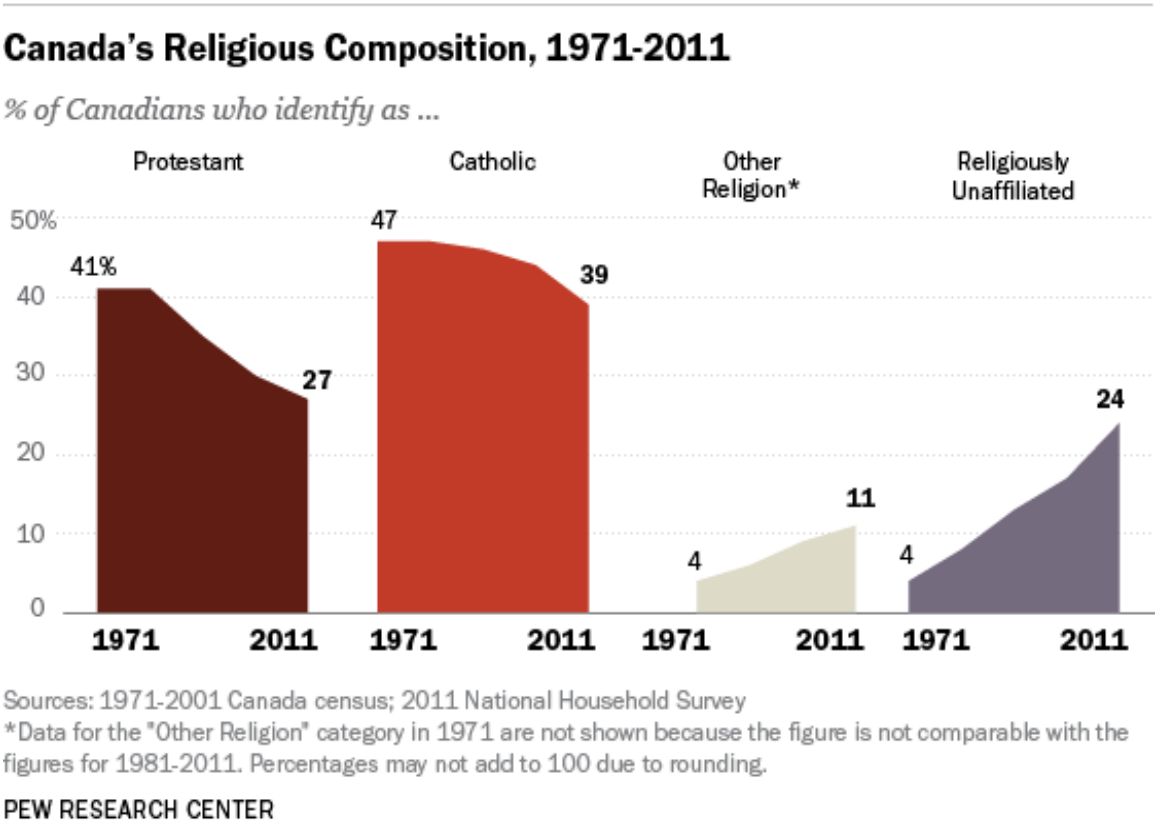
4. Percentage change in religious affiliation in Canada 1991 to 2001



Source: Kunz, 2009. p.8

Summary:
A survey cited in Kunz originally featured in the spring 2006 issue (vol 5:2) of *Canadian Diversity* reveals the percentage change in religious affiliation from 1991 to 2001. Of the groups surveyed that showed an increase, Muslims increased to 129%, Hindus 89%, Sikhs 89%, Buddhists 84%, Roman Catholics 5%, Jewish 4%, and Other Christian 121%. Canadians affiliated with the Protestant faith showed a decrease of 8%. Canadians who do not identify with a specific religion increased 44% over this period.

5. Canada's religious composition, 1971-2011 (Pew Research Center)



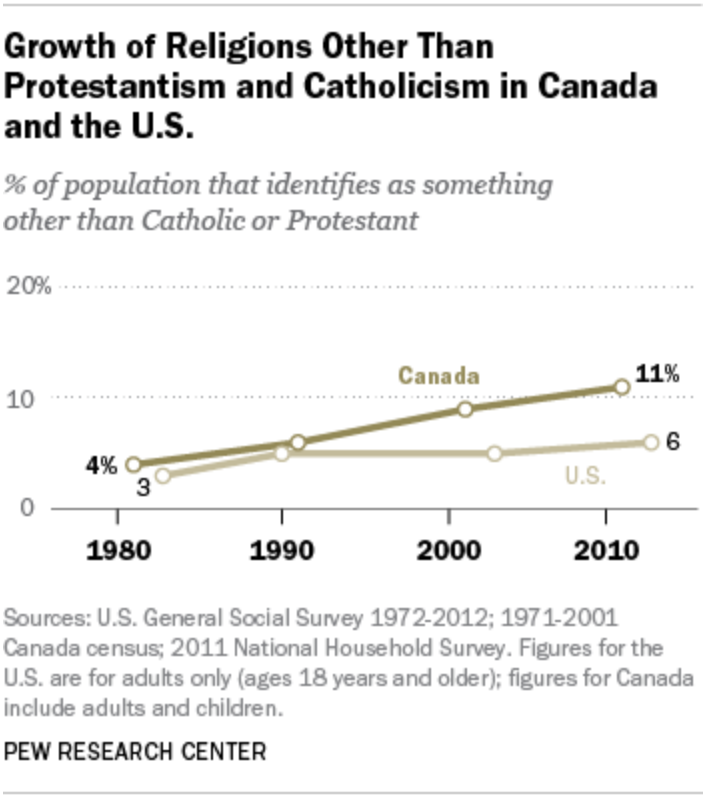
Source: Pew Research Center's Forum on Religion & Public Life. (2013). Canada's Changing Religious Landscape: Overview. Accessed July 15, 2013 at www.pewforum.org/Geography/Canadas-Changing-Religious-Landscape.aspx

Note: Unlike in previous decades, when a religion question was included in the census, in 2011 it was part of a voluntary survey among 4.5 million randomly selected households. Roughly 2.65 million households participated in the survey. Statistics Canada has indicated that some groups – immigrants, ethnic minorities, non-English or non-French speakers and Aboriginal Peoples – may be under-represented among participants in the voluntary survey. Despite these challenges, the 2011 National Household Survey (NHS) represents the best data source for religious affiliation in Canada in 2011 (Pew Forum 2013).

Summary:
In a survey conducted by the Pew Research Centre examining Canada's religious composition from 1971 to 2011, the percentage of Canadians who identified as Protestant decreased from 41% in 1971 to 27% in 2011. Similarly, people who

identified as Catholic decreased from 47% to 39% over the same period. The percentage of Canadians who identified as “Other religion” increased from 4% to 11% from 1971 to 2011, and those who did not identify with any specific religion increased from 4% to 24% over the same period.

6. Growth of religions other than Protestantism and Catholicism in Canada and the U.S. (1981-2011)

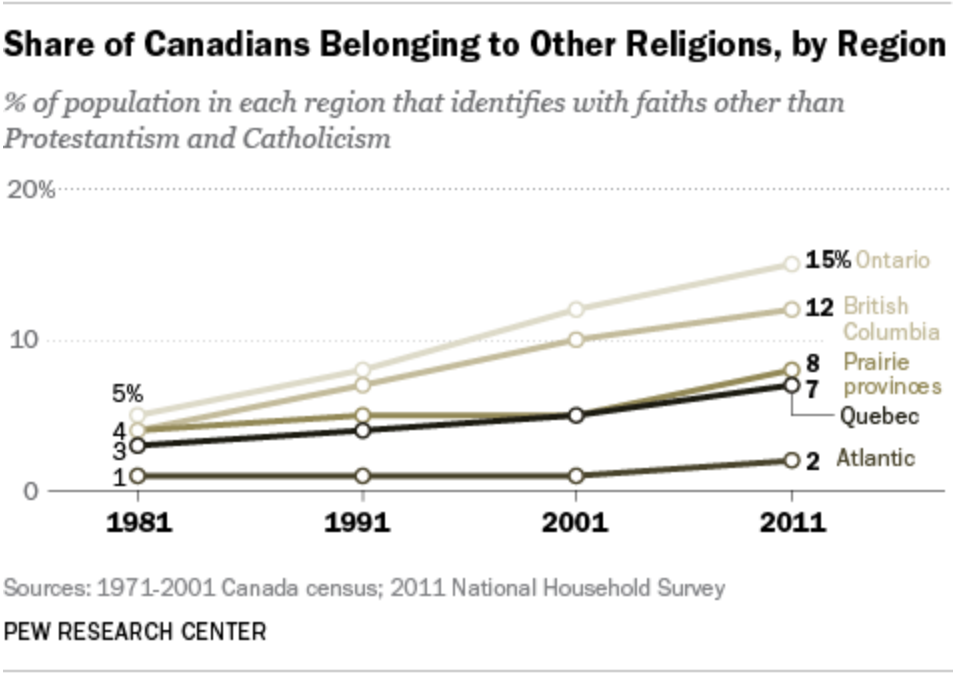


Source: Pew Research Center’s Forum on Religion & Public Life. (2013). Canada’s Changing Religious Landscape: Overview. Accessed July 15, 2013 at www.pewforum.org/Geography/Canadas-Changing-Religious-Landscape.aspx

Note: Unlike in previous decades, when a religion question was included in the census, in 2011 it was part of a voluntary survey among 4.5 million randomly selected households. Roughly 2.65 million households took part in the survey. Statistics Canada has indicated that some groups – immigrants, ethnic minorities, non-English or non-French speakers and Aboriginal Peoples – may be under-represented among participants in the voluntary survey. Despite these challenges, the 2011 National Household Survey (NHS) represents the best data source for religious affiliation in Canada in 2011 (Pew Forum 2013).

Summary:
In a survey conducted by the Pew Research Centre, from 1980 to 2010, Canadians who identified with a religion other than Protestant or Catholic increased from 4% to 11% during this period. For comparison, in the US, this figure increased from 3% to 6% over the same period.

7. Share of Canadians belonging to other religions, by region (1981-2011)

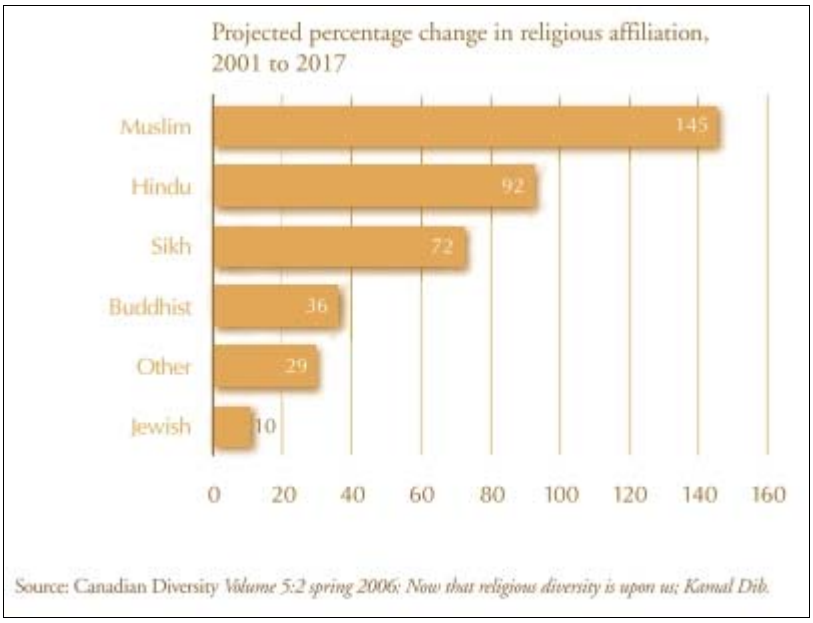


Source: Pew Research Center's Forum on Religion & Public Life. (2013). Canada's Changing Religious Landscape: Overview. Accessed July 15, 2013 at www.pewforum.org/Geography/Canadas-Changing-Religious-Landscape.aspx

Note: Unlike in previous decades, when a religion question was included in the census, in 2011 it was part of a voluntary survey among 4.5 million randomly selected households. Roughly 2.65 million households took part in the survey. Statistics Canada has indicated that some groups – immigrants, ethnic minorities, non-English or non-French speakers and Aboriginal Peoples – may be underrepresented among participants in the voluntary survey. Despite these challenges, the 2011 National Household Survey (NHS) represents the best data source for religious affiliation in Canada in 2011 (Pew Forum 2013).

Summary:
In a survey conducted by the Pew Research Centre, the percentage of the population in Canada that identifes with a religion other than Protestantism or Catholicism is displayed by region. Between 1981 and 2011, the Ontario region showed an increase from 5% to 15%, British Columbia from 4% to 12%, the Prairie Provinces from 4% to 8%, Quebec from 3% to 7%, and the Altantic region from 1% to 2%.

8. Projected percentage change in religious affiliation, 2001 to 2017



Source: Kunz, 2009, p.8

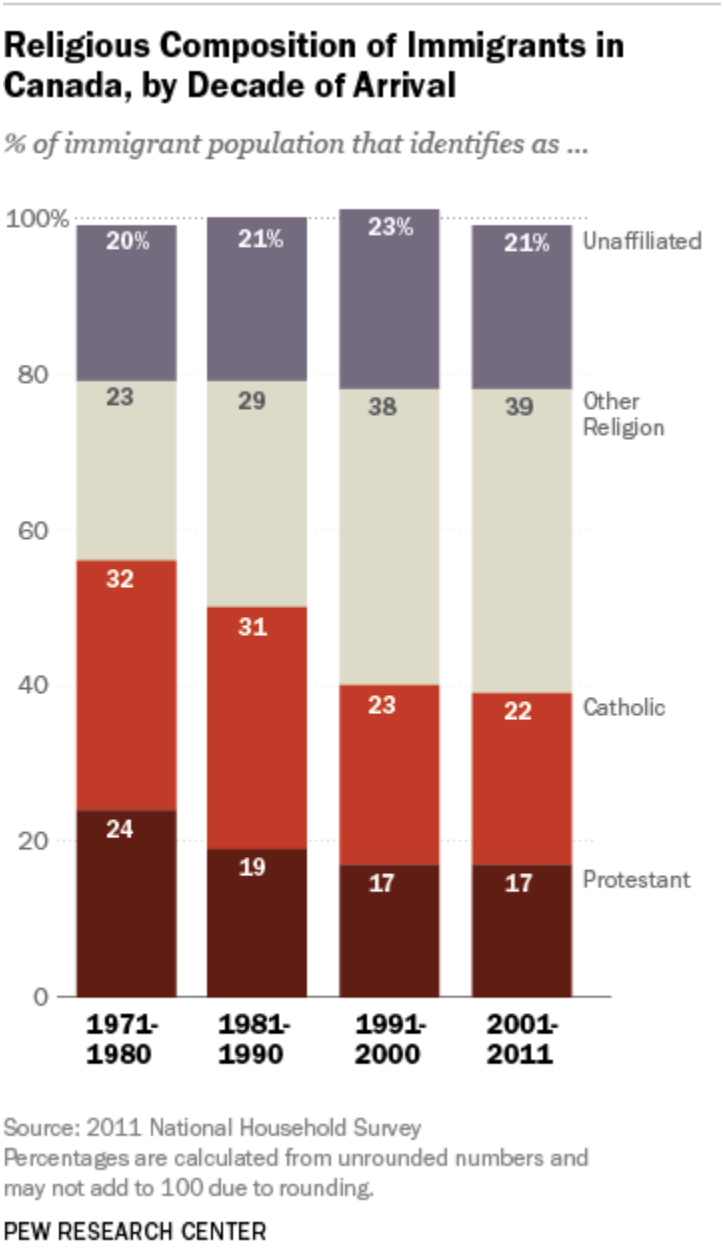
Summary:
A survey cited in Kunz (2009, p.8) originally featured in the spring 2006 issue (vol 5:2) of Canadian Diversity projects the percentage change in the religious affiliation of Canadians between 2001 and 2017. The survey projects that Canadians who identify as Muslim will increase by 145%, Hindu 92%, Sikh 72%, Buddhist 36%, Other 29%, and Jewish 10% over this period.

9. Immigrants by major religious denominations and period of immigration, Canada, before 1961 to 2001

	Period of immigration (%)				
	Before 1961	**1961-1970**	**1971-1980**	**1981-1990**	**1991-2001****
Total immigrants	100.0	100.0	100.0	100.0	100.0
Roman Catholic	39.2	43.4	33.9	32.9	23.0
Protestant	39.2	26.9	21.0	14.5	10.7
Christian Orthodox	3.8	6.3	3.8	3.0	6.3
Christian, not included elsewhere*	1.3	2.2	3.8	4.9	5.3
Jewish	2.7	2.0	2.2	1.9	1.2
Muslim	0.2	1.3	5.4	7.5	15.0
Hindu	0.0	1.4	3.6	4.9	6.5
Buddhist	0.4	0.9	4.8	7.5	4.6
Sikh	0.1	1.1	3.9	4.3	4.7
No religion	11.0	13.5	16.5	17.3	21.3
Other religions	2.1	1.0	1.1	1.3	1.4
* Includes persons who report "Christian," as well as people who report "Apostolic," "Born-again Christian" and "Evangelical."					
** Includes data up to May 15, 2001.					

Source: Seljak et al., 2007, p.30. Original source: Statistics Canada, "Overview: Canada still predominantly Roman Catholic and Protestant," Statistics Canada, www12.statcan.ca/english/census01/Products/Analytic/companion/rel/canada.cfm#growth

10. Religious composition of immigrants in Canada, by decade of arrival (1971-2011)



Source: Pew Research Center's Forum on Religion & Public Life. (2013). Canada's Changing Religious Landscape: Overview. Accessed July 15, 2013 at www.pewforum.org/Geography/Canadas-Changing-Religious-Landscape.aspx

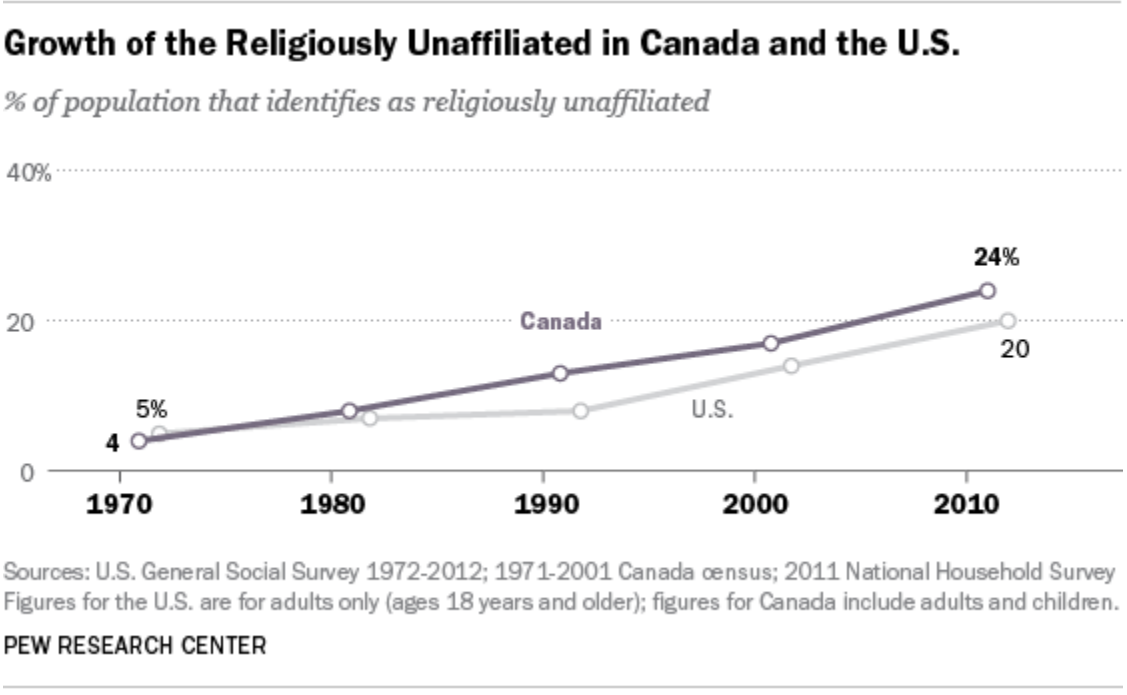
Note: Unlike in previous decades, when a religion question was included in the census, in 2011 it was part of a voluntary survey among 4.5 million randomly selected households. Roughly 2.65 million households took part in the survey. Statistics Canada has indicated that some groups – immigrants, ethnic minorities, non-English or non-French speakers and Aboriginal Peoples – may be underrepresented among participants in the voluntary survey. Despite these challenges, the 2011 National Household Survey (NHS) represents the best data source for religious affiliation in Canada in 2011 (Pew Forum 2013).

11. Religious affiliations of Canada's 7.2 million immigrants (2006)

Christian	59%
Unaffiliated	17%
Muslim	9%
Hindu	4%
Buddhist	4%
Other	4% (mostly Sikh)
Jewish	2%

Source: Todd, 2012.
Origin data, presented in Pew Forum (2012) Report, derived from 2006 Canadian census figures, based on birth (available at www12.statcan.ca/census-recensement/2006/dp-pd/hlt/97-557/T404-eng.cfm?Lang=E&T=404&GH=4&GF=1&SC=1&S=1&O=D).

12. Growth of the religiously unaffiliated in Canada and the US, 1971-2011 (Pew Research Center)

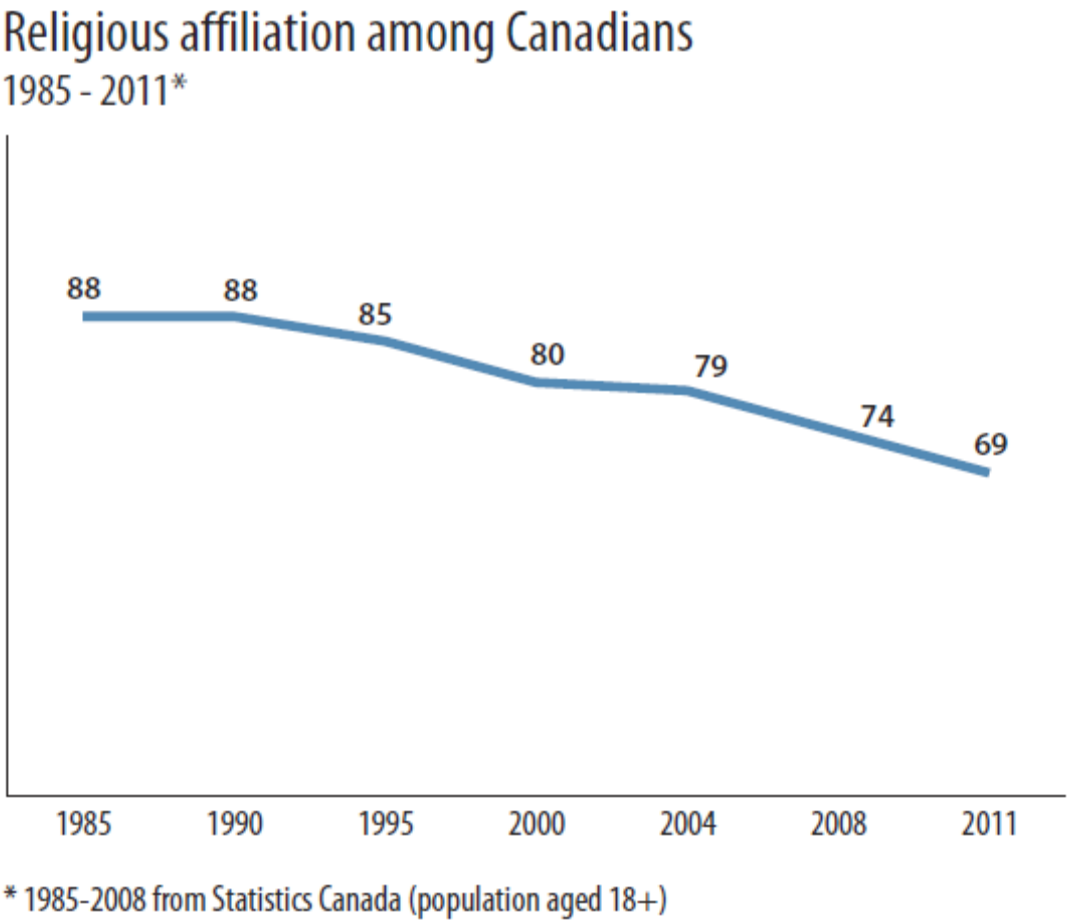


Source: Pew Research Center's Forum on Religion & Public Life. (2013). Canada's Changing Religious Landscape: Overview. Accessed July 15, 2013 at www.pewforum.org/Geography/Canadas-Changing-Religious-Landscape.aspx

Note: Unlike in previous decades, when a religion question was included in the census, in 2011 it was part of a voluntary survey among 4.5 million randomly selected households. Roughly 2.65 million households participated in the survey. Statistics Canada has indicated that some groups – immigrants, ethnic minorities, non-English or non-French speakers and Aboriginal Peoples – may be under-represented among participants in the voluntary survey. Despite these challenges, the 2011 National Household Survey (NHS) represents the best data source for religious affiliation in Canada in 2011 (Pew Forum 2013).

Summary:
In a survey conducted by the Pew Research Centre the percentage growth of the religiously unaffiliated in Canada and the US in shown between 1970 and 2010. In Canada, the percentage has increased from 4% in 1971 to 24% in 2011. In the US, the figure has increased from 5% to 20% over the same period.

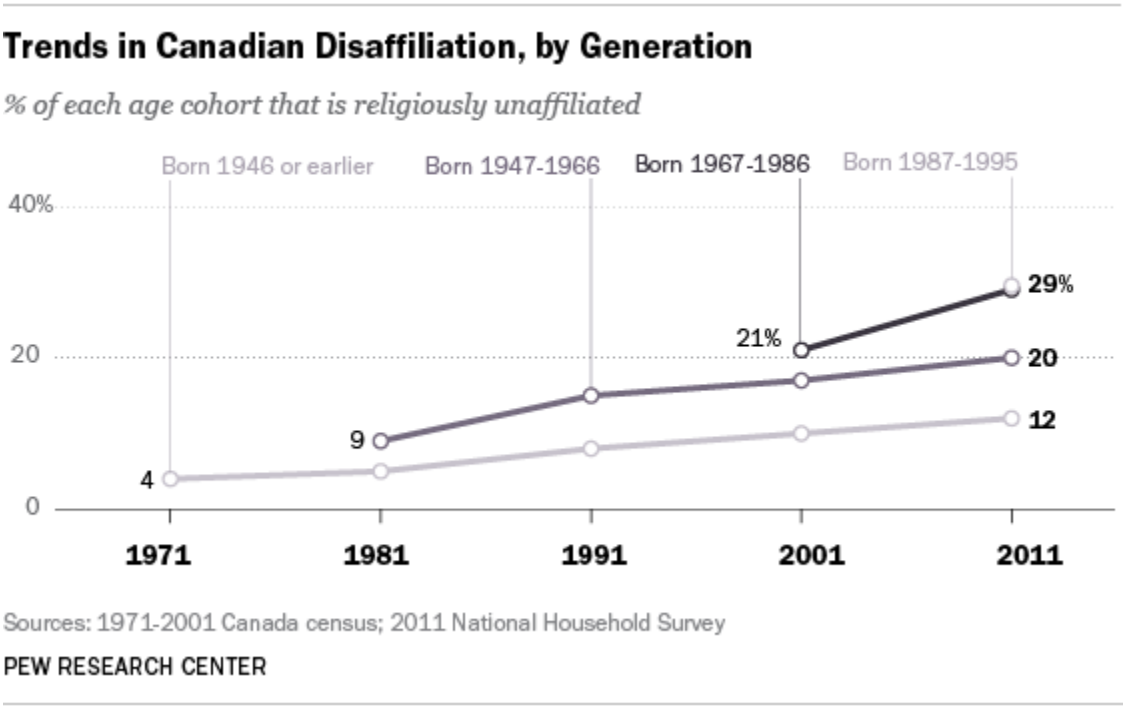
13. Environics Institute 2011 Focus Canada Survey findings on percentage of Canadians religiously affiliated (1985-2011)



Source: Environics Institute (2011), *Focus Canada 2011*, p. 39.

Summary:
In a survey conducted by the Environics Institute, Canadians who identified as being affiliated with a religion was 88% in 1985, 88% in 1990, 85% in 1995, 80% in 2000, 79% in 2004, 74% in 2008, and 69% in 2011. The graph shows a steady decline in religious affiliation among Canadians from 1985 to 2011.

14. Trends in Canadian disaffiliation, by generation (1971-2011)

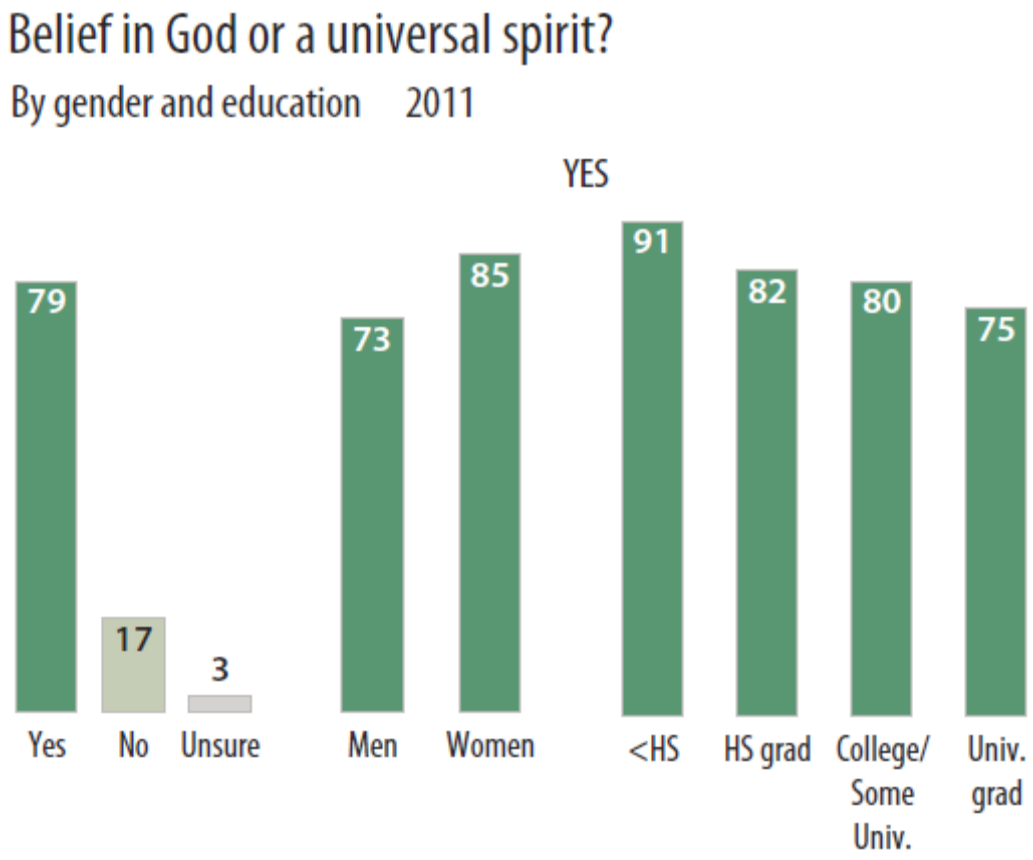


Source: Pew Research Center's Forum on Religion & Public Life. (2013). Canada's Changing Religious Landscape: Overview. Accessed July 15, 2013 at www.pewforum.org/Geography/Canadas-Changing-Religious-Landscape.aspx

Note: Unlike in previous decades, when a religion question was included in the census, in 2011 it was part of a voluntary survey among 4.5 million randomly selected households. Roughly 2.65 million households took part in the survey. Statistics Canada has indicated that some groups – immigrants, ethnic minorities, non-English or non-French speakers and Aboriginal Peoples – may be underrepresented among participants in the voluntary survey. Despite these challenges, the 2011 National Household Survey (NHS) represents the best data source for religious affiliation in Canada in 2011 (Pew Forum 2013).

Summary:
In a survey conducted by the Pew Research Centre, trends in Canadian disaffiliation are shown between 1971 and 2011. The graph displays trends by the percentage of each age cohort that is religiously unaffiliated. The first age cohort born 1946 or earlier shows an increase in those religiously unaffiliated from 4% to 12% from 1971 to 2011. In the second cohort born 1947 to 1966, the increase is 9% to 20% between 1981 and 2011. In the third cohort, born 1967 to 1986, the increase is 21% to 29% between 2001 and 2011. In the fourth cohort born 1987 to 1995, the percentage not religiously affiliated is 29% in 2011.

