

• C A N A D I A N •  
**DIVERSITÉ**  
C A N A D I E N N E

VOLUME 9:3 SUMMER 2012

# Creed, Freedom of Religion and Human Rights

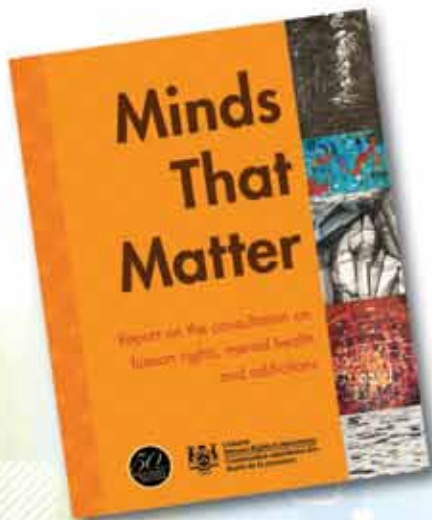


Ontario  
Human Rights Commission  
Commission ontarienne des  
droits de la personne



This issue is a product of collaboration with the OHRC and the Religion in the Public Sphere Initiative (University of Toronto)

# Must-reads from the OHRC



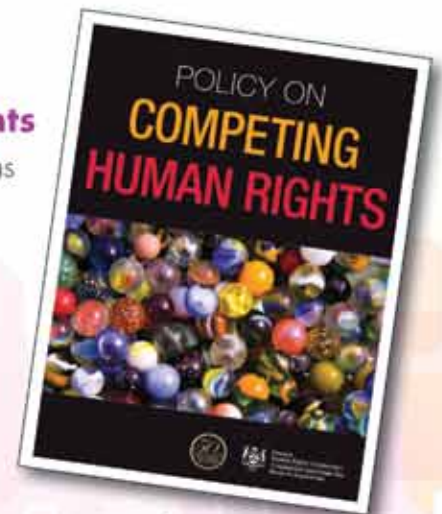
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Minelle Mahtani, University of Toronto

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CANADIAN  
**DIVERSITÉ**  
CANADIENNE

RÉDACTEUR EN CHEF / EDITOR-IN-CHIEF  
Jack Jedwab

DIRECTRICE À LA RÉDACTION / MANAGING EDITOR  
Sarah Kooi

TRADUCTION / TRANSLATION  
Victoria Chwalek & Julie Perrone

EDITORIAL ASSISTANTS/ASSISTANTS ÉDITORIAL  
Victoria Chwalek

GRAPHISME / DESIGN  
Bang Marketing; 514 849-2264 • 1 888 942-BANG  
info@bang-marketing.com

PUBLICITÉ / ADVERTISING  
sarah.kooi@acs-aec.ca  
514 925-3099

ADRESSE AEC / ACS ADDRESS  
1822, rue Sherbrooke Ouest, Montréal (QC) H3H 1E4  
514 925-3096 / general@acs-aec.ca

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## COURRIER

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*Courrier, AEC, 1822A, rue Sherbrooke Ouest, Montréal (Québec) H3H 1E4.*

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## LETTERS

**Comments on this edition of *Canadian Diversity*?**

**Write to *Canadian Diversity***

*Letters, ACS, 1822A Sherbrooke Street West, Montreal, Québec, H3H 1E4.*

*Or e-mail us at <sarah.kooi@acs-aec.ca>*

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# PREFACE

Chief Commissioner Barbara Hall, Ontario Human Rights Commission

Last year marked the 50<sup>th</sup> anniversary of the Ontario Human Rights Commission, and this year we're celebrating the 50<sup>th</sup> anniversary of the *Ontario Human Rights Code*. From the very beginning, creed has been a part of the *Code* – but many of the issues were different in 1962. Too many Ontarians faced blatant discrimination in many parts of their lives because they were Jewish, Seventh Day Adventist or Jehovah's Witnesses, or their beliefs differed from those of mainstream Christianity.

Ontario (and Canada) is a much different place today. People come to Canada from all over the world. They bring with them different systems of beliefs and different ways of celebrating their faith. They are often drawn here because of Canada's image as a place where people from all backgrounds and creeds are welcome.

But there are challenges to living up to this image. As Canadian society becomes increasingly diverse, there is potential for tension as creed issues play out more and more often in the public sphere. Should religious organizations be allowed to have a say on the sex lives and life choices of their employees? Are veganism, ethical humanism or pacifism creeds? Can a school tell a student he or she can't bring a same-sex partner to the prom?

Recent cases coming before the Human Rights Tribunal of Ontario include a religious woman who was told by her boss that she wasn't allowed to pray because it was embarrassing, a Jewish man who was mistreated by firefighters because he was burning ceremonial candles, and a Mennonite man who was assumed to be part of drug culture because of his long hair.

We also see cases where religious rights and freedoms of one group seem to be in conflict with the rights of another group. Examples are a marriage commissioner refusing to perform a same-sex marriage ceremony, or a cab driver refusing a blind passenger with a service dog because of his religion.

Human rights principles help move us away from "us versus them" attitudes to an understanding that all rights matter. Part of what we do at the OHRC is respond to changes in society by regularly updating our human rights policies to help prevent and resolve conflict before it flares up.

We recently launched a brand-new *Policy on Competing Human Rights*, which provides clear, user-friendly guidance for organizations, policy makers, litigants,

adjudicators and others on how to assess, handle and resolve competing human rights claims.

We also began work on revising our policy on creed for the first time in 15 years. The project will involve wide consultation with faith leaders, diverse community members, academics, and human rights lawyers and practitioners. We will also offer opportunities for members of the general public to share their ideas with us through online surveys, interviews, focus groups and other meetings.

Overall, the project will take 2-3 years to complete, and we hope it will provide answers to some of the pressing questions that relate to creed, like:

- What obligations do employers have to accommodate religious holidays for non-Christian staff? Do they have to give staff paid days off or ask them to use vacation days?
- What obligations do hospitals have to meet patients' food requirements because of their religion?
- How much can co-workers talk about their faith before it violates other people's rights?
- How does a person know if their comments on religion in their workplace, or when providing a service, have crossed the line and become harassment?
- Can prayers be held within public schools during school hours?
- Where does the duty to accommodate creed beliefs and practices in public space begin and end?

Another important question we hope to explore is the definition of creed. We're seeing a lot of new ideas and concepts being associated with creed. How should our definition be updated?

There are no easy answers to these questions. But they are important questions to ask if we want to make sure everyone is included and treated with dignity and respect.

In January 2012, the OHRC started on the search for answers by inviting a variety of academic, legal and community experts to submit short papers for discussion at a policy dialogue session in partnership with the University of Toronto's Religion in the Public Sphere Initiative and Faculty of Law. Presenters were also invited to submit longer versions of their papers, which would give an opportunity to expand on the key points they wished to make in the discussion on creed.

The articles presented here are the result of that work. They offer many insights on human rights, creed, freedom of religion and the law, and take many different positions based on many different perspectives. These articles serve as a starting point as we move forward to craft a new creed policy that reflects the changing needs and realities of today's Ontarians.

**Barbara Hall, B.A, LL.B, Ph.D (hon.)**  
Chief Commissioner  
Ontario Human Rights Commission

**A BIT OF HISTORY...**

*Getting started in 1962*

Ontario's first *Human Rights Code*, proclaimed on June 15, 1962, prohibited discrimination in signs, services, facilities, public accommodation, employee and trade union membership on the grounds of race, creed, colour, nationality, ancestry and place of origin.

**A BIT OF HISTORY...**

*Life Together raises the human rights bar*

In July 1977, the OHRC released a comprehensive report, *Life Together*, that outlined the findings of a province-wide consultation on the *Ontario Human Rights Code* and what could be done to improve it. The report recommended sweeping changes, many of which would eventually become law.

# EDITOR'S INTRODUCTION: HUMAN RIGHTS, CREED & FREEDOM OF RELIGION

Remi Warner, Senior Policy Analyst, Ontario Human Rights Commission

Shaheen Azmi, Director, Policy, Education, Monitoring & Outreach, Ontario Human Rights Commission

## EDITOR'S INTRODUCTION

Since the 1996 publication of the Ontario Human Rights Commission's *Policy on Creed and the Accommodation of Religious Observances*, there have been many important legal and social developments in Canada and internationally. These developments have changed the way creed and religion are understood, and shaped the experiences of individuals and communities identified by creed. There has been much public debate on the appropriate limits and protections of rights relating to religion and creed.

The Ontario Human Rights Commission (OHRC) has embarked on a revision of its 1996 *Policy*. The update aims to clarify the Commission's interpretation of human rights on the basis of creed under the *Code*, and advance human rights understanding and good practice in this area more generally. The policy update will require extensive research and consultation and will take two to three years to complete (work began in 2011).

In January 2012, the OHRC brought together community partners, academics, legal professionals and human rights and diversity practitioners from diverse backgrounds to a *Policy Dialogue on Human Rights, Creed, and Freedom of Religion*. This event was organized in partnership with the University of Toronto's Religion in the Public Sphere Initiative and the University of Toronto Law School and was hosted at the University of Toronto's Multi-Faith Centre.

The *Policy Dialogue on Human Rights, Creed and Freedom of Religion* provided an opportunity to hear from interested and affected stakeholders on such key themes as:

- the definition, interpretation and scope of 'creed' and freedom of religion in law;
- social and historical contexts shaping creed-based human rights and freedom of religion issues and experiences on the ground;
- kinds of discrimination and harassment experienced by various communities in Ontario on the basis of creed or religion;

- significant trends, gaps, challenges, and best practices relating to the accommodation of, and inclusive design for, religious/creed beliefs and practices in Ontario society and its institutions;
- intersections of creed human rights and other human rights grounds such as gender, sexual orientation, disability, race, and ethnicity.

The essays in this special issue of *Canadian Diversity* were initially selected through a public Call for Papers. They were presented at the January 2012 Policy Dialogue. The contributors include some of Canada's leading and emerging scholars and legal practitioners working in this area of human rights law, as well as a range of community voices and experts.

The papers range in order and content from historical, conceptual and legal background to concrete and specific experiences from Canadian history and society. The journal begins with an article by **David Seljak** that highlights social and historical contexts and trends shaping creed-based human rights issues and contemporary efforts to protect religious freedom. Seljak argues that Canada has become at once more secular and more religiously diverse in ways challenging to both Canada's "residual Christian" legacy and its efforts to become institutionally multicultural.

**Janet Buckingham, Lori Beaman, Iain Benson and Benjamin Berger's** papers that follow lay out some of the norms and assumptions underlying law and contemporary policy debate on religious rights. **Janet Buckingham's** paper examines diverging interpretations of the meaning of 'secular', as reflected in Canadian jurisprudence and in high profile conflicts between religion and the secular state. Highlighting the positive societal contributions of religion, Buckingham argues for a religiously inclusive understanding of 'secular', citing supporting Canadian legal decisions. **Lori Beaman's** paper explores different frameworks for thinking about religious diversity and inclusion. She highlights the implicit hierarchies of belonging that a discourse of

“tolerance” and “accommodation” can create (where majorities confer benefits on minorities). She argues for a ‘deep equality’ approach, and offers alternative language consistent with Canada’s multicultural commitments. Beaman calls on policy and law makers to incorporate and learn from not only conflict scenarios but also the day to day success stories of negotiating religious difference in Canadian society.

Critiquing the reduction (or ‘reading down’) of religion as private and individual, **Iain Benson’s** paper argues that “creed” and religion should be understood as something that informs what a person takes into the public and that necessarily includes beliefs that often influence “morals and ethics” and even “politics.” Benson also calls for a re-interpretation of the “special employer exemption” found in section 24 of the *Code* as applied to religious employers, which he critiques for focusing too narrowly on *the kinds of job duties* performed by employees rather than the *kinds of religious projects or associations* involved.

**Benjamin Berger’s** paper looks at how constitutional law governing religion both *reflects* dominant liberal cultural norms and ideals and *shapes* how religious adherents present and understand themselves before the law. He points out that this contradicts the conventional self-image of the law as being neutral and as standing above the cultural fray. Berger raises particular concerns with the way in which the law may be encouraging religious adherents, through various legal incentives, to adopt increasingly static and rigid stances.

The papers by **Howard Kislowicz, Gail McCabe, Mary Beaty and Peter Moller and Richard Landau** focus on the definition of religion and creed from different perspectives. **Howard Kislowicz’s** paper examines contending critiques of Canada’s legal definition of religion, primarily as defined by the Supreme Court of Canada decision in *Syndicat Northcrest v. Amselem* (“*Amselem*”)<sup>1</sup>, which some critics argue is either too narrow or too broad to be meaningful and useful. Kislowicz cautions against efforts to comprehensively define ‘religion’ in policy or law, arguing for a more flexible, adaptive, and evolving ‘analogical’ approach (if it looks like a duck...), which, he argues, has been the dominant approach taken by the Human Rights Tribunal of Ontario.

Collaboratively produced by the *Ontario Humanist Society’s* (OHS) ‘Ethical Action Committee’, **Gail McCabe, Mary Beaty and Peter Moller’s** paper argues for an expanded and more inclusive OHRC policy definition of ‘creed.’ The exclusion of moral, ethical, and political beliefs of a secular nature in the current definition, McCabe et al. argue has led to the failure of the *Code* to fully protect the individual and collective rights of Humanists and other such ethical communities of choice.

As a TV broadcaster faced with making difficult day-to-day choices regarding acceptable religious programming content, from both a moral and legal perspective, **Richard Landau** argues against leaving the definition and interpretation of religion and creed too open and undefined. He suggests various criteria by which one might distinguish legitimate faith communities (“authentic” religions) from those either promoting illegal or vexatious objectives, or which simply do not merit the same legal protection as centuries-old faith traditions.

**Richard Moon, Andre Schutten, Cara Zwibel and Heather Shipley’s** papers consider the boundaries and limits of creed-based human rights and freedom of religion, in interaction with various competing legal claims.

Engaging Chief Justice McLachlin’s legal reasoning in the Supreme Court of Canada decision in *Alberta v. Hutterian Brethren of Wilson Colony*<sup>2</sup>, **Richard Moon’s** paper argues that while ‘reasonable accommodation’ may be an appropriate analytical framework for imposing restrictions on an individual’s freedom of religion under *Human Rights Codes*, it is not the appropriate analysis to take in *Charter* freedom of religion cases in which restrictions on religious freedom are imposed by statute. Moon, however, critiques Chief Justice McLachlin’s alternative approach - the balancing of interests under s.1 of the *Charter* - as being ‘either inappropriate or unworkable.’

**Andre Schutten’s** paper takes issue with what he argues are overly narrow interpretations, as applied to religious employers, of the exemption from the prohibition of employment discrimination as provided for under section 24(1)(a) of the *Ontario Human Rights Code*. Schutten traces the history of such narrow readings of section 24 of the *Code* to disability case law, which he argues, has unjustifiably (for reasons of non-comparability) set the standard for section 24 analyses in religious employment contexts. He calls for a modification of the *Code* legislation under s.24 in order to fully protect the rights of citizens to freely associate with others in a religious community, consistent with *Supreme Court Charter* jurisprudence.

**Cara Zwibel’s** paper examines two main dimensions of the freedom of religion: the *freedom to* manifest beliefs and practices, in private and public, un-coerced and unconstrained by state authority, on the one hand, and the right to be *free from the imposition of religion*, on the other hand. Zwibel looks at how these two inseparable aspects of religious freedom interact in the context of religious accommodation issues in public schools. She suggests various key factors to consider in what is necessarily a delicate balancing act to ensure that school religious accommodations do not veer over the line into state endorsement or sanctioning of religion.

**Heather Shipley's** paper completes the section of papers concerned with competing rights and the limits of religious freedom by cautioning against overly narrow and rigid constructions in law and policy that oppose the rights of religious believers against the rights of sexual minorities. Such constructions, she argues, caricaturize both religious believers and sexual minorities in the process, setting up an inescapably conflictual relationship that fails to acknowledge, allow for, or cultivate actual or possible intersecting interests and identities in between these two apparent solitudes.

The remaining five papers by **Alice Donald, Anita Bromberg, Uzma Jamil, Barry Bussey and Matthew King** provide a view of how various communities, past and present, have grappled with creed-based human rights issues on the ground.

Presenting select findings of research commissioned in 2011 by Britain's *Equality and Human Rights Commission*, **Alice Donald's** paper provides a view from England and Wales of the law and its relation to equality, human rights and 'religion or belief' (as British law protects both religion and belief under human rights legislation). Donald examines some of the prominent legal cases making waves in the UK, and identifies areas where the law is particularly unclear and contested.

**Anita Bromberg's** paper looks at Jewish efforts to integrate in Canada, with their religious identities and practices intact. Bromberg highlights some of the more recent stresses on contemporary efforts by Jews to seek religious accommodation in the context of increasing religious diversity, 'multicultural' backlash and general misunderstandings of accommodation as synonymous with unmerited 'special privilege'.

Based on a preliminary analysis of data from a community research study, **Uzma Jamil's** paper looks at everyday experiences of Muslims in the Greater Toronto Area, post-9/11, with Islamophobia – a concept she explores and defines. While most of the respondents in her study expressed positive views about their rights and freedoms to practice their religious beliefs in Canada, many felt that there were widespread negative stereotypical social attitudes and perceptions about Islam and Muslims in Canadian society which, for many, created feelings of not belonging irrespective of place of birth or length of residency in Canada.

**Matthew King's** paper examines how two diverse segments within the Canadian Buddhist community - western convert and Asian immigrant - variously negotiate religious needs and practices within two mainstream Canadian institutional spheres: end of life care and the penal system. King demonstrates how dominant liberal-individualist legal interpretations of creed and religion, in effect, disproportionately privilege and protect the religious practices of western converts, while marginalizing majority immigrant understandings and practices of Buddhism.

Closing out the publication is an article by **Barry Bussey** that looks at the history of Canadian Seventh-day Adventist conscripts who sought conscientious objector status during WWII, before an unyielding Mobilization Board. The refusal of many young Seventh-day Adventist men to bear arms in the regular forces was almost uniformly met with severe consequences. Some were compelled to serve in the army. Others faced ridicule, imprisonment, and/or hard labour in alternative service work camps.

We hope that this publication serves as one of several opportunities to broaden the creed policy conversation beyond those who were able to attend the January 2012 Dialogue.

We would like to acknowledge the tremendous contributions of our partners at the University of Toronto, including Richard Chambers, Director of the Multi-Faith Centre, and Pamela Klassen, Professor in the Department for the Study of Religion and Director of the Religion in the Public Sphere Initiative. We also note the invaluable assistance and insight provided by members of the University of Toronto's Faculty of Law, including Professor Anver Emmon and Jenna Preston, as well as Nadir Shirazi at the Multi-Faith Centre, and Professors Bruce Ryder and Benjamin Berger at York University's Osgoode Hall Law School, all of whom provided critical input at key moments throughout in the development of the Policy Dialogue.

Finally, we would like to thank all of the Policy Dialogue presenters, participants and contributors who so generously offered their time, thoughts and energy to make the Policy Dialogue, and this publication, so engaging and insightful. It is our hope that your efforts, and this publication, will help set the stage for healthy, balanced and well reasoned public policy debate on human rights, creed and freedom of religion in the coming months and years.

# PROTECTING RELIGIOUS FREEDOM IN A MULTICULTURAL CANADA<sup>1</sup>

**David Seljak** is Associate Professor of Religious Studies at St. Jerome's University in Waterloo, Ontario and Chair of the Department of Religious Studies at the University of Waterloo. From 1998 to 2005, he served as Director of the St. Jerome's Centre for Catholic Experience. Along with Paul Bramadat of the University of Victoria in British Columbia, he co-edited *Religion and Ethnicity in Canada* (2005) and *Christianity and Ethnicity in Canada* (2008). He is also editor of a theological journal, *The Ecumenist: A Journal of Theology, Culture and Society*, which is published by Novalis. His latest projects have been a series of research reports for the Canadian government's Department of Canadian Heritage on religion and multiculturalism in Canada.

## **ABSTRACT**

This paper seeks to provide a social and historical context for the efforts of the Ontario Human Rights Commissions attempt to re-evaluate its policy on addressing discrimination based on “creed” and protecting religious freedom. Most Canadians assume that because Canada is a secular, multicultural society, the problems of religious intolerance and discrimination have disappeared. Consequently, they are confused by public conflicts such as the “reasonable accommodation” debate in Quebec and the “sharia courts” controversy in Ontario. Part of the confusion arises from the fact that, since the 1970s, Canada has become both more secular as well as more religiously diverse. Canadian Sikhs, Muslims, Hindus, Buddhists, Chinese and Jews – as well as aboriginal peoples – struggle to integrate themselves into structures that had been defined first by Christianity and then by Canadian-style secularism. At the same time, new forms of religious intolerance and discrimination have emerged, challenging Canada's efforts to become a multicultural society.

Many Canadians are confused about the re-emergence of questions of religious diversity and freedom in public debates about human rights. Some thought that religion had ceased to be an important element of identity and social dynamics. Others assumed that the “separation of church and state” – along with legal guarantees of freedom from religious discrimination (the *Canadian Charter of Rights and Freedoms* 1982, for example) – had put the issue to rest. Yet it is now 2012 and religion is front and centre in a variety of public policy debates in areas as diverse as citizenship, security, employment, municipal zoning, education, healthcare, justice and human rights. The new public presence of religion has inspired the Ontario Human Rights Commission – which already has a fairly progressive policy on religious freedom and protection from discrimination based on “creed” (Ontario Human Rights Commission, 1996) – to revisit the question.

Consequently, many are puzzled and disturbed by the return of religion to the public sphere. In fact, it is nothing new. Since its foundation, the European settler society has struggled over how best to govern religious diversity. In broad terms, three solutions have been attempted: a single, state-supported Christian church with little religious freedom (1608-1841); a “Christian Canada” with no official church, but a decidedly Christian culture and state

cooperation with a limited number of “respectable” Christian churches (1841-1960); and a secular society with a greater “separation of church and state” and a multicultural approach to religion (1960-present) (Bramadat and Seljak 2008). Now, fifty years into this third phase, many Canadians thought all of the problems that so plagued the previous phases (i.e., insufficient legal recognition of religions and insufficient protection against discrimination) had been resolved.

