

Grain Trucks, Graven Images, and Grave Consequences: the impact of the Charter on religious communities

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Religious freedom in Canada

- “The protection of freedom of religion afforded by s. 2(a) of the *Charter* is broad and jealously guarded in our *Charter* jurisprudence. ”
– *Reference re Same-sex Marriage*

Why protect religious freedom?

- Fundamental part of identity/human dignity
- “supreme end of human existence”
- Religious freedom is at the core of all other freedoms
- Higher calling than obligations to the state
- Inspires the best and most ethical
- Part of the public good

Law and Religion

- At McGill conference on law and religion, Chief Justice McLachlin said both law and religion lay claim to the whole of human experience.
- But, she assured audience that law would carve out space for the practice of religion.
- This does not recognize higher calling of religion in lives of followers.

UN Covenant on Civil and Political Rights

Article 18

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.



2. Everyone has the following fundamental freedoms
 - (a) Freedom of conscience and religion;
 - (b) Freedom of expression;
- Applies to government

Non-discrimination

■ Section 15 of the Charter:

(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.

What is religious freedom?

■ Canadian Human Rights Act

7. It is a discriminatory practice, directly or indirectly,
(a) to refuse to employ or continue to employ any individual, or
(b) in the course of employment, to differentiate adversely in relation to an employee,
...
on certain grounds including religion.

The basis for religious freedom

■ *Big M Drug Mart case (1985)*

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination.

The basis for religious freedom in the workplace

■ *O'Malley v. Simpsons-Sears (1985)*

O'Malley converted to Seventh Day Adventist and asked for Saturday Sabbath. Employer offered part time work. Supreme Court of Canada ruled that employer must accommodate employee unless there is "undue hardship."

Syndicat Northcrest v. Amselem (2004)

- A condo corporation refused to allow Jewish owners to have a souccah hut on the balcony although Christmas lights were tolerated. Is there a duty to accommodate religious practices?
- Supreme Court ruled in favour of Jewish owners.

Amselem v. Northcrest

■ Claimant must show

- (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and
- (2) he or she is sincere in his or her belief.

Multani v. Commission scolaire (2006)

- Sikh boy expelled from school because he wore kirpan – small ceremonial dagger – as religious requirement
- Supreme Court of Canada says that he should be allowed to wear kirpan even though it violates “no weapons” policy

Conscientious objection

- Numerous issues have been resolved in believer’s favour
- Newfoundland hospital suspended a Pentecostal clerk because she refused to sell tickets to a social event at which liquor would be served.

Conscientious objection

- Stouffville General Hospital required all obstetrics nurses who had religious objections to assist with abortions.
- Case settled with the hospital agreeing to change its policies to accommodate those nurses who conscientiously object

Conscientious objection

- Shoppers Drug Mart was required to accommodate a Jehovah’s Witness who refused to arrange a display of poinsettias during the Christmas season.

Conscientious objection

- A youth services program was found to be discriminatory for firing an employee for taking off one day a month for the “new moon”. It was discrimination on the basis of religion.

Orville Nichols (SK)

- But marriage commissioners have not been accommodated.
- *I agree with the tribunal’s finding that Mr. Nichols performs a governmental activity when he acts as a marriage commissioner. As a government actor, he is not permitted to consider his personal religious views when performing his public functions.*

Marriage Commissioners

- Saskatchewan government has drafted legislation to allow marriage commissioners conscientious objection. They have referred this to the Saskatchewan Court of Appeal on a reference (to be heard in May)

Wilson Colony v. Alberta (2009)

- But recent case where Hutterites in Alberta were asking for an exemption from mandatory photo driver's licence
- Hutterites are a sect that believes getting a photo taken violates the 2nd commandment (no graven image)



Conscientious objection

- One would have expected that they would be accommodated but Supreme Court of Canada upheld legislation
- Perhaps only a procedural issue but small red flag
- Court did recognize that group rights could apply in certain circumstances (1st recognition)

Conscientious objection and taxes

- So far, people have not been accommodated in diverting their taxes if they disagree with how governments have been spending.
- Prior (1989) was a Quaker who diverted taxes because she object to military spending

Conscientious objection and taxes

- Since 2000 David Little has refused to file tax return on abortion issue. He was charged with failing to file tax returns for 2000, 2001 and 2002. He was ordered to file returns and pay a fine.
- Jan 14, 2010, leave to appeal to SCC refused.

Chamberlain v. Surrey School Board (2002)

- Supreme Court of Canada ruled that school boards can consider concerns of religious parents but cannot use those concerns to exclude other protected groups from inclusion in public schools. The issue was storybooks featuring same-sex parents for classroom use in kindergarten and grade 1.

Christian Horizons

- Christian agency provides residential care to mentally handicapped adults. Have statement of faith and lifestyle policy. Staff fired because of homosexual relationship.
- Ontario Human Rights Tribunal ruled that exemption does not apply because NOT limit service to Christians.
- Appeal to Divisional Court heard in Dec 2009.

Kempling v. B.C. College of Teachers (2005)

- The B.C. Court of Appeal ruled that the College of Teachers was right to discipline a teacher for out of school conduct that was demeaning to gays and lesbians (letters to the editor in paper). Denied right to appeal from Supreme Court.
- Allows professional body to censor teachers.
- 2nd citation from BCCT in 2008.

Restrictions on religious expression

- Bishop Henry – Calgary, pastoral letter
- Pastor Boisson – Red Deer, AB, wrote letter to the editor on homosexuality
- Ezra Levant faced human rights complaint when he published “Danish cartoons” in Western Standard magazine
- Mark Steyn and Maclean’s faced human rights complaint for “America alone”

Freedom to preach in public

- Pastor in Pictou (2004) wanted to have an outreach play at the local bandshell but was denied permission because his play was “controversial”. He proceeded and faced loitering charges. He was acquitted. He won a human rights complaint that the municipal policy is discriminatory against religion.

Freedom to preach in public

- *Pawlowski* charged with obstruction after preaching during an alternative theatre festival. Acquitted.
- Fined for using a microphone at an outdoor event. Court overturned fines on Dec. 7, 2009.
- Now his church has been de-registered for “political activities” (one of which is fighting for freedom of expression).

Current issues

- 1997, Quebec had constitutional amendment to “deconfessionalize” schools
- New “Ethics and Religious Culture” course required – “tolerance” of all religions
- Quebec Superior Court denied parents’ application for exemption
- Last week, Quebec Court of Appeal refused appeal

Current issues

- Bountiful polygamy issue raised in 2000, at the same time as same-sex marriage case
- Human rights complaint dismissed 2007
- Blackmore and Oler finally prosecuted in 2009
- Case dismissed on procedural issue
- October 2009, BC makes constitutional reference to B.C. Supreme Court on Criminal Code s. 293