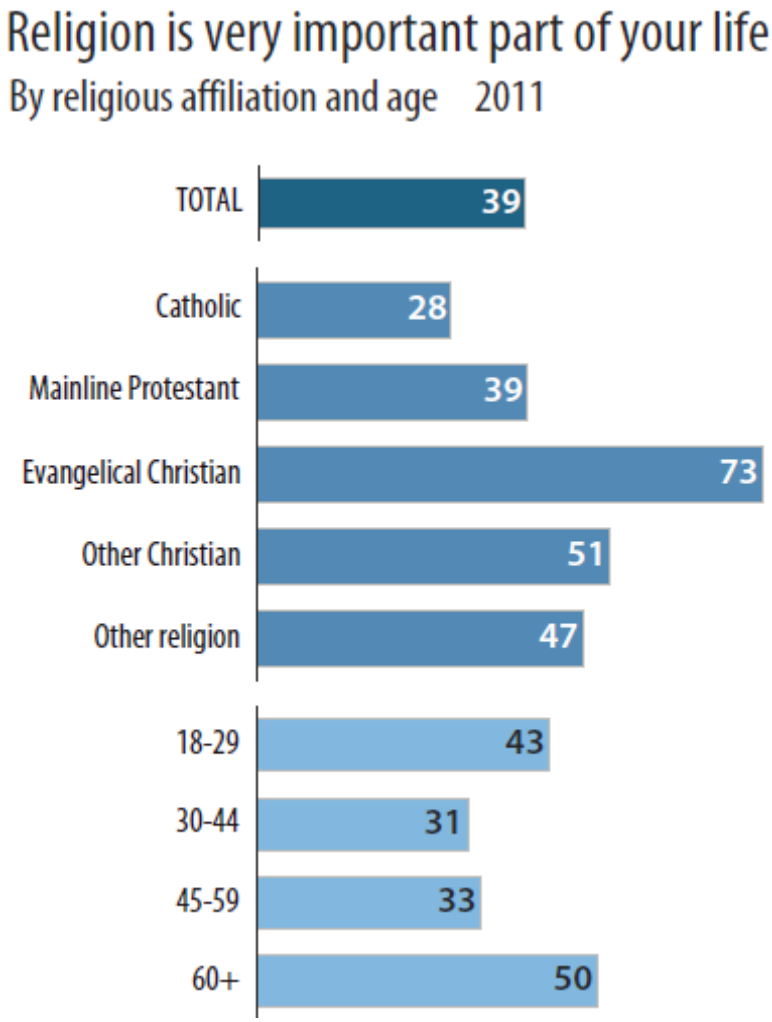
15. Environics Institute 2011 Focus Canada Survey findings on belief in God among Canadians by gender and education



Source: Environics Institute (2011), *Focus Canada 2011*, p.41.

Summary:
A 2011 survey conducted by the Environics Institute measured Canadians' belief in God or a universal spirit by gender and education. Of those surveyed, 79% indicated a belief in God or a universal spirit while 17% did not and 3% were not sure. 73% of men surveyed believed in God or a universal spirit while women showed a higher percentage at 85%. When considering education levels, 91% of people with less than a high school education believed in God or a universal spirit, 82% for people with a high school education, 80% for people with college or some university education, and 75% for university graduates.

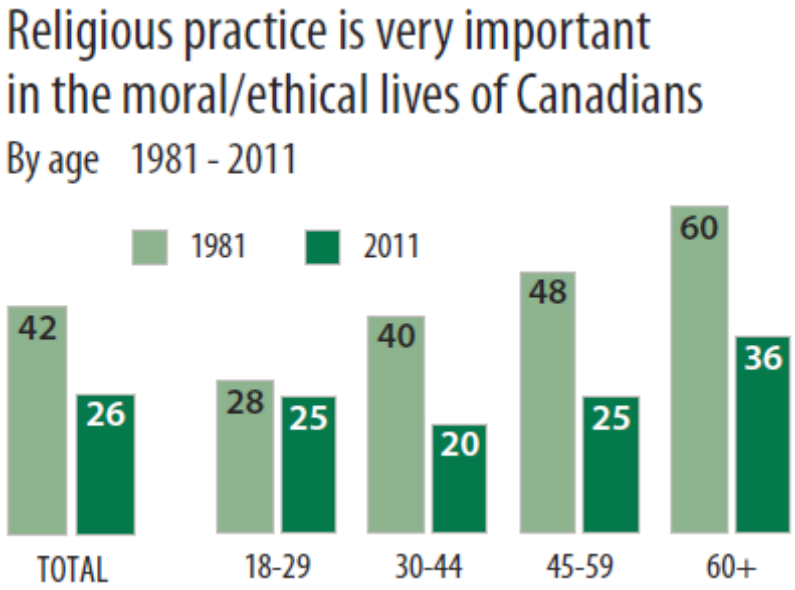
16. Environics Institute 2011 Focus Canada Survey findings on importance of religion in personal life of Canadians by religious affiliation and age



Source: Environics Institute (2011), *Focus Canada 2011*, p.40.

Summary:
In 2011, the Environics Institute conducted a survey on the importance of religion in the personal lives of Canadians with a religious affiliation. Of people surveyed, 39% of respondents with a religious affiliation indicated that religion was considered important in their personal lives. Of those who identifying with a specific group, 28% of Catholic repondents, 39% of Mainline Protestant, 73% of Evangelical Christian, 51% of Other Christian, and 47% identified as Other Religion indicated religion was important in their personal lives.

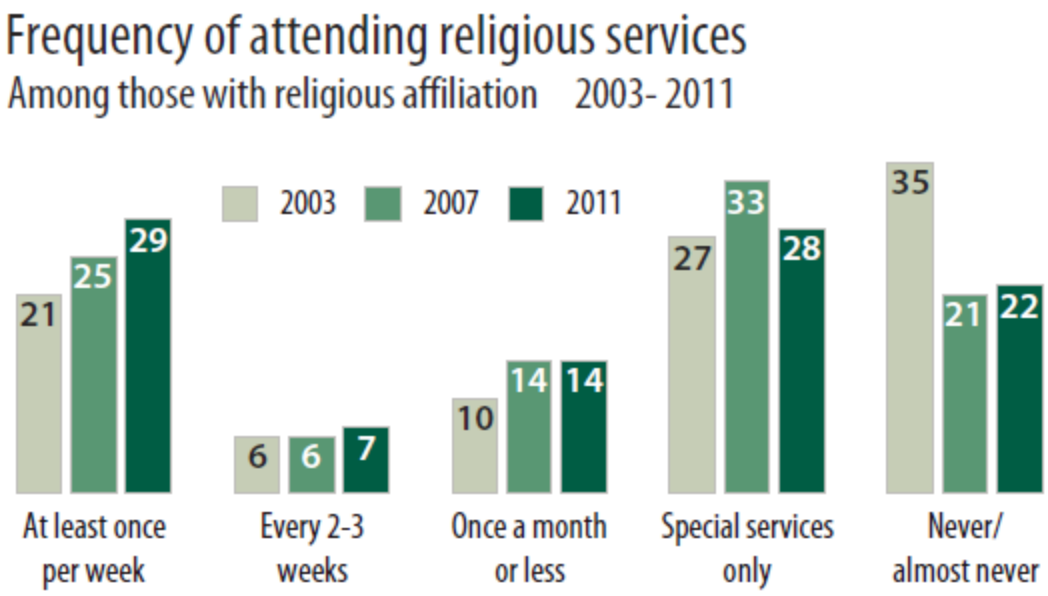
17. Environics Institute 2011 Focus Canada Survey findings on importance of religion to personal moral ethical lives of Canadians by age (1981-2011)



Source: Environics Institute (2011), *Focus Canada 2011*, p.42.

Summary:
In 2011, the Environics Institute conducted a survey examining whether religious practice is considered very important in the moral/ethical lives of Canadians between 1981 and 2011. In total, 42% of Canadians stated religious practice was important in their moral/ethical lives in 1981 vs. 26% of Canadians in 2011. Of the total respondents, people in the 18-29 age group responded at 28% in 1981 and 25% in 2011, 40% in 1981 and 20% in 2011 for the 30-44 age group, 48% in 1981 and 25% in 2011 for the 45-59 age group, and 60% in 1981 and 36% in 2011 for Canadians aged 60 or older.

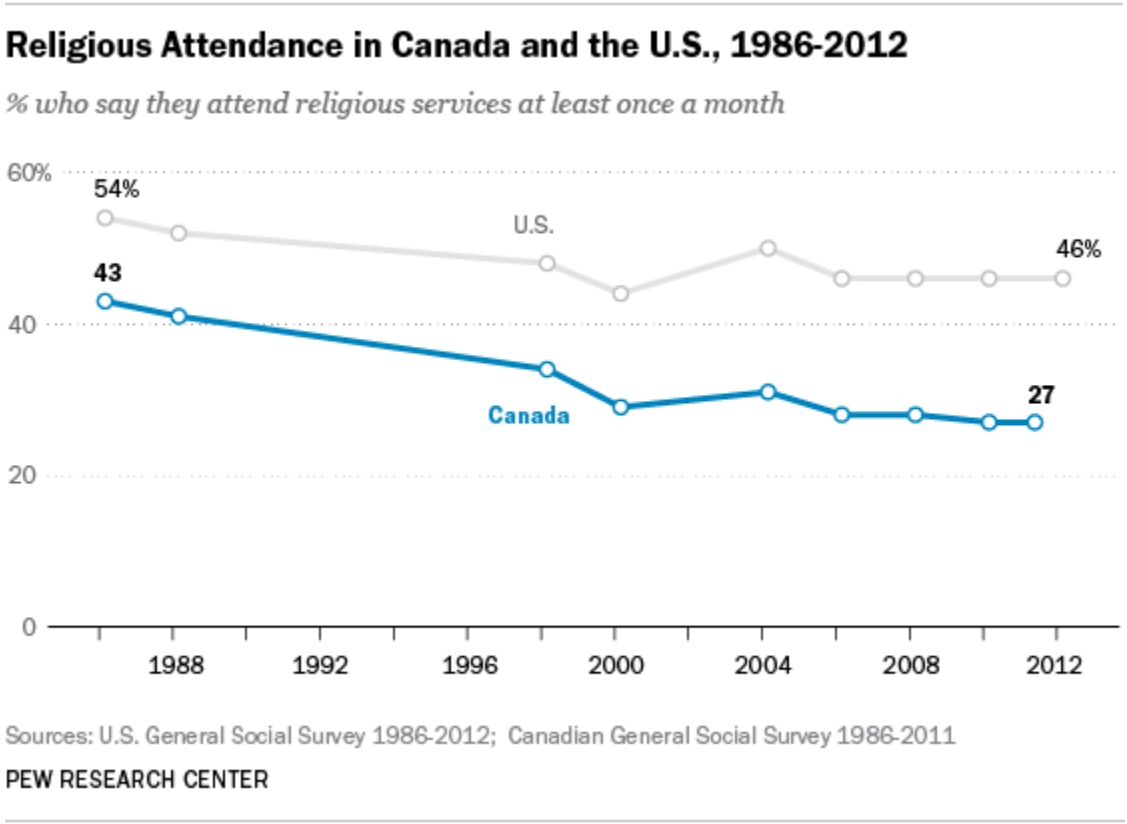
18. Environics Institute 2011 Focus Canada Survey findings on frequency of attendance at religious services among Canadians with religious affiliation (2003-2011)



Source: Environics Institute (2011), *Focus Canada 2011*, p.40.

Summary:
In 2011, the Environics Institute conducted a survey examining the frequency of attending religious services among Canadians with a religious affiliation between 2003 and 2011. Of people who attended religious services at least once per week, 21% attended in 2003, 25% in 2007, and 29% in 2011. Of people who attended every 2-3 weeks, 6% attended in 2003, 6% in 2007, and 7% in 2011. Of people who attended once a month or less, 10% attended in 2003, 14% in 2007, and 14% in 2011. Of those who attended special services only, 27% attended in 2003, 33% in 2007, and 28% in 2011. Of people who never or almost never attended religious services, 35% in reported never or almost never attending in 2003, 21% in 2007, and 22% in 2011.

19. Religious attendance in Canada and the US, 1986-2012



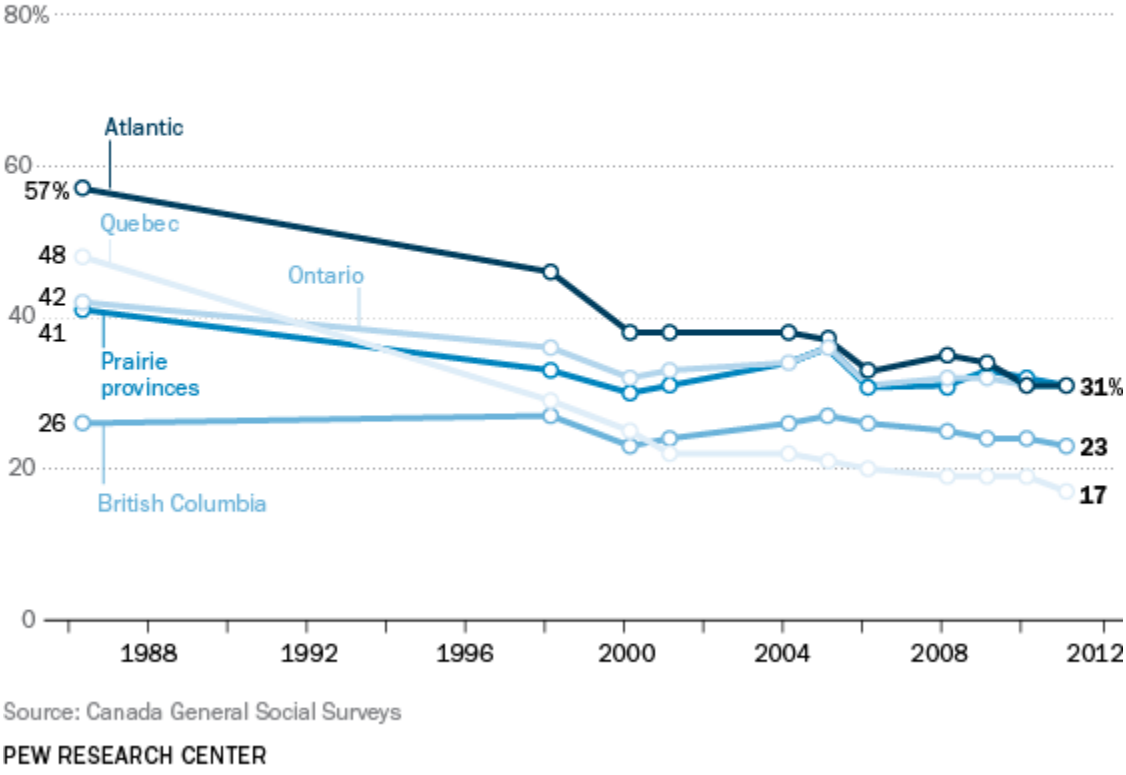
Source: Pew Research Center's Forum on Religion & Public Life. (2013). Canada's Changing Religious Landscape: Overview. Accessed July 15, 2013 at www.pewforum.org/Geography/Canadas-Changing-Religious-Landscape.aspx

Note: Unlike in previous decades, when a religion question was included in the census, in 2011 it was part of a voluntary survey among 4.5 million randomly selected households. Roughly 2.65 million households took part in the survey. Statistics Canada has indicated that some groups – immigrants, ethnic minorities, non-English or non-French speakers and Aboriginal Peoples – may be under-represented among participants in the voluntary survey. Despite these challenges, the 2011 National Household Survey (NHS) represents the best data source for religious affiliation in Canada in 2011 (Pew Forum 2013).

Summary:
In a survey conducted by the Pew Research Centre, religious attendance in Canada and the US is shown from 1986 to 2012. The survey measures the percentage of respondents who say they attended religious services at least once a month. In Canada, 43% of respondents claimed to attend religious services at least once a month

in 1986 vs. 27% in 2012. In the US, 54% of respondents claimed to attend religious services at least once a month in 1986 vs. 46% in 2012. Both lines on the graph show a gradual decline in attendance of religious services at least once a month in Canada and the US from 1986 to 2012.

20. Trends in Canadian religious attendance, by region



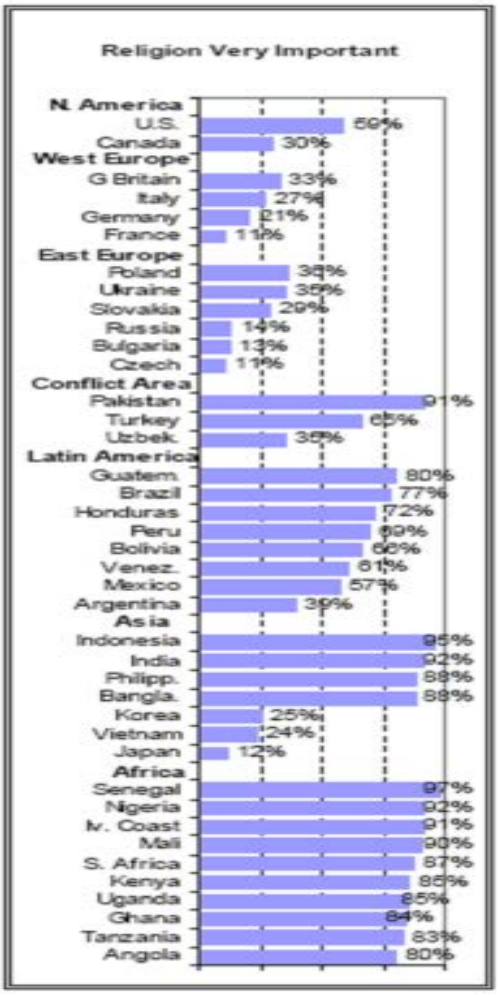
Source: Pew Research Center's Forum on Religion & Public Life. (2013). Canada's Changing Religious Landscape: Overview. Accessed July 15, 2013 at www.pewforum.org/Geography/Canadas-Changing-Religious-Landscape.aspx

Note: Unlike in previous decades, when a religion question was included in the census, in 2011 it was part of a voluntary survey among 4.5 million randomly selected households. Roughly 2.65 million households participated in the survey. Statistics Canada has indicated that some groups – immigrants, ethnic minorities,

non-English or non-French speakers and Aboriginal Peoples – may be underrepresented among participants in the voluntary survey. Despite these challenges, the 2011 National Household Survey (NHS) represents the best data source for religious affiliation in Canada in 2011 (Pew Forum 2013).

Summary:
In a survey conducted by the Pew Research Centre, the percentage of Canadians aged 15 years or older in each region who attended religious services at least once a month is shown between 1986 and 2012. In the Atlantic region, 57% of Canadians aged 15 years or older attended religious services at least once a month in 1986 vs. 31% in 2012. In the Quebec region, 48% of Canadians aged 15 years or older attended religious services at least once a month in 1986 vs. 17% in 2012. In the Ontario region, 42% of Canadians aged 15 years or older attended religious services at least once a month in 1986 vs. 31% in 2012. In the Prairie Provinces, 41% of Canadians aged 15 years or older attended religious services at least once a month in 1986 vs. 31% in 2012. In the British Columbia region, 26% of Canadians aged 15 years or older attended religious services at least once a month in 1986 vs. 23% in 2012.

21. Percentage of population saying that religion was very important by country (Pew Research Centre)



Source: Seljak et al., 2008, p.19. Original Source: Pew Research Center for the People and the Press, "Among Wealthy Nations: U.S. Stands Alone in Its Embrace of Religion."

22. HRTO application review

22.1 2010-2011 HRTO applications by ground

Ground	Totals
Disability	53%
Reprisal	24%
Sex, pregnancy and gender identity	24%
Race	22%
Colour	16%
Age	15%
Ethnic origin	16%
Place of origin	13%
Family status	10%
Ancestry	11%
Sexual solicitation or advances	6%
Creed	6%
Marital status	6%
Sexual orientation	4%
Association	5%
Citizenship	5%
Record of offences	3%
Receipt of public assistance	1%
No grounds	2%

Note: Because many applications claim discrimination based on more than one ground, the totals in the above charts exceed the total number of applications received. Also, while gender identity was added as a *Code* ground in 2012, in the past it was included under the ground of sex, as happens in this chart.

22.2 Number and percentage of HRTO applications citing creed by creed affiliation (2011-2012 fiscal year)

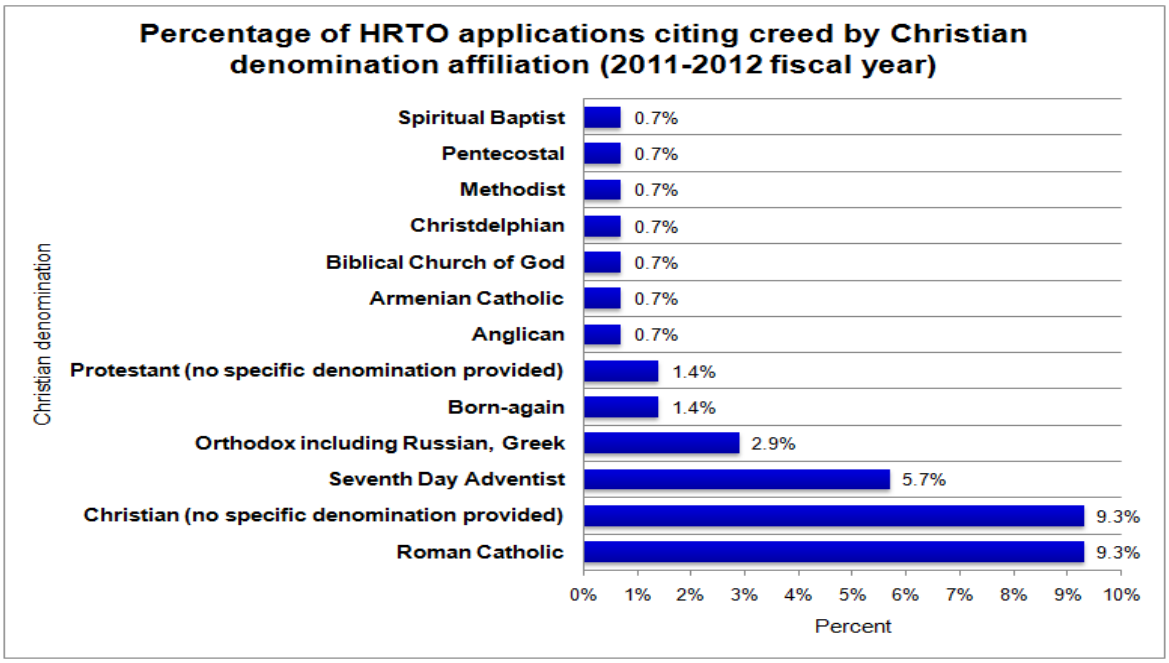
Number and percentage of HRTO Applications citing creed by creed affiliation (2011-2012 fiscal year)

Religion/creed	Number	Percentage
Muslim	50	35.7%
Christian	49	35.0%
Jewish	15	10.7%
Hindu	10	7.1%
No creed identified	8	5.7%
More than one creed identified**	7	5.0%
Aboriginal Spirituality	4	2.9%
Sikh	3	2.1%
Buddhist	2	1.4%
Witchcraft	2	1.4%
Elemental Magic*	1	0.7%
Ethical veganism*	1	0.7%
Kabala*	1	0.7%
Membership in Law Society of Canada*	1	0.7%
Non-religious	1	0.7%
Rastafarian*	1	0.7%
Taoism*	1	0.7%
Wiccan*	1	0.7%
Yoga system and cosmology*	1	0.7%
Zen*	1	0.7%
Zoroastrianism*	1	0.7%
Total* **	161	115.0%

*Grouped as miscellaneous in graph in body of text (10 or 7.1% in total)
**see Appendix 22.4 for specification of creeds identified in applications citing more than one creed
***The total exceeds 100% due to applications identifying more than one creed

Note: The creed of the applicant was determined by how applicants self-identified in applications. In some cases, applicants were discriminated against because of their perceived creed, which was sometimes different than their actual creed. In such cases, the perceived creed was counted, because of our interest in bases of discrimination on the ground of creed.

22.3 Number and percentage of HRTO applications citing creed by Christian denomination affiliation (2011-2012 fiscal year)



Number and percentage of HRTO applications citing creed by Christian denomination affiliation (2011-2012 fiscal year)			
Christian denominations	**Number**	**Percentage of total HRTO creed applications**	**Percentage of Christian-identified applications**
Roman Catholic	13	9.3%	26.5%
Christian (no specific denomination provided)	13	9.3%	26.5%
Seventh Day Adventist	8	5.7%	16.3%
Orthodox including Russian, Greek	4	2.9%	8.2%
Born-again	2	1.4%	4.1%
Protestant (no specific denomination provided)	2	1.4%	4.1%
Anglican	1	0.7%	2.0%
Armenian Catholic	1	0.7%	2.0%
Biblical Church of God	1	0.7%	2.0%
Christadelphian	1	0.7%	2.0%
Methodist	1	0.7%	2.0%
Pentecostal	1	0.7%	2.0%
Spiritual Baptist	1	0.7%	2.0%
Total identified	49	35.0%	100.0%

22.4 HRTO creed applications in which applicant identifies with more than one creed (2011-2012 fiscal year)

Number of applications	Creeds cited by applicant
1	Christian and Hindu
1	Christian and “Native Canadian”
1	Witchcraft; Kabala; Taoism; Zen; Judaism; Yoga system and cosmology; Buddhism; Elemental magic
1	Practicing Wiccan and Roman Catholic
1	“Native”/Jewish
1	Jewish/Buddhist
1	Zoroastrianism and Jewish
TOTAL: 7	

22.5 Number and percentage of HRTO applications citing creed by creed affiliation (2010-2011 fiscal year)

Number and percentage of HRTO applications citing creed by creed affiliation (2010-2011 fiscal year)		
Religion/Creed	**Total**	**Percentage**
Muslim	57	31.8%
Christian**	48	26.8%
No creed identified	19	10.6%
Jewish	10	5.6%
Atheist/humanist/agnostic	9	5.0%
Aboriginal Spirituality	5	2.8%
Non-religious	5	2.8%
Sikh	4	2.2%
Hindu	4	2.2%
Rastafarian	4	2.2%
Buddhist	3	1.7%
Raëlism	3	1.7%
More than one creed identified	3	1.7%
Falun Gong*	1	0.6%
Use of marijuana*	1	0.6%
Witchcraft*	1	0.6%
Believe in God*	1	0.6%
Pagan Vampire*	1	0.6%
Belief in being truthful*	1	0.6%
Belief in God, heaven, resurrection*	1	0.6%
Belief in respect and dignity for hard work*	1	0.6%
Belief in good business practice*	1	0.6%
Belief in honest business practice*	1	0.6%
Belief in fairness*	1	0.6%
Acceptance of all creeds*	1	0.6%
Total* **	186	103.9%

*May be grouped as miscellaneous (12 entries, 6.7% of total)

**See Appendix 22.6 below for further breakdown of Christian denominational affiliations

***The total exceeds 100% due to the number of applications identifying more than one creed

Note: The creed of the applicant was determined by how applicants self-identified in applications. In some cases, applicants were discriminated against because of their perceived creed, which sometimes was different than their actual creed. In such cases, the perceived creed was counted, because of our interest in bases of discrimination on the ground of creed.

22.6 Number and percentage of HRTO applications citing creed by Christian denomination affiliation (2011-2012 fiscal year)

Number and percentage of HRTO applications citing creed by Christian denomination affiliation (2011-2012 fiscal year)			
Christian denomination	**Number**	**Percentage of total HRTO creed applications**	**Percentage of Christian-identified applications**
Christian (no denomination provided)	20	11.2%	41.7%
Roman Catholic	9	5.0%	18.8%
Seventh Day Adventist	4	2.2%	8.3%
Christian Orthodox including Eastern and Russian	4	2.2%	8.3%
Jehovah's Witness	3	1.7%	6.3%
Pentecostal	2	1.1%	4.2%
Coptic	2	1.1%	4.2%
Church of Jesus Christ of Latter-Day Saints	1	0.6%	2.1%
Mennonite	1	0.6%	2.1%
Seventh Day Baptist	1	0.6%	2.1%
Anglican Evangelical	1	0.6%	2.1%
Total	48	26.8%	100.0%

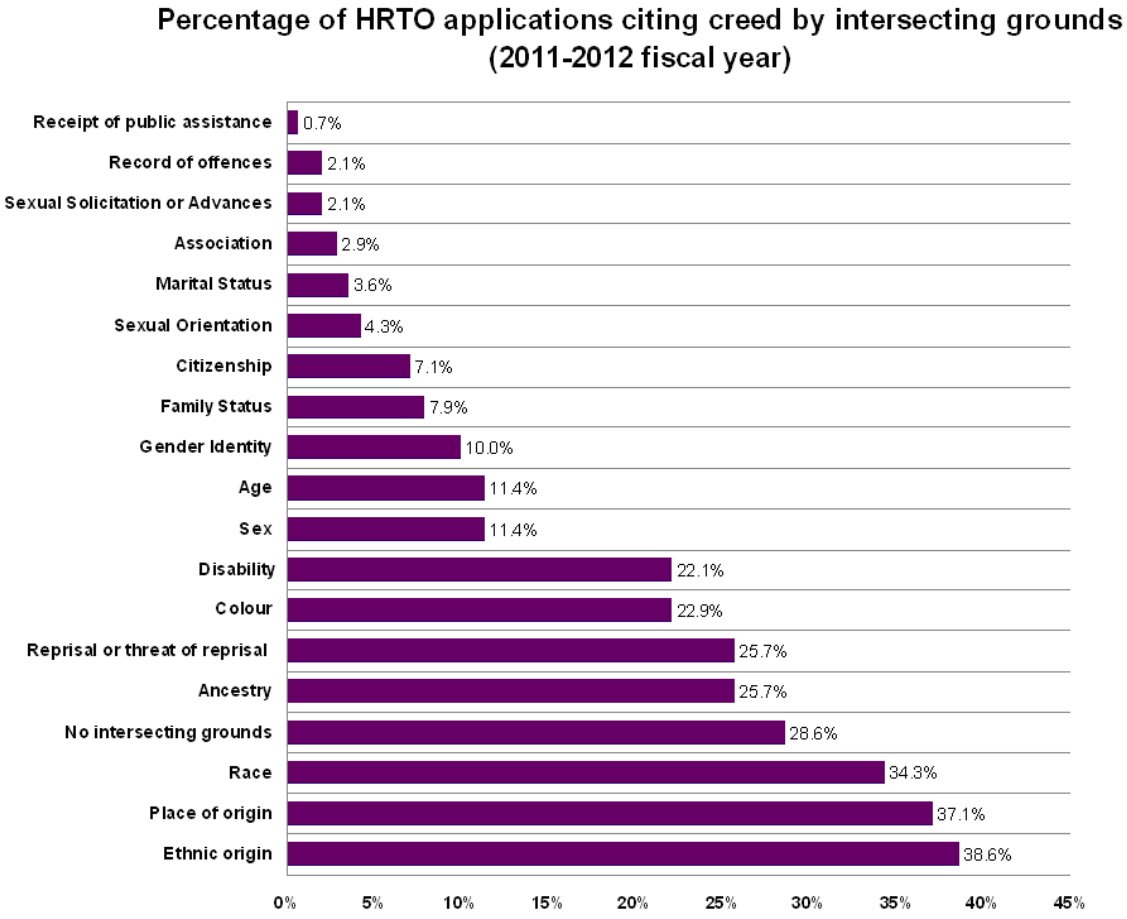
22.7 Number and percentage of HRTO applications citing creed by intersecting grounds (2011-12)

The following graph shows the number and percentage of 2011-2012 HRTO applications citing creed where an intersecting *Code* ground is also raised. Because many applications claim discrimination based on more than one ground, the totals in the chart far exceed the total number (140) of applications reviewed.

Number and percentage of HRTO applications citing creed by intersecting grounds		
Ground	**Number of applications in which this ground is cited**	**Percentage of applications in which this ground is cited**
Ethnic origin*	54	38.6%
Place of origin*	52	37.1%
Race*	48	34.3%
No intersecting grounds	40	28.6%
Ancestry*	36	25.7%
Reprisal or threat of reprisal	36	25.7%
Colour	32	22.9%
Disability	31	22.1%
Sex, including sexual harassment and pregnancy	16	11.4%
Age	16	11.4%
Gender identity	14	10.0%
Family status	11	7.9%
Citizenship	10	7.1%
Sexual orientation	6	4.3%
Marital status	5	3.6%
Association with a person identified by a ground listed above	4	2.9%
Sexual Solicitation or Advances	3	2.1%
Record of offences	3	2.1%
Receipt of public assistance	1	0.7%
Gender expression	0	0.0%
Total	518	370.0%

**Race-related ground. When aggregated under the category of “race-related ground,” an application citing one or more race or related ground was counted once as citing a “race-related ground,” which gave us a total of 50.7% of all applications. Percentages were calculated against a denominator of total creed applications (140).