Paul Bramadat and I (2012) have argued that these questions have emerged in a unique period in Canadian history, the interregnum between a secular and a post-secular Canada, i.e., a society in which religious communities are free to worship and contribute freely and fairly to public life and in which religious communities accept and recognize one another as well as the neutrality of the state (Casanova, 2008, p.113). My goal in this brief article is to illustrate where we are now (a putatively-secular Canada), what new social developments have arisen to challenge that arrangement, and what is moving us to a post-secular society. In this manner, I hope to contextualize historically and socially the current efforts of the Ontario Human Rights Commission to update its policies on religious freedom and diversity.

## PROTECTING RELIGIOUS FREEDOM IN A CHANGING SOCIETY

Because many Canadians have ceased to think about religion at all, they do not recognize the persistence of religious intolerance (attitudes, values and beliefs) and discrimination (actions, practices and structures) – nor their pernicious effects. However, religious intolerance and discrimination continue to present significant barriers to the goals of any society that wants to call itself democratic, egalitarian, participatory, and multicultural. Religious intolerance and discrimination assume three main forms:

1. Despite great advances on some fronts, many Canadians have not overcome traditional religious prejudices rooted in the historical connection between Christianity and Canadian national identity.
2. Moreover, new forms of religious intolerance and discrimination have arisen in which tensions between two groups – say between Hindus and Sikhs or Muslims and Jews – are not grounded in Canadian history or in relations between local communities in Canada, but in recent international conflicts (e.g., between Hindu and Sikh communities in India after 1947 and between Jews and Muslims in the Middle East after 1948).
3. Most importantly, the assumption that Canada is a secular society that has basically resolved the problem of religious intolerance and discrimination blinds Canadians to “structural discrimination” or “religious disadvantage” that many groups suffer (Seljak, Benham Rennick, Schmidt, Da Silva & Bramadat 2007). Certain religious groups may find themselves at a disadvantage simply because secular Canada is structured to accommodate mainline Christian religions. For example, having Sunday as a common day of rest allows most Christians to attend worship services, while members of smaller communities, such as Buddhists or Hindus, often have to move their holy day celebrations to the nearest Sunday.

## PROBLEM OF RELIGIOUS INTOLERANCE AND DISCRIMINATION IN CANADIAN HISTORY

The current policies of the Ontario Human Rights Commission – along with other legal guarantees of freedom of religion – are rooted in the attempt to address the injustices of Canadian history, specifically that era of Christian Canada (roughly 1841-1960). In fact, Christian Canada – really a compromise between mainline Protestant and Roman Catholic nation-builders – was not equally welcoming of all types of Christianity. The mainline Protestant churches (Anglican, Presbyterian and United) received special government respect, access, and support. The Roman Catholic Church shared in this special status –

although in a more limited way. Other mainstream denominations (Lutherans, Baptists, etc.) were also included in the circle of respectability. However, more marginal Christian groups, such as Mennonites, Jehovah's Witnesses, Hutterites, Eastern Orthodox and conservative evangelicals were excluded (Seljak, Benham Rennick, & Shrubsole 2011). While there was no official state-church or “establishment” in Canada's first century after Confederation, the mainline churches formed what sociologists call a “shadow establishment.” In broad terms, to be a (proper) Canadian, one had to be a (proper) Christian – in the same way that one had to be white or male. Indeed, throughout Canadian history, religious chauvinism and prejudice has most often intersected with racism and sexism (along with hetero-sexism, and class prejudice).

The consequences of this widespread assumption (to be Canadian was to be Christian) have been lamentable. It was the basis for the dismissal of Aboriginal spirituality and life-ways, as well as the efforts to convert and “civilize” Aboriginal peoples. Eventually, this assumption led the Canadian government and Christian churches to create the disastrous system of day schools and residential schools for aboriginal children (Miller 1996). It also legitimated discrimination against non-Christian Canadians, such as Sikhs, Hindus, Buddhists, Muslims and Jews. What is often forgotten though is that minority Christian groups (such as Doukhobors, Mennonites, etc.) were also victims of this prejudice. Indeed all non-conformists lived under a cloud of disrepute, which is why new religious movements – such as those that spread in the 1970s – were greeted with widespread hostility and suspicion, even though Canada was becoming a more secular society at the time. Finally, one has to mention the anti-Catholicism that one found almost everywhere in Protestant Canada before the 1960s. Often tied to prejudice against French Canadians, who were overwhelmingly Catholic, anti-Catholicism in the first century of Canada's existence was also linked to anti-immigrant sentiment aimed at the Irish, Italians, Germans, and other newcomers from Eastern and Southern Europe (Seljak, Benham Rennick, Schmidt, Da Silva & Bramadat 2007).

## LEGAL PROTECTIONS OF RELIGIOUS FREEDOM AND SECULARIZATION

After World War II, and especially during the 1960s, attitudes towards religious tolerance and freedom in Canada began to change. In order to address widespread religious intolerance and discrimination still evident in the 1960s, various levels of government adopted legal protections against discrimination based on “creed.” Our current protections are products of these initiatives. So, for

example the *Canadian Charter of Rights and Freedoms* (1982) guaranteed the freedom of religion and conscience in Section 2. Freedom from religious discrimination was also guaranteed in the *Canadian Multiculturalism Act* (1988), the *Canadian Human Rights Act* (1985) along with various provincial human rights codes, the *Employment Equity Act* (1995), and the *Canada Labour Code* (R.S., 1985, c. L-2). Along with guaranteeing protection against discrimination based on religion, these laws – and especially the *Charter* – curtailed Christian privilege in Canadian public life, having the net effect of creating a wider separation of church and state.

The separation of church and state and the broader secularization of Canadian society was, in part, also an attempt to address the problem of religious privilege and discrimination against persons of a minority faith tradition or of no faith. Secularization was embraced in Canadian public culture as part of the strategy of undermining Christian privilege and building a state that demonstrated “equal access, equal distance, equal respect, or equal support to all the religions within its territory” (Casanova, 2008, p.113). It is an on-going project, as the vestiges of Christian Canada (public funding for Catholic schools in a number of provinces, for example) remain. Still, after the 1960s, Christianity was increasingly excluded from decisions about education, health care, social services, and other public policy areas. More and more, it lost its power to define public morality. So for example, courts and government changed laws on divorce, birth control, abortion, Sunday shopping, and same sex-unions, and in each instance moved away from enforcing Christian ethics on the Canadian population.

The net effect of this “social disestablishment” of Christianity was the privatization of religion. Religion was increasingly defined as properly belonging to the private realm of personal interiority, family relations, local associations (which is how religious communities were redefined), and ethnic groups. It was largely this privatized form of religion, that Winnifred Fallers Sullivan (2008) identifies as “private, voluntary, individual, textual and believed” (p.8), which received protection under the new regime.

## NEW CHALLENGES

Since the 1960s, several social trends have challenged secularization and the privatization of religion, presenting new challenges to those who wish to protect religious freedom and promote religious diversity. For example, the liberalization of immigration laws after 1968 has resulted in an increasingly diverse society, which included the growth of non-Christian religious communities. From 1991 to 2001, the number of Canadians calling themselves

Muslim, Hindu, Sikh or Buddhist on the Canadian Census increased dramatically (Statistics Canada, n.d.). Even among Christians there is increasing diversity, with Canadians from Asia, Africa, South America, and the Caribbean now filling the pews. This new religious cosmopolitanism has led many to express anti-immigrant sentiments around religious issues, such as the wearing of the hijab or kirpan. Anti-immigrant and racist movements now highlight religious difference in their denigration of ethnic and racial minority groups. This new diversity has also led to new forms of intolerance and discrimination in which trans-national ethnic, political, and religious (and ethno-politico-religious) conflicts are now played out on Canadian soil.

Finally, this new diversity has challenged the “closed” form of the Canadian model of secularism based on a rigid model of the privatization of religion. As the Bouchard/Taylor Commission in Quebec observed, “closed” secularism – with its assumption that all religions are essentially unenlightened, tribal, anti-egalitarian, and potentially violent – is part of the problem (Bouchard & Taylor, 2008). For many Canadians, the formula “to be a good Canadian one must be Christian” has 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.

This last challenge raises the question as to whether Canadian secularism is indeed “open,” that is, egalitarian, democratic, rational and multicultural. For instance, does the Canadian state now demonstrate “equal access, equal distance, equal respect, or equal support to all the religions within its territory?” Some argue that, in fact, Canadian secularism is residually Christian, that is, it still bears the imprint of its Christian past, and consequently has not addressed Christian privilege sufficiently. For example, our major social institutions in the realm of education, healthcare and social services are largely structured after their Christian predecessors – even though each has been thoroughly secularized. Canadian public culture is still marked by Christian values about what is allowable, reasonable, desirable or extreme. Consequently, secular Canada is more open to religious communities that have adapted themselves to liberal Protestant norms. The controversies we see around religion in Canada today occur when members of various religious communities refuse to live by those norms. For instance, when they run afoul of generally accepted norms of gender equality by wearing a hijab on a soccer field, or when they expect their religion to play a role in public life, for example, by asking for state funding for Jewish day schools.

## CONCLUSION

Many public institutions – including the Ontario Human Rights Commission – have found themselves having to rethink the protection of religious freedom and the promotion of religious diversity. They will need to counter traditional forms of intolerance and discrimination, be sensitive to emerging forms of intolerance rooted in transnational conflicts, remain attentive to the emerging confluence of racism and religious intolerance and develop sensitivity to lingering Christian privilege. Finally, they will need to work towards a broader definition of religion that includes the diversity of religious belief and practice that we find in Canada today. For, in the end, 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. Attention to Canada's new religious diversity gives us the abilities to see, for the first time, the outlines, qualities, and limitations of Canadian secular human rights regime and its protections of religious freedom and diversity. Such a project will guide us in our transition to a new definition of secularism, religious freedom, and religious diversity.

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### A BIT OF HISTORY...

*Are practices really neutral?*

[In] 1962, it was generally believed that discrimination took place through conscious overt actions directed against individuals. Therefore, the *Code* expressly prohibited such actions and to some degree deliberate and overt discrimination has declined since then. But the Commission's experience in administering the *Code* during the last fifteen years demonstrates that the most pervasive discrimination today often results from unconscious and seemingly neutral practices which may, none the less, be as detrimental to human rights as the more overt and intentional kind of discrimination.

Source: *Life Together*, 1977

# THE RELATIONSHIP BETWEEN RELIGIONS AND A SECULAR SOCIETY

**Janet Epp Buckingham** is an associate professor at Trinity Western University and serves as the Director of the Laurentian Leadership Centre, an Ottawa-based, live-in, extension program focusing on public policy. She was previously director, law and public policy for the Evangelical Fellowship of Canada. She is a lawyer with expertise in religious freedom and human rights. Buckingham received her LL.B. from Dalhousie University. She has been called to the bar and practiced law in Nova Scotia and Ontario. Buckingham completed her LL.D. at the University of Stellenbosch, South Africa, with a dissertation comparing religious freedom in Canada and South Africa.

## ABSTRACT

The first step in developing a framework for the interface between a secular society and religion is to define the role of the “secular” state. This paper identifies four interpretations of the meaning of “secular” and identifies legal cases that use several different interpretations. In addition, it gives a strong rationale for the protection of religious rights. After reviewing some high profile conflicts between religion and the secular state, the author argues for the broadest inclusion of religious adherents in Canadian society.

Every society has a dominant culture, usually with religious roots. Canada had a dominant Judeo-Christian ethos until the rise of secularism in 1960s. The advent of the *Charter* in 1982 accelerated the secularization of Canadian society. Secularization reflected a move away from religion as a dominant source of social mores in the western world. As well, it is characterized by the rise of individualism, where the individual is more important than the community. Religious adherence is no longer valued in Canadian society but rather is often viewed with suspicion. How then can one justify accommodation of religious adherents?

Religion is a fundamental part of human dignity. For many adherents, it is far more than a mere lifestyle choice, it is the deepest part of who they are. To violate a person’s religious freedom or require them to act against their religious beliefs or practices violates the very core of that person’s being.<sup>1</sup> Sociological studies have shown positive benefits of religious affiliation for school performance, positive family life, well-being and contribution to community life.<sup>2</sup> Religions also provide for rites of passage such as marking birth, marriage and death.

Religions generally promote ethical, law-abiding behavior in their adherents. Religious adherents strive to obey the law and respect the authority of the state. Religion thereby fosters “moral self-government.”<sup>3</sup> Kelsay and Twiss argue, “Cooperation, sharing, and altruism can all be related to the sense of identity that religious traditions provide.”<sup>4</sup> Religious institutions are the source of much humanitarian work within Canada and internationally. Religious adherents provide much of the funding as well as volunteer

labour for these institutions.<sup>5</sup> However, “these traditions suffer a loss of function when they are removed from the domain of public life.”<sup>6</sup> It appears, then, that if religious adherence is valued and accommodated, the benefits that accrue to society are well-behaved citizens that contribute to the well-being of society. If religious adherence is denigrated, if it is marginalized, if it is shut out from public life, society will not only lose the benefits derived from religious adherents but also likely face a backlash from religious adherents.

Opponents of religion like to focus on the divisive effects of religion; on conflict and wars occurring with religious overtones. In many other conflicts, however, religion has been a positive force for peace and for state building. In Poland and East Germany, for example, civil society began in church basements<sup>7</sup>. In South Africa, a national day of prayer contributed to the relative peace in which the 1994 general election was held.<sup>8</sup> Francis Fukuyama argues that religion is part of the “art of associating” that is necessary for the functioning of liberal democracy.<sup>9</sup> Attachment to a religious community therefore facilitates engagement with and pride in democratic institutions.

Freedom of religion is a cornerstone of a free society. Chief Justice Dickson articulated the broad right to religious freedom in ringing terms in the first Supreme Court of Canada judgment on section 2(a) of the *Charter*:

*A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one*

*which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. 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.<sup>10</sup>*

These lofty words are inspiring but the reality is that religious teachings and practices often bump up against the prevailing secular society.

This raises the question of what is meant by “a secular society.” Iain Benson helpfully developed a typology in a 2000 article titled “Notes Towards a (Re)Definition of the ‘Secular’”<sup>11</sup> to identify the various ways that a secular state can interact with religion within its borders:

- (1) neutral secular: The state is expressly non-religious and must not support religion in any way;
- (2) positive secular: The state does not affirm religious beliefs of any particular religion but may create conditions favourable to religions generally;
- (3) negative secular: The state is not competent in matters involving religion but must not act so as to inhibit religious manifestations that do not threaten the common good;
- (4) inclusive secular: The state must not be run or directed by a particular religion but must act so as to include the widest involvement of different faith groups, including non-religious.

There is thus not one, single understanding of the meaning of “secular” when it comes to the responsibilities of the state towards religion.

The case *Chamberlain v. Surrey School District #36*<sup>12</sup> is a rare case in actually defining “strictly secular” in section 76 of the *BC School Act*.<sup>13</sup> The case concerned school board approval for three storybooks, which featured same-sex parents, as “educational resource material”. Two teachers, both members of Gay and Lesbian Educators (GALE), applied to have the books approved for use in kindergarten and grade 1. When the Surrey school board held public hearings on approval, there was substantial opposition from religious leaders and adherents, but also from others with no identified religion. Most of those opposed agreed that the content of the books was controversial and these issues are more appropriately dealt with at higher grades. The school board voted against approving the books.

The two teachers, and others, applied for judicial review arguing that the school board based its decision on religious concerns.

The case generated five different views of the meaning of “strictly secular.” At the B.C. Supreme Court, Justice Saunders ruled, “In the education setting, the term secular excludes religion or religious belief.”<sup>14</sup> Further, she held, “I conclude that the words ‘conducted on strictly secular... principles’ precludes a decision significantly influenced by religious considerations.”<sup>15</sup> She went on to review the affidavits submitted by religious leaders<sup>16</sup> and testimony from trustees that they were influenced by these concerns and concluded, “by giving significant weight to personal or parental concern that the books would conflict with religious views, the Board made a decision significantly influenced by religious considerations, contrary to the requirement in s. 76(1) that schools be ‘conducted on strictly secular... principles.’”<sup>17</sup> This reasoning is fairly clearly “neutral secular.” Justice Saunders believes that the state must not support religion even by allowing religious arguments to be considered by a state agency.

The B.C. Court of Appeal overturned Justice Saunders’ decision.<sup>18</sup> Justice Mackenzie, writing for a unanimous court, said, “To interpret secular as mandating ‘established unbelief’ rather than simply opposing ‘established belief’ would effectively banish religion from the public square.”<sup>19</sup> Further, “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.”<sup>20</sup> Justice Mackenzie upheld the Board’s decision as it was based on parental concerns. This decision allowed all arguments to be made in the public square and left it to the democratic process to decide the outcome. This is clearly “inclusive secular.”

The case was then appealed to the Supreme Court of Canada where three justices wrote decisions. Chief Justice MacLachlin, writing for the majority, said, “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.” In this case, then, the concerns of religious parents could not justify excluding a protected minority group, same-sex parent families. Chief Justice MacLachlin’s reasoning appears to fit the “negative secular” type. She appears to also suggest that the state was in danger of being directed by a particular religion, which would allow the argument to potentially fit within the definition of “inclusive secular.”

Justice LeBel wrote a concurring minority judgment finding that the Board’s decision was contrary to the requirement that schools be conducted on a “strictly secular” basis. He says, “The overarching concern motivating the Board to decide as it did was accommodation

of the moral and religious belief of some parents that homosexuality is wrong, which led them to object to their children being exposed to story books in which same-sex parented families appear.<sup>21</sup> However, he says Justice Saunders goes too far in saying that there is no place for religious views in the public square.<sup>22</sup> Rather, it is only religious views that are intolerant of others that cannot be countenanced by the Board, and certainly cannot be the basis for a policy decision. Justice Bel's reasoning belies a "negative secular" rationale.

Justice Gonthier dissented and followed Justice Mackenzie's approach that it is the role of the school board to make decisions about resources and they are entitled, indeed required, to take into consideration the views of parents in the community. Justice Gonthier does not appear concerned that there is moral disapproval of lifestyles. Further, he explicitly refuses to relegate religion to the private sphere, "retreated into the religious 'closets' of home and church,"<sup>23</sup> as he puts it. Justice Gonthier clearly believes that Canadian society does not require conformity of worldviews, "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."<sup>24</sup> As with Justice Mackenzie's reasoning, Justice Gonthier's argument fits within the "inclusive secular" paradigm.

When it comes to accommodating individual religious practices, which would comprise the majority of human rights complaints, Canadian law appears to support the contention that Canadian society fits within category (4), "inclusive secular." The *Charter of Rights and Freedoms* has broad protection for freedom of conscience and religion under s. 2(a), and for equal protection of the law without discrimination based on religion under s. 15(1). Supreme Court of Canada decisions also support this interpretation of the place of religious freedom in Canadian society. In the *Same-sex Marriage Reference*, the court stated that religious freedom is "broad and jealously guarded."<sup>25</sup> This has certainly been born out in cases like *Multani v. Commission scolaire Marguerite-Bourgeoys*,<sup>26</sup> upholding the right of a Sikh boy to wear the kirpan at school, and *Syndicat Northcrest v. Amselem*,<sup>27</sup> supporting the rights of Orthodox Jews to observe Succat by building structures on their balconies over the objections of their condominium corporation.

These models of interpreting "secular" apply in Ontario human rights law become very important when dealing with complex issues involving the interface between religious groups and society. A current controversial example is that of Valley Park Middle School in North York that provides space for Muslim students to have Friday prayers under the direction of an imam. The school accommodated the religious needs of a significant group of students in the school. However, parents and other religious

leaders raised issues of whether this decision was itself discriminatory in singling out one group for perceived "special treatment," leaving the school appearing to endorse a particular religion. Others expressed concerns about discriminatory treatment of girls, a competing human right. Justice Gonthier and Justice Mackenzie's approach would allow negotiation to allow the broadest possible inclusion of religion and religious observance. Justice MacLachlin's approach would allow for Muslim prayers so long as no one else was excluded. Justice LeBel and Justice Saunders would likely exclude religious observance at the school on the basis that public schools are not an appropriate forum for religious observance. It is clear that one's interpretation of the interface between religion and the secular society can determine the outcome of a claim of discrimination on the basis of "creed".

Simplistic answers do not suffice when addressing the place of religious observance, and religious accommodation, in a multi-religious, yet secular society. I would argue the inclusive secular approach should be used as the starting point; that is maximum inclusion and accommodation of religious observance. Religion is deeply important to believers and should be respected wherever possible.

#### NOTES

<sup>1</sup> Charles Taylor makes the argument for recognition of "our fundamental defining characteristics as human beings" in "The Politics of Recognition" first published in *Multiculturalism*, Amy Gutman (ed.), (Princeton: 1992); republished in *Philosophical Arguments*, Charles Taylor, (Cambridge, Mass.: 1995).

<sup>2</sup> E.H. Schludermann, S. Schludermann and C. Huynh, "Religiosity, Prosocial Values, and Adjustment among Students in Catholic High Schools in Canada" (2000), 21 *Journal of Beliefs & Values* 99; Kurt Bowen, *Religion, Participation, and Charitable Giving: a report*, (Toronto: 1999); Warren Clark, "Religious Observance: Marriage and Family", (Autumn 1998) *Canadian Social Trends*, Statistics Canada, B.G.F. Perry, "The Relationship between Faith and Well-Being" (1998), 37 *Journal of Religion and Health* 125; M. Baetz, R. Bowen, G. Jones and T. Koru-Sengul, "How spiritual values and worship attendance relate to psychiatric disorders in the Canadian population," (2006), 51 *Canadian Journal of Psychiatry* 654.

<sup>3</sup> Winnifred Fallers Sullivan, *Paying the Words Extra: Religious Discourse in the Supreme Court of the United States*, (Cambridge: 1994), at 163.