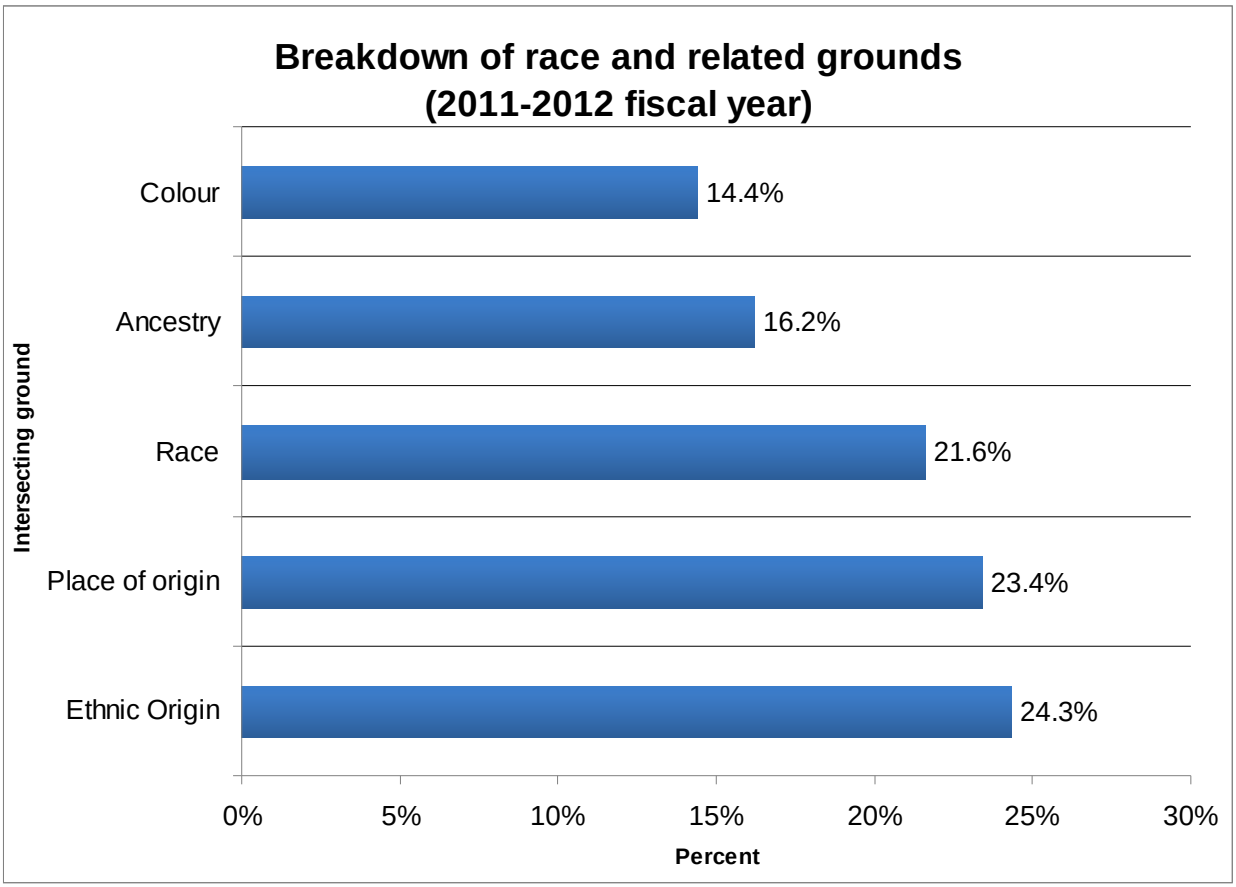
22.8 Percentage of HRTO creed applications citing intersecting ground – disaggregating race-related grounds (2011-2012)



Summary:
The following figures show the percentage of 2011-12 fiscal year HRTO applications citing creed as a ground that also cited intersecting grounds, based on OHRC data collected from the Human Rights Tribunal of Ontario (HRTO). Intersecting grounds cited in creed applications included: recipient of public assistance 0.7%; record of offences 2.1%; sexual solicitation or advances 2.1%; association 2.9%; marital status 3.6%; sexual orientation 4.3%; citizenship 7.1%; family status 7.9%; gender identity 10.0%; age 11.4%; sex 11.4%; disability 22.1%; colour 22.9%; reprisal or threat of reprisal 25.7%; ancestry 25.7%; no intersecting grounds 28.6%; race 34.3%; place of origin 37.1%; and ethnic origin 38.6%.

22.9 Breakdown of race and related grounds cited in HRTO creed applications citing intersecting grounds (2011-2012)

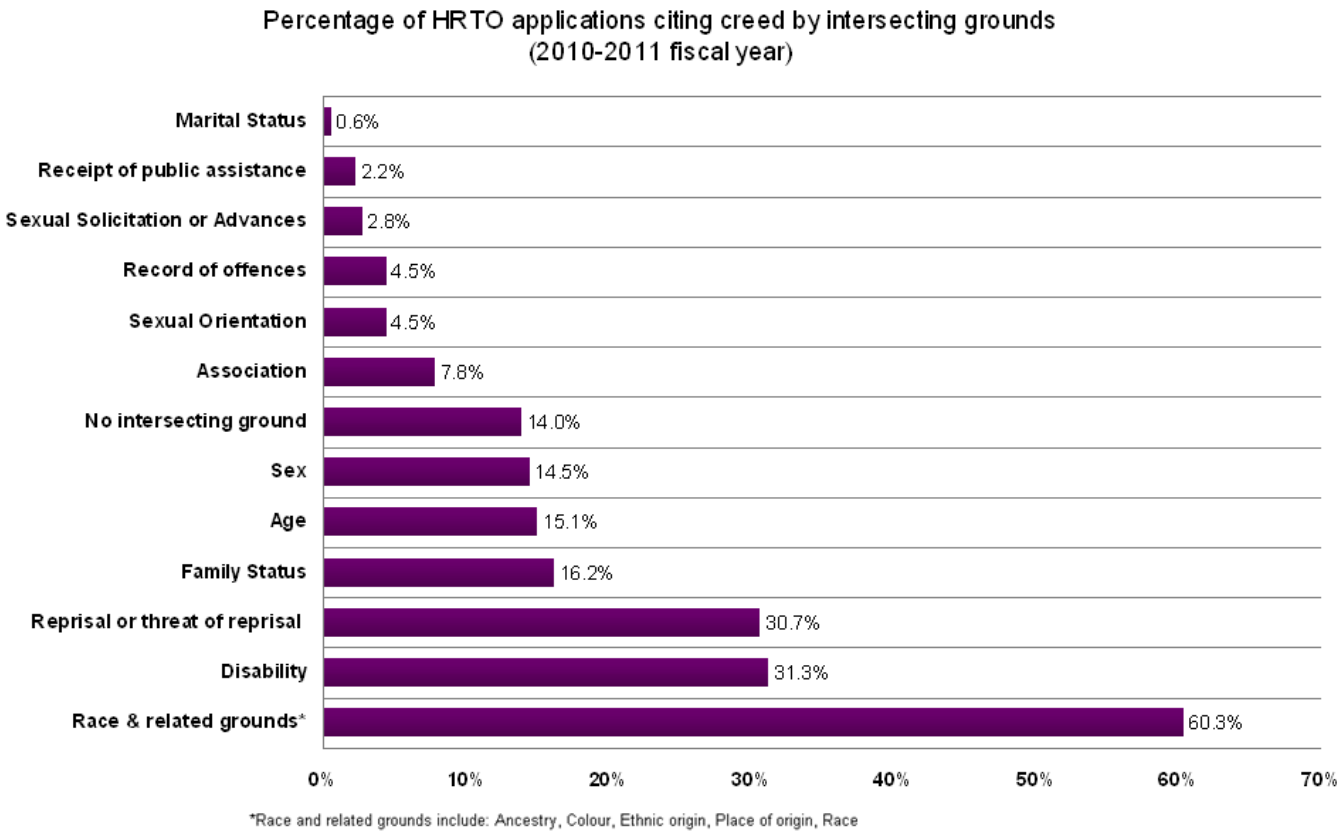
The following graph and chart show the number and percentage of 2011-2012 HRTO creed-based applications citing an intersecting race-related ground, relative to the total number (222) of intersecting race-related grounds cited in HRTO creed applications that year. The total is greater than 100% because more than one ground may be cited in an application.



	Number	Percentage (within race and related grounds)
Race and related grounds	**222**	**158.6%**
Colour	32	14.4%
Ancestry	36	16.2%
Race	48	21.6%
Place or origin	52	23.4%
Ethnic origin	54	24.3%

22.10 Number and percentage of HRTO applications citing creed by intersecting grounds (2010-11 fiscal year)

The following graph shows the number and percentage of 2010-2011 HRTO applications citing creed where an intersecting prohibited ground under the *Code* is also raised. Because many applications claim discrimination based on more than one ground, the totals in the chart far exceed the total number (179) of applications reviewed.



Summary:

The following figures show the percentage of applications citing creed also citing intersecting grounds in the 2010-11 fiscal year, based on the OHRC's collection and analysis of data from the Human Rights Tribunal of Ontario (HRTO). Of creed citing intersecting grounds: 0.6% cited marital status; receipt of public assistance 2.2%; sexual solicitation or advances 2.8%; record of offences 4.5%; sexual orientation 4.5%; association 7.8%; no intersecting ground 14.0%; sex 14.5%; age 15.1%; family status 16.2%; reprisal or threat of reprisal 30.7%; disability 31.3%; and race and related grounds 60.3%.

22.11 Number and percentage of HRTO applications citing creed by social area (2011-2012 fiscal year)

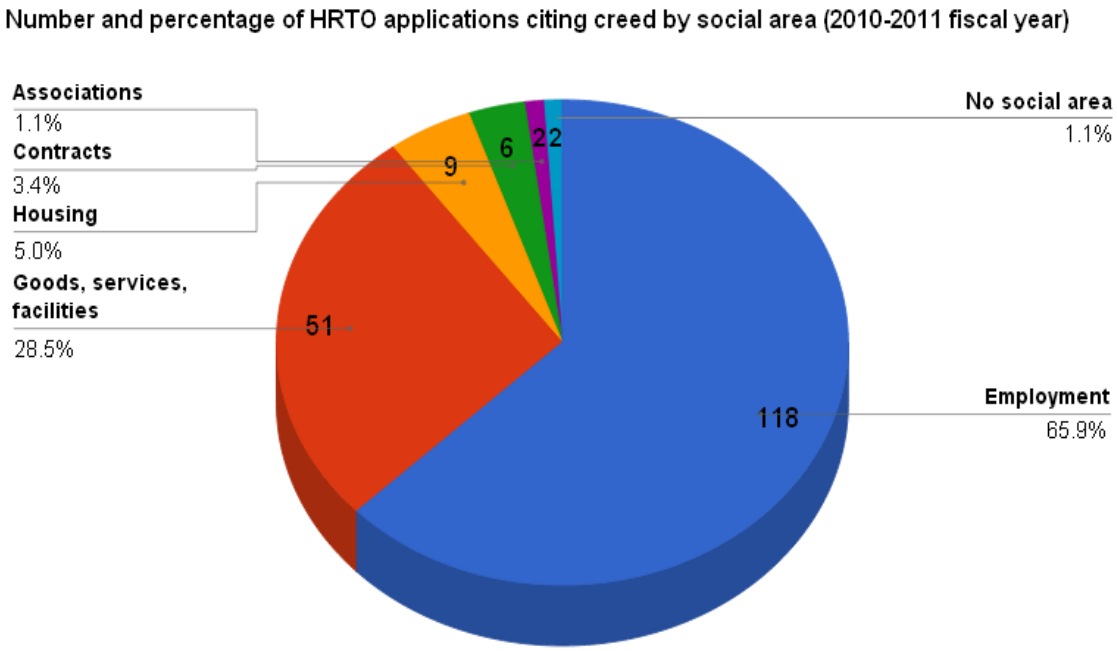
Number and percentage of HRTO applications citing creed by social area (2011-2012 fiscal year)		
Social area	**Number of applications citing this area**	**Percentage of applications citing this area**
Employment	102	72.9%
Goods, services, facilities	34	24.3%
Housing	4	2.9%
Associations	3	2.1%
Contracts	2	1.4%
Total	145	103.6%

Note: The total is 103.6% because more than one social area can be cited in a single application.

22.12 HRTO creed applications compared to all HRTO applications by social area (2011-2012 fiscal year)

HRTO creed applications compared to all HRTO applications by social area (2011-2012 fiscal year)		
Social area	**All applications**	**Creed applications**
Employment	76.4%	72.9%
Goods, services, facilities	21.0%	24.3%
Housing	5.0%	2.9%
Contracts	0.7%	1.4%
Associations	0.7%	2.1%

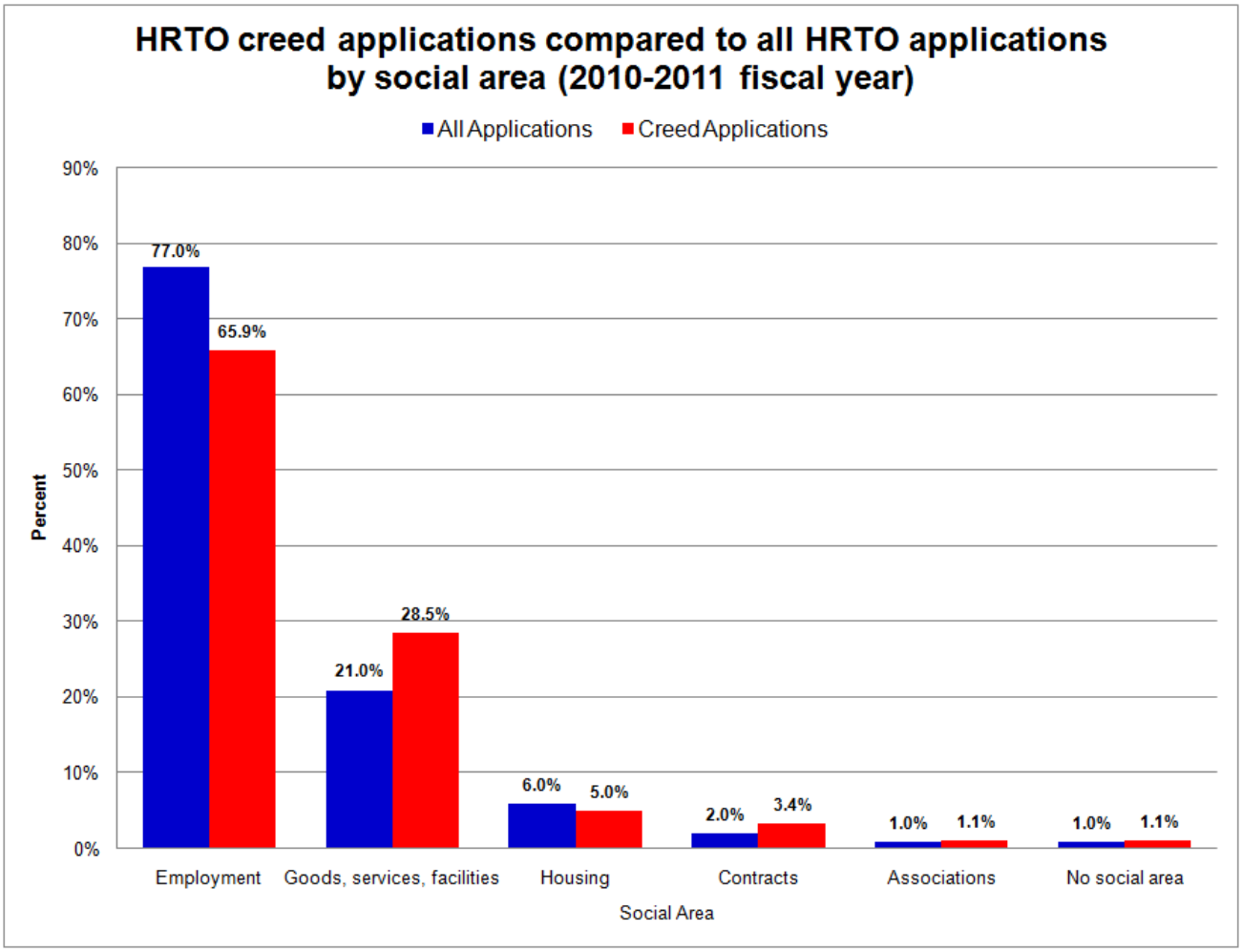
22.13 HRTO applications citing creed by social area (2010-2011 fiscal year)



Note: The total is 105% because more than one social area can be cited in a single application

Summary:
The pie chart shows the number and percentage of Human Rights Tribunal of Ontario (HRTO) applications citing creed by social area in the 2010-11 fiscal year. Of the applications, 118 or 65.9% related to employment; 51 or 28.5% related to goods, services, and facilities; 9 or 5.0% related to housing; 6 or 3.4% related to contracts; 2 or 1.1% related to associations; and 2 or 1.1% related to no specific social area.

22.14 HRTO creed applications compared to all HRTO applications by social area (2010-2011 fiscal year)



Summary:

The following figures show the percentage of HRTO creed applications vs. all other HRTO applications, grouped by social area in the 2010-11 fiscal year. In the social area of employment, creed was cited in 65.9% of creed applications vs. 77.0% for all other applications. In the goods, services, and facilities social area, creed was cited in 28.5% of applications vs. 21.0% for all other applications. In the housing social area, creed was cited in 5.0% of applications vs. 6.0% for all other applications. In the contracts social area, creed was cited in 3.4% of applications vs. 2.0% for all other applications. In the social area of “membership in voluntary association or unions” (associations for short here), creed was cited in 1.1% of applications vs. 1.0% for all other HRTO applications. For applications that did not indicate a specific social area, creed was cited in 1.1% of applications vs. 1.0%% of all other applications.

22.15 Number and percentage of HRTO creed applications by applicant sex (2011-2012 fiscal year)

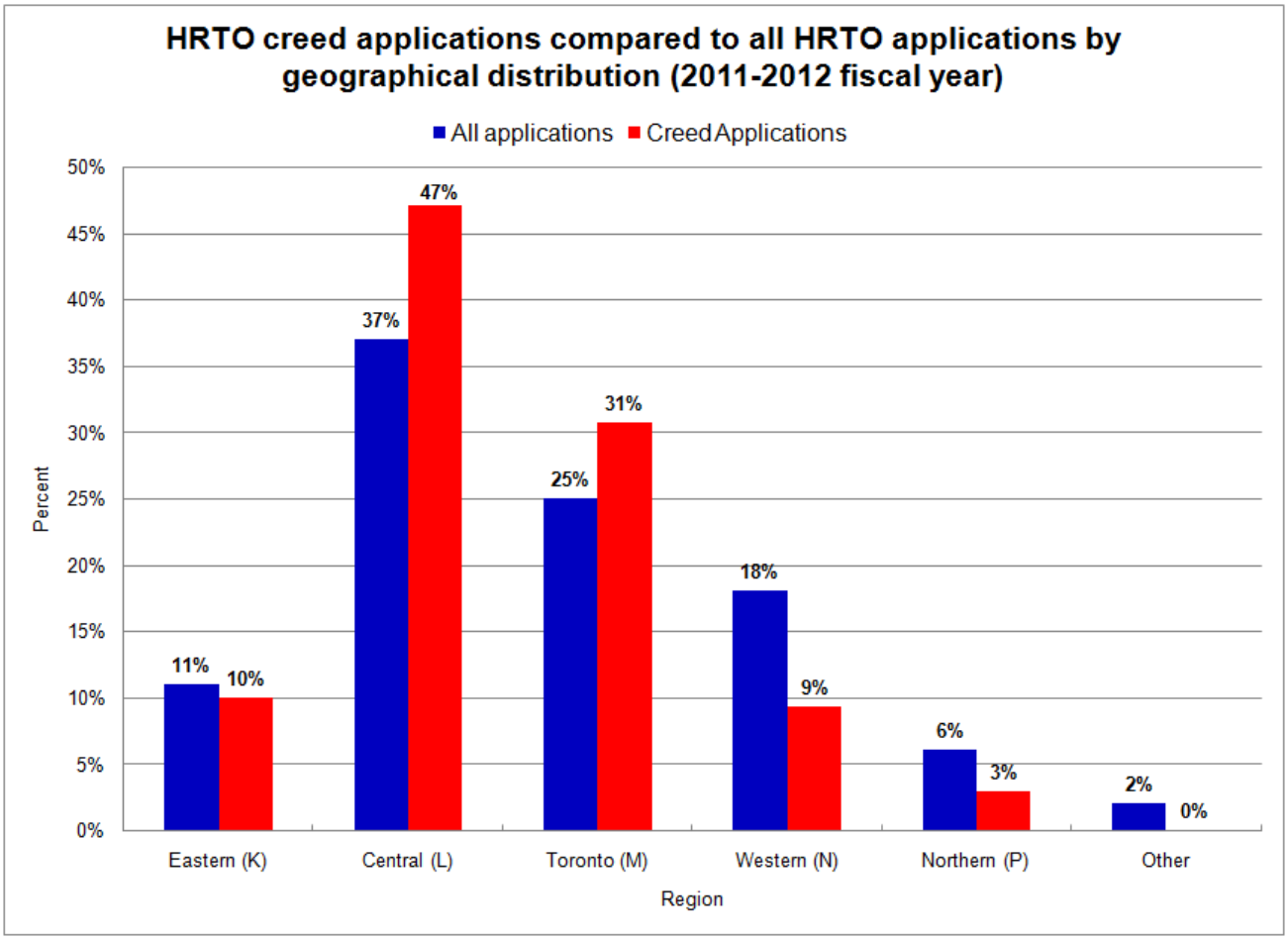
Gender	Number	Percentage
Male	80	57.1%
Female	48	34.3%
Not indicated in application	12	8.6%
Total	140	100.0%

22.16 Number and percentage of HRTO applications citing creed by geographical region (2011-2012 fiscal year)

Geographical distribution in 2011-2012 HRTO creed applications was determined by the first letter of the applicant's postal code. This is consistent with how the HRTO reports on the geographical region of origin of all HRTO applications.

Regions	Number	Percentage
Central (L)	66	47.1%
Toronto (M)	43	30.7%
Eastern (K)	14	10.0%
Western (N)	13	9.3%
Northern (P)	4	2.9%
Total	140	100.0%

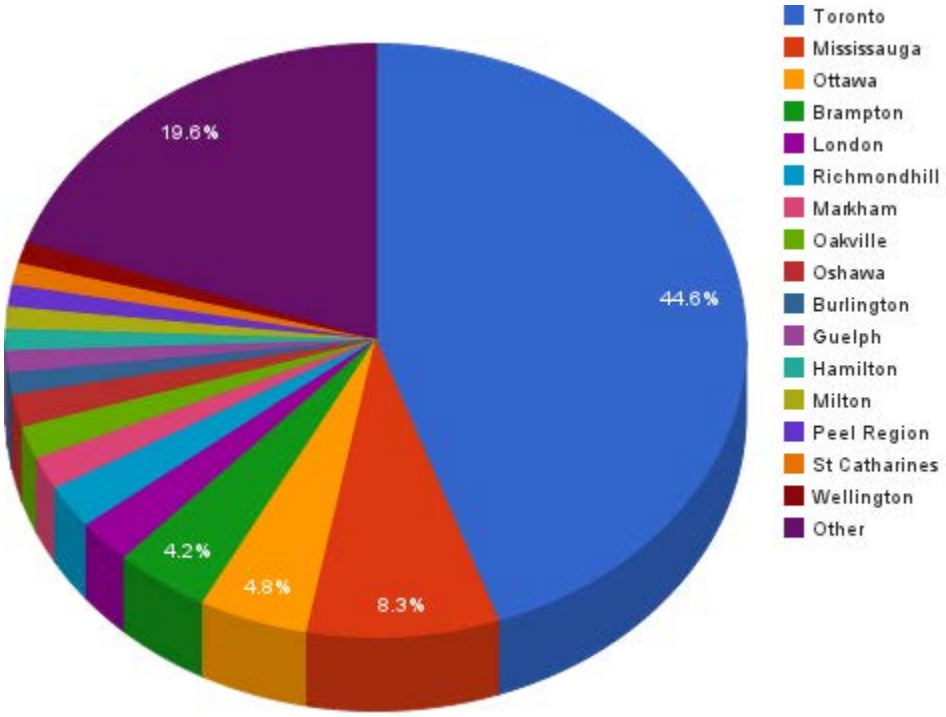
22.17 HRTO creed applications compared to all HRTO applications by geographical distribution (2011-2012 fiscal year)



Regions	All applications	Creed applications
Eastern (K)	11%	10%
Central (L)	37%	47%
Toronto (M)	25%	31%
Western (N)	18%	9%
Northern (P)	6%	3%
Other	2%	0%

22.18 Geographical distribution of 2010-2011 HRTO applications citing creed, broken down by city/location

The OHRC's review of 2010-11 HRTO creed applications classified them by city where the incident occurred, as revealed in the "Location of Discrimination" question in 7b of HRTO's application form. These findings are not comparable with how the HRTO reports its application data, by region, or how we have here reported on the 2011-12 HRTO creed applications, both of which classify region by postal code. However, this data does give a more precise sense of where allegations of discrimination are occurring.



The largest group of 2010-11 HRTO creed applications alleged occurrences of discrimination in Toronto (45% of all applications). The next most frequent location was from Mississauga (8.3%), followed by Ottawa (4.8%), Brampton (4.2%) and 2.3% each from London, and Richmond Hill. Markham, Oakville and Oshawa each produced 1.7% of applications. Burlington, Guelph, Hamilton, Milton, Peel Region, St. Catharines and Wellington were the location of two applications; Ajax, Belleville, Brantford, Cambridge, Cobourg, Collingwood , Delhi, Dwight, Fort Erie, Grimsby, GTA, King City, Kitchener, Newmarket, Niagara Falls, Orillia, Penetanguishene, Peterborough, Pickering, Sault Ste Marie, Seaforth, Seven Bridge, Sioux Lookout, Stoney Creek, Tecumseh, Thamesford, Thornhill, Vaughan, Welland, Windsor, Woodbridge, Woodstock, York Region were each the location of one application.

23. 2010 Angus Reid Poll on multiculturalism – good or bad for Canada?

Multiculturalism Thinking now about the policy of multiculturalism, do you personally think multiculturalism has been good or bad for Canada?							
	Region						
	Total	**BC**	**AB**	**MB/SK**	**ON**	**PQ**	**ATL**
Very Good / Good	55%	65%	51%	54%	57%	49%	50%
Bad / Very Bad	30%	23%	39%	27%	28%	31%	31%
Not Sure	16%	12%	10%	19%	14%	20%	18%

Source: 2010 Angus Reid Poll

24. 2010 Angus Reid Poll – Melting pot or mosaic?

Multiculturalism Which of these statements comes closest to your own point of view?							
	Region						
	Total	**BC**	**AB**	**MB/SK**	**ON**	**PQ**	**ATL**
Canada should be a melting pot – immigrants should assimilate and blend into Canadian society	54%	50%	60%	52%	50%	64%	41%
Canada should be a mosaic – cultural differences within society are valuable and should be preserved	33%	42%	32%	21%	38%	22%	40%
Not Sure	13%	8%	9%	27%	12%	14%	19%

Source: 2010 Angus Reid Poll

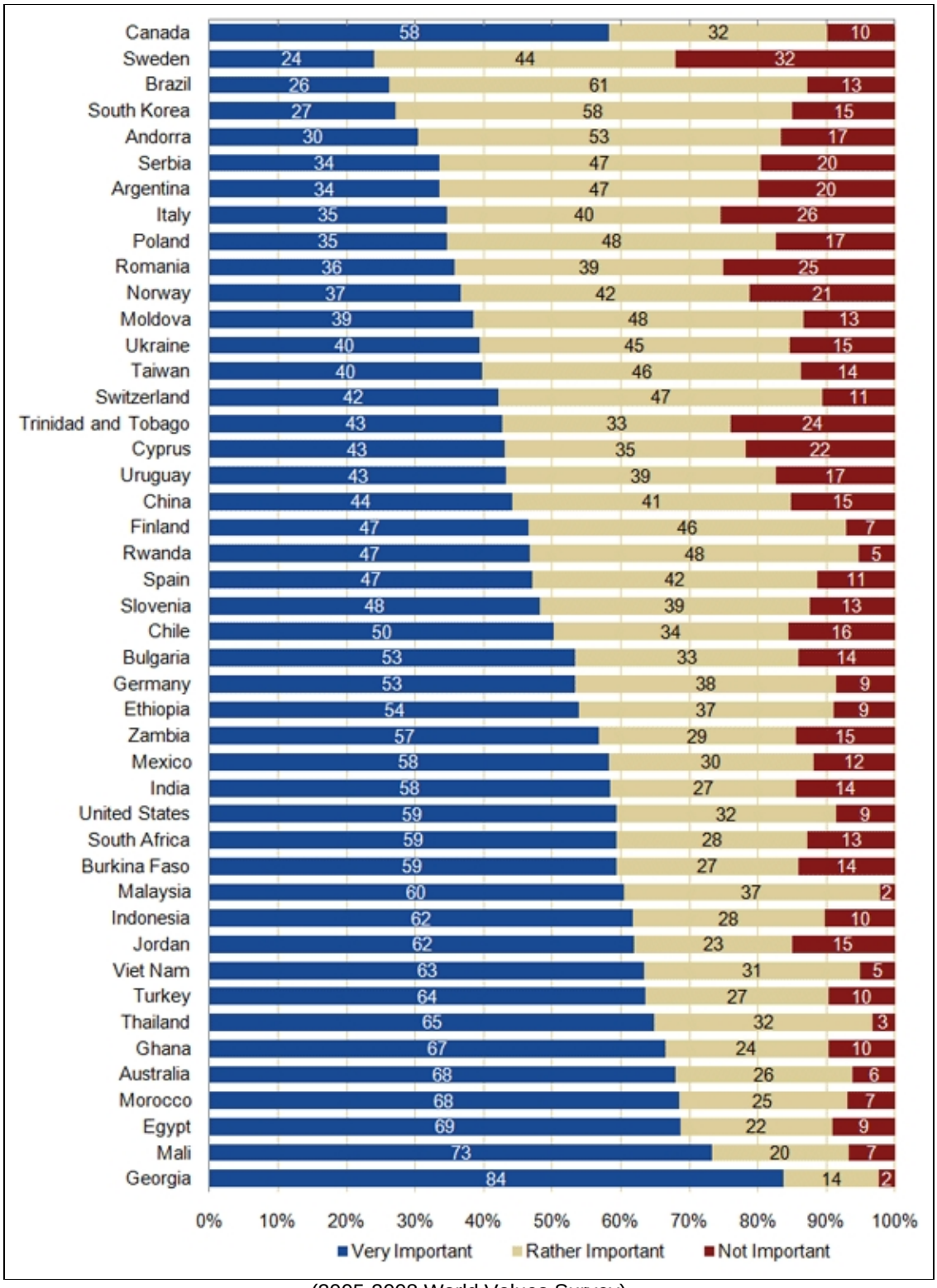
Other related opinion polls

A recent poll conducted by the Association for Canadian Studies found that 50% of Canadians think newcomers should give up traditions and become “more like the rest of us,” up from 36% in 2007 (Patriquin & Gillis, 2010, cited in Sharify-Funk, 2011). Another (2007) poll revealed that only 69% of Canadians thought that multiculturalism helped foster Canadians’ sense of identity and citizenship, down from 80% in 2001 (Sharify-Funk, 2011). Another 2010 Angus Reid Public Opinion Poll of 1006 randomly selected Canadian adults found this number to be growing from 2008, with some 54%

of survey respondents wanting Canada to be a melting pot where immigrants assimilate and blend into Canadian society (as compared to 33% who prefer the mosaic concept, where cultural differences are deemed valuable and are preserved). The numbers for Ontario were only marginally different.

Backlash related to Canada's growing and increasingly publicly visible religious diversity may well be a factor in this general trend. Those who were most likely to oppose Canada's multiculturalism policy in a 2008 poll of 1,522 Canadians conducted by Léger Marketing on behalf of the Association for Canadian Studies and the Canadian Race Relations Foundation were also most likely to blame minorities for any discrimination that they experienced (with Muslims being blamed the most, followed by Jews, homosexuals and Black people).