<sup>4</sup> John Kelsay and Sumner Twiss, (eds.), *Religion and Human Rights*, (Waco: 1994), at 3.

<sup>5</sup> Statistics Canada, *Survey of Giving, Volunteering and Participating*, (Ottawa: 2004).

<sup>6</sup> *Ibid*, at xi.

<sup>7</sup> Douglas Johnston and Cynthia Sampson, (eds.) *Religion, The Missing Dimension of Statecraft*, (New York: 1994).

<sup>8</sup> Michael Cassidy, *A Witness Forever – The Dawning of Democracy in South Africa; Stories behind the Story*, (London: 1995).

<sup>9</sup> Francis Fukuyama, *The End of History and the Last Man*, (New York: 1992), at xix.

<sup>10</sup> *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295. The court struck down the *Lord's Day Act* as offensive to religious freedom on the basis that it had a religious purpose, namely to enforce the Christian Sabbath.

<sup>11</sup> Iain Benson, "Notes Towards a (Re)Definition of the 'Secular,'" (2000), 33 U.B.C.L.R. 519.

<sup>12</sup> (1998), 60 B.C.L.R. (3d) 311 (S.C.); (2000), 80 B.C.L.R. (3d) 191 (C.A.); [2002] 2 S.C.R. 710.

<sup>13</sup> R.S.B.C. 1996, c. 412.

<sup>14</sup> *Supra* note 12, 60 B.C.L.R., at para. 78.

<sup>15</sup> *Ibid.*

<sup>16</sup> Affidavits were submitted from Christian, Hindu, Muslim and Sikh leaders.

<sup>17</sup> *Supra* note 12, 60 B.C.L.R., at para. 95.

<sup>18</sup> *Supra* note 12, 80 B.C.L.R.

<sup>19</sup> *Ibid.* at para. 30.

<sup>20</sup> *Ibid.* at para. 34.

<sup>21</sup> *Supra* note 12, S.C.R., at para. 189.

<sup>22</sup> *Ibid.* at para. 209.

<sup>23</sup> *Ibid.* at para. 135.

<sup>24</sup> *Ibid.* at para. 137.

<sup>25</sup> [2004] 3 S.C.R. 698, para. 53.

<sup>26</sup> [2006] 1 S.C.R. 256.

<sup>27</sup> [2004] 2 S.C.R. 551.

### A BIT OF HISTORY...

#### *Getting to the root causes of discrimination*

Because historical and institutional discrimination is so pervasive and complex, the Commission cannot deal with it effectively only by responding to individual complaints. It is essential that its mandate be broadened and its procedures be made sufficiently flexible to enable it to cope with human rights problems that are at the root of discrimination, rather than dealing only with the individual incidents of discrimination that arise from such problems.

Source: *Life Together*, 1977

# THE MISSING LINK: TOLERANCE, ACCOMMODATION AND... EQUALITY<sup>1</sup>

**Lori G. Beaman**, Ph.D. is Canada Research Chair in the Contextualization of Religion in a Diverse Canada and Professor in the Department of Classics and Religious Studies at the University of Ottawa. Her publications include *Defining Harm: Religious Freedom and the Limits of the Law* (UBC Press, 2008); “Is Religious Freedom Impossible in Canada?” in *Law, Culture, and the Humanities* (2010); and “‘It was all slightly unreal’: What’s Wrong with Tolerance and Accommodation in the Adjudication of Religious Freedom?” in *Canadian Journal of Women and Law* (2011). She is co-editor, with Peter Beyer, of *Religion and Diversity in Canada* (Leiden: Brill Academic Press, 2008). She is principal investigator of a 36 member international research team whose focus is religion and diversity (religionanddiversity.ca).

## **ABSTRACT**

This paper encourages a rethinking of the ideas of tolerance and accommodation, suggesting that these concepts may be inappropriate for a country that has a history of diversity, multiculturalism and equality. The paper considers the contexts in which the language of tolerance and accommodation is located. It argues that tolerance and accommodation create hierarchies wherein majorities confer benefits on minorities. Although equality is the preferred framework, sufficient conceptual flexibility allowing for the inclusion of notions like ‘respect’ is required to ensure the most robust possible protection of creed. Finally, the paper suggests that there is a major stumbling block to identifying best practices both for day to day negotiations of religious difference, for policy and law makers, and for service providers. While there are persistent negative narratives, there are no similar persistent positive narratives that recover success stories of negotiation. It is only from such narratives, or ground up knowledge, that successful best practices and policies can be developed.

## **INTRODUCTION**

Increased immigration, a renewed public discussion about the place of religion in society, and Canada and Ontario’s commitment to multiculturalism require a careful crafting of policies and laws related to religious freedom. The language used in human rights protections, policies, and processes, as well as the conceptual frameworks within which disputes are resolved—both in law and in day to day life—convey important messages about the relative value of citizens’ beliefs and practices to society.

This paper considers the accommodation of religious belief and practice in diverse contexts. Specifically it will encourage a rethinking of the ideas of tolerance and accommodation, suggesting that these concepts may be inappropriate for a country that has a history of diversity, multiculturalism and equality. The paper considers the contexts in which the language of tolerance and accommodation is located (law, interfaith dialogue and public discourse). It offers a critical exploration of the hierarchies created by the concepts of tolerance and accommodation, and proposes a rejuvenation of the idea of equality as the guiding framework for the negotiation of

religious difference, while leaving open the possibility that there is conceptual room for accommodation and respect as important principles in conversations about diversity. Finally, I argue that a robust protection of creed can only be accomplished by drawing from the positive narratives gleaned from those who work out difference on a day to day basis. It is only from such narratives, or ground up knowledge, that successful best practices and policies can be developed. While law can set the standards for dispute resolution, respect for others and commitment to finding creative ways to achieve equality ultimately rest in the hands of those who encounter difference, sameness, and similarity in their day to day lives.

## **THE ONTARIO HUMAN RIGHTS CODE AND POLICY ON CREED AND THE ACCOMMODATION OF RELIGIOUS OBSERVANCES**

The *Ontario Human Rights Code* begins with a preamble that reminds us of the equal and inalienable rights of all members of the human family emphasizing dignity, worth and the creation of a climate of “understanding and mutual respect” 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". The *Code* goes on to prohibit discrimination on a number of grounds, including creed, in a number of areas, including employment, housing, contracts, and vocational organizations. The *Code* uses the language of equality to establish these rights, in each section beginning with "1. Every person has a right to equal treatment with respect to..."

Creed here is read as religion, although its exact meaning is not defined in the *Code*. The Ontario Human Rights Commission Policy on Creed and the Accommodation of Religious Observance attempts some clarification which somewhat tracks *Charter* based discussions of religion, including a subjective approach to the interpretation of what is encompassed under the *Code* protections and consideration, as long as the beliefs, practices and observances are, in the words of the Policy, sincerely held. While creed does not include secular moral, ethical beliefs or political convictions, according to the Policy, the protection of people from being forced to accept or comply with another's religious beliefs or practices implies a protection of those beliefs as well. Also interesting is the Policy's introduction of the idea of the "needs of the group", which is an explicit acknowledgement of the role of the religious group in this realm. Finally, the policy notes that freedom of religion is the 'basic principle' that informs the right to equal treatment on the ground of creed, and that that includes both the facilitation of religious observances as well as that no person can force another to comply with religious beliefs or practices.

Despite the *Code's* emphasis on equality and dignity, the Policy implicates the language of accommodation in its clarifications. For example, under the section "Needs of the group" we see "The groups needs must be assessed to accommodate the individual"—which seems to be in tension and contradiction with the subjective approach. It also highlights the goal of establishing religious practice as being to 'accommodate' the individual rather than understanding how to shift policies, practices, and approaches that may create a 'less than' situation in which people feel disrespected and not, in fact, equal. Although the *Code* mentions the duty to accommodate only in relation to constructive discrimination (s. 11), the Policy introduces accommodation more broadly, when "a person's religious beliefs conflict with a requirement, qualification, practice" and further that 'accommodation may modify a rule or make an exception to all or part of it for the person requesting accommodation (7).

The duty to accommodate rested within the sphere of employment and disability until relatively recently, and while it has been criticized in that realm as well, there may be some good reasons to continue to use it to sort through employer-employee negotiations of religious needs.

However, in instances like membership in community associations, for example, equality rather than an accommodation framework may be a better choice.

## THE EQUALITY-ACCOMMODATION SLIDE: WHAT'S WRONG WITH ACCOMMODATION?

The Ontario Human Rights Policy on creed is in good company. Courts, including the Supreme Court of Canada, have struggled to develop a formula for the management of religious diversity.

Reasonable accommodation has infiltrated not only law and public policy, but public conversation and discourse about religious diversity as well. Because human rights regimes like that in Ontario are by and large more accessible to the general public than are the expensive and complex mechanisms of constitutional law and *Charter* protections, they represent amorphous permeable boundaries between law and society.

Although many people agree that the language of tolerance and to some extent accommodation can be problematic, they also insist that accommodation can imply or be part of equality. My worry 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. The language of tolerance and, more recently, reasonable accommodation, has come to dominate popular and legal discourse related to the management or response to religious diversity. Although tolerance has been a bit less 'tolerated' recently, reasonable accommodation has gained status as the mode of framing any discussion of the everyday negotiation of religious diversity. What is wrong with 'tolerating' others as the basis for dialogue? Why is accommodating someone problematic?

In his 1689 "A Letter Concerning Toleration" John Locke advocated for toleration, except for atheists and Roman Catholics. This exemption illustrates the core problem with basing the negotiation of religious difference on tolerance or accommodation: both frameworks create a hierarchical positioning of 'us' and 'them' that is conceptually unavoidable. There have been some powerful challenges to the use of tolerance to negotiate difference by such scholars as Wendy Brown (2006, 2010) and Janet Jakobsen and Ann Pellegrini (2004). The latter state: "what does it feel like to be on the receiving end of this tolerance? Does it really feel any different from contempt or exclusion?" (14). Alan Wong (2011) has asked "reasonable according to whom?" Day and Brodsky (1996) wrote an insightful criticism of the legal use of reasonable accommodation almost 20 years ago. Since then reasonable accommodation has expanded rather than contracted in use in the context of law (and elsewhere).

Criticisms have also come from outside of the academic community as some religious leaders have called into question the use of tolerance as a beginning place for interfaith dialogue. Space does not permit a more detailed discussion of these concepts here, which I have written about more fully elsewhere (Beaman 2012).

While theoretical criticisms of accommodation are interesting for academics, those who work on the ground, such as the Ontario Human Rights Commission, the Tribunal and the people who come before them or seek their advice are perhaps more interested in concrete policies that can help negotiate difference on a day to day basis and clear guidelines to help to make fair and just decisions that ensure that the opening statement of the *Human Rights Code*, which emphasizes dignity, equality, respect and membership in community, can be achieved. There is a wide range of cases that come before the Commission and Tribunal, and one can find a variety of tools employed to interpret creed and its protection, including accommodation, tolerance, formal and substantive approaches to equality, as well as respect.

Although equality in a substantive or deep sense rather than formal sense is the ideal, it too may need to be supported by other conceptual tools in order to ensure that it remains flexible enough to ensure a robust protection of creed. The case *Modi v. Paradise Fine Foods Ltd.* illustrates this point. The complainant engaged in a discussion at a halal meat counter he frequently patronized. The discussion erupted into an altercation when he responded to the butcher's comment that Africa would soon be all Muslim by replying that that would be for Africans to decide. The evidence suggested that the butcher became angry, threw frozen chicken at the complainant and a fellow customer, and then the owner joined in and threw beer cans at the complainant. The tribunal found in the complainants favour, ordering damages be paid and that the butcher attend a training programme at his own expense. Neither the notion of accommodation or equality works particularly well in this case, thus leaving open the question of how to implement a public policy that incorporates the idea of respect. A similar challenge arises in *Yousufi v. Toronto Police Services Board*, a Toronto Police service case in which one officer played a practical "joke" on a Muslim colleague, calling in to report that he had been involved in the 9/11 attacks. It is difficult to make either an accommodation or equality framework work in a situation such as this, and it is respect that seems a more fitting ideal.

The range of situations that present before the Tribunal means that approaches and policies must both be clear in their protection of the parties as well as contain the flexibility required to guide employers, voluntary associations, and businesses in relation to creed.

## CHALLENGES TO ACHIEVING AN EQUALITY MODEL

Although I have raised some of the problems with accommodation and argued for a language and conceptual framework of equality, I am admittedly a little thin on specificities. In my view there is a major stumbling block to identifying best practices both for day to day negotiations of religious difference, for policy and law makers, and for service providers. Specifically, there has been no systematic or social scientific study of the ways in which religious difference is successfully negotiated on a day to day basis. While there are persistent negative narratives, made public most famously by the Bouchard-Taylor Commission, there are no similar persistent positive narratives that recover success stories of negotiation. Further, it is only from such narratives, or ground up knowledge, that successful best practices and policies can be developed. What can the details of the minute practices in day to day negotiation of religious difference tell us? A systematic analysis might tell us how dialogue begins, how it is made possible, what are the conditions under which it empowers. It might reveal the ways in which religion is de-essentialized. How are individuals seen not only as individuals, but as members of religious groups who are themselves social actors in addition to being the context within which individuals sometimes frame their identities? While it is easy to talk about 'too much accommodation,' 'too much equality' is less comprehensible in our current constitutional and social contexts. It is here, by tracing the successes of human interaction that we will find a better description and understanding of deep equality.

With these limitations and challenges in mind, what might be some helpful suggestions in thinking about policies related to discrimination on the basis of religion or creed? To some extent the *Code* and *Policy* already identify some of the key aspects for an approach that promotes fairness, justice, and equality:

First, *The duty to inform*. The current obligation on those who have needs related to their religious beliefs to inform those around them is a sensible approach to take. Although it can be criticized for placing the onus on the religious practitioner rather than on those around them, and this in turn can result in a privatization of religion, the research I've been involved in would suggest that this is the best approach. There are at least two reasons for this: i. religion is only one source of identity and for some people it is not one they wish to highlight, or they wish to retain control over when it is highlighted. ii. if we see religion as a subjective phenomenon, or 'lived,' it is clear that not everyone practices in the same way. This leads to the second aspect.

Secondly, *Avoiding the assumption of orthodoxy*. There is a tendency when dealing with religious groups with which we are not familiar to essentialize them, often in orthodox ways. Thus, not all Muslims require prayer space, not all Sikhs wear kirpan, and so on. Religious groups and individuals themselves complain that such essentialization is pushing them toward an orthodoxy of practice that is inappropriate. Thus difference within groups and between groups of the same faith challenges a one size fits all approach. On the other end of the spectrum is the assumption that because some members of a group do not engage in a specific practice that no member of the group should, this type of generalizing also should be avoided.

Thirdly, *Developing a multi-layered approach*. It may be that 'reasonable accommodation' may be the most sensible approach in the employment context. However, given the emphasis on equality in both human rights codes and the *Charter*, it would seem to be imperative to ask whether equality can be better achieved in other types of situations with an alternative approach which avoids hierarchical language and promotes a deep sense of equality and respect for difference.

#### NOTES

- <sup>1</sup> This research is funded by the Social Sciences and Humanities Research Council of Canada, for whose support I am most grateful. Thank you to Morgan Hunter for her editorial assistance and to Heather Shipley for commenting on an earlier draft.
- <sup>2</sup> Lois Wilson, for example, former moderator of the United Church of Canada, challenged the use of tolerance in her keynote address at the *Sacred and Secular in Global Canada* Conference held at Huron University College.

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# TWO ERRORS IN RELATION TO RESPECTING RELIGIOUS RIGHTS: DRIVING A WEDGE BETWEEN RELIGION AND ETHICS/MORALS AND TREATING ALL KINDS OF RELIGIOUS EMPLOYERS THE SAME

**Iain T. Benson\*** is Senior Associate Counsel with Miller Thomson, LLP, with a practice in administrative, judicial review (labour and human rights), constitutional law and medical/legal subjects, with a focus on advice in the area of rights and freedoms with a particular interest in constitutional law and the *Canadian Charter of Rights and Freedoms*. He is a Senior Fellow of the Ronning Centre for the Study of Religion and Public Life, University of Alberta, Canada and is on the Founding Board (of 12) and Executive Committee (of 4) of the Global Centre for Pluralism, a joint project of the Government of Canada and the Aga Khan Development Network, based in Ottawa, Canada on which he serves with, amongst others, H.H. the Aga Khan (Chair), Kofi Annan, and the Her Excellency the Rt. Hon. Adrienne Clarkson (former Governor General of Canada). He was also appointed Extraordinary Professor, Department of Constitutional Law and the Department of the Philosophy of Law, Faculty of Law, University of the Free State, Bloemfontein, South Africa.

## **ABSTRACT**

This article argues that “creed” and religion should be understood as something that informs what a person takes into the public and that necessarily includes beliefs that may (and often do) influence “morals and ethics” and even “politics.” Second, religion may be diminished because, with respect to religious employers, there has been insufficient attention to the *kind of religious project* that is at issue when an employee challenges the employer’s religious rules. The focus has been, in some cases, on the kinds of *job duties* rather than the nature of the religious association or project itself.

This article examines two important questions that relate to how we approach the definition of “creed” or “religion” and how we approach an organization that wishes to shelter its discriminatory behaviour under the “special employer exemption” found in section 24 of the *Code*.

Religion can and has been “read down” so that it is restricted in ways that are inappropriate to the nature of the right as public (not simply private) and associational (not just individual). This article argues that “creed” and religion should be understood as something that informs what a person takes into the public and that necessarily includes beliefs that may (and often do) influence “morals and ethics” and even “politics.”

Second, religion may be diminished because, with respect to religious employers, there has been insufficient attention to the *kind of religious project* that is at issue when an employee challenges the employer’s religious rules. The focus has been, in some cases, on the kinds of *job duties* rather than the nature of the religious association or project itself. There are different kinds of religious employers and it is a mistake to treat them all the same with respect to whether job functions are considered “core” or “peripheral” to the religious project itself. The focus should not be so much on *what kind of work* the religious project does but *what sort of religious project* is involved.

## READING CREED DOWN BY EXCLUDING ETHICAL OR MORAL OR POLITICAL VIEWPOINTS BASED ON RELIGION

The current “creed” document of the Ontario Human Rights Commission<sup>1</sup> contains a positive definition and a negative qualification.

Positively, the document states that:

*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... [and] “Creed” is defined subjectively. The Code protects personal religious beliefs, practices or observances, even if they are not essential elements of the creed provided they are sincerely held (italics in original)*

Negatively, the document states that:

“Creed does *not* include secular, moral or ethical beliefs or political convictions.”

The rationale for the protection is held to be:

...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*.

The Creed document dates from before decisions of the Supreme Court of Canada in the area of accommodation and religion such as *Chamberlain*<sup>2</sup>, *Amselem*<sup>3</sup> and *Multani*<sup>4</sup>. When these are considered more broadly it is strongly suggested that the document on Creed needs to be updated and considerably revised to provide greater respect for the nature of religious belief and religious projects in society.

Recall that the *Canadian Charter of Rights and Freedoms* (1982) contains a mandatory interpretative principle that states:

**Section 27:** This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.<sup>5</sup>

Diversity is a principle that has been recognized as important to Canadian society and is often recognized by virtue of the principle of accommodation which has been held to be one of the core “values and principles essential to a free and democratic society.” The phrase “free and democratic society” being one of the foundational concepts against which all *Charter of Rights* limitations are measured in Section 1 of the *Charter*. This linking of accommodation and diversity may be seen in the following passage from the Courts’ decision *R. v. Oakes* where Chief Justice Dickson discussed the “ultimate standard” of Section 1 as follows:

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... 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.<sup>6</sup>

It may be seen from the above that accommodation of “a wide variety of beliefs” and respect for “cultural and group identity” both of which resonate with a robust recognition of the place of associations (including religious associations) and diversity, has been seen to be at the core of the Canadian understanding of our free and democratic society.

Use of the term “secular” in the creed document in the way it is used and the bracketing out of ethical and moral beliefs from religion, in a way rejected by the Supreme Court of Canada in *Chamberlain* directly contradicts the existing Creed policy.

In *Trinity Western University* it was stated on behalf of the majority of eight judges that:

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.<sup>7</sup>

In a well-known and often cited passage, Chief Justice Dickson, in the first Decision of the Supreme Court of Canada dealing with the definition of the freedom of conscience and religion in section 2(a) of the *Charter* stated:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as the person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship *and practice* or by *teaching and dissemination*<sup>8</sup>.

Thus, the right to practice, teach and disseminate religious beliefs is recognized as an important aspect of the freedom of religion. The manifestation of religious *beliefs* and *practice* necessarily includes the practice of ethical and moral beliefs based upon religion or religion is rendered practically irrelevant since it is ethics and morals that are the practical outcome of many religious beliefs (for example, pacifism, promotion of social up-liftment of a wide variety or opposition to practices such as capital punishment or abortion). The existing Creed document unjustifiably reads religion down to practices that for some are ethically or morally less relevant than those that are ethical and moral *flowing from* religious beliefs.

Religion and religious teaching forms an important role culturally in the formation of ethical and moral positions and any reflection on the rise of the “civil rights” movements or arguments (in Canada) for national health care, vastly assisted as both were by religious figures and movements (Rev. Martin Luther King Jr. or Rev. Tommy Douglas and the CCF in Canada) should be sufficient to make this point without further elaboration.

Surprisingly, Canadian jurisprudence to date has not expressed the kind of robust understanding of the

importance of the role of religions to the formation of ethical and moral beliefs that has been noted elsewhere.<sup>9</sup> Consider the following passage from a leading case from the Constitutional Court of South Africa:

For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer’s view of society and founds the distinction between right and wrong.<sup>10</sup>

The distinction between right and wrong is what ethics and morality is all about. What should be carefully guarded against is the tendency to “know what is best” from the outside of a community that holds to different mores and rules. A similar error, evident in a recent decision of the Supreme Court of Canada touching on religion, is to fail to properly investigate the principles of accommodation - - in this instance, whether alternative means of ensuring identification, could be used by the state.<sup>11</sup> The continuation of a bright line between religion and its outworking in “morals” and “ethics” is erroneous and should be removed from the creed document.