25. (2005-2008) World Values Survey – Importance of immigrants adopting the values of my country



(2005-2008 World Values Survey)

Source: Citizenship and Immigration Canada (2010). A literature review of Public Opinion Research on Canadian attitudes towards multiculturalism and immigration, 2006-2009. Retrieved April 6, 2013 at www.cic.gc.ca/english/pdf/research-stats/2012-por-multi-imm-eng.pdf

26. Ethnic Diversity Survey, 2003: Religion as source of discrimination from respondents who perceived discrimination

	Percentage who identified religion as the source of perceived discrimination	Total non-Aboriginal population aged 15 and older (Limit of EDS)	Total non-Aboriginal population aged 15 and older times percentage
Total non-Aboriginal population aged 15 and older	13%	22,445,490	402,470
Male	11%	10,947,760	188,190
Female	16%	11,497,730	214,270
Visible minority population	10%	2,999,850	99,450
Male	10%	1,443,120	50,910
Female	9%	1,556,730	48,550

Source: Ethnic Diversity Survey, Statistics Canada (2003b), as cited in Seljak et al., (2007). Percentages are calculated using total valid responses

27. Percent in each Canadian ethnic group by race and religion (2002)

Table 1: Percent in each ethnic origin group, by race and religion

	No Religion	Catholic	Prot-estant	Other Christian	Muslim	Jewish	Buddhist	Hindu	Sikh	Other Religion
Whites										
Canadian	6.1	4.2	6.3	4.0	-	5.1	-	-	-	-
French	8.8	38.5	3.1	11.4	-	-	-	-	-	-
Anglo	35.1	15.2	55.1	20.9	-	4.6	-	-	-	33.9
Northern and Western European	13.8	5.8	17.6	13.2	-	-	-	-	-	-
Russian and Eastern European	7.7	7.3	5.2	17.4	-	33.9	-	-	-	-
Southern European	0.4	0.6	-	-	-	-	-	-	-	-
Jewish and Israeli	-	-	-	-	-	34.6	-	-	-	-
Arab/West Asian/North African	0.4	0.4	-	2.2	9.4	-	-	-	-	-
Latin, Central and South American	-	0.2	-	-	-	-	-	-	-	-
Greek	-	-	-	6.9	-	-	-	-	-	-
Italian	1.9	7.8	0.6	1.3	-	-	-	-	-	-
Portuguese	-	2.4	-	-	-	-	-	-	-	-
Other European	1.1	0.5	0.4	-	-	6.7	-	-	-	-
Total Non-Visible Minority	**82.2**	**92.4**	**93.4**	**84.2**	**14.6**	**97.8**	**-**	**-**	**-**	**62.8**
Visible Minorities										
Chinese	12.0	1.1	1.4	4.7	-	-	45.2	-	-	-
South Asian	0.8	0.6	0.4	1.3	37.6	-	2.9	88.6	100	-
Black	1.5	1.2	3.1	3.4	7.8	-	-	-	-	-
Filipino	-	2.2	0.3	0.6	-	-	-	-	-	-
Latin American	0.5	1.3	0.3	0.9	-	-	-	-	-	-
Southeast Asian	0.8	0.3	-	0.2	-	-	28.0	-	-	-
Arab and West Asian	0.5	0.3	-	1.9	35.6	-	-	-	-	-
Korean	-	0.2	0.3	1.5	-	-	-	-	-	-
Japanese	0.7	-	0.2	0.4	-	-	4.1	-	-	-
Visible minority, n.i.e.	0.2	0.2	0.3	0.6	2.5	-	-	11.4	-	-
Multiple Visible Minority	0.3	0.2	-	0.2	-	-	-	-	-	-
Total Visible Minority	**17.8**	**7.6**	**6.6**	**15.8**	**85.4**	**2.2**	**83.8**	**100**	**100**	**37.2**
Total N	7850	14630	11700	3410	840	680	570	530	650	130

Note: All percentages are weighted using population weights created by Statistics Canada. However, column N's are unweighted and have been rounded. Some cells have been omitted because of cell sizes less than 30.

Source: Reitz, Banerjee, Phan and Thompson 2008.

28. Objective and reported inequality by race and religion in Canada (2002)

Table 3: Objective and reported inequality by race and religion

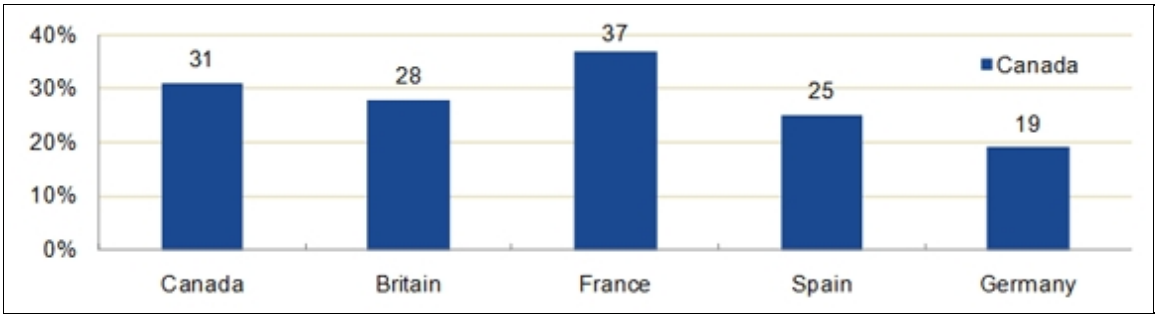
		IE HH Income Relative to CMA (mean)	Reported Discrimination (%)	Reported Vulnerability (%)	N
Whites					
	No Religion	$3,036	11.7	13.8	5800
	Catholic	$214	9.2	17.1	12670
	Protestant	$1,977	9.4	14.7	10440
	Other Christian	-$206	14.4	18.0	2580
	Muslim	-$17,690	10.6	28.1	130
	Jewish	$14,004	22.9	35.0	670
	Total	**$1,237**	**10.2**	**16.2**	32290
Visible Minorities					
	No Religion	-$6,669	35.9	34.7	2040
	Catholic	-$5,099	36.7	39.1	1960
	Protestant	-$8,757	38.6	39.9	1250
	Other Christian	-$10,061	40.6	33.6	830
	Muslim	-$15,320	34.1	38.0	700
	Buddhist	-$8,273	32.4	35.1	510
	Hindu	-$4,886	36.0	47.0	530
	Sikh	-$6,646	27.3	32.9	650
	Total	**-$7,684**	**35.9**	**37.3**	8470

Note: All percentages are weighted using population weights created by Statistics Canada. Row N's are unweighted and have been rounded. Within racial groups, only religious groups with sufficient cell sizes are included in the table. Statistical tests of significance of between-group differences are available from the authors.

Source: Reitz, Banerjee, Phan and Thompson, 2008.

29. 2006-2007 Focus Canada Survey of Muslim Canadian experiences of discrimination

In the last two years, have you personally had a bad experience due to your race, ethnicity, or religion, or hasn't this happened to you? (Muslims only) [*% answering "yes"*]



Source: Citizenship and Immigration Canada. (2010). A literature review of Public Opinion Research on Canadian attitudes towards multiculturalism and immigration, 2006-2009. www.cic.gc.ca/english/resources/research/por-multi-imm/sec02-4.asp. Original Source:Environics Research Group, *Focus Canada 2006-4*; International data from 2005 Pew Global Attitudes Survey).

30. November 2010 Angus Reid Poll on Canadian tolerance levels by social grouping

Multiculturalism Overall, would you say Canada is a tolerant or intolerant society towards each of these groups?			
	Tolerant	**Intolerant**	**Not sure**
Muslims	52%	33%	15%
Aboriginal Canadians	62%	30%	9%
Immigrants from South Asia (such as India and Pakistan)	64%	24%	12%
Gays and lesbians	72%	16%	12%
People with disabilities	75%	15%	10%
Immigrants from Asia (such as China and Hong Kong)	81%	10%	9%
Immigrants from Latin America	79%	7%	14%
Immigrants from Europe	89%	4%	7%

31. Open versus closed secular models

OPEN SECULAR	CLOSED SECULAR
▪ secularism-as-pluralism (Berger 2002)	▪ secularism as a-religiousness (Berger 2002)
▪ archetypal model historically arose in response to religious pluralism and diversity	▪ archetypal model historically arose in response to the excessive domination of the Church in a fairly religiously homogenous society
▪ no ”wall of separation” between church and state: in societies with this model, secularism is a flexible institutional arrangement aimed at protecting rights and freedoms, not an explicit and autonomous legal or constitutional principle (i.e. not “an overhanging principle”)	▪ “wall of separation” between church and state: in societies with this model, secularism is an explicit and autonomous constitutional principle (“an overhanging principle”)
▪ flexible, religiously tolerant, “mosaic” model inspired by liberal pluralist political theories affirming diversity and multiculturalism	▪ more rigid and strict republican, “melting pot” model inspired by the revolutionary French model that looks to secularism as (“enlightenment”) ideology for its primary justification
▪ pluralistic liberalism or ”modus vivendi” – state does not use its political and legal mechanisms to inculcate any single substantive vision of the good, the true and/or the beautiful. Rather searches for terms of peace among different ways of life, welcoming diversity as a sign that there are different ways of living a good life (Chiodo 2012a drawing on Gray 2000 and Benson 2004)	▪ convergence liberalism – state uses political and legal mechanisms to advance universal liberal principles and rational consensus on the best way of life; diverse ways of life are tolerated in the faith that they will eventually disappear, as citizens are moved towards an ”enlightened” vision of the true, the good and the beautiful (Chiodo 2012a drawing on Gray 2000 and Benson 2004)
▪ “neither strives to further secularization or erosion of religious belief, nor does it serve to neutralize or erase religion as an identity marker” (Woehrling 2011:91)	▪ strives to further secularize, erode religious belief, and neutralize or erase religion as an identity marker
▪ “State neutrality towards religion and separation of church and state are not seen as ends in themselves, but as means to achieve the fundamental twofold objective: respect for religious and moral equality, and freedom of conscience and religion” (Woehrling 2011:91)	▪ state neutrality towards religion and separation of church and state are seen as ends in themselves

OPEN SECULAR	CLOSED SECULAR
▪ neither favours nor disfavours religion	▪ atheism is privileged state/public stance, either *de facto* (as is the case in France) or *de jure* (as was the case in the former Soviet Union)
▪ positive contributions of religion recognized	▪ religion is actively tamed, marginalized and denigrated as irrational, unenlightened, tribal, anti-egalitarian, and/or potentially violent ▪ restricts religious practice to the private sphere (the sphere of the voluntary association, the family or the individual) respecting only ”the right to privacy”
▪ supports religious accommodation in public sphere	▪ religious accommodation in public sphere is prohibited in name of neutrality and church/state separation. “[C]itizens must refrain from entering the public sphere with any religious convictions, principles, or practices in tow” (Berger 2002)
▪ seeks to balance individual and collective rights, in part by enabling and respecting significant religious associational rights, free from state intervention	▪ individual rights privileged over collective rights, and religious associational rights significantly qualified and subject to state intervention
▪ prioritizes protection of freedom of religion and conscience, and equality between religions and beliefs, even if it requires relativizing the principle of neutrality and church/state separation (e.g. allowing government employees to wear religious signs) ▪ if there is conflict between religious accommodations and religious neutrality of the state, neutrality must yield to the accommodations	▪ prioritizes principle of neutrality over both freedom of conscience and religion, and religious equality ▪ if there is a conflict between religious accommodation and religious neutrality of the state, accommodation must yield to neutrality ideal
▪ secular ideals govern state institutions and government action, but not individuals who use public services or work in these institutions	▪ secular ideals (state neutrality, separation of church and state) directed not only at state institutional action, but also at the practices of state employees and public service users
▪ religious reasons allowed in public, in effort to nurture ”inclusive citizenship,” as long as state institutions or actors	▪ religious discourse is prohibited in public sphere. Religious arguments seen to be inherently divisive,

OPEN SECULAR	CLOSED SECULAR
do not privilege these over other countervailing views	contentious and to undermine political and civic harmony, since they rest on *a priori* first principles or dogma, which are not subjectable to rational political debate
Country examples: ▪ India ▪ Canada (in most instances, minus Quebec)	**Country examples:** ▪ France ▪ former USSR
Practical examples: ▪ religious practices accommodated in schools ▪ religious prayers and symbols allowed in parliament, as long as diversity represented ▪ parents can articulate religious reasons for curriculum preferences but school must not privilege this view to detriment of opposing views (see *Chamberlain* decision)	**Practical examples:** ▪ wearing of religious signs by all government employees is prohibited ▪ wearing the headscarf in school, or in accessing public services, is prohibited ▪ prayers and religious symbols of any kind are banned from public space
Some critiques: ▪ overly permissive of religion ▪ creates weak civic bonds and national identity ▪ fosters ethnic/religious silos, identity politics and divides the nation from within ▪ compromises state security and stability ▪ administratively costly and less efficient	**Some critiques:** ▪ treats individuals as abstract entities stripped of all pre-existing cultural and religious values and commitments; thereby fails to respect integrity and dignity of human person and identity ▪ authoritarian, paternalistic and assimilationistic ▪ unequal playing field for religious citizens. Though people can harbour any view in private, these views must "remain irrelevant, or at least silent, to many things that matter most – for example, to public discussion and policy on the environment, energy, war, and social services." (Novak) ▪ religion never has been and cannot be entirely private (ex. civil rights movement, anti-slavery movement, etc.)

Adapted primarily from Woehrling's (2011) summary and adaptation of Bouchard-Taylor Commission Report (2008).

32. Canadian Law Dictionary definitions of secular

The Dictionary of Canadian Law (4th edition, Carswell), at 1168

***Secular*, adj.**

(1) The dual requirements that education be “secular” and “non-sectarian” refer to keeping the schools free from inculcation or indoctrination in the precepts of any religion and do not prevent persons with religiously based moral positions on matters of public policy from participating in deliberations concerning moral education in public schools. *Chamberlain v. Surrey School District No. 36*, [2002] 4 SCR 710.

(2) “Strictly secular” in the *School Act* can only mean pluralist in the sense that moral positions are to be accorded standing in the public sphere irrespective of whether the position flows out of a conscience that is religiously informed or not. The meaning of strictly secular is thus pluralist or inclusive in its widest sense. *Chamberlain v. Surrey No. 36*, 2000 Carswell BC 2009 (and see other sources: BCLR, WWR, DLR, BCAC, WAC, Admin LR, E, M, P JJA.)

(3) Relating to the material world in contrast to spiritual.

***Secularism*, n.**

- What secularism does rule out, however, is any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community. A requirement of secularism implies that, although the Board is indeed free to address the religious concerns of parents, it must be sure to do so in a manner that gives equal recognition and respect to other members of the community. Religious views that deny equal recognition and respect to the members of a minority group cannot be used to exclude the concerns of the minority group. *Chamberlain v. Surrey School District No. 36*, [2002] 4 SCR 710.

Words and Phrases, Westlaw (2008), W&P 25036

Secular

Supreme Court of Canada

The [insistence of the *School Act*, R.S.B.C. 1996, c. 412] on strict secularism does not mean that religious concerns have no place in the deliberations and decisions of the Board. Board members are entitled, and indeed required, to bring the views of the parents and communities they represent to the deliberation process. Because religion plays an important role in the life of many communities, these views will often be motivated by religious concerns. Religion is an integral aspect of people's lives and cannot be left at the boardroom door. What secularism does rule out ... is any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community. A requirement of secularism implies that, although the Board is indeed free to address the religious concerns of parents, it must be sure to do

so in a manner that gives equal recognition and respect to other members of the community. Religious views that deny equal recognition and respect to the members of a minority group cannot be used to exclude the concerns of the minority group.

Chamberlain v. Surrey School District No. 36, [2002] 4 S.C.R. 710, [2002] at para. 19 McLachlin C.J.C. (Arbour, Binnie, Iacobucci, L'Heureux-Dubé and Major JJ. concurring)

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Endnotes

[1]This in part recognizes that courts and tribunals are increasingly relying more on looking at context when analyzing discrimination, and relying less on abstract formal analyses.

[2] The courts have affirmed that human rights legislation, including the *Code*, should be given a liberal and purposive interpretation, in keeping with its quasi-constitutional status. The higher courts have also provided details on the purposes of human rights statutes, also discussed in Section IV. 2.1.5.

[3] As stated in Section 29 of the *Code*.

[4] Relevant principles of statutory interpretation are considered in Section IV. 2.1. International laws and instruments that are relevant to developing creed policy include, but are not limited to the: (1948) *Universal Declaration of Human Rights* (UNDHR); (1966) *International Covenant of Civil and Political Rights* (ICCPRD); (1966) *International Covenant on Economic, Social and Cultural Rig*hts (ICESCR); and (1981) *Declaration on the Elimination of all Forms of Intolerance and Discrimination based on Religion or Belief*.

[5] B'nai-Brith. 2012 Audit of Antisemetic Incidents. National Executive Summary. Retrieved July 24, 2013 from www.bnaibrith.ca/audit2012/.

[6] Among Christian denominations, people self-identifying as "Roman Catholic" or simply "Christian" in their application accounted for the largest number of Christians filing human rights applications at the HRTO in the 2011-12 fiscal year (both 9.3 % each), followed by people self-identifying as Seventh Day Adventist (5.7%) and Christian Orthodox (2.9%).

[7] See *Ketenci v. Ryerson University*, 2012 HRTO 994 (CanLII).

[8] *R.C. v. District School Board of Niagara,* 2013 HRTO 1382 (CanLII).

[9] *Al-Dandachi v. SNC-Lavalin Inc.*, 2012 ONSC 6534 (CanLII).

[10] According to the 2011 National Household Survey (NHS), by 2011, almost one-quarter of Ontario residents (23%) were religiously unaffiliated, compared to 5% in the 1971 census.

[11] See *Kelly v. British Columbia (Public Safety and Solicitor General) (No. 3),* 2011 BCHRT 183 (CanLII).

[12] *Re O.P.S.E.U.* and *Forer* (1985), 52 O.R. (2d) 705 (C.A.).

[13] *Chabot c. Conseil scolaire catholique Franco-Nord*, 2010 HRTO 2460 (CanLII).

[14] *Huang v. 1233065 Ontario*, 2011 HRTO 825 (CanLII).

[15] A 2013 study of religious demographic trends in Canada by the Pew Forum found that Ontario has experienced the most significant increase in affiliation with minority religions among provinces in Canada (see Appendix 7). The share of Ontario residents who identify with faiths other than Protestantism or Catholicism has risen from about 5% in 1981 to 15% in 2011 (Pew Forum 2013).

[16] People identifying with no religion in Ontario in the 2001 census – 1,809,535 (or 16% of all Ontarians) – accounted for the third largest census denominational grouping after Protestant and Roman Catholic. By 2011, according to the 2011 National Household Survey (NHS), close to a quarter of Ontario residents (23%) were religiously unaffiliated, as compared to 5% in the 1971 census.

[17] See Appendix 8 for projected percentage change in religious affiliation in Canada from 2001 – 2017. According to the 2011 National Household Survey (NHS), the number of Canadians who belong to non-Christian religions – including Islam, Hinduism, Sikhism, Buddhism, Judaism, and Eastern Orthodox Christianity – has already reached 11% in 2011, up from 4% in 1981 (Pew Forum 2013). Of note, much of this diversity is projected to be concentrated in Ontario's largest cities.

[18] See Appendices 9, 10, and 11 for historical data on immigration trends by religious affiliation.

[19] The 2011 National Household Survey shows a small decline in the percentage of Ontario residents reporting to be Roman Catholic (31.4% in 2011 as compared to 34% in 2001, and 35% in 1991) and that a longer-term downward trend continues in the numbers of Ontarians who report to be Protestant (30.8% in 2011 as compared to 35% in 2001 and 43% in 1991), particularly among mainline Protestant denominations (Anglican, United Church, Presbyterian, Lutheran) (Statistics Canada, 2003a). Catholics overtook Protestants as the largest denominational grouping in Ontario for the first time in the 2011 NHS.

[20] The percentage of Christian Canadians born in non-Western countries continues to grow. As Beyer, 2008, p. 23 observes:

> Thus, the 2001 census revealed that people who simply identified themselves as Christian or who said they belonged to small Protestant groups, mostly without a previous history in Canada, had grown much more rapidly over the decade (~30%, from about 1 to 1.3 million) than the Roman Catholics, the mainline Protestants (who declined by 10%), the established conservative Protestant denominations, or even the Eastern Christians. Those among these "other Christians" who were born in non-Western countries increased by over 100%, commensurate with the growth in non-Christian religions over the same period. Analogously, although Roman Catholics increased by only 4%, their absolute numbers increased by around 600,000; and people born in non-Western countries accounted for over one-third of this growth. Therefore, as global Christianity is demographically becoming more and more a religion of the "south" [citing Jenkins, 2007], so can we expect that Canadian Christianity will continue transforming in a corresponding fashion.

[21] Source: Statistics Canada. 2013. Ontario (Code 35) (table). National Household Survey (NHS) Profile. 2011 National Household Survey. Statistics Canada Catalogue no. 99-004-XWE. Ottawa. Released June 26, 2013. www12.statcan.gc.ca/nhs-enm/2011/dp-pd/prof/index.cfm?Lang=E (accessed July 19, 2013).

[22] See Beyer (2006), "Religious Vitality in Canada: The Complementarity of Religious Market and Secularization Perspectives."

[23] Roger O'Toole, 2006, p. 20 observes: "Canadians now choose to define the nature and content of their religiosity by drawing from that 'reservoir of rites, practices and beliefs' with which they are most familiar 'without responding to any institutional prerequisites, or their consequences'. In these circumstances, their religion has generally acquired the fragmentary, syncretic, consumerist character associated with the term bricolage" (citing Yoye & Dobbelaere, 1993, p. 95-96). Based on their own empirical research, Peter Beyer (2008) and Paul Bramadat (2007) also observe how "[o]n the whole, youth of virtually all religious traditions are less loyal to these traditions and especially to the institutional expressions of these traditions (churches, mosques, temples, gurdwaras, etc.) than their age cohorts have probably been for many centuries if not millennia" (Bramadat, 2007, p. 120).

[24] In *Habits of the Heart: Individualism and Commitment in American Life*, Robert Bellah et al. (1985), coined "Sheilaism" to refer to a broader late 20th century trend in American religious conviction. Sheila Larson was a nurse whose self-defined faith included included being kind and gentle with yourself, taking care of others, believing in God, but without going to church, and seeing Jesus in oneself. For more on this trend in Canada, see Bramadat (2007); Beyer (2008); Closson James (2006); and O'Toole (2006).

[25] In this respect, Reginald Bibby, 1987, p. 85 argues that "[t]he gods of old have been neither abandoned nor replaced." Rather "they have been broken into pieces and offered to religious consumers in piecemeal form." Religious scholar, Closson James, 2006, p. 130 similarly concludes that "we should expect [religion] to continue to be characterized more by an eclectic spirituality... cobbled together from various sources rather than a monolithic and unitary superordinating system of beliefs." The growth of mixed faith marriages in Ontario is also contributing to people adhering to more than one faith tradition at the same time, sometimes depending on the context. "In 2001," one article notes, "nearly 20 per cent of people married someone outside their faith, according to Statistics Canada, up from 15 per cent two decades ago. Of that 20 per cent, Jews and Christians were the most likely to be in inter-religious unions...More than half of inter-religious unions in Canada were between a Catholic and Protestant (Noor, 2013).

[26] Seljak et al. (2008) highlight the significant transformations that have occurred since the first Gallup Poll after World War II asked Canadians if they had been in a church or synagogue sometime during the previous seven days. A full 67% of Canadians said they had (including 83% of Catholics). By 1990, positive response to the Gallup question had fallen to 23% throughout Canada (see also Byer, 2008). More recently, a 2011 Environics Institute Focus Canada Survey found that "[a]lthough the proportion with a religious affiliation continues to drop, these Canadians are as observant as ever in terms of attending religious services. Three in ten (29%) say they attend services at least once a week (up from 25% reported in Focus Canada in 2007, and 21% in 2003), while fewer now doing so only for special services (e.g., Christmas mass, Jewish High Holidays) (28%, down 5 points from 2007). Another one in five (22%, up 1) continue to say they have a religious affiliation but never attend services, with this group most prominently represented by Quebec residents and Catholics. In contrast, weekly attendance is most widely reported by Evangelical Christians (56%) and members of non-Christian faiths (42%)" (Environics Institute, 2011, p.40; See Appendix 17 for 2011 Focus Canada Survey Findings on Frequency of Attending Religious Services Among Canadians With Religious Affiliation 2003-2011).

[27] Kymlicka, Will (2003). "Introduction" In *Canadian Diversity/Diversite canadienne* May. Cited in Biles and Ibrahim, 2005, p.166.

[28] One recent study of federal public servants from several departments and agencies in the National Capital Region found among other things that: most policy practitioners and public decision makers were ill equipped to deal with religious diversity and most policies and programs did not consider religious diversity, with a few exceptions (Gaye & Kunz (2009); see also Beaman (2008); Biles & Ibrahim (2005); Bramadat (2007); Seljak (2005).

[29] This legislative framework makes explicit reference to religion or creed as an important part of Canada's celebrated diversity. It includes the (1982) Constitution Act's *Charter of Rights and Freedoms*, the (1988) *Multiculturalism Act*, and provincial human rights statutes.

[30] Will Kymlicka (2008) speaks about the need to add religion into the multicultural policy mix as a "third track" alongside ethnicity and race, noting a continuing "uncertainty about the role of religion within the multiculturalism policy, and about the sorts of religious organizations and faith-based claims that should be supported by the policy'" (cited in Kunz, 2009, p. 6). Scholars, seeing the reluctance to speak about religion as a public policy matter in Canada, describe religion as "a form of diversity that dares not speak its name" (Biles & Ibrahim, 2005).

[31] Periodisation based on Seljak (2012); see also; Beyer (2006); Beyer (2008); Bramadat (2005); and Grant, (1988) for similar periodisations.

[32] The main forms of religious diversity among early settlers in Canada overwhelmingly involved variations of Christianity. The popular hold of Roman Catholicism in Quebec, along with growing Christian religious diversity with the immigration of Lutherans, German Reformed Christians, Presbyterians, Methodists, Baptists, Congregationalists, Mennonites, Eastern Orthodox, and Irish Roman Catholics over the course of the late 18th and 19th century, scholars argue, led the early governors of Canada and Ontario to adopt

a more strategic and pragmatic approach, in part an effort to deter and dissuade dissent and rebellion. Statistical data on religion since the late 1800s also reveals that Sikhs, Muslims, Buddhists and Hindus, even if not always counted, have also all been present in Canadian society at least since the first census (Beaman & Byer, 2007; Beyer, 2008; see also Bromberg, 2012). Some argue that this pluralism not only forced the early recognition of religious freedoms, but also played a key role in evolving democratic institutions in Canada more generally (see Seljak et al., 2008).

[33] The Supreme Court of Canada traces the first expression of religious freedom in Canada to the 1760s, more specifically the (1763) Treaty of Paris, which, while bringing New France under the control of the British Crown (and by default, the Anglican Church of England), simultaneously "grant[ed] the liberty of the Catholick [sic] religion to the inhabitants of Canada" (*Saumur v. City of Quebec and Attorney General*, [1953] 2 S.C.R. 299 at 357, cited in Bhabha, 2012).

[34] For more on the idea of "plural establishment," see, Novak (2006), O'Toole (2006), and Seljak (2007).

[35] David Martin describes these officially recognized churches as functioning as a "shadow establishment" in the century of "Christian Canada" that followed Confederation. The term denotes the "semblance of detachment that the church maintained from the affairs of the state, when in reality, 'separation' really was mostly a demarcation of responsibilities" (Bramadat et al., 2008). The mainline Christian churches provided the new nation with its most sacred symbols and narratives, guiding its moral vision and cultural orientation. These churches also:

- semi-autonomously ran various public institutions in the new dominion, including education, healthcare and social services
- helped to legislate Christian morality (for example, passing laws protecting the Lord's Day, imposing restrictions on divorce, marriage, sexual morality, abortion, the sale and consumption of alcohol etc.)
- greatly influenced public policy and culture, partly from the pulpit (Canada had one of the highest church attendance rates in the world from the mid-1800s until the 1960s) (Seljak et al., 2007; Seljak et al., 2008).

[36]Also see Seljak et al. (2007); Seljak (2012).

[37] Biles and Ibrahim, 2005, p. 162 define social capital as "the community resources – the networks of social relations and the culture they generate – to achieve a common goal". Scholars further distinguish between *bridging capital* which "connects individuals across community lines" and *bonding capital* which "strengthens ties within groups" (Kunz, 2009, p. 12; see also Benson (2012b); Buckingham (2012); Jedwab (2008).

[38] This estimate comes from the *Canadian Non-profit and Voluntary Sector in Comparative Perspective*, which reports on the sector in 37 countries based on size, scope and donations. Among the registered religious charities (in Canada), more than 40% (32,000) are faith-based, which includes places of worship, clubs and other forms of association. (Citizenship and Immigration Canada 2009; citing Hall et al., 2005).

[39]Seljak, 2012, p. 9. According to this "commonsense," Peter Beyer, 2008, p. 14 further explains:

> There were the white, European, Christian and civilized peoples, some of who were admittedly 'more equal than others'; then there were the unalterable 'others' who had to be kept apart or, to the extent deemed possible, 'civilized'.

[40] Summarizing the key impact and intent of the *Indian Act* of 1876, Beyer, 2008, p. 14 notes:

> By the end of the 19th century, Canadian governments were pursuing a concerted policy whose aim was to assimilate Aboriginal people completely, to dissolve their separate identities both culturally and religiously. The *Indian Act* of 1876 was the corner stone and provided the blueprint for this policy. It effectively made Aboriginal people wards of the state, proscribed their religious practices, suppressed their distinct and highly varied forms of social and political

> organization, and attempted to socialize their children in residential schools run by Christian churches and designed to eliminate all distinct aboriginal cultural features, including language.

[41] See the Truth and Reconciliation Commission's (TRC) history of residential schools in their 2012 publication, *They Came for the Children* available on the TRC website at www.trc.ca. In a section exploring the role of the churches, this publication explains:

> Nineteenth-century missionaries believed their efforts to convert Aboriginal people to Christinaity were part of a worldwide struggle for the salvation of souls…The two most prominent missionary organizations involved with residential schools in Canada in the nineteenth century were the Roman Catholic Oblates of Mary Immaculate and the Church Missionary Society of the Church of England (the Anglican Church)…Methodist and Presbyterian mission societies, based in both Great Britain and the United States, also carried out work in Canada in the nineteenth century, and became involved in the operation of the residential school system…In his 1889 book *The Indians: Their Manner and Customs*, Methodist missionary John Maclean wrote that while the Canadian government wanted missionaries to "teach the Indians first to work and then to pray," the missionaries believed that their role was to "Christianize first and then civilize" (2012, pp.13-14).

[42] The term "antisemitic" is used here, as opposed to the alternate spelling of "anti-Semitic", for reasons explained in a formative (2002-2003) European Union Monitoring Centre on Racism and Xenophobia (EUMC) Report:

> The notation "antisemitism" will be given preference to the notation "anti-Semitism". This allows for the fact that there has been a change from a racist to a culturalist antisemitism, and in this context helps to avoid the problem of reifying (and thus affirming) the existence of races in general and a "Semitic race" in particular (p.11).

While the term anti-Semitism, in this view, reproduces the false notion of the existence of a "Semitic" race, and, as such, more strictly connotes racist forms of anti-Jewish thinking and behaviour, the term "antisemitism" can encompass new forms of hostility towards Jews or Judaeophobia that may not depend on notions of Jewish people as a "race" (see Section III 3.2.4 for further exploration of evolving forms of antisemitism historically and in the present).

[43] Bromberg, 2012, p. 61. Bromberg goes on to note how "[i]n 1829, the law requiring the oath 'on my faith as a Christian' was changed to allow Jews to not take the oath". "In 1831," she moreover notes, "a law which granted full equivalent political rights to Jews was passed, a first for the British Empire" (*ibid*.).

[44] Employment discrimination against Jews was common well into the 50s and 60s. Many institutions had quotas on the number of Jews they would hire, or forbidding their employment altogether (such as the City of Toronto's police force). In workplaces, and in both public and private facilities, signs commonly stated, "Gentiles Only," or "No Jews or Dogs Allowed." Overt discrimination was also happening in education, the military and in housing. For example, it was common for neighbourhood organizations and land developers to band together to form agreements ("racial restrictive covenants") to not rent or sell housing to members of unwanted races (including Jews), and/or to place such clauses in property deeds to maintain segregated neighbourhoods. Animosity towards Jews was particularly pronounced during economic downturns, such as the Depression of the 1920s and 30s, during which "foreigners" of various kinds were scapegoated. This included Canadian-born Jews, and often drew on rising international antisemitic propaganda, exemplifying the impact of globalization trends before the current era. See Adelman and Simpson (1996); Davies (1992); and Mock (2008).

[45] Liberal Prime Minister, William Lyon Mackenzie King (Canada's longest-serving Prime Minister) voiced such beliefs in Jewish inferiority, reflecting acceptable norms at the time. A 1943 Gallup poll, for instance, put Jews in third place, below the Japanese and Germans, as the most undesirable immigrants to Canada (Adelman & Simpson, 1996).

[46] See Bromberg (2012) and Patrias and Frager (2001) for more on the key historical role of Jewish Canadians in passing the Ontario *Human Rights Code* and other anti-discrimination legislation.

[47] The *Act* required all Chinese immigrants entering Canada to pay a $50 fee, which became known as a head tax. By 1903, the fee had increased to $500. This served, in effect, as a strong deterrent to further Chinese immigration after Chinese labourers built the Canadian Pacific Railway in the late 19th century. While the 1923 *Chinese Immigration Act* removed the head tax, this Act also stopped all Chinese immigration with few exceptions (such as business people, clergy, educators and students).

[48] This Act prohibited the immigration of persons who “in the opinion of the Minister of the Interior" did not "come from the country of their birth or citizenship by a continuous journey and or through tickets purchased before leaving their country of their birth or nationality.” This, in effect, barred immigration from South Asia since the long journey by boat necessitated a stopover in Japan or Hawaii to refuel and resupply.

[49] See, for instance, Lai, Paper and Paper (2005). Peter Beyer (2008) describes popular and government reactions to the significant growth and ethnic and religious diversification of Canada’s population between 1881 and 1911:

> The dominant Canadian identities could with some reluctance and suspicion accommodate the presence of Russian Doukhobors and eastern European Jews, but not Japanese Buddhists, Chinese Confucians, or Punjabi Sikhs…From the time of the first Chinese Immigration Act of 1885 to the second of 1923, government policy progressively made it more difficult and then virtually impossible for people from above all India, China, and Japan to enter Canada. The dominant attitude was that such people were just too unalterably foreign even to be assimilated (p. 13).

[50] The information about this case is derived from an article by Kevin Plummer, “Historicist: Citizenship and Character,” published in the online journal, *Torontoist*, on July 16, 2011. Drawing on archival material from, among other sources, an April 3, 1965 Toronto Star article, Plummer relates reported testimony from the original Citizenship proceeding as follows:

> [Judge] Leach asked what church they attended. “None,” Ernest replied. Didn’t the Bergsmas believe in God, the dumbfounded judge asked. Ernest paused to consider his answer and then replied, “No.” “Do you know that this is a Christian country?” Leach replied, according to a court transcript quoted in the press. “You must believe in something. The oath (of allegiance) doesn’t mean anything if you don’t believe in God…The things we believe in, in this country, stand for Christian values and the teachings of Jesus Christ.” He added: “Not everybody follows this, but that is what we try to attain in this country, the Christian way of life. I feel you must have some kind of faith, but you don’t seem to believe in anything from what I can gather… As I understand from your evidence, you have no religion at all.”

In the first appeal ruling at the Supreme Court of Ontario on March 17, 1965, Justice Stanley Nelson Schatz upheld this decision.

[51] The oath of allegiance which was required by law of all new citizens read: “I — swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her Heirs and Successors, according to the law, and that I will faithfully observe the laws of Canada and fulfill my duties as a Canadian citizen so help me God” (Cited in Plummer, 2011).

[52] See Bussey (2012) for poignant example of discrimination against Seventh Day Adventist conscientious objectors during WWII. The persecution, and advocacy efforts, of Jehovah’s Witnesses played a particular key role in advancing freedom of religion laws in Canada (see for instance Bhabha, 2012 for an account of precedent-setting case law in this respect).

[53] Seljak, 2012, p. 9 for instance notes that much of the anti-Catholicism in Protestant Canada before the 1960s was connected to prejudice against French Canadians (the great majority of whom were Catholic), as well as "anti-immigrant sentiment aimed at the Irish, Italians, Germans and other newcomers from Eastern and Southern Europe". Dominant "White" racial identities of the time were far from inclusive of all European ethnic groups. *Canada and Its Provinces (1914-17),* a popular and respected history text published in Toronto in 1914, presents Galatians as mentally slow; Italians as devoid of shame; Turks, Armenians, and Syrians as undesirable; Greeks, Macedonians and Bulgarians as liars; Chinese as addicted to opium and gambling; and the arrival of Jews and Negroes as "entirely unsolicited" (Mclaren, 1990).

[54] Scholars vary in how they explain these transformations in Canadian policy, law and sensibilities. Most acknowledge multiple causal factors at work. These include:

- unintended impacts of state centralization and expansion during WWII, which accelerated secularization processes (differentiation, rationalization of spheres, etc.);
- growing human rights awareness and community activism, mainly in response to the genocidal atrocities committed by Nazi Germany during WWII, but also as inspired by the US Black civil rights and strengthening labour movement;
- to a lesser degree, the growth of diversity in Canada following immigration policy reforms in the late 1960s (see Appendix I charting historical legal, policy and demographic shifts over this era).

The steady increase in the number and kind of ethno-cultural and religious categories reported in Canadian censuses over the last century – ethnic categories jumped from 30 to 232 from 1911 – 2001, and religious categories from 32 to 124 – are just one indication of this demographic transformation (Byer, 2008).

[55] There has been a move away from overt policies of assimilation requiring people to abandon cultural and religious differences to gain equal citizenship. The introduction of policies and legislation protecting minority groups' 'right to be and remain different', Seljek et al. argue (2008), reflects a significant transformation from a politics of social hierarchy emphasizing and privileging the rights of political, economic and social elites, towards what Charles Taylor calls a 'politics of universalism': a new consensus based on ideals of equality and non-discrimination.

This new universalism can be seen in the introduction of anti-discrimination legislation in the inter-war years, and its consolidation after that. Examples are:

- the *Ontario Human Rights Code* enacted in 1962, after the Bill of Rights first introduced human rights law at the federal level in 1960
- the lifting of some of the more draconian restrictions on Aboriginal cultural and religious practices in the 1950s and 1960s (granting Aboriginal people with "Indian status" full Canadian citizenship and the right to vote in 1960)
- the introduction of non-discriminatory federal immigration policy in the 1960s, and the state policy of multiculturalism in 1971 (later enacted in 1988), in the context of a greatly diversified and expanded (non-English and French) immigrant population
- perhaps most significantly, the enshrinement of individual and minority group rights, multiculturalism and religious freedom in the repatriated 1982 *Constitution Act*'s *Charter of Rights and Freedoms*.

[56] Signs of this growing separation of church and state, erosion of Christian privilege, and decline of its power to define public morality, post-1960, include:

- liberalizing laws governing sexual morality, marriage, divorce and abortion, beginning with the Trudeau governments (1968-1979, 1980-1984)
- displacing church control and assuming state control over healthcare and social services since the 1960s
- de-Christianizing Canada's public schools, especially after the 1982 Canadian *Charter of Rights and Freedoms*, and increasing public questioning of special government funding of Roman Catholic separate schools in Alberta, Ontario and Saskatchewan

- overturning the *Lord's Day Act* (1906) in 1985 to allow Sunday shopping
- a series of cases since then, that seek to put religions on an equal footing in the workplace (Bramadat et al., 2008; Seljak et al., 2007).

[57] Summing up such transformative developments, Seljak,et al. (2008) observe: "Christianity no longer enjoys the public power and prestige it once had. Christian churches no longer control the powerful social institutions they once operated hand-in-glove with the various levels of government. To a significant extent, religion in Canada has been privatized."

[58] Seljak, D., Schmidt, A. & Steward, A. (2008). Secularization and the Separation of Church and State in Canada. Multiculturalism Report # 22 (Unpublished)

[59] There were several key Supreme Court of Canada legal decisions in the 1950s that extended protection from discrimination to various disfavoured religious minorities, such as the Jehovah's Witnesses, long before the *Charter* enshrined religious freedom and equality (see Bhabha, 2012 for details on some of the cases). Bhaba argues that human rights tribunals largely followed American civil rights jurisprudence when they incorporated "reasonable accommodation" approaches to resolving workplace disputes in the 1970s. (*Ibid*.). Bhaba states that this approach was first applied to freedom of religion cases under section 2(a) of the *Charter* in the seminal *R. v. Big M Drug Mart Ltd.* case in 1985 ([1985] 1 S.C.R. 295).

[60] Bhabha (2012) cites the recent issue of Muslim congregational prayers in a Toronto-area middle-school cafeteria as one recent example of this new "transformative" versus merely "accommodative" vision of religious freedom. The section below on creed accommodation further traces the legal evolution of this more transformative and systemic approach.

[61] The HRTO identified applications where applicants checked the box for creed on the application form. Upon further OHRC review of these applications, we discovered that not all of the applications we recieved from the HRTO actually cited creed as a ground. Those that did not were not reviewed.

[62] Under-reporting of discrimination is a well-known phenomenon in the human rights world, as has also been observed in the reporting of hate crimes. Also, this general under-reporting tendency may be more prominent among newer Canadians. Many newcomers belong to creed minority groups, who are less familiar with, and/or who may feel less empowered or equipped to navigate and use the Ontario human rights legal system. Furthermore, since discrimination based on creed is often intertwined with discrimination based on other sometimes closely inter-related grounds (e.g. ethnic origin, race, colour, place of origin, ancestry), it is possible that cases involving creed are also being reported under other human rights grounds.

[63] The creed of the applicant was determined by how applicants self-identified in applications. In some cases, applicants were discriminated against because of their perceived creed, which in some cases was different than their actual creed. In such cases, the perceived creed was counted, because of our interest in the bases' of discrimination on the ground of creed.

[64] The total number of persons identifying as Christian (including all denominations) in Canada's 2011 National Household Survey (NHS) was 8,167,295 or 64.55% of the total population (Statistics Canada 2013). Roman Catholics made up 31.43% of Ontarians in the 2011 NHS, followed by persons affiliated with various Protestant denominations, who comprised 30.77% (or 3,892,965) of Ontario's population (if we aggregate, in order of their size, "Other Christian", United Church, Anglican, Presbyterian, Baptist, Pentecostal, and Lutheran denominations as reported in the 2011 NHS).

[65] The category of "Christian" is a composite category that we created to cover all Christian denominations. It does not refer simply to persons self-identifying specifically as "Christian" by affiliation.

[66] According to the 2011 National Household Survey (NHS), the Jewish population accounted for 1.55% of Ontario's population in 2011. Jews, however, accounted for a disrproportionate 10.7% of HRTO creed applications in 2011-12. While 0.13% (or 15,905) of Ontario's population were affiliated with "Traditional (Aboriginal) Spirituality" in the 2011 NHS, applications involving Aboriginal Spirituality comprised 2.9% (or 4) of all HRTO applications citing creed as a ground of discrimination in the 2011-12 fiscal year. Hindus and Siks constitute 2.9% and 1.42% of the Ontario population respectively, according to the 2011 NHS, while accounting for 7.1% and 2.1% of HRTO applications citing creed as a ground of discrimination in the 2010-11 fiscal year.

[67] Typically, services applications allege discrimination in public institutions such as health care, education and policing more often than other private services such as hospitality, dining and entertainment. But we do not have any data to confirm this is this case here.

[68] The OHRC's review of 2010-11 HRTO creed applications classified applications by city in which the incident occurred, as revealed in the "Location of Discrimination" question in 7b of HRTO's application form. These findings are not comparable with how the HRTO reports its application data, by region, or how we have here reported on the 2011-12 HRTO creed applications, both of which classify region by postal code. This data, however, does give a more precise sense of where allegations of discrimination are occurring.

[69] The HRTO's data for 2010-2011 suggest that Toronto is over-represented in applications alleging discrimination because of creed. In 2010/11, 27% of all applications filed were from Toronto, as compared to 44.6 % of all creed applications reviewed.

[70] Statistics Canada defines police-reported hate crimes as "criminal incidents that, upon investigation by police, are determined to have been motivated by hate towards an identifiable group. The incident may target race, colour, national or ethnic origin, religion, sexual orientation, language, sex, age, mental or physical disability, or other factors such as profession or political beliefs" (Statistics Canada, Police-reported hate crimes, June 7, 2011; www.statcan.gc.ca/daily-quotidien/110607/dq110607a-eng.htm). Statistics Canada has collected police-reported hate crime data yearly since 2006. It has only collected comprehensive data covering and comparing all of Canada (99% of the population) since 2010.

[71]The 2012 Statistics Canada study (the first of its kind reporting on hate crimes at the provincial level in all provinces and territories in Canada) showed that the highest rate of hate crime was reported in Ontario (particularly in the Census Metropolitan Areas). The 2011 study showed a 43.2% increase in hate crimes (901 in total) reported in Ontario in 2009 compared to 2008, and a 35% increase in hate crimes reported nationally in 2008 compared to 2007. See 2011 hate crime research based on 2009 data by Dauvergne and Brennan (2011) and Dowden and Brenna (2012) for research based on 2010 data.

[72] According to Statistics Canada, "the largest share of the West Asian population, 43% in 2001, were Iranian, while 20% were Armenian, 12% were Afghan, and 12% were Turks" (Lindsay 2001:9). The majority of Canadians of West Asian origin are Muslims (*ibid*., p.12).

[73] "A pilot study undertaken by Statistics Canada of hate-crime reports in 12 Canadian police departments," for instance, "indicated a sharp spike in anti-Muslim (and, oddly, antisemitic) incidents in the year after 9/11" (Seljak et al., 2007, p. 26). The study of hate crime reports of 12 Canadian police forces from major centres found 928 hate-crime incidents during 2001 and 2002, and 43% of these crimes were motivated by religion, second only to race or ethnicity (57%) (Seljak et al., 2007).

[74] See Statistics Canada (2003b) and Seljak et al. (2008) for analysis of survey findings.

[75] See Seljak et al. (2007).

[76]See Sharify-Funk (2011), Emon (2010), and Bramadat (2007).

[77] Quoting Seljak et al., 2008, pp. 13-14, who further observe:

> Some argue that Canada is essentially a Christian country and newcomers who are not Christians must learn to adapt to this reality. Others argue that Canada is essentially a secular society – with a strict separation of Church and State – and so it cannot accommodate the religious needs of newcomers without compromising its neutrality.

[78] There is some evidence to suggest that Canadians are growing somewhat weary of multicultural values of inclusion and tolerance and increasingly favour assimilation approaches to dealing with ethnic and religious diversity (see Appendices 24, 25). For instance, a 2005 Pew Global Attitudes Survey found that the distribution of opinion in Canada was markedly more assimilation-oriented than most other OECD countries in the sample, and no different from the United States (see Appendix 27: 2005-2008 World Values Survey on perceived Importance of immigrants "adopting the values of my country").

[79] The Alberta Human Rights Tribunal case of *Randhawa v. Tequila Bar and Grill Ltd*, 2008 AHRC 3 (CanLII) involved a turban-wearing Sikh man who was denied entry to a bar because, according to the doorman, the bar "had an image to maintain" and did not want "too many brown people in." This is just one of many disturbing current examples of intersectional discrimination based on race, religion, ethnicity and ancestry. See the OHRC's *Creed case law review* for other cases involving intersecting grounds.

[80] Canadian researchers observe that overall, very little scholarly work has been conducted on the types and levels of religious discrimination in Canada (Bramadat, 2007; Seljak, 2012). The data that does exist, disproportionately from opinion surveys, has many methodological limitations, which limit the extent we can draw general conclusions from it. This lack of sophisticated research and data on religious and creed-based demographics, discrimination and intolerance in general leads to serious constraints to informed, evidence-based policy-making. Although the last decade has seen growing interest and attention to religious/creed diversity in policy and research circles, there are still major gaps in basic data.

[81] The 2003 Ethnic Diversity Survey is one of the few studies that looks directly at Canadian experiences and perceptions of religious intolerance and discrimination (Statistics Canada, 2003b). A fairly small proportion of respondents said that they had "experienced discrimination or been treated unfairly" because of their religion. Of the people who reported they experienced discrimination in the last five years, 13% cited religion as a reason (16% for women, 11% for men). Fewer visible minorities (10%) claimed discrimination based on religion, with most citing race and ethnicity as the primary basis (see Appendix N for percentages of visible minority versus non-visible minority Canadians reporting discrimination based on religion). Another recent University of Toronto study by Jeffrey Reitz, Rupa Banerjee, Mai Phan and Jordan Thompson, 2008, p. 15 found visible minority status to be a considerably stronger predictor of economic disadvantage and discrimination than religion. Their study of Statistics Canada's 2002 Ethnic Diversity Survey found that "[c]onsistent with their membership in visible minority groups, Muslims, Hindus, Sikhs, and Buddhists experience more disadvantage both objectively in terms of household income and subjectively in terms of reported discrimination and vulnerability" compared to other religious groups with fewer numbers of visible minorities. See Appendices 29 and 30 for the visible minority composition of Canadian religious groups, and objective and reported inequality and discrimination by Canadian racial and religious groups. Reitz et al. (2008) nevertheless qualify their findings by noting that the effects of 9/11 and ensuing religious polarization may not be reflected in the early 2002 census data they analyzed. In fact, the authors predict somewhat different results if the study was repeated today, given religious polarization trends.

[82] For example, Peter Beyer's (2005) study shows that Muslim Canadians have the second highest educational attainment in Canada (after Jews), which is 10% above the Canadian average. Despite this, "Muslims quite clearly earn less for their level of education" (cited in Seljak et al., 2007). This appears to remain the case for well-educated second-generation Muslims (see also Model and Lin, 2002) study of 1991 census data, which reached similar conclusions; cited in Seljak et al. (2007). Model and Lin, 2002, p. 12 conducted a research study focusing on employment occupation and labour participation rates, and

more broadly, "indicators of relative economic well-being of Canada's religious minorities suggests that Muslims are the most handicapped, with Sikhs not far behind" (p.1083). Such findings led Seljak et al. (2007) to conclude that "[s]hould this situation continue into the second and third generations of the post-1960s surge of Muslim immigrants, we might well see in Canada the development of religious conflict that has marked Europe recently".

[83] Noting the ways religion is often implicated in "neo-racism," Balibar, 2007, p. 85 explains::

> What we see here is that biological or genetic naturalism is not the only means of naturalizing human behaviour and social affinities…[C]ulture can also function like a nature, and it can in particular function as a way of locking individuals and groups a priori into a genealogy, into a determination that is immutable and intangible in origin.

For more on the distinctive qualities of contemporary "neo racism," see Barker (1981) on "new racism;" Miles (2003) on "racialization;" Modood (1997) on "cultural racism" and Taguieff (2001) on "differentialist racism."

[84] The very definition and concept of "racialization" anticipates this possibility. British sociologist Robert Miles provides a theoretical elaboration of the concept of racialization in a way that is not exclusively premised on "biological inherentism" and skin colour. For Miles, racialization involves "signifying processes" that"construct differentiated collectives as races" based on "historically shifting markers of racial otherness." These may draw on, and intermix with, other -isms (nationalism, ethnicism, etc.) (Miles, 1982, p.170). The concept of "racial articulation" was developed by Miles to help think through such interrelations between exclusionary ideologies and "othering" processes.

[85] Scholars have traced the historical evolution from anti-Judaism or "Judenhass (hatred of Jews as evident in the Persian and Seleucid Empires, and the early Christian Church and Roman Empire denunciation of Jews as "Christ-killers") to the antisemitic racism of the modern era that made the "Final Solution" possible, based on biologically deterministic ideas of race and nation. German intellectual Wilhelm Marr first coined the term "*Antisemitismus*" in 1879. Historian Martin Bunzl, 2007, p. 12-13 adds:

> Both the term and its attendant ideology were the brainchild of German intellectuals who made the exclusion of Jews the cornerstone of a political and cultural movement. Hatred of Jews long preceded this movement, of course. But prior to the modern period, anti-Judaism operated on religious grounds. Persecution was often vicious, but, in theory at least, Jews could overcome their stigma through conversion. What was new about the late nineteenth century's variant of Jew-hatred was its anchoring in the notion of race. A secular concept grounded in modernity's striving toward rational classification, the idea of race gave Jews an immutable biological destiny. All this was connected to the project of nationalism, with the champions of antisemitism seeing themselves, first and foremost, as guardians of the ethnically pure nation-state. Given their racial difference, Jews could never belong to this national community, no matter their strivings for cultural assimilation

[86] This definition is taken from a 2004 report of the European Union Monitoring Centre on Racism and Xenophobia (EUMC). This was the first comprehensive study of antisemitism in the EU. In 2005, the EUMC (since renamed the European Union Agency for Fundamental Rights [FRA]) adopted the following "working definition" of antisemitism, based on this earlier report:

> Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities (cited on the website of the European Forum on Antisemitism at www.european-forum-on-antisemitism.org/working-definition-of-antisemitism/english/; Retrieved May 10, 2013).

Units of the Organization for Security and Co-operation in Europe (OSCE) concerned with combating antisemitism also use the definition, as does the US State Department's report, *Contemporary Global Antisemitism*, released earlier this year.

[87] The *Ottawa Protocol* (2011) reaffirms the EUMC – now Fundamental Rights Agency (FRA) – working definition of antisemitism, which says:

> Contemporary examples of antisemitism in public life, the media, schools, the workplace, and in the religious sphere could, taking into account the overall context, include, but are not limited to:
>
> - Calling for, aiding, or justifying the killing or harming of Jews in the name of radical ideology or an extremist view of religion.
> - Making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as collective – such as, especially but not exclusively – the myth about a world Jewish conspiracy, or of Jews controlling the media, economy, government or other societal institutions.
> - Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews.
> - Denying the fact, scope, mechanisms (e.g. gas chambers) or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II (the Holocaust).
> - Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.
> - Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations (see Inter-parliamentary Coalition for Combating Antisemitism, 2010).

[88] See *supra* note 42 for elaboration of the rationale for using the notation of “antisemitism” as opposed to “anti-Semitism”.

[89] While some view antisemitism as properly only applying to its dominant race-based modern 19th century variant, others highlight continuities and transformations over a long history extending from ancient times to the present.

[90] Ben-Moshe, 2007, p. 108 for instance argues:

> The new antisemitism is not “classic” antisemitism directed at Jews because they are foreign and different, but the spilling over of the Israeli-Arab conflict to Jewish communities throughout the world...[It] is aimed at the collective Jewish state, albeit by employing classical antisemitic characteristics…”.

Though its precise characteristics and features remain contested and are evolving, included in the new antisemitism (some call it “Judeophobia”) are things like “singling Israel out for selective condemnation and opprobrium” (quoting the Ottawa Protocol), targeting the state of Israel as a “Jewish collective,” denying Jews the right to national self-determination afforded to others (for instance, by attacking the legitimacy of the state of Israel, or comparing Israel with apartheid South Africa).

[91] While acknowledging how anti-Zionism can take antisemitic forms, the (2004) Report of the European Union’s Monitoring Centre for Racism and Xenophobia suggests that only if Jews are targeted “as Jews” is it legitimate to speak of “antisemitism.” Anti-Zionist viewpoints, from this perspective, are only antisemitic if "Israel is seen as being a representative of 'the Jew,'" as opposed to "hostility towards Israel as 'Israel,' i.e. as a country that is criticized for its concrete policies" (2004 European Union Monitoring Centre on Racism and Xenophobia Report, cited in Bunzl, 2007).

[92] See *supra* note 42 for elaboration of the rationale for using the notation of “antisemitism” as opposed to “anti-Semitism.”

[93] Partly in recognition of this, in 2009, the Canadian Parliamentary Coalition to Combat Antisemitism was established by all four major federal political parties to investigate and combat antisemitism, including new antisemitism.

[94] See bnaibrith.ca/files/audit2011/AUDIT2011.pdf.

[95] B'nai Brith (2012).

[96] Tel Aviv University (2010). *Antisemitism Worldwide 2010 General Analysis*. Edited by Roni Stauber. The Stephen Roth Institute for the Study of Contemporary Antisemitism and Racism and The Kantor Center for the Study of Contemporary European Jewry. Study cited in Sutcliffe, 2007.

[97] OHRC, 2005, p. 10. The OHRC's *Policy and guidelines on racism and racial discrimination* further describes Islamophobia as "[a] contemporary and emerging form of racism in Canada" that "[i]n addition to individual acts of intolerance and racial profiling…leads to viewing Muslims as a greater security threat on an institutional, systemic and societal level". The Canadian Race Relations Foundation (2013b) similarly defines Islamophobia as "expressions of fear and negative stereotypes, bias or acts of hostility towards the religion of Islam and individual Muslims."

[98] Definition taken from Netherlands national submission as part of an unpublished 2002 European Union Monitoring Centre on Racism and Xenophobia (EUMC) study cited in Allen, 2010, p. 134. Named the RAREN 3 data collection project, the EUMC did this study in late 2001 and early 2002, to establish universally accepted definitions for "racism," "xenophobia," "antisemitism" and "Islamophobia." It involved surveying EU member states for their definitions.

[99] British Runnymede Trust (1997), cited in Jamil, 2012, p. 65.

[100] The European Monitoring Centre on Racism and Xenophobia commissioned Allen and Jorgen S. Nielsen to co-author its *Summary report on Islamophobia in the EU after 11 September 2001*, 2010, p. 190. Allen continues to lead government sponsored research on Islamophobia in the UK, and internationally. He defines Islamophobia as

> An ideology, similar in theory, function and purpose to racism and other similar phenomena, that sustains and perpetuates negatively evaluated meaning about Muslims and Islam in the contemporary setting in similar ways to that which it has historically, although not necessarily as a continuum, subsequently pertaining, influencing and impacting upon social action, interaction, response and so on, shaping and determining understanding, perceptions and attitudes in the social consensus - the shared languages and conceptual maps - that inform and construct thinking about Muslims and Islam as Other. .. As a consequence of this, exclusionary practices - practices that disadvantage, prejudice or discriminate against Muslims and Islam in social, economic and political spheres, including the subjection to violence – are in evidence. For such to be Islamophobia however, an acknowledged 'Muslim' or 'Islamic' element - either explicit or implicit, overtly expressed or covertly hidden, or merely even nuanced through meanings that are 'theological', 'social', 'cultural', 'racial' and so on, that at times never even necessarily name or identify 'Muslims' or 'Islam' - must be present.

Though cumbersome and unwieldy in its definition, Allen arguably advances the analytical purchase of the concept by moving away from definitions that:

- hinge on distinguishing between "open" or "closed," "true" or "false" representations of Islam (which tend to engender a fractious, but largely irrelevant, politics of authenticity, i.e. "*real* Islam says…")
- do not distinguish between effects and causes of Islamophobia and other related phenomenon (either reducing it, or ignoring its relationship to racism, xenophobia, orientalism, etc.)
- treat Islamophobia in a social and historical vacuum, either over-generalizing or failing to see connections beyond a specific event or issue in time;
- do not elaborate the precise "ideological" and discursive mechanisms for sustaining and perpetuating it.

[101] Zine, 2004, p. 113. Zine, a professor of sociology at Wilfrid Laurier University, argues: "to capture the complex dimensions through which Islamophobia operates, it is necessary to extend the definition from

its limited conception as a 'fear and hatred of Islam and Muslims' and acknowledge that these attitudes are intrinsically linked to individual, ideological, and systemic forms of oppression that support the logic and rationale of specific power relations".

[102] Questions include: to what extent are the tenets of Islam actually a focus of Islamophobes, and to what extent are Muslims or Arabs or South Asians as a people targeted, no matter what their beliefs? How can a highly multi-ethnic religious community that does not share biological descent be the subject of racism? Meer and Modood, 2010, p. 77 argue that "while it is true that "Muslim" is not a (putative) biological category in the way that "Black" or "south Asian" (aka "Paki"), or Chinese is, neither was "Jew": In that instance it took a long non-linear history of racialization to turn an ethno-religious group into a race." Similarly, "Bosnian Muslims were "ethnically cleansed" because they came to be identified as a "racial" group by people who were phenotypically, linguistically and culturally the same as themselves". Meer and Modood, 2010, p. 82 go on to observe how "it is frequently stated that while gender, racial and sexuality based identities are ascribed or involuntary categories of birth, being a Muslim is about chosen beliefs, and that Muslims therefore need or ought to have less legal protection than these other kinds of identities. What this ignores, however… is that people do not choose to be or not to be born into a Muslim family. Similarly, no one chooses to be born into a society where to look like a Muslim or to be a Muslim invites suspicion and hostility, and this logically parallels the kinds of racial discrimination directed at other minorities…".

[103] Most agree that while current-day Islamophobia has distinct features, it draws upon a reservoir of discourses, images and hostile stereotypes from a much longer European historical encounter with Islam.

[104] Both quantitative and qualitative studies to date show increasing levels of anti-Muslim prejudice. Much of this research is based on opinion polls and surveys. A report by the Toronto Police Service showed a 66% increase in hate crimes in Toronto in 2001, with the largest increase being against Muslims (Zine, 2004). Incidents reported that year included: the stabbing of a Muslim man; the beating and and hospitalization of a 15-year-old boy; attempts by drivers to run down Muslim women as they crossed the street; threats to Mosques and Islamic schools; and in Hamilton, not far from Toronto, the firebombing of a Hindu temple that was mistaken for a mosque (Zine, 2004). Another Ipsos Reid poll found that 60% of people surveyed felt there was increased discrimination against Muslims compared to 10 years ago (Chung, 2011; cited in Jamil, 2012). For more qualitative research on Islamophobia see Jamil (2012) and Perry and Poynting (2006). Further qualitative research on Islamophobia in Canada was being conducted by Dr. Barbara Perry in 2012, including an unpublished (at the time) year-long study on the rise of incidents of hate-based attacks against Muslims.

[105] Ihsaan Gardee, Executive Director of CAIR-CAN, commented on three recurring myths encountered in the Canadian context: (1) Muslims are monolithic – they all believe, practice and manifest in the same way; (2) Muslims are trying to undermine democratic institutions and pose a threat to society; (3) there is a necessary link between hate and Islam (e.g. Islam as hateful towards women, LGBT minorities, non-Muslims, etc.).

[106] For example, in a 2006-2007 Environics Canada survey, the most comprehensive of its kind, 28% of the general Canadian population sampled believed that "most" or "many" Canadians are hostile towards Muslims (Adams, 2009, p.23). Thirty-eight percent of the 2,000 Canadians surveyed said their impression of Islam was negative. Security concerns were evident in such assessments as most respondents viewed a terrorist attack perpetrated by Canadians with a Muslim background as either very (19%) or somewhat (40%) likely.

A diverse range of later opinion polls and surveys show growing levels of animosity towards Muslims, who were generally perceived to be the least trusted and the most disliked of all religious, ethnic or racial groups among the general Canadian population. For example, in a (2007) Léger Marketing Poll commissioned by Sun Media, only 53% of the 3,000+ Canadian adults surveyed between December 2006 and January 2007 said they held a positive view of the Arab community, lower than that for the Black (70%) or Jewish (76%) communities (Léger Marketing 2007). A (2008) poll of 1,522 Canadians conducted by Léger Marketing on behalf of the Association for Canadian Studies and the Canadian Race

Relations Foundation showed similar results (Hill, 2012; see also Jedwab, 2008). An equivalent phone survey would have a margin of error of 2.9 per cent, 19 times out of 20. When asked how much they trusted Protestants, Catholics, Jews, Aboriginal people, immigrants and Muslims, the overall "total trust" scores for the five groups (using a combination of rankings for "trusted a lot" and "trusted somewhat") were: Protestants 71%, Catholics 70%, Jews 69%, Aboriginals 64%, immigrants 64% and Muslims 48% (with mistrust levels of Muslims being highest for older Canadians). People aged 18-24 gave Muslims the highest rating for trustworthiness, and people over 65 gave Muslims the lowest rating. A November (2010) Angus Reid Public Opinion online survey asked 1,006 randomly selected Canadian adults if Canada is tolerant or intolerant towards nine different groups (Angus-Reid, 2008). One-third of respondents (33%) thought that Canadian society was intolerant towards Muslims, the highest of all categories (followed by Aboriginal Canadians and immigrants from South Asia). See Appendix 31 for more on findings. When this same poll asked who is most disliked in Canada, Muslims came out on top at 33%, followed by immigrants from India and Pakistan (24%), Africa (16%) and China (10%).

Another 2011 survey conducted by the Association of Canadian Studies found that 43%, or less than half of the 2,345 people polled, expressed "very positive" or "somewhat positive" perceptions of Muslims (Boswell, 2011; cited in Jamil, 2012).

[107] See Allen (2010) focusing on the UK context in this respect.

[108] The 2006-2007 Environics Focus Canada Survey survey found that 55% of Canadians thought banning Muslim headscarves (of any kind) was a bad idea, compared to 57% of Americans and 62% of Britons (Adams, 2009). Thirty-six percent called the ban a good idea. Environics surveyed 500 Canadian Muslims, as well as 2,000 members of the Canadian general public, to gain comparative insight into attitudes towards and about the integration of Muslims in Canada, inspired by a parallel study conducted by the Pew Global Attitudes project in France, Spain, Germany and Great Britain. The survey of Canadian Muslims took place from November 30, 2006 to January 5, 2007, while the general population survey occurred between December 8 and December 30, 2006 (Adams, 2009). Interestingly, when asked whether they thought most Muslims wanted to "adopt Canadian customs and way of life" or "be distinct from the larger Canadian society," a modest majority (55%) of Muslims said they believed most Muslims wanted to adopt Canadian customs. Among the general population, just a quarter of all Canadians (25%) believed that most Muslims are interested in adopting Canadian customs, and a majority (57%) believed that Muslims wish to remain distinct. Seven percent of the general public believed Muslim Canadians are interested in both integrating and remaining distinct (Adams 2009). Canada had the second greatest disparity between the opinions of the Muslim community and the general population of all five countries surveyed (including France, Germany, Britain and Spain). This finding may show that many Canadians associate wearing such outer religious symbols as the hijab with a failure or resistance to adapt to "Canadian customs and norms" (versus merely expressing "reasonable" security and identification concerns as often portrayed). Retaining *both* cultural distinctness *and* adapting to Canadian norms was rarely seen as an option – an either/or approach dominated the perceived realm of possibilities.

[109] Though not explicitly stated, Bill 94 takes specific aim at Muslim women who wear the niqab (full-face veil) in public, for avowed concerns around security, communication and identification.

[110] Sharify-Funk (2011). The 2010 Angus Reid poll also found 95% of Quebecers supported the Bill. Overall, men were more likely to support the Bill than women (83% vs. 77%), and people over 55 were more likely than those under 35 (86% vs. 69%). The Bill received wide public support from people like Prime Minister Harper ("the law...makes sense") and Michael Ignatieff (who spoke of sensible compromise). Mario Conseco, vice president of public affairs for Angus Reid, noted that "it is very rare to have such a high level of public support for a government measure," further noting that "such breadth of consensus suggests a turning point: a moment at which Canadians are reaching the limits of our vaunted self-image as tolerant and inclusive" (cited in Sharify-Funk, 2011, p.146.