## EMPLOYMENT CASES AND THE RELIGIOUS EMPLOYER

Case law often fails to attend to the different kinds of projects that may be at issue in the “religious employer” cases. In some, a focus on the job duties of the “ordinary employee” category may be appropriate where there is no overall religious ethos (or practice) required of all employees. In other cases, however, where there is an overall religious practice (prayers, bible studies etc. shared by all employees) then it is appropriate to recognize that such work-places are permeated by an overall shared religious ethos the fact of which is important and the maintaining of which essential to a broader understanding of the nature of religion as shared.

In the shared or permeated ethos kind of work-place it would be inappropriate to parse job duties to hive off for protection only those jobs that an outside view determines are “sufficiently connected with religion.” For a shared ethos project *all job functions* (from gardener to CEO) are part of the religious mission and practice of the religious employer in a way that they are not where there is no such shared

religious practice. To apply a non-permeated ethos test (such as was done in *Heintz* with its job-parsing focus on education) so as to view only those that teach or proselytize as “religious” fails to satisfactorily recognize and protect shared ethos projects.

The case law in relation to this is emerging and the principles from place to place are rather contradictory. Thus the appeal decision of the Ontario Divisional Court in *Heintz v. Christian Horizons*,<sup>12</sup> while it purports to uphold the very important decision in *Caldwell v. Stuart* (where the Supreme Court of Canada allowed a Catholic school to refuse to re-hire a teacher who had married a divorced man in a civil ceremony in breach of Church teaching) did so in a manner that failed to attend to the deeper principles that animated the *Caldwell* decision itself. In short, *Heintz* was not about education, *Caldwell* was and it was incorrect to apply educational tests to the setting of *Heintz*.

The principal parties decided not to appeal so the point was not tested by a higher court than the one that narrowed the tribunal decision. Had the parties appealed, an argument on the appeal could well have been that the Court on review asked itself the wrong question.

In other decisions the overall ethos of the religious institution focus has enabled religious based discrimination to be upheld.<sup>13</sup> What this means, practically, is that the nature of the employer’s religious ethos may well be relevant where it has been appropriately raised at hiring, consistently re-enforced in such things as employment contracts and the application of work rules and fairly applied in disciplinary matters where a breach is alleged. Where, on the other hand, an employer cannot satisfy tests as to notice and application and show that religious ethos is a real part of the work place setting, reliance on an ethos justification would fail.

#### NOTES

<sup>\*</sup> Professor Extraordinary, Department of Constitutional Law and Philosophy of Law, Faculty of Law, University of the Free State, Bloemfontein, South Africa; Senior Association Counsel, Miller Thomson, LLP, Canada. PhD. (Cand.) University of the Witwatersrand, Johannesburg. Part of this paper may be submitted towards the doctoral thesis. Senior Research Fellow, Chester Ronning Centre for the Study of Religion and Public Life, University of Alberta. The opinions expressed are those of the author and not those of his faculty or firm or any of the Institutes with which he is affiliated. iainbenson2@gmail.com.

<sup>1</sup> See: “Policy on Creed and the Accommodation of Religious Observances” ISBN – 0-7778-6518-1. Approved by the Commission: October 20, 1996 (as revised); [http://www.ohrc.on.ca/en/resources/Policies/PolicyCreedAccomodeN?page=religious-Creed\\_.html#Heading36](http://www.ohrc.on.ca/en/resources/Policies/PolicyCreedAccomodeN?page=religious-Creed_.html#Heading36) Footnotes that accompany this document have been omitted here.

<sup>2</sup> *Chamberlain v. Surrey School Board No. 56* [2002] 4 S.C.R. 710.

<sup>3</sup> *Syndicat Northcrest v. Amselem* [2004] 2 S.C.R. 551.

<sup>4</sup> *Multani v. Commission scolaire Marguerite-Bourgeoys* [2006] 1 S.C.R. 256.

<sup>5</sup> Multi-culturalism in Canada was adopted following the Royal Commission on Bilingualism and Biculturalism, a government body set up in response to the grievances of Canada’s French-speaking minority (concentrated in Quebec). The principle, recognized by Section 27 of the *Charter*, has been recognized in the context of the freedom of religion by the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295. In the early decision of the Ontario Court of Appeal in *Videoflicks Ltd. et al. v. R.* (1984) the court held that if a law limits the free exercise of religion then the law is of no use in promoting multiculturalism, since it effects a “part of one’s culture which is religiously based.” The recognition of religion as key to culture (the term culture is not protected per se in the Canadian *Charter* as an enumerated right unlike the Constitutions of some other countries) is recognized by the Constitutional Court of South Africa in *M.E.C. v. Pillay* 2008 (1) SA 474 (CC).

<sup>6</sup> *R. v. Oakes* (1986) 1 S.C.R. 103 per Chief Justice Dickson. emphasis added.

<sup>7</sup> *Trinity Western University v. College of Teachers* [2002] 1 SCR 772 at 812.

<sup>8</sup> *R.v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 at 336 (emphasis added).

<sup>9</sup> John McLaren makes a similar observation about the reticence of the Canadian courts to give a more positive analysis of the role and nature of religion and comments that: “.religion can be a mind-expanding experience, a source of spiritual education, an inspiration in matters of social justice and a beacon of humanitarianism.” McLaren calls on the courts to “...recognize the importance that religion plays in the life of individuals and communities...” see: “Protecting Confessions of Faith and Securing Equality of Treatment for Religious Minorities in Education” in Avigail Eisenberg, ed., *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver, UBC Press, 2006) 153 – 177 at 169 and 173. See also a most helpful collection of essays, particularly those by Richard Moon “Introduction” and David Schneiderman “Associational Rights, Religion and the *Charter*” in Richard Moon ed. *Law and Religious Pluralism in Canada* (Vancouver, UBC Press, 2008) at 1 – 20 and 65 – 86 respectively.

<sup>10</sup> *Christian Education South Africa v. Minister of Education* 2000 (4) SA 757 (CC), paragraph 36; referred to in the judgment in Canada on the case *Bruker v. Marcovitz* 2007 SCC 54.

<sup>11</sup> *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, (“Hutterian Brethern”) a recent decision of the Supreme Court of Canada touching upon religion, 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 has been widely criticized for not considering sufficiently that other means (such as finger-prints) could have been used to achieve the state’s purposes without ignoring the concerns of the religious community. The decision was a very narrow majority with three justices of the seven in dissent.

<sup>12</sup> *Heintz v Christian Horizons* (2008) 65 CCEL (3d) 218 (Ont. H.R. Trib.) overturned in part on review by the *Ontario Divisional Court in Ontario Human Rights Commission et al. v. Christian Horizons* (2010) 102 O.R. (3d) 267 – 298 (Ont. Div. Ct.) (May, 2010) (decision overturning, in part, a Human Rights Tribunal Decision and held that the religious exemption provision of the Ontario *Human Rights Code* should apply to religions that do not restrict their work to their adherents. (I declare an interest as I acted for the Assembly of Catholic Bishops of Ontario who intervened in that case).

<sup>13</sup> See, for example, *Schroen v. Steinbach Bible College* (1999), 35 C.H.R.R. D/1 (Man. Bd. Adj. [D.R. Knight, Q.C.] in which the overall Mennonite nature of the Bible College precluded a successful claim by a Mormon clerk who lost her job. A focus of the job duties, minimizing the overall ethos, could have come to a different conclusion. See, further, Alvin Esau who helpfully illuminates the nature of “inside” and “outside” rules in “Living by Different Law: Legal Pluralism, Freedom of Religion, and Illiberal Religious Groups” in Richard Moon, ed. *Law and Religious Pluralism in Canada* (Vancouver, UBC Press, 2008) 110 – 139.

### COMPETING RIGHTS: SETTING THE STAGE FOR RESPECTFUL DIALOGUE

We live in an increasingly diverse and complex society in which all citizens enjoy a variety of rights, freedoms and corresponding obligations. It is inevitable that conflicts between rights will arise.

The Canadian Charter of Rights and Freedoms, provincial human rights legislation and the courts recognize that rights have limits if they interfere in a significant way with other people’s rights. We know that no right is absolute, and we all have a shared obligation to search for solutions to reconcile competing rights on a case-by-case basis. The goal is to maximize enjoyment of rights on both sides. This starts with respectful dialogue, and sometimes requires legal steps as well.

It is often difficult to strike a balance between different rights – which is why we have supported public discussion and provided policy guidance. Our final goal was to create a Policy on competing human rights, which we launched in April 2012.

This policy outlines a series of steps that various sectors, organizations and individuals can take to deal with everyday situations of competing rights and avoid legal action. The policy may also give guidance to the Human Rights Tribunal of Ontario and the courts for addressing cases where litigation cannot be avoided.

The policy and the framework it contains are already being lauded as an important tool to help individuals, organizations and decision-makers effectively deal with some of the most challenging rights issues affecting Ontarians.

– Ontario Human Rights Commission  
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# INDUCING FUNDAMENTALISMS: LAW AS A CULTURAL FORCE IN THE DOMAIN OF RELIGION

**Benjamin L. Berger\*** is an Associate Professor at Osgoode Hall Law School. He earned his LLM and JSD at Yale University, where he studied as a Fulbright Scholar. His teaching and research focuses on law and religion, constitutional and criminal law and theory, and the law of evidence, fields in which he has published extensively in Canadian and international journals and edited collections. Prof. Berger is on the editorial board of the *Canadian Journal of Law and Society* and *Studies in Religion/Sciences Religieuses*, and is associate editor of Hart Publishing's Series *Constitutional Systems of the World*.

## **ABSTRACT**

This essay explores the possibility that the way that the constitutional rule of law imagines and analyses religion influences how religious groups present and, perhaps ultimately, understand their own beliefs, practices, and traditions. In particular, certain aspects of the current legal approach to religious liberty and equality claims encourage a kind of absolutism and “positional hardening” that deemphasizes the complexity and dynamism of religious traditions. In so doing, the law risks inducing a kind of fundamentalism incompatible with the openness and mutual regard necessary in a highly diverse society.

Religious fundamentalisms pose daunting problems for contemporary law and public policy. In a society with an extraordinary range of ways of being and visions of a just society we depend more than we recognize on the assumption that perspectives and practices contain a capacity for malleability. This tacit dependence on a degree of pliancy in commitments is particularly strong in the domain of religious and cultural difference. When we speak publicly of the need for tolerance and accommodation if we are to meet the challenges of deep diversity, we are addressing not only state agencies and public authorities but also – and importantly – the communities that comprise the realm of culture that we imagine the law is responsible for overseeing. In this call for tolerance and accommodation we can hear a plea for openness, a request that we all think of our ways and perspectives as including a principle of provisionality. This openness involves a commitment to the idea that part of what we hold dear about our cultural commitments is their capacity for change in light of the world in which we find ourselves, and the neighbours with whom we find ourselves living. If these are the tacit assumptions that govern our public sphere and our human rights practices, religious fundamentalism, understood as a rigid or absolutist fidelity to a particular interpretation of a tradition, poses obvious and obviously deep challenges.

This much should be relatively contentious. What is too often missing from this picture is the cultural nature of the rule of law itself. Public stories about multiculturalism and religious difference tend to imagine law in managerial or curatorial roles above the realm of culture, guiding discourse and smoothing out tensions from the comfortable heights of rational objectivity. As I have argued in detail elsewhere, this framing of the problem is seductive because it hides one of the greatest difficulties in thinking about the interaction of law and religion, namely that the law is itself a cultural actor and, as such, the interaction of law and religion is itself a cross-cultural encounter.<sup>1</sup> Resort to law is not a retreat into a neutral space in which the messiness of culture can be more sterilely assessed. Turning to the law is, instead, moving into a rich cultural framework in its own right. This is to say more than that public law in Canada pursues certain values that have a cultural and historical provenance, though that is both true and important. To confront law's cultural nature is to recognize that the very way that it sees and defines issues, the symbols and metaphors that it uses to frame problems, the assumptions it makes about what is of value and relevance, are themselves but one way of making sense of experience.

My principal purpose for this brief essay is to gesture towards how the cultural nature of law might contribute to

the problem of religious fundamentalisms with which I began this piece. In turning back to religion and asking what law's particular understanding of religion might mean for how religious individuals and groups interpret and present their own traditions, I want to raise the prospect that in unreflectively exerting its cultural force, law has the capacity to induce the very fundamentalisms that it then finds so challenging to address.

## LAW IMAGINING RELIGION

Religion never simply appears before the law. With the first look of a legal gaze, religion is rendered into a form that is most readily digestible within the cultural commitments of the contemporary rule of law. This is a point to be neither applauded nor lamented. The fact that the law exerts its own categories of value and of relevance on the matters that appear before it is not a glitch in current legal analysis or a doctrinal error that stands in need of correction. If one takes seriously the proposition that the law is a rich way of imagining the world, of interpreting events and problems in a particular way that gives rise to particular imagined solutions, one must cede any ambition to make law more neutral, arid, or a-cultural. Indeed, it is the conceit of the cultural aridity of law that has allowed us to proceed under the more comfortable but less edifying story that, with time, law will get progressively better at accommodating and tolerating religious difference.

Understanding the interaction of law and religion as a cross-cultural encounter offers a better appreciation of how law *sees* religion. As I have argued elsewhere at length, a careful review of the *Charter* jurisprudence shows that when the courts assess religion, there are three classificatory dimensions that take on a prominent role.<sup>2</sup> First, law is overwhelmingly viewed as an individual, rather than a group, phenomenon. The priority that the contemporary constitutional rule of law places on the liberty and rights of the individual, rather than the group, has been widely recognized in areas such as equality, association, and expression. This strong priority for the individual – this atomism – is an outgrowth of enlightenment rationality and the individualism that is the mark of liberal modernity.<sup>3</sup> That it finds one of its principal expressions in the law should come as no surprise to us. Nor should it be surprising that this element of law's cultural imagination imprints on the way that law perceives and analyses religion. As a result, law is able to see claims of religious inequality and limits on liberty that touch upon the individual much more clearly than those that affect a group.

Second, the law casts religion as a fundamentally private, rather than public, phenomenon. Liberal political theory has imagined that the key boundary over which the law would serve as sentry would be the public/private. From

matters of search and seizure to questions of expression, the private has been the realm that the law has imagined being the quintessential domain of interest and preference – it is the arena in which the logic of the law has the least purchase. By contrast, the public sphere is the realm of reason, stripped to the extent possible of idiosyncratic worldviews and comprehensive doctrines. The corollary is that the law has an intrinsic scepticism when private interest erupts into the public sphere. This is very much true of law's treatment of religion. The law imagines religion as a quintessentially private matter. Belief is more digestible than conduct – this legal axiom is one potent expression of law's commitment to religion as a private matter.

The final dimension of law's understanding of religion is arguably the most potent and certainly the most significant for this paper. Religion is viewed by the law as, at core, a matter of autonomy and choice. The overwhelming focus on religious freedom rather than religious equality is an artefact of this powerful aspect of 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. It is for this reason that one sees the caselaw so fiercely protecting autonomous decision-making (or the future capacity for such decision-making).<sup>4</sup> Of course, for many religious individuals, religion is more linked with identity than choice and the religious dimension of one's life is simply part of how one finds oneself in the world.

Those who come to the law may understand the stakes of their religious claim dominantly in terms of group identity, and as much about public conduct as private belief. However, law will render the religious claim in terms of its cultural filters for value and relevance, naturally testing the religious issue against a picture framed by individual autonomy and the public/private divide. Seeing this possibility for interpretive divergence is an important part of understanding the interaction of law and religion as a cross-cultural encounter. But the insight and implications go further, affecting our understanding of how legal tolerance and practices of accommodation really shape up. 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.<sup>5</sup> The guarantee of religious freedom and equality will be readily enforced to protect religion that already comports with law's cultural commitments; when religion grates on one of these dimensions of law's imagination it begins to feel intolerable. It is at this point that we begin to speak in terms of the limits of religious freedom. In this way, the limits of legal tolerance and

practices of accommodation also turn out to be fundamentally cultural, tracing their way back to a particularly legal way of valuing human experience and imagining the world.

## RELIGION IMAGINING ITSELF

Having argued that law's particular way of seeing religion impacts on the manner in which it treats issues of religious freedom, equality, tolerance and accommodation, I want to reframe the question. I want to gesture to the possibility that law's rendering of religion, law's ways and assumptions, affect how religious groups and individuals in contemporary Canadian society imagine and present themselves to the law. My suggestion is that the particular way in which law values and analyses religion has powerful "back stream effects," becoming highly influential and even potentially authoritative within religious culture.

Some such back stream effects are readily identifiable. The subjective sincerity test that has been adopted as the means of defining what "counts" as religion for the purposes of Canadian rights jurisprudence<sup>6</sup> has the capacity to intervene in the internal dynamics of religious groups. Rather than adopting an objective test of what is "religious", one that might be based on tradition or authoritative interpreters, and instead asking simply whether a claimant sincerely believes that the practice or belief in question has a nexus with religion, the law empowers the idiosyncratic religious believer within a tradition. Of course there is no way to avoid such influence. The alternative – to recognize history, orthodox interpretation, or some objective reference as the standard for the "religious" – would be to undergird existing authorities within a community by lending them the definitional support of the state.

What is of most interest to me, however, is the ways in which the definitions, values, and analyses of the law can produce what might be called "positional hardening" among religious groups. Perhaps the only safely generalizable statement within religious studies is that religious traditions are in a constant state of change and adaptation in response to their surrounding social conditions. Religions are constantly in flux, redefining their practices and beliefs in dialogue with their local, historical, and social milieus. Whole libraries can be filled with religious studies texts showing the *dynamic* genius of religious belief. Missing this fluidity is the mistake into which fundamentalisms tend to fall. They are moment-in-history interpretations of a moving and dynamic tradition.

Aspects of the approach to religion in the constitutional rule of law have the potential to incentivize and reward religious fundamentalisms of various sorts. Consider, for example, the test currently being offered by the Supreme Court of Canada as the central metric for testing the

strength of a rights claim based on religion: does this interference deprive the individual of his or her meaningful choice to practice the religion?<sup>7</sup> This test encourages religious claimants to think of each and every aspect of their religious traditions as definitive of the whole. In this way, the law encourages a kind of practice of synecdoche in which each part of the religion must be capable of standing in for the whole. If the practice is merely one mutable, though perhaps treasured, component of a vast constellation of interlocking symbolic expressions of a tradition (as it almost always is), the claim will simply not fare as well in a rights analysis as if the claimant presents the practice as definitional, core, and immutable.

Consider also the emphasis on weighing and proportionality in the law's treatment of religious freedom and conflicting rights. The Supreme Court of Canada has recently stated that, rather than focussing on minimal impairment (the *Charter* analogue to reasonable accommodation), most claims of religious freedom and equality should be determined at an overall weighing of the harms suffered by the religious claimant over against the benefits derived from the legislative policy or practice in question.<sup>8</sup> As I have elsewhere explained, the benefit of emphasizing concepts like minimal impairment is that it focuses attention on the reasonableness and respectfulness of the government's measures – the extent to which those responsible for policy wrestled seriously with and attempted to be responsive to differing cultural communities.<sup>9</sup> Stressing, instead, a general balancing of harms and benefits encourages communities to respond to any and every interference with their religious belief and practices as a devastating blow to the religion, deemphasizing the tradition's capacity for adaptation, adjustment, and change.

Think, finally, about the focus on the public/private divide in law's understanding of religion. As I have explained, to the extent that religious claimants are able to explain their religion in purely private, internal terms, they will more readily fit law's understanding of religion and more readily attract its protective practices. One risks losing law's regard by admitting to historical engagement with external social forces and, as the *Wilson Colony* case showed, community interconnectedness. Adaptation to the modern market and involvement with modern technologies is precisely what led the majority of the Court in *Wilson Colony* to question whether the autonomous nature of this Hutterite colony was really all that central to the religion. Had the *Wilson Colony* been *more* insular, more private, it seems it would have fared better in Court.

Even in this brief sampling of certain aspects of law's understanding of and approach to religion shows ways in which one cross-cultural effect of the encounter of the modern constitutional rule of law and religion might be to

distort the very way in which religion is presented in public policy debates. Through the force of its cultural understandings, law may encourage religious claimants to think of their traditions as less complicated, more fragile, and more insular than might otherwise be. In short, the law might induce a kind of religious fundamentalism. It can invite distortions of religion that make legal and policy solutions more difficult to solve. If unreflective about its cultural force, in the very effort to attend to religious freedom and equality, law has the capacity to make its engagement with religion more fraught and to make compromises more difficult to identify.

### CONCLUSION: PRIVILEGING DYNAMISM AND REGARD

The story of religion is, in substantial part, the story of adaptation and response to changing social worlds and, for centuries, the law has been one important figure in this dynamic history. Law has not just struggled with questions of religious freedom but has challenged religion to test the resiliency, complexity, and resources of its own traditions. An important challenge for contemporary human rights law is to ensure that it continues to encourage this dynamism rather than serving as a freezing agent.

How might this be done? Allow me to venture just two preliminary ideas, hoping to suggest areas for further thought and exploration. First, awareness of the issues explored in this paper should make one wary of adopting tests in the law that encourage individuals or communities to identify an unchanging “core” in their tradition. Second, perhaps we should be skeptical of general balancing tests, weighing costs and benefits, which encourage claimants to catastrophize interferences with religious beliefs or practices. The gravamen of most rights claims is some failure of regard. The focus is, thus, more productively placed on the extent to which the authority or government actor took genuine and sensitive regard of the religious community in forming policy.