[111] As was found in the 2006 Environics Canada Survey, the 2011 *Focus Canada Survey* by the Environics Institute found that the Canadian public is most likely to feel that Muslims experience discrimination (often or sometimes). This survey was based on telephone interviews with a representative sample of 1,500 Canadians (aged 18 and over) between November 21 and December 14, 2011. The survey sample, stratified to ensure coverage of all 10 provinces, reflects the population by age cohort, gender and community size. The results from a survey of this size drawn from the population are expected to produce results accurate to within plus or minus 2.5%, in 95 out of 100 samples.

[112] The youngest cohort of Canadian Muslims was the most likely to report an experience of discrimination in the 2006-2007 Environics Canada survey: 42% of people aged 18 to 29 reported such an experience, 11 points above the Muslim average (Adams, 2009). Women were also more likely than men to say they had been discriminated against, a trend in part linked to their greater visibility when wearing headscarves (hijab) or face veils (niqab) identifying them as Muslim (Adams, 2009; see also Jamil, 2011).

[113] A 2002 national survey by the Canadian branch of the Council for American-Islamic Relations (CAIR-CAN) – entitled "Canadian Muslims One Year After 9-11" - showed that Muslims felt they were increasingly the targets of religious discrimination following 9/11. Fifty-six percent of respondents reported experiencing anti-Muslim incidents in the year after 9/11. Verbal abuse accounted for 33% of incidents, racial profiling accounted for 18% and workplace discrimination for 16% (cited in Council for American-Islamic Relations Canada, 2004, p. 6).

[114] Jamil, (2012).

[115] Husaini (1990).

[116] Unlike classical antisemitism and other modern forms of racism that questioned racialised others' "fitness for inclusion in the national community...in the interest of national purification," Bunzl, 2007, p. 13 comments on the contemporary European situation: "Islamophobes are not particularly worried whether Muslims can be good Germans, Italians, or Danes. Rather, they question whether Muslims can be good Europeans", to which we could add, citizens of western secular liberal democracies more broadly.

[117] See for instance Thomas (2009).

[118] Calhoun, 2008, p. 7. The emergence and propagation of a more closed and rigid "ideological secularism" in Canada and elsewhere, as noted in the 2008 Bouchard-Taylor Commission report among other research, has in part been a response to global religious resurgence, the "War on Terror" and increasing religious diversity and non-western immigrant presences in major western metropolitan centres.

[119] Quoting Bramadat, 2007, p. 121. From this reductive perspective, Bramadat notes, "all acts of altruism, kindness, creativity and human solidarity one sees in religion are treated as illusions oriented toward duping outsiders and insiders" (*ibid*.; see also Seljak et al., 2007).

[120] Noting an upsurge in anti-immigrant rhetoric positioning religion as a barrier to immigrant integration, Seljak et al. (2007) envisions:

> [A]nti-immigration – and worse anti-immigrant discourse – will increasingly be constructed in terms of the need of a putatively secular, democratic, egalitarian and enlightened society needing to protect itself from religious communities identified with immigrant populations and imagined as regressive, anti-democratic, authoritarian and irrational.

Using supposedly democratic and egalitarian ideals to socially exclude ethno-racial and religious minorities is a classic example of what Henry and Tator (2009) call "democratic racism". They describe democratic racism as "the most appropriate model for understanding how and why racism continues in Canada." They broadly define democratic racism as an ideology that permits and sustains people's ability

in Canada to maintain and reconcile two apparently conflicting sets of values: (1) liberal democratic values and principles such as justice, equality and fairness, and (2) non-egalitarian values that reflect and sanction negative feelings, attitudes and discriminatory behaviours towards minority racial groups.
[121] This trend has been noted in recent high-profile religious minority accommodation cases in public life, in areas like congregational prayers in school, kirpans in schoolyards and courtrooms, equally funding religious schools, or faith-based family mediation (see Seljak et al., 2008). Some incidents and reservations initially involved Muslims and a perceived threat of "Islamicisation," but eventually led to criticism of religious practice in public more generally. As a result, previously unquestioned accommodation of religious minorities across the religion spectrum are now being challenged. An example of this is the recent controversy following media reports of congregational Muslim prayers in a Toronto-area public middle school. Bromberg (2012) observes how the ensuing public debate resulted in public comments about ending rentals of facilities to Jewish and other faith groups for after-school religious activities. Bromberg, 2012, pp. 62-63 further notes how public misunderstanding about the fundamental purpose and rationale for reasonable accommodation is "creating a climate of animosity and mistrust towards new immigrants, as well as existing cultural/religious communities." Also, "new demands that seem to threaten established ways or norms are resulting in a pull back against publicly accepted rights that the Jewish community and other groups have enjoyed".

[122] More than one participant expressed this view at the January 2012 OHRC Policy Dialogue on Creed Human Rights at the University of Toronto's Multi-faith Centre. A 2013 episode of CBC's "Cross-Country Check-Up" also prominently featured the view that Christian Canadians were now viewed and treated as second-class citizens in the public sphere and dominant institutions, particularly when compared to those identified as more secular. (Sunday March 3, 2013 edition, "Does religion have a place in public life?").

[123] In many instances, women's bodies and comportment have become a major area for playing out social conflicts within and between minority and majority communities, with men (and some women) in both communities vying for control. An example here is the recurring political and media debate over Muslim women wearing head scarves (see, for instance, Banerjee & Coward, 2005; Sharify-Funk, 2011).

[124] See Shipley (2012).

[125] Some case law examples showing religious diversity and conflict within similar communities (either race or religion) include conflicts between:

- SIkhs of a higher (Jat) caste claiming discriminatory exclusion from a religious organization led by those of a lower (Ravidassi or Chamar) caste; *Sahota and Shergill v. Shri Guru Ravidass Sabha Temple*, 2008 BCHRT 269 (CanLII)
- an Aboriginal Catholic employee alleging that the Aboriginal Executive Director was biased towards Aboriginal Catholics due to Canada's residential school history; *MacDonald v. Anishnawbe Health Toronto*, 2010 HRTO 329 (CanLII)
- a Jewish kosher caterer who is not "orthodox or shomer Shabbat" alleging that a Jewish kosher certifying organization treated him differently than if he had been orthodox; *Rill v. Kashruth Council of Canada*, 2008 HRTO 162 (CanLII)
- a Muslim travel agent imposing different requirements for getting a hajj visa to travel to Saudi Arabia on the basis that African Muslims overstay their visas; *Tulul v. King Travel Can*, 2011 HRTO 438 (CanLII).

[126] See Beyer (2008), as discussed in endnote 20.

[127] See Bramadat (2007). Ethnic and racial tensions were recently shown in a demographically transforming Toronto-area church, where the leadership became divided along racial lines, with newer and more numerous visible minority congregation members claiming discrimination by the older, white church establishment.

[128] Systemic faithism may appear neutral on its surface, but nevertheless, has an "adverse effect" or exclusionary impact on persons belonging to particular communities of belief.

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

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

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

[131] Residual Christianity can be a basis of systemic faithism, to the extent that it results in the inadvertent disadvantaging of individuals and communities practicing faiths and creeds outside of the historical mainline Christian denominations (whether non-Christian or non-mainstream Christian).

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

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

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

- The national motto, *A Mari usque ad Mare* (from sea to sea) is taken from Psalm 72:8 ("He shall have dominion from sea to sea and from river unto the ends of the earth.")
- Some provincial and municipal governments have opened sessions of legislatures and municipal councils with Christian prayers and have required an oath to God in courtrooms (Examples taken from Beaman, 2003; Biles & Ibrahim 2005; Beyer, 2008; Kunz 2009; O'Toole 2006; Seljak et al., 2008).

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

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

Roger O'Toole (2006) highlights many other ways that Victorian Christianity in particular (with historical roots in Britain and Western Europe) has profoundly shaped contemporary Canadian institutions, from universities, hospitals and social service agencies, to the political party system, welfare state and public morality (including contemporary preoccupations with law and order) more generally.

[135] R.S.O. 1990, c. H.19, s. 19 (1).

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

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

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

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

[139] Many recent high-profile, precedent-setting accommodation cases receiving significant public and media attention have involved members of the Sikh faith. Public controversy has surrounded many of these cases, whether involving wearing kirpans (ceremonial daggers) in schools, legislatures or courtrooms, or wearing turbans or uncut beards in the place of standard workplace uniforms and safety equipment. All of these cases involve public expressions of religion, against the status quo norm. The Sikh-Canadian community has been at the forefront of expanding the legal human rights frontiers of

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

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

[140] A 2007 Léger Marketing poll commissioned by Sun Media surveying over 3,000 Canadians, for instance, asked respondents: "Does respecting the following religious practices pose a problem to living in your city's society?" Levels of tolerance for religious practice progressively declined as observances became more public and visible, particularly those of the Islamic faith. For instance, whereas a majority believed that prayer (84%), the observance of the Ramadan fast (83%), and prohibition of alcohol (77%), did not pose a problem, the veil, contrastingly, was seen to pose a problem for 37% of respondents, as compared to the wearing of religious ornaments more generally (25%) (Léger Marketing, 2007). While the meaning and implications of such findings are debatable (for instance how much is resistance to the veil attributable to concerns with gender inequity versus civic norms of what belongs in public/private), religious studies scholars have observed an evolution of Canadian identities and norms of civic engagement in the current era. The historic maxim that "to be a good Canadian one must be Christian," Seljak, 2012, p. 10 for instance observes, has increasingly "been replaced with a new one: to be a good Canadian (egalitarian, democratic, rational and multicultural) one must be secular – or at least the right kind of religious person, that is, one who confines religion to private life".

[141] Survey and opinion poll research provides some support of the view that "secularism in Canada can accommodate historically dominant forms of Christianity" and/or expressions of religion/creed that are consistent with this, but not faiths or practices that are perceived not to be as such. Drawing attention to this double standard, Seljak et al. (2008) for instance cite the example of the 2007 Ontario election campaign debate around religious school funding, which saw the (John Tory) conservative proposal for extending public funding to faith-based schools beyond Catholicism roundly rejected by the electorate, as an affront to secular ideals (in terms of what belongs in the private versus public sphere) and threat to civic unity. Interestingly, while a mid-election poll conducted for the CTV television network and the *Globe and Mail* newspaper showed that 71% of the electorate was opposed to public funding for faith-based schools, subsequent coalitional efforts organized under the banner of 'One School System', advanced by the Canadian Civil Liberties Association and (solely among political parties) the Green Party of Ontario among others, gained little traction or support from the public for its proposal to end public funding of Catholic schools. Another September 10, 2007 opinion poll published in the *Montreal Gazette* during the Quebec Bouchard-Taylor Commission on Reasonable Accommodation similarly revealed that while Quebecers overwhelmingly disapproved of Jews or Muslims getting time off work to pray (72%), or Muslim women wearing the (face-covering) niqab in public (67%), or the hijab in school (61%), some 59% of respondents had no issue with displaying Christian crucifixes on the walls of public schools. Seljak et al. (2008) and Emon (2012) explore how this same double standard dynamic played out in the 2004-2005 debates in Ontario over the introduction in Ontario of a Sharia-based family law arbitration system (an analogous system of which was in use, without issue, up until then, by Jewish Canadian communities, before being roundly publicly rejected when laid claim to by Muslims).

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

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

[144] For example, Matthew King's (2012) Creed Policy Dialogue paper, "On Canadian Buddhist Engagement with Religious Rights Discourse and the Law" highlights the ways the OHRC's definition of religion and creed – in its emphasis on "belief," discrete acts of worship and prescribed ritual practices – privileges, for legal protection, what he calls "white, privileged, middle class Buddhism (an individualized, faith-based tradition which draws heavily upon liberal Protestantism)" (King, 2012, p. 70). He argues that obscured from view and equal legal protection is "the more social, exteriorized and community-based experience of hundreds of thousands of 'ethnic' Buddhists in Canada," for whom "religious affiliation and identity are perhaps less about belief and practice so defined, as they are about marking a familiar social enclave in the midst of an alien Canadian society" (*ibid*.).

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

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

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

[148] Seljak et al. (2008).

[149] The OHRC's own definition of creed with respect to secular moral and ethical belief is examined in Section IV. McCabe et al. (2012) have suggested further examples of how secular humanists are disadvantaged by current policy and legal definitions of rights based on religion and creed.
[150] Sociologists of religion have moved away from the language of" "cults" and "sects," with their negative connotations, in favour of the term New Religious Movements (NRMs) or "baby religions" as Canadian sociologist, Susan Palmer, prefers to call newer religious movements and creed-based communities (see Palmer, 2006).

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

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

[153] There are several examples of such creed minority communities being subjected to various forms of prejudice and discrimination in the human rights case law, and literature more broadly, which is pushing the boundaries of what and who rightfully merits human rights legal protection (see for instance Gail McCabe et al., 2012; David Sztybel, 2012; Camille Labchuck, 2012; and the OHRC's *Creed Case Law Review*). The fact that HRTO applications by atheists, agnostics and people identifying with "no religion" in 2011 outnumbered applications by Roman Catholics is one indicator of this.

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

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

[156] According to the New Oxford Companion to Law (2008), the word 'secular' comes from the Latin word 'saecularis' (meaning 'temporal' or 'of a generation, belonging to an age'), which was used in Catholic Canon Law to describe clergy who lived within medieval society and not in seclusion in a monastery. In this usage, dating back to the 14th century, the term meant "of or pertaining to the world," or, as defined in Dr. Johnson's Dictionary "worldliness – attention to things of present life" (Benson, 2004). Earliest uses did not necessarily connote a-religiousness, consistent with some of the more pluralist uses and interpretations today (Berger, 2002), though the term did also come to be used more negatively to mean 'godlessness' (New Oxford Companion to Law, 2008). The latter negative connotation was turned on its head by the positivist movement in the 19th century.

[157] George Holyoake and Charles Bradlaugh are most credited with having developed secularism as an ideology (Benson, 2004; New Oxford Companion to Law, 2008). Secularism as a broader ideology took myriad forms, including everything "from belief that scientific materialism exhausts the explanation of existence to the view that values inhere only in human orientations to the world and not in the world itself

to the notion that there is no world of transcendent meaning or eternal time that should orient people in relation to actions in the everyday world" (Calhoun, 2008, p. 7).

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

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

[160] Usually a particular historical institutional model of the secular – most often the American or the French version – is taken as *the only* possible model or meaning of the secular in public uses of the term. "This kind of move amounts...to a fetishization of the favoured institutional arrangements, whereas one should start from the goals and derive the concrete arrangements from these," argues Charles Taylor (Taylor, 2010, p. 28). See also Bhargava (2010) for discussion of this problem.

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

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

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

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

Interestingly, many of the Canadian federal governmental policy practitioners interviewed in Gaye and Kunz's (2009) study favoured a principle-driven, but contextual, case-by-case approach, over systematic "rigid, high-level directives," given ever-changing social and demographic realities and unique situations, which called for flexible policy. Such findings further affirm the importance of looking at the underlying values and goals, when dealing with issues of religion and creed and their accommodation in public spaces.

[164] The failure to acknowledge the differing ways of weighing and realizing secular goals can fuel polarizing discourses between religious and non-religious persons (for or against secularism), where opponents are caricatured as either a-religious/anti-religious extremists, or as religious zealots having

no commitment to the secular (instead of acknowledging the diverse ways of understanding and realizing secular ideals).

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

(1) Integral secularism is characterized by a determination to secularize the public sphere through an 'antireligious activism' and a vision of an insurmountable conflict between modernity and religion.
(2) "Neutral" secularism claims a secularism open to individual freedom of religion, coupled with the strict neutrality of the state. Its followers oppose religious expressions in the sphere of power, but they accept the preservation of certain religious symbols and practices in public institutions.
(3) Open secularism is similar to "neutral" secularism, but recognizes both individual and collective religious rights. A neutral state is seen as able to accommodate religious and cultural expressions, while ensuring that religion plays no role in the exercise of power.
(4) The integral religious approach sees religion as a requirement of a healthy social order and lessens the predominance of secularism (cited in Chiodo, 2012a).

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

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

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

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

The term "open secularism" was used in an earlier report, entitled *Religion in Secular Schools: A New Perspective for Quebec*, published in 1999 by a Quebec Task Force on the Place of Religion in Schools. The Task Force recommended adopting "open secularism" to inform the secularization of Quebec schools, "that is, one that did not rule out recognition of religious realities in relation to respect for the freedom of conscience and religion of both those attending schools and those who teach in them" (cited in Milot & Tremblay, 2009).

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

Quebec Ministry of Immigration and Cultural Communities, attempts to do just this, distinguishing between laicization, laicity and laicism, drawing on the work of Micheline Milot (2002):

> **Laicization** refers to the deliberate steps taken by the State to maintain neutral relations with religions and to prevent any direct interventions by religions in the management of the State. These elements are either formulated by means of constitutional provisions, by judicial decisions, or through common law.
>
> **Laicity** describes the result of the process of laicization. It can be defined as "a progressive development of social and political institutions with respect to the diversity of the moral, religious and philosophical preferences of citizens. With this development, freedom of conscience and religion are guaranteed by a neutral State with respect to the different conceptions of the good life, on the basis of commonly shared values that make encounter and dialogue possible [translation]" (citing Comité des affaires religieuses [Religious Affairs Committee], 2003, p. 21).

Therrien furthermore describes laicity as "rest[ing] upon individual rights" and as "impos[ing] itself upon institutions so that individuals may be able to fully enjoy their rights and freedoms." Emphasizing its underlying commitment to individual freedom of conscience and religion, she argues: "Laicity defined in this way is quite different from **laicism**, a doctrine which aims to remove religion, in all its manifestations, from the entire public sphere" (Therrien, 2009, p. 67).

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

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

[171] These include:

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

(2) Article 1 of the federal ***Cultural Property Export and Import Act***, R.S.C. 1985, c. C-51, which mentions "religious or **secular**" property in its definition of "cultural property"

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

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

[172] Novak, 2006, p. 114.

[173] *Ibid*.

[174] Canada's strategy for managing religious diversity – legally, administratively and constitutionally – has been appropriately described as more of a "bricolage" of regionally-inflected institutional arrangements, which have been pragmatically (versus programmatically or philosophically) arrived at (Seljak et al., 2008). Showing this bricolage approach, the country's foundational (1982) *Constitution Act* acknowledges in its Preamble that "Canada is founded upon principles that recognize the supremacy of God and the rule of law." At the same time, s. 2(a) of the *Charter of Rights and Freedoms* guarantees "freedom of conscience and religion" as a "fundamental right." Though eluding neat classification, from a global and historical perspective, Canada's approach most resembles a model of non-constitutional pluralism, where multiple faiths enjoy (albeit non-official) state support and recognition (Seljak et al., 2008). This is seen in the current protections for denominational school rights in the (1867 and 1982) *Constitution Act* and the Ontario *Human Rights Code*, as well as in things like state supported multi-faith chaplaincy services in state institutions (see earlier discussion of Canada's historical "plural" but arms-length "shadow establishment") (*ibid.*).

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

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

> Inclusion of these words [free and democratic society] as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified (*R. v. Oakes* (1986) 1 S.C.R. 103 per Chief Justice Dickson).

The Supreme Court of Canada decision in *Trinity Western University v. British Columbia College of Teachers* makes a similar connection between religious inclusion and Canada's commitment to diversity. The decision states, on behalf of the majority of eight judges: "The diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected" (*Trinity Western University v. British Columbia College of Teachers* [2002] 1 SCR 772 at 812).

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

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

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

The B.C. Court of Appeal overturned Justice Saunders' B.C. Supreme Court decision which stated at para. 78 that "In the education setting, the term secular excludes religion or religious belief." Justice Mackenzie, writing for a unanimous B.C. Court of Appeal, found "to interpret secular as mandating 'established unbelief' rather than simply opposing 'established belief' would effectively banish religion from the public square," (at para. 30) and also that "No society can be said to be truly free where only those whose morals are uninfluenced by religion are entitled to participate in deliberations related to moral issues of education in public schools" (at para. 34). While the Supreme Court overturned elements of this decision, it upheld the inclusive understanding of the secular. It held that operating in a strictly secular way meant that the school board could not allow the concerns of one group of parents to deny equal recognition to the family models of other members of the school community.

[179] *Dictionary of Canadian Law* 4th edition at 1168.

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

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

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

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

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

[185] *Supra* note 8.

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

In its Decision, the Tribunal found that protection against discrimination based on creed extends to atheism. The Tribunal also found that not every exposure to religion in schools violates rights under the *Code*. As Associate Chair, David Wright, stated:

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

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

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

[188] Berger, 2002, p. 52 argues that these core values, though "institutionally unidentified," exist in Canadian law and can be "teased out from the fabric of the *Charter of Rights and Freedoms*" – human dignity, autonomy and security. Taylor (2010) alternatively describes the civil norms structuring contemporary liberal democratic societies as (1) human rights, (2) equality and non-discrimination, and (3) democracy. Bhabha (2012) looks at the more self-conscious embrace, in such recent decisions as *S.L.* (*supra* note 170) of what he calls "secular diversity" as an ultimate Canadian value. These are not neutral procedural norms, but substantive liberal values that are in fact (even if not recognized as such) the basis of "a fighting creed" (Berger, 2002, p. 45, citing Taylor, 1995, p.249). Bhabha (2012) also argues that these core liberal civic values are not simply one set of values among others, to be "balanced" in an equilibrium (e.g. by a proportionality test). Instead, they are "hypergoods" or supreme values, providing the normative framework and basis for evaluating and mediating between competing moral claims and rights scenarios.

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

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

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

[190] Stein (2009).

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

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

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

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

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

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

The courts somewhat acknowledge a public/private distinction in *Code* and *Charter* jurisprudence that distinguishes between the right to hold beliefs, and the right to act on those beliefs (the latter being broader than the former). However, this happens only in a secondary and indirect way, to the extent that the rights of others (and broader constitutional values) come into play once one enters the public square.

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

[198] See Benson (2012b).

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

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

[200] Benson, 2013, p.15. In this article, Benson further notes how George Jacob Holyoake, the 19th Century positivist champion who is often credited with coining the term "secularism," explicitly acknowledged this dimension of faith or belief within non-religious even scientistic paradigms in the subtitle to his 1896 manifesto entitled *English Secularism: **A Confession of Belief*** (emphasis added). However, the idea that atheism is a "belief" is contested by such new atheists as Christopher Hitchens.

While arguing of the new atheists that "[o]ur belief is not a belief" and that"[o]ur principles are not a faith," Hitchens nevertheless acknowledges, "We do not rely solely upon science and reason, because these are necessary rather than sufficient factors…" (Hitchens, 2007, cited in Benson, 2013, p. 14). See also Benson, 2010; Benson, 2012a; Benson, 2012b; Chiodo 2012a).

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

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

[202] *Supra* note 177.

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

[204] Bhabha (2012). Highlighting the impossibility of absolute neutrality, and the grounding of all viewpoints and actions in "belief," Benson, 2010, p. 23 provides the example of someone who chooses not to wear or display any religious symbols or identifications in public. "Not wearing a religious symbol", he argues, "is just a somewhat more vague way of showing what one believes and doesn't".

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

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

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

[208] *Supra* note 170

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

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

[211] Moon, 2008, p. 231. Cited by Deschamps, J. at para. 30, writing for the majority (McLachlin C.J. and Binnie, Deschamps, Abella, Charron, Rothstein and Cromwell JJ) in the *S.L.* Supereme Court Decision (*supra* note 170).

[212] Cited in Chiodo (2012a). Bhabha (2012) commends the *S.L.* decision (*supra* note 170), in this respect, for explicitly embracing the value of what he calls 'secular pluralism' (respecting not just religious but cultural differences of all kinds in Canada's multicultural society), and for not shying away from, or concealing, the inevitability of normative (versus falsely 'neutral') assessments of the limits of individual rights and freedoms, and the background norms out of which these very rights and freedom grow. In this context, he argues, "the Court may be moving, slowly but surely, towards a theory of religious freedom that is defined and shaped by the normative priority of respecting difference in a multicultural society" (p. 14). He sees this as a departure from the historical legal norm in Canada of protecting religious diversity, not for reasons of multicultural diversity, but for reasons of upholding equality between religions.

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

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

[215] For more on the concept of structural discrimination and religious disadvantage as a consequence of lingering Christian privilege in contemporary Canadian secular institutions and structures, see Seljak et al. (2008); Beaman (2008); and Beyer (2008). The failure to recognize the structural privileges and accommodations that already exist, by default, for the majority group is often compounded by the dominant Canadian self-image as tolerant, egalitarian, open and multicultural.

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

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

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

injustice, along with associated feelings of anger, despair, and alienation may provide young people with the motivations/justifications they need to participate in both crime and religious extremism."

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

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

[219] Saul (2008).

[220] See the OHRC's *Policy on creed and the accommodation of religious observances*, 1996, p. 4.

[221] *Ibid*, p. 4. The *Policy* also states that "[t]he existence of religious beliefs and practices are both necessary and sufficient to the meaning of creed, if the beliefs and practices are sincerely held and/or observed".

[222] *Ibid*, p. 5..

[223] *Ibid*, p. 5. The *Policy* further states in an endnote: "Not only are such groups not protected under the *Code*, but they may also be subject to provisions of the Criminal Code. Any reports of activities involving such groups should be immediately reported to the police. For example, female genital mutilation is a violation of women's human rights and is not protected on the ground of creed. See the OHRC's *Policy on female genital mutilation*.

[224] See *Ketenci v. Ryerson University*, 2012 HRTO 994 (CanLII).

[225] *R.C. v. District School Board of Niagara, supra* note 8.

[226] *Al-Dandachi v. SNC-Lavalin Inc.*, 2012 ONSC 6534 (CanLII).

[227] See *Creed case law review* (2012) and Chiodo (2012a) for summary of some decisions in this respect.

[228] 6th edition, 1990.

[229] Tarnopolsky and Pentney, 1985, p. 61.

[230] *Supra* note 8.

[231] *Ibid.*, at para. 30. In his decision in favour of the atheist applicant, HRTO Associate Chair, David Wright, further stated, at para. 31:

> "…Protection against discrimination because of religion, in my view, must include protection of the applicants' belief that there is no deity, a profoundly personal belief about the lack of existence of a divine or higher order of being that governs their perception of themselves, humankind and the world. The applicants' beliefs relate to religion, and engage the purpose of ensuring that people are treated equally regardless of their views and practices on religious matters. It is not necessary in this case to decide whether creed may in some cases encompass core beliefs about fundamental matters other than religion."

[232] See Kislowicz (2012) for more on the strengths of this analogical approach**.**

[233] See *Kelly v. British Columbia (Public Safety and Solicitor General)*, *supra* note 11.

[234] *Re O.P.S.E.U.* and *Forer* (1985), *supra* note 12.

[235] *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567.

[236] *Chabot c. Conseil scolaire catholique Franco-Nord*, 2010 HRTO 2460 (CanLII).

[237] *Huang*, *supra* note 14.

[238] *Central Alberta Dairy Pool v. Alberta (Human Rights Commission),* [1990] 2 S.C.R. 489.

[239] In this particular grievance arbitration decision, the labour arbitrator did not discuss why participation in the Rocky Mountain Mystery School, an organization that "teaches the ancient practice and knowledge of light and light work in the world" was a creed. Instead, the arbitrator focused on whether the employer was required to accommodate the employee's request for time off to attend a pilgrimage (*Communications, Energy and Paperworkers Union of Canada Local 722-M v. Global Communications*, [2010] C.L.A.D. No. 298 (QL). In finding that the employee should have been accommodated, the arbitrator implicitly accepted that the ground of creed was engaged.

[240] See *Sullivan and Driedger on the Construction of Statutes*, 2002, pp. 158-161, citing a number of Supreme Court of Canada decisions. In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)* 2011 SCC 53, the Supreme Court of Canada affirms this "legislative presumption against tautology" citing supporting decisions, stating, at para 38:

> ...As Professor Sullivan notes, at p. 210 of her text, "It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose." As former Chief Justice Lamer put it in *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28, "It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage." See also *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at para. 838.

[241] The "presumption of consistent expression" also holds across statutes, implying that statutes should not be interpreted in a way that makes them inconsistent with one another (for more on considering parallel legislation, across statutes, see endnote 243). Therefore, when two statutes dealing with the same or analogous subject matter use the same or similar words, the courts will generally conclude that the words have the same meaning. Conversely, when different words are used in otherwise similar statutes, it may be presumed that the legislature intended a different meaning or purpose (see *Sullivan and Driedger on the Construction of Statutes*).

[242] Like the presumption of consistent expression, the "presumption against tautology" may be rebutted by providing a possible meaning for a potentially tautologous word that would not render it superfluous or meaningless, or by submitting reasons for why, in the particular word choice, the legislature may have wished to be redundant or include superfluous words. When the court has reason to believe that the legislature deliberately included tautologous words, the presumption will be more easily rebutted. For example, the court may suggest that the legislature chose to repeat itself to guard against confusion and misapplication of the legislation. Repetition may also have been necessary to make the statute easier to understand for the layperson. See *Sullivan and Driedger on the Construction of Statutes.*

[243] The relevance of considering parallel legislation in other provinces and territories in attempting to discern and interpret legislative intentions and meanings is affirmed in *Canada (Canadian Human Rights*

Commission) v. Canada (Attorney General) 2011 SCC 53. In this decision, the Court cites other supporting decisions for this principle, stating at paras. 57 and 58:

> [57] The respondent... urges us to consider parallel legislation in the provinces and territories and we agree that this is a useful exercise in this case. Of course, we do not suggest that consulting provincial and territorial legislation is always helpful to the task of discerning federal legislative intent. However, Professor Sullivan confirms that cross-jurisdictional comparison of statutes dealing with the same subject matter may be instructive (pp. 419-20).
>
> [58] The Court has made use of parallel legislation as an interpretative aid in other cases. For example, in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614, Sopinka J. looked at several pieces of comparable provincial legislation to assist him in determining whether the federal legislation allowed the Public Service Staff Relations Board to decide who is an employee under its enabling legislation (pp. 631-32). Another example of this approach is found in *Morguard Properties Ltd. v. City of Winnipeg*, [1983] 2 S.C.R. 493, where Estey J. relied on a comparative analysis between Manitoba's legislation, and that of the other provinces, when deciding whether Winnipeg intended to freeze property tax assessments (pp. 504-5).

The courts have shown a particularly strong desire for uniformity across Canadian human rights legislation. As a result, they have seemed to impose a burden on provincial legislatures to strongly signal, through the language used in the statute, their intention to depart from the national approach to human rights legislation. Lamer, C.J., writing for the majority of the Supreme Court of Canada in *Berg v. University of British Columbi*a, [1993] 2 S.C.R. 353 illustrated this by stating at para. 372:

> If human rights legislation is to be interpreted in a purposive manner, differences in wording between provinces should not obscure the essentially similar purposes of such provisions, unless the wording clearly evinces a different purpose on behalf of a particular provincial legislature.

As a consequence, it may be argued in some cases, particularly where this has been explicitly signalled by the legislature, that using different words across legislation with a similar purpose shows that the legislature intended for these words to have different meanings, in accord with the "presumption against tautology."

[244] *B. v. Ontario (Human Rights Commission)*, [2002] 3 S.C.R. 403 at para. 42.

[245] *Ibid.*

[246] Amselem, *supra* note 137, at para. 39 states that when dealing with religious freedom, only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected under the Quebec or Canadian *Charter*.

[247] *Supra* note 137.

[248] *Wali v. Jace Holdings Ltd*. [2012], CHRR Doc. 12-0389, 2012 BCHRT 389.

[249] In this case (*ibid*.), Tribunal adjudicator Enid Marion noted at para.106:

> The *Code* does not define "political belief," and the Tribunal has not exhaustively commented on its scope. However, in *Croxall v. West Fraser Timber Co.*, 2009 BCHRT 436 [CHRR Doc. 09-2826], the Tribunal noted that:
>
> > The ground of political belief is not defined in the *Code* and the Tribunal has not had many occasions to consider comprehensive legal argument and to develop its definition.

> In *Prokopetz and Talkkari v. Burnaby Firefighters' Union and City of Burnaby*, 2006 BCHRT 462 [CHRR Doc. 06-621], at para. 31 ("*Prokopetz*") the Tribunal summarized the few cases that raised political belief as a ground and determined two underlying principles. The Tribunal found that political belief under the *Code* is to be given a liberal definition and that it is not, on one hand, confined to partisan political beliefs nor, on the other, is it unlimited in its definition. (at paras. 19-20)

In finding the applicant's claim based on political belief under the B.C. *Code* justified, the Tribunal further found at paras. 117 and 119:

> In my view, the free speech of College members on matters affecting the regulation of their profession falls within the scope of political belief, given the legislative framework under which the College operates and the express regulatory mandate given the College by the government regarding pharmacy technicians. This was a new legislated initiative, that involved the public welfare, and that was being debated within the pharmacy community.
>
> I accept that the expression of Mr. Wali's belief was in respect of a system of "social cooperation", that being the social contract between the government, the College and the public regarding the safe distribution of pharmaceutical medication.
>
> Thrifty admits that Mr. Wali's position before the College was a factor in his termination. Since I have concluded that Mr. Wali's position falls within the scope of political belief under the *Code,* I find that this aspect of Mr. Wali's complaint is also justified.

[250] Labchuck (2012) draws on the work of Ruth Sullivan, *Driedger on the Construction of Statutes* [Butterworth Canada Ltd, 3 Ed (1994), Chapter 3: Avoiding Absurd Consequences]. She also points to court justifications for expansive interpretations of a statutory provision to avoid such absurdity. She offers the example of *Campbell (G.T.) & Associates Ltd. v Hugh Carson Co.*,[1979] 99 DLR (3d) 529 (Ont CA).

[251] See Labchuck (2012) and Szytbel (2012).

[252] See Sztybel (2012) and Kislowicz (2012). In her January 12, 2012 Policy Dialogue keynote address, law professor Winnifred Sullivan talked about the problem of defining religion in law to protect religious freedom, and, in the same act, thereby delimiting such freedoms (through pre-emptive definition).

[253] "While there may be an argument to be made for excluding the term 'secular,' one can hardly account for the exclusion of moral or ethical beliefs since religion is only one of the arbiters of morality and ethics," McCabe et al. (2012). Benson (2012b) similarly draws attention to the logical problem created in any effort to extricate not only morals and ethics, but also politics (excluding from the definition of creed) from properly religious concerns. He argues that politics must encompass morals and ethics.

[254] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008) at 101 and 102.

[255] *R. v. Turpin*, [1989] 1 S.C.R. 1296 at paras. 1313 and 1314.

[256] *Supra* note 8, at para 42. Associate Chair David Wright stated, "I rely upon the French translation of 'creed' in the Code, croyance. This reflects a broader understanding of creed that reflects beliefs rather than only identification with a formal set of religious views".

[257] *R v. Morgentaler*, [1988] 1 SCR 30 at para 179. See also *R. v. Little*, 2009 NBCA 53 (CanLII) at para. 6 stating in *obiter*: "Of course, s.2(a) does more than protect religious beliefs. It makes room for the conscientious objector whose judgment is informed by other sources."

[258] *Alberta v. Hutterian Brethren of Wilson Colony*, *supra* note 235 at para. 90. See also *Simoneau v. Tremblay*, 2011 QCTDP 1 at paras. 208 and 209

[259] *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713 at para. 759. See Chiodo (2012a); Chiodo (2012b).

[260] [1994] 2 F.C. 406, 1994 CanLII 3453 (FCA).

[261] *R. v. Morgentaler*, [1988] 1 SCR 30. In this case, the Supreme Court struck down a provision of the *Criminal Code* that limited the availability of abortions, because it unjustifiably violated s. 7 of the *Charter*. In her concurring opinion, Wilson J stated:

> [I]n a free and democratic society "freedom of conscience and religion" should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a *secular morality*. Indeed, as a matter of statutory interpretation, “conscience” and “religion” should not be treated as tautologous if capable of independent, although related, meaning.

[262] Chiodo (2012a) cites *Mortillaro v. Ontario (Minister of Transportation)*, 2011 HRTO 310 (CanLII) at para. 61; *Ontario (Director, Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593. However, as both of these cases relate to congruent interpretation of discrimination analysis under the *Code* and s.15 of the *Charter*, they may have little applicability to s. 2(a) of the *Charter*. Labchuk cites Justice McLachlin’s decision in *R. v. Zundel,* [1992] 2 S.C.R. 731 which held that when legislation is capable of two equally persuasive interpretations, the court should prefer an interpretation that promotes *Charter* principles and values over one that does not.

[263] Vice-chair Ken Bhattacharjee in *McKenzie v. Isla*, 2012 HRTO 1908 (CanLII) cites the following cases as affirming this principle (at para. 33): *Taylor-Baptiste v. Ontario Public Service Employees Union*, 2012 HRTO 1393 (CanLII); *Dallaire v. Les Chevaliers de Colomb*, 2011 HRTO 639 (CanLII); and *Whiteley v. Osprey Media Publishing*, 2010 HRTO 2152 (CanLII).

[264] See Labchuck (2012) and Chiodo (2012a).

[265] This term was used by a participant during an OHRC consultation event. See Ryder (2012b) for more on debate about the relationship between *Charter* versus *Code* discrimination analyses. See also *Huang v. 1233065 Ontario*, *supra* note 14 at para. 28 citing a number of decisions dealing with the relationship between the *Code* and *Charter* and *R. v. Badesha*, 2011 ONCJ 284 (CanLII). In the 2010 BC Court of Appeal decision in *British Columbia (Ministry of Education) v. Moore*, 2010 (CanLII) BCCA 478 at para. 51, Justice Rowles argued in a dissenting opinion (that was subsequently largely followed by the Supreme Court of Canada on appeal) that *Charter* jurisprudence "should appropriately inform, but not dominate, the statutory analysis.” Justice Rowles quoted Leslie Reaume in support of this point:

> ”...borrowing from the *Charter* context to the statutory context is appropriate so long as the exercise enriches the substantive equality analysis, is consistent with the limits of statutory interpretation and advances the purpose and quasi-constitutional status of the enabling statute" (at 375; cited in Ryder, 2012b, p. 12).

[266] *Freitag v.Penetanguishene (Town) [2013] HRTO 893*.In this (2013) Human Rights of Ontario Tribunal Decision, adjudicator, Leslie Reaume, argues in this respect: “…The *Charter* and the *Code* are different statutory instruments and a finding of a breach of section 2(a) of the *Charter* is not dispositive of the allegations of discrimination before me under the *Code*” (at para. 27). She further states at para. 42:

> “[T]o the extent that observations from these [Charter section 2(a)] cases are imported into a *Code* analysis, they must be considered in a manner which is consistent with the long-standing interpretive principles which govern an analysis of discrimination under the *Code*. And although there are obvious linkages between section 2(a) of the *Charter* and the concept of discrimination, the different interpretive approaches to the *Charter* and the *Code*

> raise the possibility of two different outcomes even where the issues and evidence are similar in nature."

[267] In *Freitag v.Penetanguishene,* HRTO adjudicator, Leslie Reaume, further distinguishes between *Code* and *Charter* section 15 anti-discirmination legal protections, stating, at para. 41:

> Even in the context of section 15 cases, where discrimination is at the core of the analysis, courts have found that there are significant differences in how the *Charter* and the *Code* are interpreted: See *Ontario (Disability Support Program) v. Tranchemontagne*,2010 ONCA 593.

[268] For instance, consider *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 (CanLII). Writing for the unanimous Court, Stratas J.A. states, at para.19: "The equality jurisprudence under the Charter informs the content of the equality jurisprudence under human rights legislation and *vice versa*: see *e.g.*, *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at paras. 172-176; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 27; *Moore* [*v. British Columbia (Education)*, 2012 SCC 61 (CanLII)] at para. 30; [*Quebec (Attorney General) v. A.*, 2013 SCC 5 (CanLII)] at paras. 319 and 328)."

The equality provisions of the *Charter* in section 15 are:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, **religion**, sex, age or mental or physical disability.

As well, subsection 15(2) signals a broader substantive equality concern with "the amelioration of conditions of disadvantaged individuals or groups." It says:

> 15. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[269] In support of its *positioning* of freedom of religion as the "basic principle that informs the right to equal treatment under the *Code* on the ground of creed" (p.5), the (1996) *Policy* states (in endnote #7 of the policy):

> This is reflected in the Preamble of the Code which recognizes that the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace ... [and that has as its aim] the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province.

[270] For instance, Labchuck (2012), in her call for expanding the definition of creed, places relative emphasis on the *Code*'s goal of protecting individual human dignity. Labchuck describes the spirit, intent and aim of human rights law as "to be maximally protective to human dignity". Others at the 2012 Policy Dialogue and Legal Workshop offered a more socially situated reading of the *Code*, stressing the role of human rights law in progressively eliminating "social practices of exclusion."

[271] The courts have shown a strong desire for uniformity across Canadian human rights legislation. Lamer, C.J., writing for the majority of the Supreme Court of Canada in *Berg v. University of British Columbia* illustrated this by stating at para. 372:

> If human rights legislation is to be interpreted in a purposive manner, differences in wording between provinces should not obscure the essentially similar purposes of such provisions, unless the wording clearly evinces a different purpose on behalf of a particular provincial legislature.

[272] See for instance Labchuck (2012), Chiodo (2012a), McCabe et al. (2012), Benson (2012b), and Szytbel (2012).

[273] Both Labchuck (2012) and Chiodo (2012b) cite *Insurance Corp of British Columbia v Heerspink*, [1982] 2 SCR 145 in this respect.

[274] According to Labchuck (2012), the Supreme Court approved this concept in *Dickason v University of Alberta* [1992] 2 SCR 1103 at para. 115.

[275] Chiodo (2012a) and Labchuck (2012) among others point to the *Code*'s explicit affirmation of the need to progressively interpret and advance the *Code*'s purposes.

[276] Labchuck (2012).

[277] *R.C. v. District School Board of Niagara*, s*upra* note 8*,* at para. 43.

[278] Chiodo, 2012b, p.19.
[279] Charles Taylor has written extensively on the quest for meaning and authenticity in the modern era, as inspired from such diverse sources as religion, spirituality and/or secular humanism (Taylor, 1989).

[280]Labchuck (2012).

[281] Chiodo (2012a). See also Benson (2012).

[282] Sometimes, this need to advance human rights purposes can lead the courts to seek to do so even where the existing letter of the law is limited. In support of this principle, Labchuck cites *Ontario (Human Rights Commission) v Simpsons-Sears* ("O'Malley"), [1985] 2 SCR 536, where the court implied a duty to accommodate, despite its then absence in the *Code*.

[283] Although the courts have broadly defined religion and creed to include many non-western religious beliefs and practices, there is a feeling that these must still be characterized as "religion," the concept of which, critics argue, was developed primarily with western faith traditions in mind (for example, see *Huang, supra* note 14).

[284] Kislowicz (2012) draws on the work of American legal scholar Winnifred Fallers Sullivan, in this respect, who made a similar appeal in her January 12, 2012 Policy Dialogue Keynote Speech. David Seljak (2012) similarly cautioned against against overly prescribing rules and definitions and making creed rights too specific, in ways preventing a more capacious, dynamic understanding of religion and creed: "We cannot protect what we cannot see and how we define religion will determine what we do – and do not – see as worthy of protection and promotion" (Seljak, 2012, p. 11).

[285] Kislowicz, 2012, p.31.

[286] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 69-71.

[287] Article 18 of the *International Covenant on Civil and Political Rights* (ICCPR) includes the following provisions:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

[288] See *Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief, 1981* at [www2.ohchr.org/english/law/pdf/religion.pdf].

[289] Article 7 of the *Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief*, 1981, reads: "The rights and freedoms set forth in the present Declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice."

[290] Article 28 of the *International Covenant on Economic and Social Rights (ICESR)* and Article 50 of the *International Convention on Civil and Political Rights (ICCPR)* provide that the provisions of these covenants (including Article 18 of the ICCPR) shall extend to all parts of federal States without any limitations or exceptions. For more on this, see the OHRC's research paper, *Human rights commissions and economic and social rights* (www.ohrc.on.ca/en/human-rights-commissions-and-economic-and-social-rights/social-cultural-and-economic-rights-under-international-law).

[291]In *Human Rights Committee General Comment No. 22: The right to freedom of thought, conscience and* religion, that comments on Article 18 of the *International Covenant on Civil and Political Rights*, the Committee affirms that

- Article 18 includes freedom of thought on all matters, personal convictions and commitment to religion or belief (individually or in community)
- Freedom(s) of thought and conscience are protected equally with freedom(s) of religion and belief (at para. 1)
- Article 18 protects theistic, non-theistic, atheistic beliefs – including the right not to profess any religion or belief
- The terms "belief" and "religion" should be broad
- The right in Article 18 should not be limited to traditional religions and should not discriminate against any religion or belief for any reason (including being newly established, or representing religious minorities) (at para. 2)

The Human Rights Committee is a body of 18 independent experts. Signatory States are required to submit reports on how rights are being implemented (usually every four years) and the committee provides comments and suggestions. *Article 41* of the ICCPR allows the committee to hear complaints brought against a State party by another State party. The *First Optional Protocol* allows this committee to hear individual complaints against signatory States.

In a subsection dealing with "Religious Minorities and New Religious Movements" in another UN Commission on Human Rights (2006) *Report of the Special Rapporteur on freedom of religion or belief*, Asma Jahangir, further notes ([A/HRC/4/21], at paras. 43-47), among other things, that:

- Belief in a Supreme Being, rituals, set of ethical or social rules are not just common to religions but can also be found in political ideologies
- The distinction between sects and new religious movements is complicated because no international human rights instruments provide definitions of the concept[s] of religion, sect or new religious movement
- "Sect," "religions," "new religious movements" are all terms that need to be further clarified
- Defining a religion or belief is extremely complex.

This report taks about similar challenges at the international level in grappling with religious and creed diversity and related definitions. Other points noted in this report relating to the interpretation of the *Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief, 1981*, include:

- Rosalyn Higgins (member of Human Rights Committee when *General comment No. 22* was drafted) opposed the idea of a State deciding what was or was not a genuine religious belief – should be decided by worshipers themselves
- Special Rapporteur Amor stated "it is not the business of the State or any other group of community to act as the guardian of people's consciences and encourage, impose or censure any religious belief or conviction." (Report by the Special Rapporteur on Religious Intolerance [E/CN/4/1997/91], at para. 99)
- Special Rapporteur Riberiro stated that the antiquity of a religion, revealed character and existence of scripture are important but not enough to distinguish between religions, sects and associations (1990).

Another UN General Assembly (2009) *Interim Report of the Special Rapporteur on freedom of religion and belief* [A/64/159] similarly affirms that that the "contents of a religion or belief should be defined by worshippers themselves."

[292] *Supra* note 8. In this (2013) HRTO decision, the HRTO relied on international protections when interpreting the ground of creed under the Ontario *Code*:

> I also rely on the fact that international human rights law includes protections for atheism as part of freedom of religion. As the Supreme Court held in *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817, at para. 70, "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review". Article 18(1) of the International Covenant· on Civil and Political Rights, which has been ratified by Canada, reads as follows:
>
> > 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. [40]
>
> Although the wording includes "religion or belief', Article 18 in my view has the same purposes as the protection of creed in the *Code.* Article 2 of the 1993 General Comment on this article by The Office of the High Commissioner for Human Rights, General Comment No. 22, UN Doc. *CCPC/C/21/Rev.1/Add/4L* makes clear that atheistic beliefs and non-belief are protected in this fundamental international human rights treaty:
>
> > Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms "belief' and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions (at paras. 40 and 41).

[293] See Donald (2012).

[294] See Labchuck (2012).

[295] See Kislowicz (2012) for more on the strengths of this analogical approach.

[296] See *Kelly v. British Columbia (Public Safety and Solicitor General)*, *supra* note 11.

[297] *Re O.P.S.E.U.* and *Forer* (1985), *supra* note 12.

[298] *Hutterin Brethren, supra* note 160.

[299] *Chabot c. Conseil scolaire catholique Franco-Nord*, 2010 HRTO 2460 [CanLII), *Gilbert v. 2093132 Ontario Inc.*, 2011 HRTO 672 (CanLII).

[300] *Huang*, *supra* note 14

[301] *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489.

[302] In this particular grievance arbitration decision, the labour arbitrator did not discuss why participation in the Rocky Mountain Mystery School, an organization that "teaches the ancient practice and knowledge of light and light work in the world" was a creed, instead focusing on whether the employer was required to accommodate the employee's request for time off to attend a pilgrimage (*Communications, Energy and Paperworkers Union of Canada Local 722-M v. Global Communications*, [2010] C.L.A.D. No. 298 [QL]). In finding that the employee should have been accommodated, the arbitrator implicitly accepted that the ground of creed was engaged.

[303] *Supra* note 8.
[304] *Hendrickson Spring v. United Steelworkers of America, Local 8773 (Kaiser Grievances)*, [2005] O.L.A.A. No. 382, 142 L.A.C. (4th) 159.

[305] *Rand v. Sealy Eastern Ltd*. (1982), 3 C.H.R.R. D/938 (Ont. Bd. Inquiry) at D/942. This was one of the earliest Ontario decisions dealing with creed. Professor Cumming, hearing the complaint of a Sikh man who was denied employment because of his beard and turban, described creed as derived from the Latin "credo" meaning "I believe." He also looked to the Oxford and Webster Dictionary definitions which were:

> **Oxford:** Creed... "An accepted or professed system of religious belief: the faith of a community or an individual, especially as expressed or capable of expression in a definite formula."
>
> **Webster's:** Creed… "Any formula of confession of religious faith; a system of religious belief, especially as expressed or expressible in a definite statement; sometimes, a summary of principles or set of opinions professed or adhered to in science or politics, or the like; as his hopeful creed."

[306] [1997] CanLII 12445 (ON SC), upheld 1999 CanLII 3744 (ONC CA).

[307] *Ibid.* at para 39. The Ontario Humanist Society, in their OHRC paper submission (McCabe et al., 2012), cite other similar dictionary definitions and etymologies deriving "creed" more broadly, from the Latin "credo," meaning "I believe," without any implication or requisite of a religious basis for such belief.

[308] *Ibid.* at para 40.

[309] 1999 *Jazairi* Court of Appeal decision (*supra* note 306) at para. 28. In a recent decision, the Ontario Superior Court of Justice refused a defendant's motion to strike a human rights claim in a civil action. The plaintiff alleged that he was dismissed from his employment because he expressed views about the armed conflict in Syria which were inextricably linked to his identity as a Syrian Canadian and a Muslim. The defendant argued that the plaintiff's claim was in essence one of discrimination based on "political opinion" and the Code does not cover this. The Superior Court cited the Court of Appeal in *Jazairi* and found that the Court of Appeal expressly left open the possibility that some other system of political belief could constitute a creed. The Superior Court felt that on the allegations before it, it could not conclude (on a motion to strike) that the views of the plaintiff could not amount to a creed; see *Al-Dandachi, supra* note 9.

[310] For example, in *Sauve v. Ontario (Training, Colleges and Universities)*, 2009 HRTO 1415 (CanLII), the HRTO found it did not have to decide whether the Metaphysical Church and tarot card reading was a creed: "I find that even if tarot could legally be included in the *Code's* definition of creed, the decision to deny the applicant the SEB benefits was not based on tarot card reading; therefore, it is unnecessary for me to make a determination as to whether tarot in the context of this case constitutes a creed under the relevant case law…."(at para. 39). See also *Hayes v. Vancouver Police Board and another (No.2)*, 2010 BCHRT 324 (CanLII) regarding Paganism. In other cases, decision-makers have accepted, with little discussion or analysis, that a belief system is a creed and have instead focused on what practices are protected. For example, in a grievance arbitration decision, the labour Arbitrator did not discuss why participation in the Rocky Mountain Mystery School, an organization that "teaches the ancient practice and knowledge of light and light work in the world" was a creed, instead focusing on whether the employer was required to accommodate the employee's request for time off to attend a pilgrimage (*Communications, Energy and Paperworkers Union of Canada Local 722-M v. Global Communications*, [2010] C.L.A.D. No. 298 [QL]). In finding that the employee should have been accommodated, the arbitrator implicitly accepted that the ground of creed was engaged.

[311] *Supra* note 137 at para. 69.

[312] *Ibid.*

[313] Chiodo, 2012b, p. 19 argues:

> With belief becoming more individualized and less associational, the distinction between religious and non-religious convictions is becoming increasingly hard to justify. Indeed, the distinction appears to many observers to be arbitrary, and implies that familiar or favoured creeds are "real" beliefs, while different or new creeds are not beliefs or are only pseudo-beliefs.

[314] Moon, 2012a.

[315] Several participants at the March 2012 OHRC Legal Workshop similarly argued that human rights legislation, as it evolved in Canada, was not intended to protect all manner of individual belief, but rather to advance substantive equality and remedy rights violations that had a group basis to them. They said that persons with grievances extending beyond such purposes can and should appeal to other legal and policy instruments for redress (e.g. anti-bullying legislation, freedom of conscience under the *Charter* etc.).

[316] In *Quebec (Attorney General) v. A*, 2013 SCC 5 ["*Quebec*"], the Supreme Court of Canada (SCC) noted that the purpose of the s. 15 equality provision and anti-discrimination law in general is to "eliminate the exclusionary barriers faced by individuals in the enumerated or analogous groups in gaining meaningful access to what is generally available" (*Quebec*, at para. 319 citing *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R). Writing for the unanimous Court in a recent Federal Court of Appeal decision, *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 (CanLII), Stratas J.A. affirmed the importance of going beyond formal comparator group analyses in this case and "taking 'full account of social, political, economic and historical factors concerning the group'" (para. 22, citing *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 at para. 39). The SCC has nevertheless made it clear in *Quebec* that showing stigma, prejudice, stereotyping or perpeuating historical disadvantage are not freestanding requirements that must be proven to establish discrimination. Similarly, in *B. v. Ontario (Human Rights Commission)*, *supra* note 244, the Supreme Court found that the claimant did not have to identify himself as a member of a historically disadvantaged group to claim protection from discrimination based on family status (at para. 47). The HRTO confirmed this in *Hendershott v. Ontario (Community and Social Services)*, 2011 HRTO 482 (CanLII) [*Hendershott*].

HRTO decisions, nevertheless, appear to leave open the possibility that in some cases, it may be necessary to further examine to what extent a claim engages the purposes of anti-discrimination law and the principles of substantive equality. In those generally rare cases where the identity of the claimant

and/or the subject matter of the claim do not appear to be consistent with the purpose of statutory human rights legislation, it may be useful to consider issues such as prejudice and stereotyping, which may presume a group component. This may help clarify if the allegations "truly create a disadvantage" and raise concerns for substantive equality (*Hendershott, ibid.* at paras. 45, 49-51 and 55.

Tranchemontagne,[2006] SCC 14 at para. 104 cited in *McCalla v. Home Depot of Canada*, 2012 HRTO 877 [CanLII]). A good example of a case where there appeared to be no obvious connection between the ground of discrimination and the types of substantive discrimination the Code is meant to prevent is Giggey v. York District School Board, 2009 HRTO 2236 (CanLII). The applicant argued that a school board's refusal to allow him to register his son for kindergarten in the 2009-2010 school year, because his birth certificate showed his date of birth as January 1, 2006, was discriminatory based on the *Code* ground of "place of origin" because he was born in a different time zone. Had he been born in Ontario, his birth date would have been registered as December 31, 2005 (thus making him eligible to enter kindergarten in 2009-2010). In its decision dismissing the claim, the HRTO stated (at para. 11): "…there must be a connection between the "place" impacted and the purposes of the prohibition. In this case I find there is none. Whether a particular time zone is earlier or later than another results from the rotation of the earth, and choices of human society about time zone boundaries and the placement of the international date line.It in no way engages considerations of stereotyping, social or historical disadvantage, or presumed characteristics."

[317] In a significant recent decision, *Moore v. British Columbia (Education)*, 2012 SCC 61, the Supreme Court of Canada considered the test for discrimination under the British Columbia *Human Rights Code*. The Court applied the traditional, long-standing test for *prima facie* discrimination from *O'Malley*, *supra* note 282 at para 28. To demonstrate *prima facie* discrimination under the *Code*, a claimant must show that:

(1) he or she has a characteristic protected from discrimination under the *Code*
(2) he or she experienced an adverse impact with respect to the service (employment etc.)
(3) the protected characteristic was a factor in the adverse impact (*Moore* at para. 33).

The Ontario Court of Appeal adopted a very similar version of the test in *Shaw v. Phipps*, 2012 ONCA 155 at para. 14.

In the context of the *Charter's* anti-discrimination provision (s. 15), Abella J., writing for the majority of the Court on this point in *Quebec* (*supra* note 316), reaffirmed the Court's commitment to the test for discrimination set out in *Andrews v. Law Society of British Columbia*, [1989] 1 S.CR. 143, which says the claimant's burden under s. 15 of the *Charter* is to show that:

(1) the government has made a distinction based on an enumerated or analogous ground and that
(2) the distinction's impact on the individual or group perpetuates disadvantage.

The court said that disadvantage is caused by a distinction based on a prohibited ground that imposes burdens, obligations or disadvantages on an individual or group not imposed upon others, or that withholds or limits access to opportunities, benefits and advantages available to other members of society.

Given the Supreme Court has very recently articulated two tests for discrimination: one in the *Charter* context ("*Quebec")*, and the other in a claim of discrimination under a human rights statute ("Moore"), a question remains about what extent the two tests coalesce and what the test is for discrimination under the Ontario *Human Rights Code*. In practice, the HRTO's application of the *prima facie* test since *Tranchemontagne* has been somewhat malleable, varying depending on the circumstances of the case. In some decisions, the HRTO has said that an applicant must show that the differential treatment creates disadvantage (see *A.N. v. Hamilton-Wentworth District School Board*, 2013 HRTO 67 (CanLII) at para. 112 and *Addai v. Toronto (City)*, 2012 HRTO 2252 (CanLII)). The HRTO has also said that in most statutory human rights cases, substantive discrimination can be inferred where there is adverse treatment

based on a prohibited ground and where the subject-matter of the claim is connected to the underlying purpose of the *Code*.

Nevertheless, while a majority of decisions based on the *Code* have confirmed that the test or threshold for discrimination remains the same for all the grounds, the contextual factors considered can vary depending on the ground. For example, in age cases, appears to have been a heavier emphasis on showing indicators (disadvantage, prejudice, stereotyping) of substantive discrimination and a greater unwillingness to simply infer it from the existence of an age-based distinction. In terms of creed, some decision-makers have noted that not every impact on creed violates rights (e.g. not being able to take part in social or cultural activities related to creed, not being able to wear a particular style of hijab). In the case of social or cultural activities, see *Eldary v. Songbirds Montessori School Inc*., 2011 HRTO 1026 (CanLII); *Hendrickson Spring v. United Steelworkers of America, Local 8773*, *supra* note 304; *Assal v. Halifax Condominium Corp. No. 4* (2007), 60 C.H.R.R. D/101 (N.S. Bd. Inq.). In the hijab case, see *Audmax Inc. v. Ontario Human Rights Tribunal*, 2011 ONSC 315 (CanLII)). It is possible that if the OHRC decides to broaden its policy definition of creed, the courts and Tribunal could place a heavier emphasis on indicators of substantive discrimination.

[318] For instance, legal scholar Bruce Ryder emphasized this distinction in his presentation ("The relationship between religious equality and religious freedom: convergence and divergence") at the (2012a) Legal Workshop.

[319] Some human rights statutes, such as British Columbia's, are more explicit in their sensitivity to social patterns of inequality. The stated purposes of the British Columbia *Human Rights Code* include:

(1) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia
(2) to promote a climate of understanding and mutual respect where all are equal in dignity and rights
(3) to prevent discrimination prohibited by this Code
(4) *to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code*
(5) to provide a means of redress for those persons who are discriminated against contrary to this *Code* (*Human Rights Code*, R.S.B.C. 1996, c. 210, s. 3; emphasis added).

[320] The Supreme Court first addressed the scope of section 2(a) in its landmark decision in *R v Big M Drug Mart Ltd*, *supra* note 181. The Court adopted a broad, contextual approach to s. 2(a), emphasizing individual liberty and conscience, taking into account the values underlying both the provision and the *Charter* generally. As Dickson CJ described the purpose of freedom of religion and freedom of conscience (at para. 123):

> The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.

[321] Section 2(a) jurisprudence reveals internal divisions about the proportionate weight accorded to the liberty and equality dimensions of this fundamental freedom. The first major decision under s. 2(a) of the *Charter, Big M Drug Mart*, *supra* note 181, recognized *both* liberty and equality goals and aims under freedom of religion.

[322] Many OHRC paper contributors observe the courts' one-sided focus on issues of individual liberty and belief in section 2(a) decisions since *Big M* (see Berger, 2012; Bhabha, 2012; Moon, 2012a; Ryder, 2012a). Bhabha (2012) for instance observes how the courts have tended to only recognize religious accommodation rights claims based on individual interests, while "claims based on group or community rights, on the other hand, have been generally unsuccessful" (see also Berger, 2002 and Berger's earlier [2012] analysis of the liberal cultural biases in s. 2(a) jurisprudence). According to Berger (2012):

> The overwhelming focus on religious freedom rather than religious equality is an artefact of the law's way of seeing religion. For the law, religion seems to take its core value as an expression of the autonomous will of the individual agent. Any dignity or privilege accorded religion flows from the fundamental place that it holds in the individual's set of choices around living a good life.

[323] Ryder (2012a). See also Bhabha (2012); Moon (2012a); and Reaume (2012).

[324] This view of religion as having both a collective and an objective dimension is expressed in Justice Bastarache's dissenting judgement in *Amselem* (*supra* note 137). Maintaining that "a religion is a system of beliefs and practices based on certain religious precepts" (para. 135), Justice Bastarache inferred that (1) such precepts are therefore "objectively identifiable, making the limits of religious freedom protections more predictable;" and (2) "by connecting practices to these religious precepts, an individual makes it known that he or she shares a number of precepts with other followers of the religion." In other words, sharing one's beliefs and practices with a community is, for Justice Bastarache, an essential element of religion (cited in Kislowicz, 2012).

[325] 2007 CanLII 1857 (ON LA) at para 120. Note, however, that the Arbitrator was not commenting on what constitutes a creed. Rather he was considering whether an employer must accommodate an individual religious conviction that is not required by an individual's creed. The Arbitrator made the statement while commenting on why he prefers the approach of the minority in *Amselem* (*supra* note 137) in the labour relations context. As the Arbitrator was bound by the majority decision in *Amselem*, the comments are *obiter*.

[326] *Supra* note 160.

[327] *Ibid*. at paras. 181-18;, cited in Schutten, 2012; emphasis added.

[328] At p.7.

[329] *Supra* note 158.

[330] Moon, 2012a.

[331] Berger (2002) argues:

> From the perspective of the adherent, religion cannot be left in the home or on the steps of Parliament. The religious conscience ascribes to life a divine dimension that infuses all aspects of being. The authority of the divine extends to all decisions, actions, times, and places in the life of the devout. Unlike the powers of a liberal state, the religious conscience is profoundly ajurisdictional (p. #).

[332] At p.5.

[333] In *Freitag v.Penetanguishene (Town) [2013] HRTO 893*, Human Rights of Ontario Tribunal adjudicator, Leslie Reaume, for instance argued in her decision in favour of the applicant: "…The applicant does not have to declare a specific creed or belief system in order to be protected from the imposition of the religious beliefs and observances of others in certain contexts…" (at para. 22).

[334] Bemoaning the growth of "cults and fringe organizations" using "the borrowed legitimacy of the language and terminology of faith and belief to further narrow, illegitimate and, perhaps, even illegal ends" (Landau, 2012, p. 37), Richard Landau, in his (2012) Policy Dialogue paper, said:

> If a Canadian founds a religious belief system in 2011 and claims he and his adherents demand the right to suspend work every Thursday, is that a legitimate expression of belief and is the society compelled to accommodate it?

As a broadcasting executive and media producer with experience vetting appropriate religious content for Canadian television, Landau emphasized the practical importance for organizations to have clear guidelines and definitions around creeds and religions meriting societal recognition, accommodation, and, in his particular field, airplay (see Landau, 2012 for his elaboration of criteria).

[335] This is a result of the *Code*'s broader jurisdiction in Ontario, which covers government actors and actions (as the *Charter*) and also non-governmental and private sector actors, including all provincially regulated employers, service providers, housing providers, associations, etc.

[336] *Supra* note 158. Frivolous and vexatious claims, from this perspective, could just as easily be couched under terms of religion as secular ethical or moral beliefs. They can also be filed regardless of what policy the OHRC adopts.

[337] This principle is affirmed in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)* 2011 SCC 53. In this case, the Supreme Court considers principles of statutory interpretation, and emphasizes the need for a "careful examination of the text, context and purpose of the provisions" (at para 32). The Court goes on to state, at para 33:

> The question is one of statutory interpretation and the object is to seek the intent of Parliament by reading the words of the provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21). In approaching this task in relation to human rights legislation, one must be mindful that it expresses fundamental values and pursues fundamental goals. It must therefore be interpreted liberally and purposively so that the rights enunciated are given their full recognition and effect: see, e.g., R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 497-500. However, what is required is nonetheless an interpretation of the text of the statute which respects the words chosen by Parliament.

[338] *Ibid*., at para. 43. The Supreme Court elaborates, in this regard:

> The legislative evolution and history of a provision may often be important parts of the context to be examined as part of the modern approach to statutory interpretation: *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425, at para. 28, *per* Binnie J.; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 528, *per* L'Heureux-Dubé J.; *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706, at paras. 41-53, *per* Abella J. Legislative evolution consists of the provision's initial formulation and all subsequent formulations. Legislative history includes material relating to the conception, preparation and passage of the enactment: see Sullivan, at pp. 587-93; P.-A. Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at pp. 496 and 501-8 (at para. 43).