Respect for religious tolerance and equality imposes obligations on public law to think critically about its assumptions, commitments, and demands. The law must look for ways to adjust and adapt in order to give genuine

regard to differing conceptions of the good life, while remaining faithful to key public values such as equality and inclusion. Yet the exigencies of living in a deeply diverse society mean that individuals and cultural groups also bear an obligation to explore their own resources for the adjustment and adaptation. When the law induces fundamentalisms it frustrates this shared obligation for dynamism and regard on the part of state, individual, and religious groups alike, which is the ethical heart of a tolerant and pluralistic society.

### NOTES

- \* The author wishes to thank Samara Selter for her research assistance and for comments and suggestions on earlier versions of this essay.
- <sup>1</sup> Benjamin L. Berger, “The Cultural Limits of Legal Tolerance” (2008) 21:2 Can. J. L. & Jur. 245.
- <sup>2</sup> Benjamin L. Berger, “Law’s Religion: Rendering Culture” (2007) 45:2 Osgoode Hall L.J. 277.
- <sup>3</sup> See, e.g., Charles Taylor, *Modern Social Imaginaries* (Durham and London: Duke University Press, 2004).
- <sup>4</sup> One sees this commitment to autonomous decision-making particularly clearly in cases involving children or youth whose capacity for such rational authorship is an open question. See, e.g., cases involving blood transfusions for Jehovah’s Witness children. For a recent case involving a mature minor, see *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181.
- <sup>5</sup> See “The Cultural Limits of Legal Tolerance”, *supra* note 1; Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton and Oxford: Princeton University Press, 2006).
- <sup>6</sup> *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551.
- <sup>7</sup> See *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 [*Wilson Colony*].
- <sup>8</sup> *Wilson Colony*, *supra* note 7.
- <sup>9</sup> Benjamin L. Berger, “Section 1, Constitutional Reasoning, and Cultural Difference: Assessing the Impacts of *Alberta v. Hutterian Brethren of Wilson Colony*” (2010) 51 *Supreme Court Law Review* (2d) 25.

# TRYING TO PUT AN OCEAN IN A PAPER CUP: AN ARGUMENT FOR THE “UN-DEFINITION OF RELIGION”

Howard Kislowicz\*, B.A., B.C.L./LL.B., LL.M., is a doctoral candidate at the University of Toronto’s Faculty of Law and a lecturer in constitutional law at Osgoode Hall’s NCA preparatory program. His work examines religious freedom and multiculturalism in Canada; it has appeared in the *UBC Law Review* and the *Alberta Law Review*. He currently holds a SSHRC Joseph-Armand Bombardier Canada Graduate Scholarship. He previously served as clerk to Justice Gilles Létourneau at the Federal Court of Appeal. He is the recipient of numerous awards, including the Alan Marks Medal for best thesis in the University of Toronto’s graduate law program.

## ABSTRACT

Critiques of Canada’s legal definition of religion run in opposing directions. Some argue that the definition is too wide and lacks an objective aspect; others claim that the definition is too narrow and fails to capture religion’s cultural aspects. The author suggests that religion may not be susceptible to a comprehensive definition, and argues that an approach that draws on analogies would be more appropriate. Such a methodology is familiar to common law reasoning, and would lead to a more flexible and capacious understanding of religion. Indeed, decisions of the Human Rights Tribunal of Ontario have successfully employed this technique.

## INTRODUCTION

The Supreme Court of Canada has adopted a highly individualistic and subjective definition of religion. This definition has been criticized in two opposing directions, with judges and commentators arguing alternatively that it is too wide and too narrow. Those who claim the definition is too wide argue that it should have an objective aspect, or fear that the state will not be able to “reliably weed out persons with ‘fictitious’ or ‘capricious’ claims” (Charney, 2010, p.50). Those who claim that the definition is too narrow argue that the highly individualistic definition can substantially impoverish understandings of religion (Berger, 2007), neglecting its collective, communal and cultural aspects.

This paper suggests that legal definitions of religion have been found wanting because the lived religious experiences of individuals and communities are so diverse that a single encompassing definition is impossible. This paper examines whether it is possible to have a coherent law of religious freedom that does not adopt an *a priori* definition of religion.

The paper begins by canvassing existing definitions of religion in Canadian case law and legal scholarship. Then, based on scholarship in religious freedom and multiculturalism, it argues in more detail that religion is

not susceptible to a comprehensive definition. In the final section, drawing on recent decisions of the Human Rights Tribunal of Ontario and the Ontario Human Rights Commission’s policy on creed and the accommodation of religious observances, this paper demonstrates that it is possible for justice institutions to function without setting out to comprehensively define religion.

## DEFINITIONS OF RELIGION

The leading definition of religion in Canadian law comes from the majority decision of the Supreme Court of Canada in *Syndicat Northcrest v. Amselem* (2004). There, the majority held:

*Defined broadly, religion typically involves a particular and comprehensive system of faith and worship... In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual’s spiritual faith and integrally linked to one’s self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith (para. 39).*

Though this definition deliberately speaks in broad strokes, it is notable for its individualistic treatment of religion. It relies on the concepts of “freely” held convictions (implying an individual choice), *individual* self-definition, and *individual* connections to the divine or spiritual realms (see Berger, 2007).

Palpably absent from this definition is any notion of community. This was a point of division for the Court. In a dissenting judgment, Justice Bastarache held that “a religion is a system of beliefs and practices based on certain religious precepts” (*Syndicat Northcrest v. Amselem*, 2004, para. 135). These precepts serve two principal functions for Justice Bastarache: first, they are objectively identifiable, making the limits of religious freedom protections more predictable. Moreover, 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. These definitions of religion diverge sharply, and lead to different legal consequences. Justice Iacobucci’s definition renders religion entirely subjective, with the sincerity of an individual’s belief becoming the touchstone for analysis. Justice Bastarache’s approach would have required claimants to prove the objective existence of a religious precept in order to benefit from the protection of religious freedom.

Notably, both these diverging definitions adopt a general definition of religion before resolving the dispute at hand. This is a familiar practice in law, particularly in constitutional reasoning. While, for the purposes of a particular discipline of inquiry, it may make sense adopt a specific definition of religion (Modak-Truran, 2004, p.721), there is more at stake when a court or tribunal, bearing the coercive and symbolic power of the state, makes decisions about religious freedom or discrimination.

While it is tempting to refine existing legal definitions of religion, the lack of consensus on this definition may inspire a move in a different direction. Indeed, a more appropriate response may be to refuse to adopt a comprehensive, *a priori* definition of religion altogether. In the next section, I argue that attempts to define religion for the purpose of protecting religious freedom under the law ultimately stifle religious freedom, strengthening the claim that religion is simply not susceptible to a comprehensive definition.

## IS RELIGION IMPOSSIBLE TO DEFINE?

Winnifred Fallers Sullivan argues that “legally encompassing the religious ways of people in an intensely pluralist society is most likely impossible” (2005, p.138). She bases this argument in part on her experience acting as an expert witness in a lawsuit in Florida where a dispute

arose over individuals’ installation of graveside monuments in a publicly managed cemetery (*Warner v. Boca Raton*, 1999). As witnesses attempted to fit their actions into the prosecutor’s idea of what religion was, she observed: “their religious lives could not be contained in legal language or in the legal spaces assigned to them in the cemetery” (p.45).

This problem of defining religion may be part of a larger phenomenon. Drawing on the writings of Ludwig Wittgenstein, James Tully explains that words are “too multiform to be represented in a theory or comprehensive rule that stipulates the essential conditions for the correct application of words in every instance” (1995, p.104). Instead,

*understanding a general concept consists in being able to give reasons why it should or should not be used in any particular case by describing examples with similar or related aspects, drawing analogies or disanalogies of various kinds, finding precedents and drawing attention to intermediate cases* (p.108).

In this view, general linguistic terms are likened to families. The more specific instantiations of those terms are the members of the family, and, like members of a human family, share family resemblances. Attempting to abstract a comprehensive and general definition of the family by reducing it to its essential traits hinders analysis; the more fruitful endeavour is to work case by case through constant comparison (p. 112-114).

While Tully (following Wittgenstein) makes the stronger claim that all general concepts operate in this fashion, I wish to make the smaller claim (following Sullivan) that at least the term “religion” does. When the Supreme Court set out to define religion in *Amselem*, it may have prejudged whether certain activities were “religious,” excluding from the term practices that should be included. For example, the Court’s individualistic definition of religion makes it more difficult to see the religious import of collective activities, brought to light in the lived practices of the Hutterian Brethren (see Esau, 2004). The Hutterite faith requires adherents to adopt a collective lifestyle and be as isolated and self-sufficient as practical necessities allow. But in *Alberta v. Hutterian Brethren of Wilson Colony* (2009), the majority of the Supreme Court of Canada refused to consider the communal religious practices of the Hutterites under the constitutional guarantee of freedom of religion, considering the impact on the Hutterite community only in assessing the proportionality of the impugned legislation. In so reasoning, the majority minimized the specifically religious import of the Hutterite practice of communalism. However, it is difficult to conceive of the

Hutterite commitment to communal living as anything but religious: it arises out of a particular interpretation of biblical texts, it is passed from one generation to another, deviation from the principle has consequences in this life and the afterlife, etc. Taking a more case by case approach and considering more seriously the perspective of the Hutterian Brethren, may have allowed the Supreme Court to treat religion as a more capacious and, in my view, more accurate concept. In the next section, I argue that the Ontario Human Rights Commission and Tribunal have done just that.

### THE BUMBLEBEE FLIES ANYWAY: WORKING WITHOUT A DEFINITION

While the *Ontario Human Rights Code* does not define the term creed, the Commission has adopted a Policy that provides a definition (Ontario Human Rights Commission, 1996, p. 4-5). Though this definition resonates with *Amselem* by adopting a Policy of subjectivity, it does not set out to define religion by reference to the role it serves in people’s lives, as the *Amselem* definition does. Instead, the definition draws on examples to explain what will and will not be considered religion. The Policy states, for example, that religion includes “non-deistic bodies of faith, such as the spiritual faiths/practices of aboriginal cultures” (p.4). However, the Policy also notes that religion excludes “secular, moral or ethical beliefs or political convictions” (p.5). It is striking that, as in the Wittgensteinian family resemblance approach, when the Policy sets out to define creed and religion, it does not attempt to set out a number of criteria that a practice must fulfill in order to be considered religious. Instead, it reasons by analogy.

Perhaps in part because of this Policy, when the Human Rights Tribunal of Ontario was required to decide whether an organization qualified as a “religious organization” in *Heintz v. Christian Horizons*, (2008) the Tribunal was able to reach a conclusion without citing a particular definition of religion. Instead the Tribunal was able to identify enough indicia in the organization’s practices to reach, with “no difficulty”, the conclusion that Christian Horizons was a religious organization, even in the face of an argument to the contrary. The Tribunal took a similar approach in determining whether Falun Gong was a religion in *Huang v. 1233065 Ontario Inc. (No. 3)* (2010), reasoning that “Falun Gong consists of a system of beliefs, observances, and worship” (para. 36); this statement implies an analogy to other religions. This shows that, in the tradition of the common law, it is possible to deal with cases one at a time, without attempting to set a “once and for all” definition of religion. This is a particularly prudent approach as understandings of religion vary across cultures and over time.

My research has not turned up any case in which the Tribunal rejected a claim that a particular belief or practice was religious. It is tempting to bring up examples of worldviews whose religious nature is controversial in order to put the theory of analogical (as opposed to comprehensive) definition to the test. However, in keeping with the common law approach of dealing with cases as they arise, I think it better to leave the door open so that the religious or non-religious nature of a particular practice or set of beliefs can be dealt with in a specific factual context.

### CONCLUSION

I have argued that the criticisms of the Supreme Court’s definition of religion cut in opposing directions, arguing that it is both too wide and too narrow. These contradictory currents stem from the more basic problem that religion is not susceptible of a comprehensive, *a priori* definition. Instead, I have argued for an approach that reasons by analogy, taking one case at a time, in the style of the common law and Wittgensteinian analysis. Indeed, the Ontario Human Rights Commission and Tribunal have shown through their policies and decisions that this approach can work in practice, allowing for justice to be done without relying on a set definition of religion.

### NOTES

- \* I am grateful for the support of the Social Sciences and Humanities Research Council of Canada. Thanks to Dr. Naomi Lear and Nicole Baerg for helpful comments.
- <sup>1</sup> Modak-Truran, for example, adopts Schubert Ogden’s definition: “the primary form of culture in terms of which we human beings explicitly ask and answer the existential question of the meaning of ultimate reality for us.” This definition, arguably, is appropriate for Modak-Truran’s analysis of the extent to which judges’ religious perspectives inform their legal reasoning. However, by Modak-Truran’s account, the definition “not only includes the recognized world religions of Christianity, Judaism, Islam, Hinduism, and Buddhism, but it also includes humanism, capitalism (when proposed as a normative rather than as a positive theory), communism, and other so-called secular answers to the existential question” (p.725-726).
- <sup>2</sup> With concerns directed more specifically at American constitutional law, she also notes: “One reading of the First Amendment would suggest that when the government gets into the business of defining religion, it gets into the business of establishing religion. The result is necessarily discriminatory. To define is to exclude, and to exclude is to discriminate” (p.100-101).
- <sup>3</sup> Notably, the dissenting judges and the judges of the lower courts did take this into account.
- <sup>4</sup> Discussion of the appropriateness of where the policy draws its line is beyond the scope of this paper.
- <sup>5</sup> Varied on appeal, but not on this point.

<sup>6</sup> In *Obdeyn v. Walbar Machine Products of Canada Ltd.*, (1982, at para 6358), an Ontario Board of Inquiry was assumed for the purpose of argument that communism fell within the meaning of "creed." In *Sauve v. Ontario (Training, Colleges and Universities)* (2009), the Tribunal refused to decide whether a belief in Tarot cards was a religious belief in the absence of evidence. In *Young v. Petres* (2011), the British Columbia Human Rights Tribunal rejected a claim that the beliefs of one of the parties were religious, but this was an unusual case. There, two employees claimed that their employer was imposing upon them his religious beliefs, which they called "a 'slurry' of Reiki, Taoism, and Shintoism" (para. 13). The employer denied that his beliefs were religious, and the Tribunal held that the employees had not brought any evidence to rebut this claim.

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#### A BIT OF HISTORY...

##### *Discrimination laundering*

The Commission is encountering a growing number of incidents of discrimination committed on behalf of clients by such intermediaries as employment agencies and management consultants. This practice constitutes, in effect, a "laundering" of discrimination in the sense that the employers themselves have no direct contact with the victims and thus do not appear to be acting in contravention of the Code, though clearly they are as responsible for discrimination as the agent who accepts the assignment ... Indeed, acts of discrimination of this kind are frequently so covert that the victim may not even know that he or she is being discriminated against.

Source: *Life Together*, 1977

# TOWARDS AN INCLUSIVE INTERPRETATION OF ‘CREED’<sup>1</sup>

**Gail McCabe**, PhD RSSW is President of the Ontario Humanist Society, a Sociologist and Social Service Worker. An OHS Humanist Officiant, she was the first Humanist Chaplain at the University of Toronto.

**Mary Beaty**, MLS, an OHS Humanist Officiant and Chair of the OHS Ceremonies Program, established the University of Toronto Humanist Chaplaincy working with the Secular Students Alliance.

**Peter Moller**, P Eng., is a retired engineer. An OHS Officiant, he is also the Treasurer; Chair of the Bylaws Committee, and a member of the Ceremonies Committee. As a founding member of OHS, Peter co-authored the Society’s bylaws and Code of Ethics.

## **ABSTRACT**

The Ontario Humanist Society (OHS) is representative of Humanist ethical communities of choice, with an established institutional history supporting deeply held ethical beliefs and principles as a ‘living’ creed. These communities are currently excluded by definition from the concept of the OHRC definition of ‘creed.’ As a result, the collective rights of Humanists and other such ethical communities of choice are not recognized under the *Ontario Human Rights Code*. On that account, we argue for a more inclusive interpretation of the term ‘creed’ in this paper, which is a collaborative work by the OHS Ethical Action Committee.

It is the position of the Ontario Humanist Society (OHS) that the Ontario Human Rights Commission (OHRC) should move towards a more inclusive interpretation of the term ‘creed.’ The word “creed” derives from the Latin “credo,” meaning “I believe.” The Cambridge University Press dictionary defines creed as “*a set of beliefs which expresses a particular opinion and influences the way you live.*” It is a definition that makes no reference to religion, at the same time it refers to ‘a set of beliefs’ suggesting a substantial belief system akin to the beliefs or tenets of a religion.

We see this definition as a starting point for reconsidering the interpretation of creed as expressed in the “Policy on creed and the accommodation of religious observances” (OHRC website):

1. Creed does *not* include secular, moral or ethical beliefs or political convictions.[4] This policy does not extend to religions that incite hatred or violence against other individuals or groups,[5] or to practices and observances that purport to have a religious basis but which contravene international human rights standards or criminal law.[6]

The Ontario Humanist Society represents Ontario Humanist societies and communities. We are affiliated with Humanist Canada at the national level and with the International Humanist and Ethical Union (IHEU) representing over 100 Humanist and Ethical associations in

over 40 countries. IHEU has member status with the United Nations Economic and Social Council (ECOSOC), reflecting the Humanist commitment to “a world in which human rights are respected and everyone is able to live a life of dignity” (IHEU website).

As Humanists, we define ourselves as a ‘community of choice,’<sup>2</sup> constituted on the basis of strongly held philosophical, moral and ethical beliefs that we espouse as our creed. As a community, we have experienced significant consequences when our rights have been abrogated on the basis of the OHRC interpretation that fits only those communities that define themselves as a religion and espouse a “professed system and confession of faith, including both beliefs and observances or worship” (OHRC Policy on Creed).

A more inclusive definition of creed encompassing communities of choice such as ours would broaden the scope of the term to afford such communities the same protections as religious groups. Such a definition would retain the requirement that a necessary aspect of creed is that moral and philosophical beliefs of the community are “*sincerely held and/or observed*” through ethical community practices (Ibid). Further to the OHRC interpretation, ‘creed’ would be “defined subjectively” with personal philosophical, moral or ethical observances protected “even if they are not essential elements of the creed provided they are sincerely held” and a good fit with the community’s creed (Ibid).

In order to fully clarify our position, we have provided commentary relative to three defining aspects of our proposal for a more inclusive interpretation of ‘creed’:

1. Conceptualizing the Humanist creed;
2. The case for revising the interpretation of creed;
3. The abrogation of rights in practice as an outcome of exceptions in the OHRC’s interpretation of creed.

## 1. CONCEPTUALIZING THE HUMANIST ‘CREED’

### A. ETHICAL COMMUNITIES OF CHOICE

Feminist philosopher, Hilda Lindemann Nelson conceptualizes the process of moral self-definition as a potential evolving from communities of choice structured by an ethics of care and interdependence (Nelson 1995, 1999). Both personal and community empowerment arise from such communities as opposed to the dominance and subordination that structure many modern associations including some religions (McCabe, 2004, p.9, 72-76).

Humanist societies in general can be construed as ethical communities of choice constituted on the basis of shared values and ideals where individual difference in experience is understood to be a source of wisdom, insight and expertise. The empowerment ensuing from such a community invigorates the innate capacities of humans to think critically, feel compassionately and act ethically.

### B. MODERN HUMANIST BELIEFS, GUIDING PRINCIPLES AND PRACTICE

#### Universal Declaration of Human Rights (1948)

A foundational “creed” of Humanists that guides our beliefs, our actions, and our understanding of our responsibility to others as Humanists, is the *Universal Declaration of Human Rights (UDHR)*, a United Nations instrument ratified in 1948, which has become a universal standard for defending and promoting human rights. The declaration is based on belief “in the dignity and worth of the human person.” It requires all states, groups and individuals to observe and promote respect for rights and freedoms. We note that the Declaration, referred to by Eleanor Roosevelt as the “Magna Carta of Mankind” and Pope John Paul II as the “Conscience of Mankind,” was first drafted by Canadian Humanist, John Peters Humphrey. His contributions reflect the values, universal tolerance and aspirations of a long tradition of Humanist practice in Canadian society.

The UDHR, and subsequent Human Rights instruments and treaties it generated enshrine the values of tolerance, reciprocity, equality, and human dignity – all firm principles of Humanism stated in an explicitly non-religious environment, which still protects freedom of thought, conscience and religion or belief.

#### The Amsterdam Declaration, 2002(1952)

Humanists also rely on the International Humanist and Ethical Union’s (IHEU) statement of the fundamental principles of Modern Humanism passed at the first World Humanist Conference in 1952 (2002 update) (IHEU website). Humanists support and use these documents as a ‘living’ creed. All members of the IHEU must agree to accept these statements. The Ontario Humanist Society is a registered member of IHEU. We accept and refer to these and subsequent Human Rights instruments that they generated, to define, refine, and support our principles such as the OHS Ten Principles and Position Statements, LGBTQ rights, for example (OHS website).

#### Principles in practice

As to how Humanists live their creed in practice, examples abound. We prize ethics, reason and critical thinking, and support for universal human rights, which we promote through educational outreach. We also recognize that humans by our very nature are social beings imbued with compassion for our kind as well as the natural world. It is these aspects of everyday life that we consider with our Educational Outreach, Chaplaincy and Officiant Programs.

#### EDUCATIONAL OUTREACH

A standard practice of Humanist groups is public education on a range of topical and significant social, environmental and scholarly considerations. For example, recently our affiliate, the Humanist Association of Toronto (HAT) hosted a public lecture on the Humanist approach to international Canadian Peacekeeping initiatives delivered by OHS member and veteran, Matthew Bin.

Dr. Gail McCabe and Mary Beaty, OHS board members, presented the UDHR as a foundational creed of Humanist philosophy to the World Religions class at Durham College. Ms Beaty who also acted as the American Humanist Association’s (AHA) NGO National Representative for the Department of Public Information at the United Nations presented the *UDHR* as a foundational creed of Humanist belief on *Being Human*, a Vision TV series produced by Humanist Canada (HC).

#### CHAPLAINCY SERVICES

Humanists have established Humanist Chaplaincies in universities in Canada, the United States and Europe to strengthen ethical communities grounded in the Humanist creed. Chaplains provide leadership, social support and compassionate care services to Humanist students, staff and faculty.

In 2008, Dr. McCabe was appointed to the Campus Chaplains Association (CCA) as the first Humanist Chaplain at the University of Toronto. She was joined by

Mary Beauty in 2010. Their aim is to broaden the scope of service of the CCA and the Multifaith Centre to include ethics as well as spirituality. This initiative has created a change in focus at the Multifaith Centre as some documents and events now recognize both 'faith and ethics' as significant values of campus life.

### HUMANIST CEREMONIES

Humanist Officiants routinely refer to the UDHR and the Convention on Rights of the Child Rights (CRC) as part of their work as clergy. For instance, we have incorporated Article 16 of the UDHR as part of the Marriage Ceremony:

- (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.

And we use Article 7 of the CRC in our Celebration of Naming:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

Our Officiants and Chaplains are also involved in community awareness and care in the spectrum of human life cycles, from family services to welcoming new children, to weddings, funerals, and the development of compassionate care for the isolated and elderly, among other community initiatives.

## 2. THE CASE FOR REVISING THE INTERPRETATION OF 'CREED'

### A. EXCEPTIONS AND EXCLUSION

In our opinion there is a logical fallacy in the statement that "[c]reed does *not* include secular, moral or ethical beliefs." And since the OHRC interpretation of creed is deemed to mean "religious creed" or "religion," it is exclusionary on the basis of religion.

This statement runs counter to the aims of the *Human Rights Code of Ontario*. 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. Human rights as enshrined in civil laws, treaties and other instruments are examples of moral and ethical principles.

### B. THE GAP IN ACCOMMODATIONS FOR ETHICAL COMMUNITIES OF CHOICE

The logical fallacy may be explained as a typographical error through the inclusion of a comma between secular and moral. Perhaps, the OHRC meant to say "secular moral or ethical beliefs." And it is clear from a later paragraph that the OHRC considers that atheists and agnostics are accommodated in the *Human Rights Code*.

*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.[3]*

We found no redress for communities of choice such as ours in the interpretation of creed despite our lived experience with the Humanist creed described in Section 1 of this paper. On that account, we urge the OHRC to reinterpret the term 'creed' to include Humanist and Ethical communities of choice whether styled as societies, communities or associations.

### 3. THE ABROGATION OF RIGHTS IN PRACTICE: AN OUTCOME OF EXCLUSION

Members of Humanist associations have experienced the abrogation of our collective human rights, which we have experienced as diminished opportunities in some cases and exclusion from opportunities in other cases. This reflects differential recognition of religious denominations as social institutions requiring protection under the *Ontario Code of Human Rights*, while Humanist associations as ethical communities of choice do not qualify for protection.

We see this differential recognition as discriminatory and unfair – a contradiction to the stated objectives of the OHRC. These practices limit our ability to reach our full potential as Humanists following our creed as well as to our right to self-definition as Humanists.

Here, we provide a list of those limiting circumstances:

- i. Requisite recognition by the Province of Ontario to solemnize Humanist marriages. In seeking the authority to solemnize marriages, Humanist associations must meet the requirements of a religion. The application was framed as if we were a quasi-religion resulting in a lengthy, tenuous and challenging process given that our values and principles differ in kind from a religion.

- ii. Recognition of our communities and associations by the charitable directorate. In seeking charitable status, our applications have generally been successful solely on the basis of educational objects. Unlike religious groups, Humanist communities have been refused status on the basis of service for the good of our communities.
- iii. Humanist communities are not afforded the tax-free status on community-held property of religious groups.
- iv. OHS Humanist Officiants are not afforded the tax benefits of religious clergy limiting their ability to serve our community.
- v. Appointments as chaplains for prisons, army, and hospitals requiring recognition by the Multifaith Counsel of Ontario have not been forthcoming.

Efforts to secure these accommodations have had limited success. In Toronto, HAT was successful in gaining status through the courts on the basis of serving the good of the community. Others have not had such success suggesting that status is bestowed as a privilege on a case-by-case basis rather than as common practice on the basis of creed.

## CONCLUSION: TOWARDS A MORE INCLUSIVE INTERPRETATION OF 'CREED'

The OHRC has made a narrow interpretation of the term 'creed' such that the Ontario Humanist Society and other Humanist and Ethical communities are excluded. But why should this be so? The exclusion of organized groups with an established institutional history of supporting deeply held ethical beliefs and principles contradicts the very *raison d'être* of the OHRC as well as the intentions of the *Ontario Human Rights Code*.

This exclusion, a function of discrimination in the interpretation of the term 'creed,' has caused instrumental and affective distress within our Humanist community. This was best articulated by Peter Moller, OHS Treasurer who noted with respect to the statement on atheists and agnostics that "the rights of the non-religious should not be relegated to a footnote."

Mr. Moller offered an alternative definition of the OHRC passage that this paper began with:

*Creed includes any established beliefs which expound moral or ethical standards. It does not include political convictions. This policy also does not extend to religions or groups that incite hatred or violence against other individuals or groups,[5] or to practices and observances that purport to have a religious basis but which contravene international human rights standards or criminal law.*

We support this definition because it seems to redress our issues. The absence of protection for collective rights for Humanist communities as well as other ethical groups who define themselves within an ethical creed that is not religious in nature is of great significance to the Ontario Humanist Society.

## NOTES

<sup>1</sup> This paper reflects the perspectives of the Ontario Humanist Society and its members as well as members of local Ontario Humanist groups and the international Humanist community. The drafting of the paper was a collaborative effort of three members of the Ethical Action Committee of the Ontario Humanist Society.

<sup>2</sup> See explanation of 'ethical communities of choice,' Section 1, page 2.

## REFERENCES

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# TOWARD A DEFINITION OF LEGITIMATE RELIGIONS

**Richard M. Landau** has been responsible for adjudicating disputes and enforcing a television network code of ethics in a religious broadcasting setting since 1992. He is a graduate of Carleton University and the University of Ottawa. A leader in interfaith dialogue, Mr. Landau has consulted with the UK Home Office, and the White House Office of Community- and Faith-Based Initiatives. He works closely with leadership in all of the major world religions. He is author of [What the World Needs to Know about Interfaith Dialogue](#).

## **ABSTRACT**

This article explores the manner in which individuals, organizations, and institutions of civil society can identify and distinguish legitimate faith communities from those who would use the purloined language and symbols of religion to advance non-creedal and illegitimate objectives. This article provides a basis for according religious organizations and their adherents, rights and recognition without granting concomitant authorization to organizations that may promote hatred, illegal activities or vexatious objectives.

What is a religion? Should a so-called “new church” promoting a pure-race Aryan philosophy be extended the same rights, freedoms and protections as, say, an institution like the Roman Catholic Church? 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? How does a society separate the crime of a so-called “honour killing” from its perpetrator’s claim to some form of religious immunity?

What can we do when faced with the growth of groups seeking the borrowed legitimacy of the language and terminology of faith and belief to further narrow, illegitimate and, perhaps, even illegal ends?

Many organizations of civil society have been loath to wade into this area. This is largely because there is little knowledge of the criteria for identifying and distinguishing “religion” and sincere religious claims. However, without the application of a working definition of what defines an expression of faith or creed, Canadian courts run the risk of inadvertently extending *Charter* protections and rights to abhorrent practices that contradict existing laws, and abnormal observances, which might have unintended consequence of abridging the real rights, freedoms and intentions of *Charter 2* protections.

With clearly established criteria, each backed by a rationale, one can define religion rationally without presenting any grounds for an accusation of arbitrariness or favouritism. Without some criteria in place, one might be compelled to resort to arbitrary decisions or, conversely, be prepared to accept potentially racist and extremist groups as equally entitled to protections and freedoms.

## **WHAT IS A FAITH?**

When an esteemed group of faith leaders from many world religion traditions came together in 1984 to form Canada’s Interfaith Network, the first multifaith TV service, they grappled with this issue and they arrived at what have proven to be workable criteria. They affirmed the status of the established faiths while acknowledging that many people do not follow the so-called established religions. The four criteria they enunciated are still the most reliable for determining what is a faith: longevity, universality, charitable status, and the right to solemnize unions. To these four, this article proposes a fifth criterion: legitimacy.

### **Longevity**

Trends in faith and belief come and go but religions and religious systems endure through generations. Genuine faith communities stand the test of time; but cults of personality die out soon after their founders pass away, and quasi-religious groups evolve or fade away. Often, it is the length of existence that separates cults and mere new trends from faith communities that have a long-term and pervasive worldwide influence. The 1984 group reasoned that since the average lifespan of a healthy human is 75 years, for any faith to be regarded as “established”, it would need to demonstrate that in the corporate sense it had existed for, at least, 75 years.

### **Legitimacy**

Obviously, individual churches, synagogues and other congregations that have existed for much less than 75 years, cannot independently meet the longevity threshold. In such cases, an organization can prove its legitimacy through a

letter of certification or authorization of legitimacy and authenticity from an established and recognized parent or umbrella organization. So then, until the “Aryan” Church can obtain a letter of certification from either the Canadian Council of Churches or the Evangelical Fellowship of Canada or other certifying body, then it cannot be regarded as a legitimate Christian church or sect. It is not Christian. The same applies for the Nation of Islam. If no council of imams or widely recognized group like the Islamic Society will certify it as genuinely within the Islamic tradition, then it cannot claim that it has the same root as all Islam, which goes back over 1,300 years. Such groups would have to ‘fly on their own ticket’, counting their legitimate origins from the date of their own incorporation.

Let’s examine this test of legitimacy more closely. In recent years, all over the Western world groups of self-described “Messianic Jews” have emerged. They claim they are Jewish, yet they accept Jesus (who they refer to as “Yeshua”) as the promised Messiah. This runs in the face of the traditional Jewish definition of ‘who is a Jew’. In 1999, I adjudicated such an issue. I relied upon a test of legitimacy in my decision; the question of legitimacy in its purest form becomes: “By whose authority can you lay claim to being a legitimate branch of the (name) religion?”. In other words, just because someone lays claim to a name or claims to represent a given creed – in this case *Judaism* – it does not necessarily and immediately mean that claim is legitimate.

This is an important distinction because sometimes, cults and fringe organizations will appropriate the language of faith in an attempt to “manufacture legitimacy”. Fringe groups looking for legitimacy regularly use the word “church” in their name, and address their leaders as pastors or ministers. The mere titles are a façade and without substance unless we can ascertain what recognized and accepted theological course of study these ‘ordained’ leaders pursued. Legitimacy must be earned.

### Universality

Without proof of a certain number of adherents, one person’s self-proclaimed “church” gains the same authority and rights and protections as an established faith community with millions of adherents – and that’s problematic.

In Ontario, there is a small band of acolytes that belong to a so-called “church” that eschews the wearing of clothing and promotes the use of illegal drugs as a sacrament. Without some numerical means test of universality, this handful of people would have the same rights and authority as the hundreds of thousands of Roman Catholics in the community and, by extension, the one billion Roman Catholics worldwide.

A numerical test of universality, prevents small, yet active, localized quasi-religious groups from changing the face of the society at large to accommodate abnormal

practices. However, the numerical test is not a sufficient stand-alone criterion. Otherwise, one might fail to accord recognition to the practices and beliefs of faiths that have universality and international acknowledgment, yet are few in numbers in a given local community, like Zoroastrianism or the Baha’i Faith in Canadian communities.

### Registered Charitable Status & Articles of Incorporation

One of the generally accepted tests of religious organizations is whether they have charitable status. While the ultimate power to authorize, certify and extend recognition to legitimate religions cannot be yielded to the Canada Revenue Agency or any other nation’s national taxation and revenue service, it is true that most developed nations’ governmental taxation departments exercise a range of stringent tests of their own before they will grant this special status.

Groups that maintain charitable status must demonstrate that the funds they collect from their general membership are used for purposes that are clearly defined in their letters of incorporation, e.g. religious activities. Charitable status usually means the operations of the organization are for a common good or purpose rather than for personal gain, self-aggrandizement or to enrich a handful of privileged members. The provision of charitable status also means that the group’s objectives are not in contravention of the laws of the land.

### Solemnizing of Marriage

The right to solemnize marriage, as extended by civil authorities to faith communities, is another useful test of what constitutes a legitimate religious organization. Here again, one cannot arbitrarily subjugate good judgment and the *final* right of acceptance to civil authorities. Nevertheless, governments generally apply tests before they will extend to any faith community the right to conduct officially recognized weddings.

This right expresses more than just the right to conduct a lawfully recognized wedding. It indicates an “organized” faith community governed by rites of passage, a body of laws, and a framework of revealed scriptures and teachings. These are at the core of what historically has defined a religion. An organization without scriptures, sacred texts and laws governing personal conduct and relations is not a religion. After all, when we examine the traditional definition of religion, we find it is about “commitment or devotion to religious faith or observance; a personal set or institutionalized system of religious attitudes, beliefs, and practices” leading individuals to live lives of moral rectitude. The codes of laws can be as precise as the 613 laws in the Torah, or as all-encompassing as the Buddhist Dhammapada: they all provide prescriptions and laws for proper conduct.

### Other Criteria

Over and above the five criteria listed above, a religious community in good standing will endorse, uphold and act in accordance with the following:

1. The principles enunciated in the Universal Declaration of Human Rights governing the equality of all peoples regardless of race, creed, religion, sex, income, etc.
2. The laws of its host nation and other jurisdictions.

The first of these other criteria is a safeguard against racist supremacists cloaking themselves in the purloined legitimacy of faith. Moreover, the second criterion will eliminate such groups that claim illegal substances as sacraments and such fringe organizations that stockpile weapons, kidnap or harm people or openly seek to overthrow the government in the name of faith. There are people and organizations that conceal their nefarious and anti-social objectives in religious terminology and the trappings of ritual and faith as did the Branch Davidians and The Peoples Church of Jonestown.

With appropriate criteria in place, such extremists are denied the opportunity to seek religious protections under the law or to flourish and appropriate the rightful place of legitimate religion and creed in our society.

### QUASI- AND PARA-RELIGIOUS ORGANIZATIONS AND MOVEMENTS

By their very nature, some of the so-called “new religions” and philosophical movements are among the most outspoken. Many of them actively seek to expand and find new members. Some are infused with the enthusiasm that accompanies new-found belief. Others are interested in the borrowed legitimacy of appearing in the same forums as the world religions which genuinely meet the criteria listed earlier in this article. Still others are new strains and offshoots of the established world religions and would presume, without permission, to speak on behalf of the main corpus of the faith tradition from which they claim to have emerged.

There are many, many such quasi-religions and movements. Each one presents a distinctive case. Each will have different problems with the five criteria listed earlier in this article. Clearly, determinations in such cases will need to be made on a case-by-case basis. Some movements may not be universally well regarded or embraced by the respective mainstream faiths with which they identify, but are still accorded recognition. However, the converse is also true: such organizations as the Nation of Islam or Messianic Judaism – are rejected by the established umbrella organizations in the faiths to which they purport to belong.

### CONCLUSION

The application of a working definition of an expression of faith or creed, will allow Canadian courts to avoid inadvertently extending *Charter* protections and rights to abnormal practices masquerading as religious observance, which could have the net effect of diluting the intent of *Charter* 2 protections.

#### NOTES

- <sup>1</sup> Vision TV, Code of Ethics, Section D. **Mosaic Programming.** <http://www.visiontv.ca/about-vision/code-on-ethics/>.
- <sup>2</sup> Church of the Universe. [http://en.wikipedia.org/wiki/Church\\_of\\_the\\_Universe](http://en.wikipedia.org/wiki/Church_of_the_Universe).
- <sup>3</sup> *Charitable Purpose, Advocacy and the Income Tax Act.* Andrew Kitching. Library of Parliament. 28 February, 2006. <http://www.parl.gc.ca/Content/LOP/researchpublications/prb0590-e.htm>.
- <sup>4</sup> “Religion”. *Merriam-Webster Dictionary.* <http://www.merriam-webster.com/dictionary/religion>.
- <sup>5</sup> Universal Declaration of Human Rights. <http://www.un.org/en/documents/udhr/>.

# ACCOMMODATION AND COMPROMISE: WHY FREEDOM OF RELIGION ISSUES CANNOT BE RESOLVED THROUGH BALANCING

**Richard Moon** is a Professor in the Faculty of Law, University of Windsor. He is the author of *The Constitutional Protection of Freedom of Expression* (University of Toronto Press, 2000), editor of *Law and Religious Pluralism in Canada* (UBC Press, 2008) and a contributing editor to *Canadian Constitutional Law* (4<sup>th</sup> ed) (Emond Montgomery Press, 2010). His research deals with freedom of religion and is funded by a grant from the Social Sciences and Humanities Research Council.

## **ABSTRACT**

Chief Justice McLachlin has said that while “reasonable accommodation” may be the appropriate “analysis” in private sector freedom of religion/religious discrimination cases, it is not appropriate in *Charter* cases in which the restriction on religious freedom is imposed by statute. I think the Chief Justice is right that there are important differences between these two kinds of restriction on religious practices – private sector/human rights code and legislative/*Charter*. I will argue, though, that her alternative approach, the balancing of interests under s.1 *Charter*, is either inappropriate or unworkable.

In the case of *Alberta v. Hutterian Brethren of Wilson Colony*,<sup>2</sup> Chief Justice McLachlin said that while “reasonable accommodation” may be the appropriate “analysis” in freedom of religion/religious discrimination cases under human rights codes, it is not appropriate in *Charter*<sup>3</sup> freedom of religion cases, or at least in *Charter* cases in which the restriction on religious freedom is imposed by statute. Her rejection of “reasonable accommodation analysis” in *Charter* cases surprised many people. I think the Chief Justice is right, though, that there are important differences between these two kinds of restriction on religious practices – private sector/human rights code and legislative/*Charter*. She may also be right that “reasonable accommodation” is not the best way to describe the courts’ approach to the justification of statutory limits on religious practices; although I am inclined to think that the term is sufficiently open that it may still be appropriate in these cases. I will argue, however, that her alternative approach, the balancing of interests under s.1 of the *Charter*, is either inappropriate or unworkable.

The “religious accommodation” issue (i.e. whether the state should be required to adjust the law to make space for religious practices) is complicated for reasons that relate both to the function of law and the nature of religion. Laws seek to advance public interests – the rights and welfare of community members – and are framed in general terms. And while religion is often concerned with what might be

described as personal/spiritual matters, it sometimes addresses matters of civic concern. Religious beliefs sometimes have something to say about the rights and interests of others and about the way in which society should be organized.

The conflict between religion and law may be described as indirect (or incidental), when the religious practice conflicts with the means chosen to advance public policy (the way in which a policy is advanced) and not with the policy itself.<sup>4</sup> For example, the government may have decided on a particular route for a new highway, only to discover that its preferred route runs through an area that is sacred to an aboriginal group.<sup>5</sup> In such a case it may be possible for the state to advance its purpose in a different way, through different means, so that it does not interfere (at least to the same degree) with the religious practice or space. The law-makers ought to have taken into account the interests and circumstances of the different religious (and other) groups in the community and designed the law so as to avoid unnecessary conflict. Indeed, it may reasonably be asked in such a case whether the state would have enacted the same law (adopted the same means) had the religious practices of a more politically-influential group been similarly affected. It is important to recognize, though, that even in the case of what might be described as an indirect conflict between law and religion, the adoption of different means will often detract to some extent from the law’s

ability to advance a particular policy. In the example given, an alternative route may add to construction costs or detract from ideal road conditions.

In the case of an indirect or incidental conflict between law and religious practice, “reasonable accommodation” is an appropriate response (or an appropriate way to describe the response), even though in practice the state may be asked to do very little accommodating. “Reasonable accommodation” analysis asks whether the law (the way in which it advances its policy) can be adjusted so that it does not interfere (to the same extent) with the religious practice, without compromising the law’s public purpose in any significant way. When applying this test, and determining whether a religious practice should be accommodated, there may be disagreement about the extent to which government policy should be compromised. And I would note here simply that the courts have not been willing to require the state to compromise its policies in any serious way.<sup>6</sup>

Sometimes, though, the conflict between religious practices and public policy is more direct, in the sense that the law is pursuing a policy (a public value) that is directly at odds with the religious practice. In such a case the conflict between the law and religious practice cannot be avoided or reduced by the state simply adjusting the means it has chosen to advance its public purpose. If law-makers have decided, for example, that corporal punishment of children is wrong and should be banned or that sexual orientation discrimination is wrong and ought to be prohibited, how is a court to decide whether an exception to these norms or requirements should be granted to a religious individual who believes that corporal punishment is mandated by God or that same-sex relationships are sinful and should not be supported? The issue for the court in the first example is not whether physical discipline is effective or whether the value or utility of physical discipline outweighs its physical and emotional harm to children. Nor is the issue whether parents should have the right to make judgments about the welfare of their children without state interference, which if resolved in favour of parental autonomy would result in the striking down of the ban and not just the creation of an exception for some parents. In other words, the court is not questioning the public norm and considering whether physical discipline is in fact sometimes right or justified. Instead, the issue is whether some parents – *religious* parents – should be exempted from an otherwise justified ban on physical discipline because they believe that God has mandated them to discipline their children in a way that the law has forbidden. The court must decide whether space should be given to a different normative view – a view that the legislature has rejected.

In such a case then, the courts task is not to decide the proper balance or trade-off between competing interests or values (in accordance with the ordinary justification process under s.1 of the *Charter*). Their task instead is to determine whether a religious individual or group should be exempted from the law. But if, as a democratic community, we have decided that a particular activity should be restricted as harmful or a particular policy should be supported in the public interest, why should the issue be revisited for an individual or group who/which holds a different view on religious grounds?