[339] People taking this view, from a more historical reading, note how Christian denominations have been differentiated from one another based on their "creeds"; creedal beliefs being central in Christianity to community and faith formation. Much, if not most, historical discrimination and prejudice based on creed in Canada occurred between members of differing Christian creeds.[this last sentence seems inconsistent with the earlier sections talking about treatment of Jews, Aboriginal persons etc.]

[340] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)* 2011 SCC 53 at para. 33.

[341] Sullivan 2002 at p. 377. See p. 374-378 for a discussion of presumed legislative intent when interpreting human rights statutes.

[342] In addition to the 1944 *Racial Discrimination Act*, the following legislation was mentioned by Hon. Warrender when he introduced the *Human Rights Code* in 1961:

- 1951 *Fair Employment Practices Act* and *The Female Employee's Fair Remuneration Act*
- 1954 *The Fair Accommodation Practices Act*
- 1958 Ontario Anti-Discrimination Commission was established (renamed Ontario Human Rights Commission in 1962).

[343] The Hansard (Ontario parliamentary debates) dated March 10, 1943 described the bill introduced by John Glass as a bill to "prevent discrimination against any person because of race, creed or religion." One clause states that "No person shall be denied the accommodation or facilities of any hotel, restaurant, theatre or other public place because of his race, creed or religion." Another provision says "No person shall publish or display or cause to be published or displayed, any statement, symbol, emblem or other representation creating or tending to create hatred, ridicule or contempt of or for any person or class of persons because of the color, race, creed or religion of such person or class of persons."

[344] The Hansard dated March 23, 1943 reported that "Mr. Glass was the only member in the House to raise his voice in favor of the bill." One reason for the defeat mentioned in the Hansard is that the bill would not "promote unity" and putting the bill through "would be resorting to a policy of force contrary to democratic principles."

[345] The passing of this bill nevertheless encountered strong opposition from advocates of free speech. After it was introduced as Bill 46 on March 3, 1944 it was amended on March 13 to "protect liberties." A section was added, which read, "This act shall not be deemed to interfere with the free expression of opinions upon any subject by speech or in writing and shall not confer any protection to or benefit upon enemy aliens."

[346]In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)* 2011 SCC 53, the Supreme Court of Canada affirmed in its decision the relevance of considering the history of legislation in its interpretation, including excluded proposed provisions. The Court for instance states at para. 44:

> We think there is no reason to exclude proposed, but unenacted, provisions to the extent they may shed light on the purpose of the legislation. While great care must be taken in deciding how much, if any, weight to give to these sorts of material, it may provide helpful information about the background and purpose of the legislation, and in some cases, may give direct evidence of legislative intent: Sullivan, at p. 609; Côté, at p. 507; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, at para. 37. This Court, in *M. v. H.*, [1999] 2 S.C.R. 3, has held that failed legislative amendments can constitute evidence of Parliamentary purpose: paras. 348-49, *per* Bastarache J.

Applying the statutory principle of interpretation against tautology to the proposed but excluded first draft general anti-discrimination bill could suggest that "creed" and "religion" were intended to have different meanings, since they co-existed as terms in the same proposed bill. However, this does not shed light on how such terms may have been differently interpreted. Nor does it exclude the possibility of both terms having a religious mooring.

[347] McCabe et al. (2012, p. 33) quote the Cambridge dictionary definition of creed.

[348] In this case, the HRTO rejected the argument that Falun Gong is akin to a "cult" and should not be accepted as a creed because as a belief system it is not reasonable, cannot withstand scientific scrutiny, or espouses beliefs that are not consistent with *Charter* values. In her testimony, the complainant referred to Falun Gong as a "practice" as opposed to a "religion." However, the HRTO accepted expert evidence that the notion of "religion" is significantly different in China than in the West and that in western terms Falun Gong would be understood as a creed. The HRTO concluded that Falun Gong consists of a system of beliefs, observances and worship and falls within the notion of "creed" under the *Code* (see *Huang, supra* note 14).

[349] In *Re O.P.S.E.U. and Forer* (*supra* note 12), a 1987 labour arbitration decision, after reviewing evidence, including from experts, regarding its history, practice and beliefs, Wicca was found to fall within the term "religion" as used in the collective agreement. The panel adopted "a broad, liberal and essentially subjective" approach to religious observance set out in an earlier Ontario Court of Appeal decision (*Re O.P.S.E.U. and Forer*, (1985), 52 O.R. (2d) 705 [C.A]). In that case, the Court of Appeal noted the variety of religions and religious practices in Canada and stressed that what may be regarded as a religious belief or practice by one religion may be regarded as secular by another. Religion is not to be determined from the perspective of the "majority" or "mainstream" in society.

[350] In *Jazairi v*. *Ontario Human Rights Commission*, 1999, *supra* note 306, the Ontario Court of Appeal confirmed that the complainant's opinions concerning the single-issue of the relationship between the Palestinians and Israel did not amount to a creed. However, the Court confirmed the importance of assessing each creed claim on its own facts and noted that whether or not some other political perspective that is made up of a cohesive belief system could amount to a "creed" was not before it. The Court commented that it would be a mistake to deal with such important issues in the abstract.

[351] In *Roach v. Canada (Min. of State for Multiculturalism and Citizenship)*, [1994] 2 F.C. 406, 1994 CanLII 3453 (FCA), Linden JA distinguished between "conscience," as a "location of profound moral and ethical beliefs," and "political or other beliefs" that are protected by freedom of expression under s 2(b). If one holds that the *Code* should take its cue from the *Charter* in situations of statutory ambiguity, as discussed earliler, this could be interpreted to suggest that political belief should be excluded from the scope of creed protections under the *Code.*

[352] Chiodo (2012a; 2012b) makes this argument, more specifically, in the context of conscience under the *Charter*. She argues that the same threshold could apply to interpreting creed under the *Code*.

[353] *Amselem, supra* note 137.

[354] *Ibid*. at para 39.

[355] *Ibid*. The 1996 *Policy on Creed* speaks to this comprehensive belief or worldview in its definition of creed "as a professed *system* and confession of faith, including both beliefs and observances or worship" (p.4; emphasis added).

[356] *Bennett v Canada (Attorney General)*, 2011 FC 1310 (CanLII) at para 55 (citing indicia for **religion** recognized in a United States decision. It is important to note, however, that some of the indicia cited in the U.S. decision are not consistent with what have been found to be creeds in Ontario, e.g. the requirement of a founder or prophet, a clergy and important texts, prescribing dieting or fasting etc.).

[357] "In *Amselem*, *supra* note 137 for example," Chiodo (2012a) argues, "while the apartment-dwellers' belief that they had to erect succahs did not reflect an obligation incumbent on all Jews, it bore a nexus to the Jewish religion" (citing *Amselem* at para. 69). See Section V 3.2 above for more discussions of legal arguments and decisions raising a collective, association-based dimension of religion and creed.

[358] Chiodo, 2012b, p. 10.

[359] *Hashman v Milton Park (Dorset) Ltd (t/a Orchard Park)* ("Hashman") Employment Tribunal (ET/3105555/09, 26 October 2011).

[360] *Grainger plc v Nicholson* ("Grainger") [2010] IRLR 4 (EAT) [Employment Appeal Tribunal].

[361] Closely following international human rights law (in particular Article 18 of *the Universal Declaration of Human Rights* which extends rights to "religion or belief"), Article 9 of *the European Convention on Human Rights* provides that:

- Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, and to manifest his religion or belief, in worship, teaching, practice and observance.
- Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Citizens in European member countries may appeal to the ECHR, as individual plaintiffs, against their member state and its directives.

[362] *Grainger, supra* note 360.

[363] Other important cases not discussed here include *McClintock* v *Department of Constitutional Affairs* [2008] IRLR 29, *R Williamson* v *the Secretary of State for Education and Employment* UKHL 15 [2005] 2 A.C. 246, *R v. Countryside Alliance v Attorney General* [2007] UKHL 52*, Campbell and Cosans* v *United Kingdom* [1982] 4 EHRR 293 and *Eweida* v *British Airways Plc.* [2009] ICR 303.

[364] Cited in Labchuck (2012).

[365] *Supra* note 359.

[366] In the UK, the distinction between belief system and 'mere' opinion is derived from *McClintock v Department of Constitutional Affairs* [2008] IRLR 29, Times 5 December 2007, in which a Magistrate claimed that he had suffered discrimination due to his opposition to same sex marriage (Pitt, 2011, p. 389). He lost the case, "because the facts indicated that the real basis for his objection was not his interpretation of Christianity but rather his opinion that children fared best in a traditional household with a heterosexual couple (*ibid*)." In *Hashman*, the court states that in *McClintock v. Department of Constitutional Affairs*, some of the limits of the test were specified; more specifically, "it is not enough to have an opinion based on some real or perceived logic or based on information or lack of information available (*ibid*, para 44)." Some argue that the distinction between a mere opinion and a philosophical belief system is blurry and difficult one open to significant divergences in interpretation – a point touched upon by the defense counsel in *Hashman.*

[367] *Campbell and Cosans* v *United Kingdom* [1982] 4 EHRR 293 at para. 36 and *R (Williamson)* v. *the Secretary of State for Education and Employment* UKHL 15 [2005] 2 A.C. 246 at para 23.

[368] *R (Williamson)* v. *the Secretary of State for Education and Employment* UKHL 15 [2005] 2 A.C. 246

[369] *Ibid*, at para. 43.

[370] Note that in *Hashman*, *supra* note 359, the court explicitly limited the precedential value of the case by stating that the ruling pertained only to the views and circumstances of the plaintiff. The decision should therefore not be interpreted to mean that anti-foxhunting views in themselves constitute a philosophical belief system.

[371] Chiodo, 2012a.

[372] For example see Pitt, 2011.

[373] *Supra* note 359, at para 43.

[374] Such potential impacts are discussed in Chiodo's (2012b) paper, "Conscience, Creed and the *Code*: Forthcoming Changes to the Ontario Human Rights Commission's Policy on Creed."

[375] See Chiodo, 2012b.

[376] Chiodo (2012b) is not overly concerned about this possibility, since she thinks most cases will continue to fail at the first *prima facie* stage of discrimination analysis, as is currently the case.

[377] This observation is made by Seljak, 2012.

[378] One Creed Policy Dialogue participant commented, making a point also affirmed in Bromberg's 2012 paper:

> Last year I worked for a large [company] and was warned against the term accommodation because of employee backlash. In the eyes of some, this gave certain people "special privileges" at the expense of others. Thus, the concept of human rights and the Commission became "dirty words," and the management did not handle it well...There is a backlash against accommodation and we must be aware of that.

[379] Noting an upsurge in such sentiments of late, Anita Bromberg (2012) emphasizes the importance of clarifying the underlying goals and aims of "accommodation."

[380] Faisal Bhabha (2012) uses the disability context to argue that the courts recognizing that the constructed world is not neutral but privileges the able-bodied "gives rise to the duty to accommodate as a measure of fundamental protection against invidious harm".

[381] The (1996) *Policy on Creed* defines constructive discrimination:

> Constructive discrimination arises when a neutral requirement, qualification or factor has an adverse impact on members of a group of persons who are identified by a prohibited ground of discrimination under the *Code*. Because of its adverse impact, this is said to result in "constructive discrimination" (OHRC, 2006, p. 6).

[382] As Brodsky et al., 2012, p. 36 explain in their paper, "Accommodation in the 21st Century," focusing on the disability context of human rights accommodation:

> Accommodation is not about same treatment. It is about inclusion for people...who have historically been excluded from full participation in society. In an accommodation case, the issue is not whether the claimant has received formal equality of treatment but whether the actual characteristics of the person have been accommodated so that they can access a benefit that is otherwise unavailable. As McIntyre J. explained in Andrews the "*accommodation of differences…is the true essence of equality*" (citing *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at para. 31; emphasis added).

[383] Beaman,2012, p. 18.

[384] *Supra* note 282.

[385] R.S.O. 1990, c. H.19, s. 11 (1). Part 1 of the *Code* (Freedom from Discrimination) outlines the prohibited grounds of discrimination and the social areas (services and facilities, housing, contracts, employment, vocational associations) where discrimination based on these grounds is prohibited.

[386] *Moore v. British Columbia (Education) 2012, supra* note 317.

[387] *Hutterian Brethren, supra* note 235. In its recent decision in *R. v. Badesha,* 2011 ONCJ 284 (CanLII) ["*Badesha*"]*,* the Ontario Court of Justice noted that the degree of interference that must be shown before the impact on religious rights is found to be more than "trivial" or "insubstantial" may vary depending on the precise circumstances.

[388] *Eldary v. Songbirds Montessori School Inc.*, 2011 HRTO 1026 (CanLII). In this HRTO decision, managing a children's day camp put on by the claimant's church as a fundraiser was found not to be religious in nature nor was it found to be required as a tenet of her faith. The fact that the activities were at her church were not sufficient to find that they were covered by the ground of creed.

[389] *Hendrickson Spring, supra* note 304.

[390] *Assal v. Halifax Condominium Corp. No. 4* (2007), 60 C.H.R.R. D/101 (N.S. Bd. Inq.). In this case, the Nova Scotia Board of Inquiry rejected a claim that a condominium was required to accommodate a request to install a satellite dish, contrary to its bylaws, to receive Muslim religious and cultural programming from international sources. The Board stated that being able to establish discrimination requires something more than being able to draw some connection to religion. Unlike in *Amselem* (*supra* note 137), there was nothing to suggest that accessing the satellite service was a religious practice, belief, requirement or custom, or was part of the tenets of the family's faith or culture. While the complainant wanted access to the technology to allow his family greater exposure to their culture, language and religion, there was nothing to suggest that its absence would in any way compromise the practice of their faith.

[391] *Hendrickson Spring*, *supra* note 304, was cited in this decision that found that giving out religion-based gifts (e.g. pens with religious inscriptions) in the workplace is not a protected right, even though the ability to do so was extremely important to the grievor. There was no evidence that this activity formed any part of her religion as a Born-again Christian (*Ontario Public Service Employees Union v. Ontario (Ministry of Community and Social Services) (Barillari Grievance)*, [2006] O.G.S.B.A. No. 176, 155 L.A.C. (4th) 292).
[392] *Whitehouse v. Yukon* [2001], 48 C.H.R.R. D/497 (Y.T.Bd.Adj.). In this decision, a Yukon Board of Adjudication did not accept that a First Nations man was entitled to special leave to attend land claim selection meetings because of his ancestral and religious duties.

[393] *R v.N.S.,* 2010 ONCA 670 at paras. 69.

[394] Saadi v. Audmax, 2009 HRTO 1627 (CanLII).

[395] In *Audmax Inc. v. Ontario Human Rights Tribunal*, 2011 ONSC 315 (CanLII), the Ontario Divisional Court, on judicial review, disagreed with the HRTO's conclusion in *Saadi v. Audmax* that the employer's application of a dress code policy discriminated against the applicant based on the intersecting grounds of sex and creed. The Divisional Court found that the HRTO should have considered whether Ms. Saadi could have complied with the dress code without compromising her religious beliefs around appropriate religious attire. It stated (at para. 86):

> There was nothing about Ms. Saadi's religion that required her to wear the particular form of hijab she was wearing on the day in question. If it was possible for her to wear a religiously acceptable form of hijab that was fully consistent with the dress code (as indeed she had done every day for six weeks), her religious rights were not affected. All that was affected was her sense of style, which apparently was in conflict with that of her employer.

[396] See Beaman (2012).

[397] See Beaman (2012). Lorne Sossin (2009) highlights similar tensions in the legal regime and discourse governing religion in Canadian workplaces. Rival frameworks evident include, on the one hand, a narrative of pluralism, inclusion and mutual recognition, and on the other hand, a narrative of "exceptionalism" that envisions "Canada as a majority Christian society in which other religious minorities are tolerated within a framework of deviation from the norm" (p. 485).

[398] Beaman, 2012, p.16. Drawing attention to the origins and reverberations of "accommodation" discourse in labour law and employment contexts of employer/employee power imbalance, Beaman, 2012, p.16-17 views the discourse and practice of accommodation as insufficiently advancing or fulfilling

the objectives and promise of substantive equality as a central Canadian constitutional value. However, she notes the relative recency, and hence transformability, of the now legally and discursively dominant accommodation concept.

[399] *Ibid*., p.17.

[400] Under the heading of ”constructive discrimination,” Section 11(2) of the *Code* states:
> The Commission, the Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any (cited in OHRC *Policy on creed*, 1996, p. 8).

The 1996 *Policy on creed* suggests this “inclusive design” component of accommodation analysis where it states: “Accommodation may modify a rule or make an exception to all or part of it for the person requesting accommodation” (p. 7).

[401] *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 S.C.R. 3 ("Meiorin").

[402] *Ibid.* at para. 41 citing Day, Shelagh, and Gwen Brodsky. “The Duty to Accommodate: Who Will Benefit?” (1996), 75 *Can. Bar Rev*. 433.

[403] *Ibid*. at para. 42.

[404] For adverse effect discrimination, the main defense is “*bona fide* requirements,” as mentioned in Section 11 of the *Code*: “a rule, requirement etc. which has a discriminatory effect is allowed where it can be shown to be reasonable and *bona fide*.” According to the Supreme Court of Canada, to be considered a *bona fide* (which means “good faith” or “genuine” or “legitimate”) occupational requirement, an employer must show that the standard, factor, requirement or rule:

- was adopted for a purpose or goal that is rationally connected to the function being performed
- was adopted in good faith, in the belief that it is necessary to fulfill the purpose or goal
- is reasonably necessary to accomplish its purpose or goal, because it is impossible to accommodate person(s) adversely effected without undue hardship.

This last point was introduced in *Meiorin* (*supra note* 401) and is essential since it requires that employers design their standards, rules and requirements from the outset in a way that considers the diversity of people within the organization – and seeks to accommodate and enable this diversity, up to the point of undue hardship.

[405] *Meiorin*, *supra* note 401 at para. 68.

[406] Commenting on the “profound changes in the legal conception of accommodation” ushered in by the *Meiorin* decision, Melina Buckley and Alision Brewin observe:
> Before this decision, employers had only to consider accommodation of an individual by assisting those who did not fit the existing standard. Now the duty is two-fold. *First, an employer must consider whether the standard itself can be changed so as to be more inclusive and promote substantive equality in the workplace. Second, if this is not possible or if the standard is fully justifiable under the new higher legal threshold, then substantial e orts toward individual accommodation are still required* (Buckley and Brewin, 2004, p. 22; cited in Brodsky et al., 2012, p. 10, emphasis added).

[407] Karen Schucher describes the idea of ”systemic accommodation" in her commentary on the new approach to adverse effect discrimination advanced in *Meiorin*: “This broader approach expands the

concept of accommodation to require systemic change to workplace standards. This systemic change extends both to a recognition of the distinctive realities among groups and individuals, as well as to more individually focused remedies and exceptions. Systemic accommodation effectively requires transformation of workplace standards…" (Schucher, 2000, pp. 9-10; cited in Broskey et al., 2012, p.10).

[408] International human rights law makes an important distinction – also affirmed in domestic case law – between the ìnternal dimension of one`s belief or conviction (*forum internum*), which "has absolute protection with no limitations," which is distinct from "external manifestations" that can be limited "for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society" [UNDHR, Section 29(2); See UN General Assembly (2012) Interim Report of the Special Rapporteur on freedom of religion or belief [A/67/303] (at paras. 17-21) for more on this distinction].

[409] Balpreet Singh's January 13, 2012 presentation at the OHRC's Policy Dialogue on Creed.

[410] In contrast, Meer and Modood, 2010, p. 82 argue, using the specific example of Muslims in Britain, "What this [position] ignores however, is that people do not choose to be or not to be born into a Muslim family. Similarly, no one chooses to be born into a society where to look like a Muslim or to be a Muslim invites suspicion and hostility, and this logically parallels the kinds of racial discrimination directed at other minorities".

[411] Quebec (Attorney General) v. A. 2013 SCC 5

[412] Nadir Shirazi's January 13, 2012 presentation at the OHRC's Policy Dialogue on Creed.

[413] The Supreme Court has recognized the communal and collective aspect of religious rights in several decisions, including *Hutterian Brethren*, *supra* note 235, where Justice LeBel wrote in his dissenting judgement at paras. 181-2:

> "[Freedom of religion] incorporates *a right to establish and maintain a community of faith that shares a common understanding* … Religion is about religious beliefs, but also about religious relationships… [and] the maintenance of communities of faith" (Emphasis added; cited in Schutten, 2012).

[414] The school in question, which had a Muslim-majority student population, had arranged for congregational Friday prayers to be held in its school cafeteria, for a combination of reasons having to do with safety and inclusion considerations and efforts to curb school absenteeism.

[415] The courts have recognized a continuum of what may count as "pressure" in school contexts and contexts involving children and young people, who are more impressionable and vulnerable to peer pressure. Religious pressure, in this context, may take more indirect forms.

[416] The duty to accommodate has both a procedural and substantive dimension. While the substantive duty refers to the actual accommodation being requested or provided, which must appropriately accommodate the actual needs of the person in question, the procedural duty to accommodate is equally important. It requires both accommodation seekers and providers to take part in a process to determine what is an appropriate. An organization may fail to meet the duty to accommodate, solely based on its procedural failing to explore the request and related options in good faith, even where a substantive accommodation is found not to be merited. Likewise, an accommodation seeker may have a rights claim dismissed because they failed to play their part in the accommodation process (in keeping with the procedural duty), even if a substantive accommodation may have been merited. For example, see the case of *Daginawala v. SCM Supply Chain Management Inc*., (2010 HRTO 205 (CanLII)), where the employee did not give sufficient advance notice in a request for a religious leave. In this case, the HRTO found that the applicant did not give enough notice of his need for four hours of unpaid leave to allow the employer to find a

replacement. The employee gave approximately 72 hours notice and the employer typically had provided time off in the past when sufficient notice was given.

[417] Page 18 (footnote 20).

[418] This is exemplified in controversial cases in European (including British, Italian, EU) courts where Christian religionists have been told that they do not have a right to wear a cross in workplaces, as part of freedom of religion legal protections, since this is not a required 'observance' of the faith (but rather simply a practice connected to the faith) (see Donald, 2012). However, in a recent, potentially precedent setting, Court decision involving a British Airways check-in worker who was prevented from wearing a cross at work, the European Court of Human Rights (ECHR) ruled that the employee's right to express her religion was unfairly restricted by the airline (for media coverage of this story, see "**Cross ban did infringe BA worker's rights, Strasbourg court rules,** www.guardian.co.uk/law/2013/jan/15/ba-rights-cross-european-court).

[419] In a discussion about "religious symbols," a (2006) UN Commission on Human Rights *Report on Civil and Political Rights Including the Question of Religious Intolerance* by the Special Rapporteur on freedom of religion or belief, Asma Jahangir, for instance, highlights a distinction, made by some, between an *observance* which refers to "prescriptions that are inevitably connected with religion or belief and protects both the right to perform certain acts and the right to refrain from doing certain things," and *practice* which refers to manifestations that are "not prescribed, but only authorized by a religion or belief" (E/CN.4/2006/5). While some states extend only protection to the former, the UN's Human Rights Committee (specifically Rosalind Higgins) has stated that it is neither the Committee's nor member States responsibility to decide what is and is not a genuine religious belief or manifestation of religion (UN Human Rights Committee discussion on 24 July 1992, Summary Records of the 1166th meeting of the forty-fifth session, at para. 48).

[420] *R v. Badesha, supra* note 387.

[421] Haboucha, 2010. Section 1 of the *Charter*, also known as the "reasonable limits clause," provides for limits on constitutional rights (including freedom of religion and conscience under section 2(a) and religious equality rights under section 15) where these are deemed "reasonable" and "demonstrably justifiable in a free and democratic society**."** The exact language for the test determining such reasonable limits was set out in *R. v. Oakes*. To justify a Charter infringement the government must show*:*

(1) A pressing and substantial government objective
(2) That the means to achieve that objective is proportional meaning
    a. The means must be rationally connected to the objective
    b. There must be minimal impairment of rights
    c. There must be proportionality between the infringement and objective
    (*R. v. Oakes*, *supra* note 176).

[422] See for instance Bhabha (2012) and Moon (2012a).

[423] In *Hutterian Brethren*, *supra* note 235, the Supreme Court of Canada ruled that "Hutterites who do not believe, for religious reasons, in having their photographs used for identification purposes, must nonetheless comply with a provincial law for reasons related to the public interest in identity in relation to driving licences...The decision was a very narrow majority with three justices of the seven in dissent" (Benson, 2012, p.23). In this case, the Supreme Court held that Hutterian Brethren were still "free" to practice the core tenets of their religion, as a consequence of the court decision. They just would not have ('justifiably' in the courts s.1 analysis) equal access to operating vehicles and thus equal mobility, since they would in effect be denied licences as a consequence of their religiously-based conscientious objection to having their picture taken for licensing purposes.

[424] *Supra* note 387. *R. v. Badesha* involved a challenge by a Sikh man to an Ontario law that requires helmets when operating a motorcycle. Mr. Badesha argued that he could not wear a helmet because of his strongly held religious beliefs concerning the need to wear a turban. The Court found that the interference with Mr. Badesha's religious rights as a result of being unable to ride a motorcycle was trivial and insubstantial and therefore section 2(a) of the *Charter* was not breached. The Court noted that any limit is on the individual's ability to ride a motorcycle in the fashion that he chooses, not on his right to worship or practice any belief associated with religion. Driving any motor vehicle is a privilege and not a right. The judge also considered an analysis under Section 1 of the *Charter* and found that the mandatory motorcycle helmet law was justified.

[425] Moon (2012a). For instance, in *R. v. Badesha*, *supra* note 387, the court ruled that the complainant retained the liberty to practice his Sikh religion, but that he would "justifiably" not have access to the full range of transportation options as other citizens which was deemed a privilege rather than a right. Part of the argument in this case and *Hutterian Brethren*, *supra* note 235, appears to be that they still had other transportation options, and still had the liberty to practice their religion, thus making the infringement less than substantial. Badesha, for instance, could always drive a car (for which a helmet is not required), while the Hutterian Brethren could always take other modes of transportation other than a car, which did not require a drivers licence (see Moon, 2012a for a critique of the weak standard of justification adopted by the courts, in their interpretation of Section 1, in these cases). [See my point about repetitive citations. The previous one has much of the same information in it]

[426] "How far do we want to take this kind of analysis – that if disallowed or refused a service, for reasons relating to a *Code* ground, one can always go somewhere else," one participant commented in regards to the *Badesha* (*supra* note 387) and *Hutterian Brethren* (*supra* note 235) decisions at the January 2012 Policy Dialogue, concluding: "I find that kind of analysis disturbing."

[427] For example, some have argued that that the legislative purposes of identification and security in *Hutterian Brethren* (*supra* note 235), and health and safety in *Badesha* (*supra* note 387) could have fairly easily been met through alternative means (e.g. finger printing in the case of *Hutterian Brethren*) (see Benson, 2012).

[428] In *Hutterian Brethren, supra* note 235, the Supreme Court explicitly rejected the relevance of human rights statute-based "reasonable accommodation analysis" in Section 1 *Charter* analysis of whether a law infringing upon a religious practice is justified. This position was later reflected in the Ontario Court of Justice decision in *Badesha*, *supra* note 387 (see Moon, 2012a for further in-depth analysis of *Hutterian Brethren*). According to McLachlin C.J.'s rationale in *Hutterian Brethren*: "A law's constitutionality under s.1 of the *Charter* is determined not by whether it is responsive to the unique needs of every individual claimant, but rather by whether its infringement of *Charter* rights is directed at an important objective and is proportionate in its overall impact" (*Hutterian Brethren* at para. 69; cited in Moon, 2012a). In *R. v. Badesha*, the Ontario Court of Justice noted that *Human Rights Code* analyses that involve accommodation and undue hardship are inapplicable in a s. 1 analysis that applies to a claim that a law infringes the *Charter*.

[429] *Huang, supra* note 14.

[430] See *R.C. v. Niagara District School Board*, *supra* note 8, for a most recent example. In this case, the HRTO found that the Niagara District School Board's (2010) policy was discriminatory because it allowed, under certain conditions, the distribution of only "recognized sacred texts of which there is global association and recognition":

> There was also discrimination in the attempted restriction of the policy to "recognized sacred texts of which there is global association and recognition" and not secondary materials…The policy was discriminatory because its definition of acceptable materials violated substantive equality by excluding the kinds of materials central to many creeds. The restriction to sacred or foundational texts excludes some creeds and is therefore discriminatory. The requirement that

there be "global recognition" may also have the effect of excluding emerging or non-traditional creeds (at para. 68).

[431] *Amselem, supra* note 137, at para. 52.

[432] *Ibid.* at para. 53.

[433] *R. v. N.S*., 2010, *supra* note 393.

[434] *R. v. N.S.,* 2012, *supra* note 183.

[435] Research suggests that many people now approach their religion or creed in a highly individualistic and selective way, basing their beliefs and practices more on personal interpretations and experiences than on institutional expressions or requirements of the faith. This personalization of belief has also contributed to a growing pattern of eclectic beliefs and practices – famously dubbed “Sheilaism” by an American sociologist – as people increasingly “cobble together” their beliefs and practices from increasingly diverse sources and traditions, in shifting and context dependent ways. In his article, “Dimorphs and Cobblers: Ways of Being Religious in Canada,” William Closson James cites the increasingly common example of a friend of his whom, as a partner in a Jewish-Christian marriage, attends both the Reformed Synagogue (where he was once Adult Education Co-ordinator) and the United Church (where he sits on the Outreach Committee). The reality of syncretism in beliefs is particularly common among practitioners of various Asian religions, and among formerly colonized peoples, including Aboriginal Peoples in Canada, many of whom have developed syncretic religious forms that may assume situationally alternating versus synthesized forms.Those assessing sincerity of belief by western (Judaeo-Christian) standards of consistency will need to be sensitive to this diversity, so they do not judge others by standards, such as exclusivism, that may be particular to dominant versions of the Abrahamic monotheistic faiths).

[436] *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525.

[437] *Ibid.* at para. 14.

[438] *Ibid.*

[439] *Ibid.* The school board based its argument on in part on its position that paid statutory holidays that coincided with Christmas and Good Friday were not expressly religious in nature but secular, so there was no discrimination involved (since there was no distinction being made, or benefit or holiday being provided, directly based on religion). The Supreme Court refuted this rationale and found this to amount to indirect or constructive (adverse effect) discrimination.

[440] The following analysis in Chambly led to the Court's finding of adverse effect (i.e. constructive) discrimination (at p. 541):

> ...Christian holy days of Christmas and Good Friday are specifically provided for in the calendar. Yet, members of the Jewish religion must take a day off work in order to celebrate Yom Kippur. It thus inevitably follows that the effect of the calendar is different for Jewish teachers ... [t]hey...must take a day off work while the majority of their colleagues have their religious holy days recognized as holidays from work. In the absence of some accommodation by their employer the Jewish teachers must lose a day's pay to observe their holy day. It follows that the effect of the calendar is to discriminate against members of an identifiable group because of their religious beliefs. The calendar or work schedule is thus discriminatory in its effect.

The Court then examined the nature of the accommodation that would be required to alleviate the adverse effect. It rejected the view that the school board's offer of unpaid leave to the Jewish teachers was sufficient accommodation. Mr. Justice Cory wrote:

> If a condition of work existed which denied all Asian teachers one day's pay, it would amount to direct discrimination . . . The loss of one day's pay resulting from direct discrimination would not be tolerated...and would fly in the face of human rights legislation. Similarly adverse effect discrimination resulting in the same loss cannot be tolerated unless the employer takes reasonable steps to accommodate the affected employees. (*Ibid.* at 542).

The Court concluded religious leave should have been available under the special purpose paid-leave provision in the collective agreement since it did not cause undue hardship to the school board.

[441] 2000 CanLII 16854 (ON CA).

[442] *Chambly, supra* note 436.

[443] 2008 HRTO 64 (CanLII).

[444] *Ibid.*

[445]*Koroll v. Automodular Corp*., 2011 HRTO 774 (CanLII). In this case, a member of the Living Church of God alleged that his employer infringed his rights by not giving him time off with pay to observe High Sabbaths. He also alleged that the employer's Attendance Recognition Program discriminated against him. Employees with perfect attendance received bonuses, but he was denied bonuses when his attendance was perfect except for the Sabbaths when he was unable to work because of his religious beliefs. The HRTO followed its earlier decision in *Markovic* and dismissed his claim that he was entitled to paid leave for holy days. However, the Tribunal did find that the employer's requirement that the applicant attend work on all scheduled days to have perfect attendance and receive bonuses did discriminate based on creed. The respondent did not show that the religious needs could not be accommodated without undue hardship. The HRTO awarded $2,000 for injury to dignity and self-respect and directed the respondent to review its Attendance Management Program to remove the discriminatory effect on employees whose religious beliefs require them to be absent from work.

[446] Some argue from a substantive equality standpoint that requiring non-Christian employees to use overtime or lieu time to observe religious holidays, even if this does not result in a loss of pay, may still amount to an inequity since it imposes an additional burden on non-Christian employees to use "banked time" to satisfy religious needs, in a way not similarly imposed on Christian employees whose religious needs are met by the statutory holiday calendar.