From a secular/public perspective a particular religious practice has no intrinsic value; indeed, it is said that the court should take no position concerning its truth. The practice matters because it is significant to the individual – because she/he believes it is required by God or will bring her/him closer to the divine. However, the importance of the religious practice to the individual may not be enough to justify the creation of an exemption to a democratically-mandated norm. The willingness to exempt a religious practice may also be based on an awareness of the practical limits of state authority. More particularly, accommodation may be based on a recognition that political decision-makers are fallible and that some respect should be paid to the traditional or evolving responses of different religious communities to fundamental moral issues. It may also rest on a concern that if religious adherents are required to act in a way that is contrary to what they believe is right or necessary, they will become alienated from the political order and may even engage in civil disobedience. Accommodation then may be intended to prevent the marginalization of minority religious groups and the possibility of social conflict – concerns we associate with equality rights.

A court’s willingness, in a particular case, to exempt a religious individual or group from a public norm – to treat the individual’s/group’s practice as part of the “private” sphere – may depend on two related considerations. The first is whether the practice has an impact on the rights or interests of others in the community, or whether it is simply personal to the individual or internal to the religious group. There is plenty of room for debate and disagreement about the public/private character of a religious practice. For example, while the education of children may be seen as principally the concern of parents, there is also a public interest in how children are educated. As well, the community may have some responsibility to children to ensure they are properly educated. Another example involves the performance of a marriage ceremony by a religious authority, which is generally viewed as a private matter, even though it has civic or legal consequences. The point here is simply that there is no bright line between public/civic and private/personal activities.

The second (but related) consideration is whether membership in the religious group is seen as voluntary. The internal operations of a group will be exempted from public norms (for example anti-discrimination rules) only if the members of the group have a meaningful right or opportunity to exit the group and are not thought to require protection from intra-group oppression. In this short paper I can do little more than acknowledge that the ‘voluntariness’ of group membership is a complicated matter. An individual’s identity may be tied in a deep way to her/his religious group; and so exit from the group may be difficult even when there are few material barriers. The individual’s exit from her/his religious community may be difficult for the very same reason that community autonomy is important. Exit is difficult precisely because religious community plays a central role in the individual member’s life and identity – because it is the source of meaning and significance for her/him.

The difficulty in determining when an exemption should be granted is nicely illustrated by the superficially simple case of a claim to exemption from a paternalistic law. A religious exemption may be appropriate in the case of paternalistic laws that preclude individuals from engaging in “risky” activities that are required by their faith: for example, an exemption for Sikh men from a law that requires everyone to wear a helmet when riding a motorcycle or bicycle. Paternalistic laws are intended to protect individuals from their own bad decisions. A commitment to religious freedom may at least limit the state’s power to treat “self-regarding” religious practices as unwise – as something against which the individual needs to be protected. Yet, even in the case of apparently paternalistic laws, the courts have been hesitant to recognize exceptions – to treat the practice as a private matter.<sup>7</sup> The reluctance to recognize a religious exception in such cases appears to be based on a realization that no law is simply paternalistic (a private matter) and that any time an individual is injured there will be an impact on others, including friends and family members, employers, co-workers, and of course the general community, which must cover the injured person’s medical costs.

At issue in these “religious accommodation” cases then is the line between the political sphere (of government action) and the private sphere (of religious practice). The courts may sometimes draw the line in a way that exempts a religious practice from the application of an otherwise

justified law. In this way they may create some “private” space for religious practice, without directly challenging the state’s authority to govern in the public interest and to establish public norms. This, of course, will depend on whether the courts are willing to view the practice as sufficiently private – as not impacting the rights and interests of others in any real way. Accommodation, though, will not be extended to beliefs/practices that explicitly address civic matters (the rights or welfare of others in the community) and are directly at odds with democratically adopted public policies. When religious beliefs address civic matters they will be treated as political judgments that may be rejected (and perhaps accepted) in the political process.

While the courts do not engage in anything that could properly be described as the “balancing” of competing public and religious interests (in which the state’s objectives might sometimes be subordinated to the claims of a religious community), they have sometimes sought to create space for religious practices at the margins of law. First, accommodation may sometimes be given in the case of a religious practice that conflicts indirectly with the law. In such a case the court may require the state to compromise, in a minor way, its pursuit of a particular objective to make space for the religious practice. Second, in the case of a more direct conflict between a religious practice and a public norm, the court will require the state to exempt (accommodate) a religious individual or group from the law only if this will have no real impact on others in the community. In such a case the practice will be treated as private and insulated from the application of the law.

There is no principled way for the courts to determine the appropriate ‘balance’ between democratically chosen public values or purposes and the spiritual beliefs/practices of a religious individual or community (an alternative normative system). A judgment about whether to create space for a religious practice at the margins of law must be both pragmatic and contingent. The courts’ ambivalence about religious accommodation stems I suspect from the belief that when adjudicating rights claims, they should be principled – that they should be balancing values. A pragmatic response to the claims of legal policy and religious practice does not fit well with the court’s commitment to resolve issues in a principled way, a commitment that underpins the legitimacy of judicial review.

## NOTES

<sup>1</sup> Faculty of Law, University of Windsor. This paper is a modified version of a talk given at the Multi-Faith Centre, University of Toronto, Jan. 2012.

<sup>2</sup> *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37. The adoption of a common approach to private and state restrictions on religious freedom might seem to follow from the conceptual links between human rights codes and the *Charter*. The courts' initial interpretation of equality rights under the *Charter* (s.15) drew heavily on the anti-discrimination case-law developed by human rights commissions and tribunals. And the Supreme Court of Canada in its early freedom of religion cases under the *Charter* interpreted the freedom not simply as a liberty to practice one's religion but as a form of equality right.

<sup>3</sup> *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*.

<sup>4</sup> In the discussion that follows I have drawn a distinction between indirect and direct restrictions on religious practice. I recognize though that these two "categories" are sometimes difficult to distinguish and might more accurately be viewed as part of a continuum.

<sup>5</sup> Such a claim was rejected in the U.S. Supreme Court judgment of *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988).

<sup>6</sup> See for example *Multani v. Commission Scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256, *Amselem*, note 2 and *Wilson Colony*, note 2.

<sup>7</sup> *R. v. Badesha*, 2008 ONCJ 94; 2011 ONCA 601.

### TAKING A FRESH LOOK AT CREED

From the very beginning 50 years ago, Ontario's *Human Rights Code* included protection from discrimination because of creed. Half a century later, creed continues to be an area of discussion and sometimes conflict in communities across Ontario and across Canada.

In our 1996 *Policy on creed and the accommodation of religious observances*, we interpreted creed to mean "religious creed" or "religion." Under this policy, religion was 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 was not required. So the definition of creed included non-deistic bodies of faith, such as the spiritual faiths and practices of First Nations, Inuit and Métis cultures. As well, it could include new and emerging religions, which were assessed on a case-by-case basis.

But this interpretation of what creed means in the *Code* may be outdated, since many things have changed in the past 15 years. That's why we are in the early stages of drafting a new policy on creed that reflects today's beliefs, issues, challenges and society.

In our new policy, we will take another look at defining the ground of creed in the *Code*, and we will offer updated ways for respecting and advancing creed rights in our increasingly complex world.

– OHRC 2011-2012 Annual Report

# THE NEED FOR GREATER PROTECTION OF RELIGIOUS ASSOCIATIONAL RIGHTS IN EMPLOYMENT

**André Schutten** completed his law degree at the University of Ottawa. His major research paper argued for greater protection of associational rights in non-profit employment. His undergraduate degree in Religious Studies helped shape his appreciation for and recognition of the very important role that religion plays in Canada's pluralistic society. He interned for the Centre for Faith and Public Life and articulated with the Evangelical Fellowship of Canada. André currently serves as legal counsel to the Association for Reformed Political Action Canada where he monitors freedom of religion. He is also enrolled as an LL.M. candidate (Constitutional Law) at Osgoode Hall.

## **ABSTRACT**

The exemption from the prohibition of employment discrimination (section 24(1)(a) of the *Human Rights Code*) is a concern for religious communities; narrow interpretation results in undue infringement of the right to freely associate with others in a religious community. I argue in light of Supreme Court *Charter* jurisprudence that section 24 should result in robust protection for associational rights including the right to limit employment to other members of the association. I then propose a modification to the legislation that would see greater legislative clarity and greater protection for creed-identifying communities without abandoning the purpose and intention of the *Code*.

The *Ontario Human Rights Code*<sup>1</sup> allows for certain exemptions from the general prohibition against employment discrimination. The *Code* bans employment discrimination in section 5(1), but allows an exemption in section 24(1), the Special Employment Exception Section (hereafter, the SEES).<sup>2</sup>

The Supreme Court of Canada explained the purpose of the SEES as one which “confers and protects rights”; a section which is “a protection of the right to associate.”<sup>3</sup> Justice Beetz later reinforced this purposive approach:

*[the section is] designed ... to allow certain non-profit institutions to create distinctions, exclusions or preferences which would otherwise violate the [Québec] Charter if those distinctions, exclusions or preferences are justified by the ... religious ... nature of the institution in question. In this sense, [the SEES] confers rights upon certain groups. [It] was designed to promote the fundamental right of individuals to freely associate in groups for the purpose of expressing particular views or engaging in particular pursuits.*

*Its effect is to establish the primacy of the rights of the group over the rights of the individual in specified circumstances.*<sup>4</sup>

Despite this clear directive from the Supreme Court, there still exist concerns within creed-identified communities with respect to the application and interpretation of the *Code* exemption. It has been narrowly applied such that the freedom to associate with other members of a religious group is unduly infringed; a troubling trend for creed-identified communities.<sup>5</sup>

## **RELIGIOUS AND ASSOCIATIONAL FREEDOMS**

It is helpful to first discuss the legal principles surrounding the fundamental freedoms of religion and association as protected by section 2 of the *Canadian Charter of Rights and Freedoms*.<sup>6</sup> These are especially relevant to the discussion of employment discrimination in the context of religious organizations.<sup>7</sup>

In the *Hutterian Brethren* case<sup>8</sup> the Supreme Court emphasized the importance of recognizing the community and collective aspect of religious rights. Justice LeBel wrote, “[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.<sup>9</sup> This recognition of a communal right to the free exercise of religion is important for religious individuals who wish to collectively express their identity or who wish to engage in enterprise together to the exclusion of others. Justice LeBel's statement recognizes that freedom of religion includes a right to "establish and maintain a community of faith that shares a common understanding" about lifestyle or morality or religious practice whether or not these values are obligatory.<sup>10</sup>

Furthermore, the purpose of s. 2(a) of the *Charter* is "to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being."<sup>11</sup> The court in *Amselem* forcefully affirmed this by stating that

*the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.*<sup>12</sup>

The freedom of religion then has both individual as well as collective rights protection. The freedom of association is an individual, not a collective, right. However, Professor Hogg states, "The right protects the exercise in association of the constitutional rights of individuals... freedom of religion [does] not lose constitutional protection when exercised in common with others."<sup>13</sup> The communal religious rights of individual members of religious organizations are also protected by their freedom of association. The Supreme Court explained that to not allow for this is contradictory and otherwise defeats the purpose of the s. 2(d) freedom:

*[The] freedom of association should guarantee the collective exercise of constitutional rights. Individual rights protected by the Constitution do not lose that protection when exercised in common with others. People must be free to engage collectively in those activities which are constitutionally protected for each individual.*<sup>14</sup>

This should include the freedom to limit membership in the religious community according to "subjective understandings of religious requirement"; this necessarily includes limiting employees to similarly identified believers.<sup>15</sup>

## SUPREME COURT ON SPECIAL EMPLOYMENT EXEMPTIONS AND THE BFOQ

The final, most complex and most elusive step that religious organizations must pass to qualify for the special employment exception is that they must show on a balance of probabilities that their employment qualifications are reasonable and *bona fide* because of the nature of the employment. To determine this, the Supreme Court has developed a test that has a subjective and objective element.<sup>16</sup>

The Supreme Court has dealt with employment exemptions many times; however the *bona fide* occupational qualification (BFOQ) test it uses (and which by necessity all lower courts and tribunals use) is from the pre-*Charter* era<sup>17</sup> based on a fact scenario that is fundamentally different than those cases involving creed-based rights. There is a major difference between *Etobicoke* and cases like it and the *Christian Horizons* case and other cases like it.

In *Etobicoke*<sup>18</sup> and in *Meiorin*<sup>19</sup> the question regarding the "nature of the employment" in the dispute was in regards to the actual physical work itself, *i.e.* whether 60-year-old men or female workers were physically able to do the work of a firefighter and whether imposing such limits is reasonable and *bona fide*. Here, the BFOQ is a requirement that can be objectively measured with scientific studies: can men over 60 still perform satisfactorily as firefighters? In these types of cases, the original *purpose* of the SEES (the protection of associational rights) does *not* play a role in the analysis. Furthermore, creed-based organizations need a different test because their employment criteria are *not* empirically measurable and cannot be objectively evaluated, nor should tribunals and courts attempt to do so.<sup>20</sup>

A more helpful case is the *Caldwell* case<sup>21</sup> where a Roman Catholic teacher was not rehired because she married a divorced man, contrary to Catholic Church dogma. There was no issue with the complainant's ability; she was qualified to teach.<sup>22</sup> So in this case the BFOQ looks beyond the measurable, objective qualifications and considers qualifications that are particular to the employing organization. The Supreme Court ruled in favour of the school board and rephrased the objective branch of the BFOQ test to fit the religious and educational institution in question:

...the essence of the [objective] test remains applicable and may be phrased in this way: "Is the requirement of religious conformance by Catholic teachers, objectively viewed, reasonably necessary to assure the accomplishment of the objectives of the Church in operating a Catholic school with its distinct characteristics for the purposes of providing a Catholic education to its students?"<sup>23</sup>

The objective test so stated is an improvement on the approach taken in *Etobicoke*. However, there remains problems with using "objective" criterion: first, there is no accommodation for associational rights which arguably need no justification for their limitations<sup>24</sup> and second, technically and actually, most (if not all) jobs at any religious institution can be performed regardless of religious affiliation when evaluated "objectively". So where do the courts and tribunals draw the line?

Can an atheist perform the job of a church organist? Can a Hindu complete the duties of a secretary in a synagogue? Can a homosexual man carry out the duties of a Roman Catholic altar server?<sup>25</sup> Can a woman in a common-law relationship teach Sunday school to children?<sup>26</sup> The "objective" answer to these questions is yes. But the result is absurd for many religious groups. The subjective religious views of the particular religious community must take precedence in any analysis. An objective assessment robs the religious members of the legitimacy of their own religious precepts and their freedom to associate and disassociate with whom they please. Instead of looking at employment with religious organizations in an instrumental or compartmental way, we must instead look at the employment with religious organizations in a holistic way – each employee of a religious organization should be seen as a functioning member of that religious community.

## A BETTER LAW, A BETTER TEST

A better test in these special situations is one that simply recognizes and accommodates religious associational rights. An adjustment to the legislation can provide greater clarity on this issue and better direction for Tribunals in the future. This will ensure that individual freedoms of religion and association are properly balanced with the right to be free from employment discrimination.

The exception in the *Code* currently allows discrimination "if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment."<sup>27</sup> At the very least, this statement should add a phrase to read "... because of the nature of the employment, *the institution or the organization*". Appending these five words would direct our tribunals to use the approach of the Supreme Court in *Caldwell*, where the Supreme Court emphasized that the objective element in a BFOQ test analysis requires consideration of the nature of the religious organization itself and not simply of the job description.

A further improvement would be to remove the objective term "reasonable" from the equation. Religious groups should not have to demonstrate to the State the objective reasonableness in their associating with like-minded believers. A simple *bona fide* occupational requirement, which defers to the good faith policies of the organization, their "subjective understandings of religious requirement",<sup>28</sup> should be enough. Religious groups should be allowed to hire only people who completely identify with *all* parts of that community as long as the qualification is consistently applied by the organization and as long as the employment limitations are for associational reasons.

The *Human Rights Code* currently requires the tribunal to determine whether or not certain religious employment requirements are objectively reasonable. This forces the tribunal to go down a road she or he may not go down (see *Amselem*), wading through religious dogma and arbitrating contentious matters of religious doctrine. With the amendments suggested, the legislature will remove that burden from the tribunals and courts.

The current approach used for religious employment discrimination is unhelpful due to a flawed application of the SEES in the *Human Rights Code*, an antiquated test from a pre-*Charter* era, and a section whose language is overly restrictive. Foundational to a correct application of the special employment exception is a proper understanding of the fundamental freedoms set out in the *Charter*. Courts and tribunals must not read the SEES as an exemption from being bound by the anti-discrimination policies of the *Code*. Rather, the SEES should be read as an additional protection incorporated into the *Code*. The freedom for a religious organization to hire only co-religionists is the granting of a right, not a denial of rights.<sup>29</sup> By protecting associational rights, we ensure continued diversity through the viability of distinct and unique groups, contributors to our Canadian pluralist fabric.

## NOTES

- <sup>1</sup> *Human Rights Code*, R.S.O. 1990, c.H.19 [Code].
- <sup>2</sup> *Ibid.*, at s.24.(1)(a): “The right under section 5 to equal treatment with respect to employment is not infringed where, (a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment.”
- <sup>3</sup> *Caldwell v. Saint Thomas Aquinas High School*, [1984] 2 S.C.R. 603 at 626 [Caldwell].
- <sup>4</sup> *Brossard (Town) v. Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279 at para.100 [Brossard] [emphasis added].
- <sup>5</sup> The Christian Horizons case is an example in which the religious associational rights of the group were ignored in favour of the individual; the Tribunal and the Divisional Court on appeal did not give adequate attention to the issue of associational rights and the true purpose of the SEES. See *Heintz v. Christian Horizons*, [2008] O.H.R.T.D. No. 21 and *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105.
- <sup>6</sup> *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.
- <sup>7</sup> In addition to the fundamental freedoms in section 2, we can look to section 15 and how that clause also applies to individual members of a religious organization. See Iain T. Benson, “The Freedom of Conscience and Religion in Canada: Challenges and Opportunities” (2007) 21 *Emory Int’l L. Rev.* 111 at 148.
- <sup>8</sup> *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37.
- <sup>9</sup> *Ibid.* at para 180-182 [emphasis added].
- <sup>10</sup> See *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R.551 [Amselem]. The Supreme Court rejected the argument that non-obligatory religious observance is not protected by freedom of religion; “voluntary expressions of faith” are equally protected (at para.47).
- <sup>11</sup> *R. v. Edward Books*, [1986] 2 S.C.R. 713 at 759.
- <sup>12</sup> *Amselem*, *supra* note 10 at para.50 [emphasis added].
- <sup>13</sup> P.W. Hogg, *Constitutional Law of Canada*, student ed. (Toronto: Thomson-Carswell, 2007) at 1009.
- <sup>14</sup> *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at para 172. I believe that, with the exception of unions in labour law, associational rights have otherwise been undervalued. I agree with David Schneiderman who argues for greater protection of religious associational rights in “Associational Rights, Religion, and the Charter” in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 65 at 80].
- <sup>15</sup> See *Amselem*, *supra* note 10 at para.50.
- <sup>16</sup> *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 [Etobicoke].
- <sup>17</sup> *Ibid.* This case is a pre-Charter case, yet its test remains the standard used in employment discrimination cases. It was applied in *Caldwell*, *supra* note 3 and in *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] S.C.J. No. 74, re-affirmed in *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561, expanded in *Brossard*, *supra* note 4, and refined in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees’ Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] 3 S.C.R. 3 (SCC) [Meiorin].
- <sup>18</sup> *Etobicoke*, *supra* note 16.
- <sup>19</sup> *Meiorin*, *supra* note 17.
- <sup>20</sup> See arguments regarding the proper interpretation and implementation of the *Amselem* case, *supra* note 12, and why tribunals and judges must refrain from delving into the objectivity of different religious requirements.
- <sup>21</sup> *Caldwell*, *supra* note 3.
- <sup>22</sup> *Ibid.* at para.28.
- <sup>23</sup> *Ibid.* at para.33.
- <sup>24</sup> There is a big difference between discriminating and associating. Both involve selection by preference. However, it is one thing to hire all kinds of different people except for one target group. That is discrimination. It is quite another to not hire any type of people except for a specifically defined target group. That is association.
- <sup>25</sup> See *Corcoran v. Roman Catholic Episcopal Corporation of the Diocese of Peterborough*, 2009 HRTO 1600.
- <sup>26</sup> See *Hoekstra v. First Hamilton Christian Reformed Church*, 2010 HRTO 245.
- <sup>27</sup> *Code*, *supra* note 1 at s.24(1)(a).
- <sup>28</sup> *Amselem*, *supra* note 10 at para. 50.
- <sup>29</sup> *Caldwell*, *supra* note 3 at 626.

# FAITH IN THE PUBLIC SCHOOL SYSTEM: PRINCIPLES FOR RECONCILIATION

**Cara Faith Zwibel** is Director of the Canadian Civil Liberties Association's Fundamental Freedoms Program. In this role Cara has focused on issues related to freedom of religion and religious accommodation. She has a degree in Political Science from McGill University, an LL.B. from Osgoode Hall Law School and an LL.M. from New York University. Cara articulated at the Supreme Court of Canada as a law clerk to the Honourable Justice Ian Binnie and was called to the Ontario bar in 2005. She has co-authored articles on the rule of law in the Supreme Court of Canada and on *Charter* advocacy.

## ABSTRACT

Freedom of religion includes both the right to manifest beliefs and practices and the right to be free from state coercion or constraint in matters of religion. This paper looks at the scope and interaction of these two aspects of freedom of religion in the context of religious accommodation issues in public schools. It considers the factors that may be relevant in addressing requests for accommodation in schools and how to address the difficult challenges of ensuring that accommodation of practices does not become and is not perceived as state endorsement or sanctioning of religion.

## INTRODUCTION

Well before the ratification of the Canadian *Charter of Rights and Freedoms*,<sup>1</sup> freedom of religion was an important part of Canadian society. The Supreme Court of Canada acknowledged early on that freedom of religion has two core components. First, it encompasses the right to manifest beliefs and practices, and is therefore also closely related to freedom of opinion and belief. This means that freedom of religion requires that religious beliefs and practices be respected and accommodated. Second, freedom of religion includes the right to be free from state coercion or constraint in matters of religion. Thus, freedom of religion includes freedom from religion.

This paper will explore the scope of these two aspects of freedom of religion, and their intersection and interaction with one another. It will become clear that it is almost impossible to talk about freedom of religion without also considering concerns around equality and discrimination. While these issues arise in many contexts in our modern society, this paper will examine them through the lens of the school system and consider how to reconcile often competing concerns in this highly charged forum.

## LEGAL FRAMEWORK

Section 2(a) of the *Charter* provides that: "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion". As mentioned above, the Supreme

Court recognized the key components of freedom of religion early on. In *R. v. Big M Drug Mart Ltd.*,<sup>2</sup> the majority of the Court held:

*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 religious beliefs by worship and practice or by teaching and dissemination. But the concept means more than that.*

*Freedom can primarily be characterized by the absence of coercion or constraint... Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others.*<sup>3</sup>

The Court recognizes, therefore, the dual aspect of freedom of religion. In addition, section 15 of the *Charter* provides protection from discrimination on the basis of religion (among other grounds). As is true of all *Charter* rights, neither freedom of religion nor the right to equality

are absolute. Rather, these rights are subject to reasonable limits. In many cases the real difficulty or struggle comes in considering what constitutes a reasonable limit on a right and, conversely, when rights are limited in an unreasonable way.

In addition to the *Charter*, Canadians also benefit from human rights statutes that guard against discrimination on the basis of religion.<sup>4</sup> While the *Charter* constrains government action, human rights codes protect individuals from discrimination that may be perpetrated by other actors as well, often in the realms of the provision of housing or accommodation, goods or services.

In a public school context, both the *Charter* and human rights statutes are relevant in developing principles that should guide religious accommodation and respect for religious freedom. School boards are creatures of statute with powers delegated by government. Since a legislature cannot pass a law that violates the *Charter*, it similarly cannot violate the *Charter* simply by delegating a power to an administrative decision maker.<sup>5</sup> At the same time, schools provide a publicly available service and are therefore also subject to human rights codes in place across Canada. Finally, each province and territory has legislation that addresses the education system generally. There are often detailed regulations passed in relation to education as well as a significant number of policies, procedures and guidelines in place at the level of local school boards and even individual schools. Where an issue of religious freedom or accommodation is raised, these various instruments will need to be considered.<sup>6</sup>

## A MATTER OF PRINCIPLE

It can sometimes seem as though questions of religion in the schools are ubiquitous, with issues and challenges constantly arising. In fact, although we may often read and hear about concerns regarding religion in the media, there are few legal cases that have proceeded to human rights tribunals or courts dealing specifically with religious accommodation in a school environment. Perhaps the best known case is one that required the Supreme Court of Canada to consider whether a Sikh student could wear his kirpan (ceremonial dagger) to school despite the school's zero tolerance weapons policy. This case, *Multani v. Commission scolaire Marguerite-Bourgeoys*,<sup>7</sup> demonstrates three important ideas that should be considered in any case concerning religious accommodation in a school environment. First, it recognizes that freedom of religion is not about what religious leaders or texts say is required of adherents, but rather that individual sincerity of belief is the appropriate test.<sup>8</sup>

Second, although the concept of "reasonable accommodation" is usually associated with discrimination claims under human rights statutes, the Court in *Multani*

recognizes the role that this concept can play when a violation of freedom of religion under the *Charter* is asserted. The majority held that reasonable accommodation provides a helpful analogy in assessing whether a limit placed on freedom of religion impairs the freedom as little as possible.<sup>9</sup> Thus, if an accommodation can be found that respects freedom of religion and still achieves whatever goal or purpose the school or board is trying to achieve, the limit on freedom of religion may not be reasonable.

It is worth noting that the Supreme Court has rejected the reasonable accommodation approach in a subsequent case, *Alberta v. Hutterian Brethren of Wilson Colony*.<sup>10</sup> In that case the majority found that a sharp distinction should be maintained between the reasonable accommodation approach under human rights statutes and a section 1 *Charter* analysis. This development is concerning because it suggests that there is no obligation on decision makers to engage in dialogue with minority groups, something which is crucial in negotiating issues of religion in a school setting. The silver lining may be the Court's recognition that, at least when government action or an administrative practice is alleged to violate freedom of religion, the duty to accommodate analysis may still be relevant in considering whether the means chosen to achieve a particular objective minimally impair freedom of religion.<sup>11</sup> Arguably then, this concept should still be engaged where an individual or group accommodation is sought in a school setting.

Finally, the Court in *Multani* recognizes that schools are a special venue and may present unique opportunities for teaching lessons about tolerance and respect. Claims of religious freedom and requests for accommodation may help open up an important dialogue on these issues. As the majority held:

*Religious tolerance is a very important value of Canadian society. If some students consider it unfair that Gurbaj Singh may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instill in their students this value that is...at the very foundation of our democracy.<sup>12</sup>*

Other religious accommodation cases have considered whether a private school could preclude a Sikh student from attending because of a uniform policy that precluded the wearing of a turban,<sup>13</sup> and whether a daycare had a duty to provide meals adhering to a halal diet.<sup>14</sup> Generally, however, the body of law in this area is small and not well-developed.<sup>15</sup> Nevertheless, a number of general principles emerge from both religion and discrimination cases, both in and outside of the school context. These principles help in the development of factors to be considered when

decision-makers are faced with a claim of freedom of religion and/or a request for accommodation.

### ACCOMMODATION: RELEVANT FACTORS

First, as a general rule, public institutions should be neutral with respect to religion and should not sanction or endorse (nor be seen as sanctioning or endorsing) one religion over another. Religious indoctrination in a school setting is not acceptable. While schools may teach about religion in general, and use curriculum designed to foster moral values, giving preference to one religion over another and proselytizing to students is over the line.<sup>16</sup> In cases where a claim for accommodation is made, decision-makers must consider whether granting the accommodation may end up endorsing a particular religious belief or practice. Although this won't often be an issue, an accommodation for a large group of students may lead to this concern and therefore should be undertaken with particular care.

Second, human rights statutes and, in some cases, the *Charter*, require reasonable accommodations for religious practices. In some ways, the duty to accommodate may be seen to run counter to the requirement of neutrality, so these ideas need to be reconciled. In achieving this reconciliation, schools must consider both the purpose and effects of a particular practice or exercise. If students feel that an accommodation amounts to the sanctioning of a particular practice or belief, these concerns will not be alleviated by the fact that individuals can opt not to participate without penalty. In the school setting, concerns about indirect coercion may be particularly acute, but also subtle and sometimes difficult to detect.<sup>17</sup> The manner in which an accommodation is sought or implemented can help to mitigate some of these issues. For example, are accommodations considered only for those who seek them out, or are they offered to the broader student population? Are accommodations equally available to all, so that there is no preference (or perceived preference) given to one group? Is the accommodation issue managed in a way so that parents and students are not required to speak up about their beliefs unless they so choose? The way in which a particular accommodation or practice is implemented may have a significant impact on where it is seen as lying on the spectrum between accommodation and endorsement.

Third, we must recognize the important role that schools play in our society. Public schools are intended to be institutions that foster tolerance and respect for diversity.<sup>18</sup> As a result, the personal views of individuals (students, administrators, etc.), whether animated by religion or otherwise, should not be used to undermine these goals. The Supreme Court has recognized this special role in a number of cases dealing with religious freedoms in a school context, including *Multani* and others.<sup>19</sup>

Finally, in any case where an accommodation is being sought or a claim of freedom of religion is being made, we must both recognize and listen to the affected stakeholders. For young children, accommodation requests will probably be made by parents or guardians, but we should still look for opportunities to discern what students themselves want or need. The rights of the child should lie at the centre of any issue around a claim for accommodation or religious freedom, and schools must work to ensure that parental religious beliefs and rights are not operating at cross-purposes to the rights of the child.<sup>20</sup> Even if we are willing to accept that parents can force their views on their children at home (or in their places of worship), we need to ensure that schools, as public institutions, are not complicit participants in this. This will obviously require walking a fine line in many cases, but such is the duty on an institution as central to our society as the school.<sup>21</sup>

### CONCLUSION

Issues of religion are always difficult because they involve deep-seated beliefs. At stake are multiple interests and values, respect for parental roles, increasing respect for the rights of the child, gender and racial equality, protection of multiculturalism, and the central role that education plays in our society. Without undertaking a comprehensive look at all aspects of this issue, this paper has endeavoured to pose some important questions about how to address freedom of religion and discrimination and equality concerns in public schools.

Some relevant factors to be considered and addressed when these issues arise include:

1. The need to guard against religious indoctrination/coercion;
2. The need to accommodate religious practices/beliefs without endorsing or sanctioning any in particular or favoring some over others;
3. The role of schools as institutions that promote a variety of societal goals including tolerance and respect, the promotion of equality (including gender equality), and the prevention of discrimination against marginalized groups;
4. The educational opportunities that arise in different accommodation contexts; and
5. Respect for the rights of the child and the rights that students have to participate in their own education.

Although the list is not exhaustive, it is likely only in the application of these factors to a variety of unique situations that a more fulsome framework will emerge.

## NOTES

- <sup>1</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the “Charter”).
- <sup>2</sup> [1985] 1 S.C.R. 295.
- <sup>3</sup> *Ibid.*, at pp. 336-337.
- <sup>4</sup> See e.g. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 3(1) and *Human Rights Code*, R.S.O. 1990, c. H. 19, s. 1.
- <sup>5</sup> See *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para. 22.
- <sup>6</sup> See e.g. *Education Act*, R.S.O. 1990, c. E.2. Some Regulations under that Act will be relevant in considering requests for religious accommodation including, for example, the Regulation related to Opening or Closing Exercises, O. Reg. 435/00. Individual school boards within the province may also have pertinent policies or regulations.
- <sup>7</sup> *Supra* note 5. See also *Pandori v. Peel (County) Board of Education* (1991), 80 D.L.R. (4<sup>th</sup>) 475 (Ont. Div. Ct.), leave to appeal ref’d.
- <sup>8</sup> *Ibid.*, at para. 35.
- <sup>9</sup> *Ibid.*, at paras. 52-55.
- <sup>10</sup> 2009 SCC 37.
- <sup>11</sup> *Ibid.*, at paras. 65-71. In *Hutterian Brethren* a law of general application was being challenged.
- <sup>12</sup> *Ibid.*, at para. 76.
- <sup>13</sup> *Sehdev v. Bayview Glen Junior Schools Ltd.* (1988), 9 CHRR D/4881, 1998 CarswellOnt 3315 (Ont. Bd. of Inquiry).
- <sup>14</sup> *Québec (Commission des droits de la personne & droits de la jeunesse) c. Centre à la petite enfance Gros Bec*, [2008] R.J.Q. 1469.
- <sup>15</sup> For a discussion of cases from outside of Canada, see Wendy J. Harris, Q.C. and Audrey Ackah, “Freedom of religion and Accommodating Religious Dress in Schools” (2011) 20 *Educ. & L. J.* 211.
- <sup>16</sup> See e.g. *Zylberberg v. Sudbury Board of Education (Director)* (1988), 65 O.R. (2d) 641 (Ont. C.A.) and *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341 (Ont. C.A.).
- <sup>17</sup> *Ibid.* See also *R. (on the application of Begum) v. Headteacher and Governors of Denbigh High School*, [2006] 2 All E.R. 487 (U.K. H.L.) and in particular Lady Hale’s opinion.
- <sup>18</sup> The special role of schools and the involvement of children make some of the religious accommodation cases found in other contexts (e.g. employment) difficult to apply.
- <sup>19</sup> See e.g. *Ross v. New Brunswick School District No. 15* [1996] 1 S.C.R. 825 at para. 42. See also *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 at para. 66.
- <sup>20</sup> See Cheryl Milne, “Religious Freedom: At What Age?” (2009) 25 *Nat’l J. Const. L.* 71. See also R. Brian Howe, “Schools and the Participation Rights of the Child” (2000) 10 *Educ. & L. J.* 107.
- <sup>21</sup> See Paul Clarke, “Parental Rights, the Charter and Education in Canada: The Evolving Story” (2010) 19 *Educ. & L. J.* 203.

## A BIT OF HISTORY...

*Discrimination laundering*

The Commission is encountering a growing number of incidents of discrimination committed on behalf of clients by such intermediaries as employment agencies and management consultants. This practice constitutes, in effect, a “laundering” of discrimination in the sense that the employers themselves have no direct contact with the victims and thus do not appear to be acting in contravention of the *Code*, though clearly they are as responsible for discrimination as the agent who accepts the assignment ... Indeed, acts of discrimination of this kind are frequently so covert that the victim may not even know that he or she is being discriminated against.

Source: *Life Together*, 1977

# HUMAN RIGHTS, SEXUALITY AND RELIGION: BETWEEN POLICY AND IDENTITY

**Heather Shipley** has a PhD in Religious Studies (2009), an M.A. in Religious Studies (2006), and a B.A. in Religious Studies and Psychology (2004). She is Project Manager for The Religion and Diversity Project, a SSHRC Major Collaborative Research Initiative and teaches part-time at the University of Ottawa and Carleton University. Publications include: 2012. "Fairies, Mermaids, Mothers and Princesses: Sexual Difference and Gender Roles in *Peter Pan*," *Studies in Gender and Sexuality*, 13(2), in press; 2008. "Examining Sexual Diversity: Sexual Orientation and Marriage in Canadian Legal Discourse." *Journal of Religion and Culture* 20: 95-116; "One of these things is not like the other: Regulating Sexual Difference," *Reasonable Accommodation: Managing Religious Diversity*, edited by L. Beaman, Vancouver: UBC Press, in press.

## **ABSTRACT**

As important policy changes are discussed and opened to public response, the urgency to reflect more critically about the narrow and essentialized identity constructions within policy is evidenced. While there will continue to be conflict in the public arena regarding religion and sexuality, from those who identify solely with one aspect and condemn or criticize the other, our policies should be reflective and inclusive of more than these narrow assumptions; if our policies and the application of policies can become more adaptive in response to these challenges, perhaps the assumed inherent conflict can be managed with more productive, alternative strategies.

This paper examines implications and consequences when religion and sexuality are assumed to be inherently in conflict, an argument which centres on discourses that essentialize both religious and sexual identities. Discussing two specific examples I explore the framing of religion and particular sexual identities (i.e. LGBTQ); frameworks which are then used to regulate and manage identity based on assumed inherent traits. I conclude with some reflections, suggestions and recommendations regarding inclusivity in policy and law, and further where I think we need to bridge between policy and application.

Increasingly media coverage in Canada, and beyond, has been focused on the subject of the reasonable accommodation of religious minority groups, highlighting numerous controversies regarding the role of religion and religious practices in Canada, often counter positioned to assumed 'secular' principles of Canadian society. When the controversies relate to gender and sexuality, often the strongest religious voices heard in the public arena are voices arguing that sexuality equality rights challenge religious beliefs. Additionally, certain frameworks of 'religion' are regularly framed as inherently oppressive, often toward women and children. Increasingly it is clear that not all religious groups are unified in their approach on the topic of equality rights based on gender, sexuality or

sexual orientation. So too are voices of those who are both religious and sexually 'other' or religious and in support of sexual diversity becoming more loudly heard, though often the assumption is that to be religious is to stand on one side of this particular dichotomy.

There is widespread evidence that the relationship between religion and sexuality is not inherently in conflict, but often is constructed as such in public discourse/media, further reinforced through policy. What is frequently portrayed in public controversies and debates is that "religion" and "religiosity" necessarily oppose sexual diversity, which perpetrates the assumption that certain groups and individuals ought to be seeking freedom from religious imposition. As important policy changes are being formulated, the urgency to reflect more critically about narrow and essentialized identity constructions within policy is of critical importance. There will continue to be conflict in the public arena regarding religion and sexuality, from those who identify solely with one aspect and condemn or criticize the other, however if our policies and the application of policies can become more adaptive in response to these challenges, perhaps the assumed inherent conflict can be managed with more productive, alternative strategies.

I propose we begin to think not just about how creed-based rights or religious identification challenges those considered to be ‘non-religious,’ but rather want to suggest that it is time to think of how policies of inclusion can be formulated so that religion is not necessarily posited as in conflict with sexual diversity, or equality regarding sexuality.

Relating directly to non-discrimination policies, such as the *Charter*, it is important to reflect on how these policies are intended to be adopted in institutional settings. Recent proposed changes to Ontario’s sex education policy caused enough controversy for 2 years of curriculum development to be shelved as a result of ‘competing’ rights controversies. There is a clear gap between the existence of policies of non-discrimination, policies that recognize intersections and the experience and application of policy within a lived context. Although publicly funded schools are required to commit to the *Charter* and provincial policy, it can be demonstrated that there is a gap between the requirement and the actuality of that in the education environment. This goes to the challenge regarding application of policy, or what I am calling the transmission of policy into experience.

In *Heintz v. Christian Horizons*, Connie Heintz argued that the termination of her employment as a support worker as a result of her sexual orientation violated the *Ontario Human Rights Code*. During her employment at the residence operated by Christian Horizons, Heintz’s identity as a lesbian came into conflict with Horizons’ Lifestyle and Morality Statement, which prohibits homosexual relationships. Christian Horizons argued that it fell within section 24(1)(a) of the *Code*, which permits restrictive hiring or hiring preferences for certain organizations based on one of the proscribed grounds of the code, in this case is creed.

In considering these rights, the Tribunal states: “At the same time, it has been said that no right is absolute. Rights may conflict, and courts and tribunals may be called upon to reconcile competing interests and balance conflicting rights” (para 9). Arguing that the Human Rights Commission is an agency with a mandate to promote human rights, the Tribunal felt that:

*the issue in this case is whether an organization which is effectively 100 per cent publicly funded, which provides social services on behalf of the government to the broader community, and offers those services to individuals without regard to their race, creed or cultural background, may discriminate in its hiring policies on the basis of one of the proscribed grounds in the Code (at para 12).*

Christian Horizons is a publicly funded institution, and therefore it was argued by the Tribunal that they are required to commit to policies of non-discrimination as outlined in the *Code*. The Tribunal did not claim that the organization was not religious simply because it received public funding (para 116), noting “There may well be legitimate public policy discussions and debate about whether an organization that has restrictive membership or employment policies should receive public funds” (para 116) but stated that Christian Horizons’ client base and organization structure was such that it could not be considered under the *Code* regarding exemptions for employment and hiring purposes based on religious beliefs.

In the decision, the Tribunal argued that the *Code* was violated because Christian Horizons suggested Heintz seek counselling to effect ‘restoration’; they created/permitted a poisoned work environment (and no steps were taken to remedy harmful effects); and they acted on discriminatory views (para 205). Heintz was awarded for damages, and Christian Horizons was ordered to modify policies and to take steps to undergo non-discrimination training with their employees.

Interesting to note is that Heintz herself stated she discovered her changing sexual orientation during the course of her employment with Christian Horizons, and that as a woman of deep Christian faith this required a process of understanding on her own part. This process for Heintz was not aided by the environment in which she worked after it became known that she was a lesbian and was involved in a same-sex relationship. Heintz states, however, that she would not have filed a claim against Christian Horizons had they not been the recipients of public funding. There is a connection for Heintz and the Tribunal between policies of non-discrimination and equal treatment principles and the role of public institutions in safe-guarding those principles.<sup>1</sup>

While I argue that policies require revisions in order to respond to contemporary identity politics, I also mentioned the gap between policy and the experience of policy. In addition to this gap, there is of course the problem of the application of policies in any given tribunal or court case; application which relies on interpretation and judgement by those applying policies. Notions of identity categories and the relationship of aspects of identity such as religion and sexuality go directly to the specific policy controversy regarding gender and sexuality that I turn to here; sex education curriculum.

Recently Ontario witnessed a brief but intense public debate regarding the sex education curriculum, culminating in Ontario’s premier claiming that the changes were put on hold to consider the multicultural and religiously diverse needs of the province.

In April 2010, when first asked to comment on the proposed changes to Ontario's sex education curriculum, Dalton McGuinty responded by defending the changes (CBC 2010d). In the aftermath of his defense, however, the Premier backed off the curriculum changes, which have since been placed on hold. Notably, the timeline of events is incredibly brief: McGuinty was first asked about the changes April 21; he had reversed his opinion regarding the proposed changes by April 23.

The revisions that seemed to evoke the most concern were as follows: Grade 1: identifying genitalia using the correct words, such as penis, vagina and testicle; Grade 3: learning about invisible differences, such as gender identity, sexual orientation, and allergies; Grade 6: masturbation and wet dreams; Grade 7: oral and anal sex; how to prevent unintended pregnancy and sexually transmitted infections, including HIV.

These changes were suggested as necessary to adapt to contemporary sexual health education standards and to increase understanding regarding sexual identity; the new topics were to be introduced to students at age and developmentally appropriate stages in their education. The existing curriculum is much more general; the modifications include specific body parts, activities and give name to the topics which should be addressed at any given level.

Two years of development went into the proposed changes, beginning in 2007, including a year of research and consultation with public and Catholic school boards, university faculties of education, health groups and parent groups. The first draft of the proposal was sent out for public feedback, circulated to 5,000 parents in Ontario (many of whom were supportive of the changes), resulting in 3,000 responses which subsequently involved further revision and fact checking prior to finalizing the proposed changes in 2009 (The Star 2010; Globe and Mail a-b).

Controversy in the course of those two days included statements by the Institute for Canadian Values, Canada Christian College and the Greater Toronto Catholic Parent Network. What was repeated in the coverage of the proposed changes and controversy regarding the changes was an emphasis of the continued argument that the opposition to the changes was representative of religious ideologies. This repeated emphasis reaffirms the notion that not only is it acceptable for "the religious" to oppose teaching sexuality, it is in fact expected that religious groups/individuals will feel this way.

In response to the swift controversy over the curriculum, Premier McGuinty backed away from the policy changes, citing the need to consider the multicultural and religious diversity of the province and concerns of parents (CBC2010a-c). Parents who were interviewed about the

curriculum expressed both support and opposition to the changes, there was not the same one sided representation of what 'the parents' felt. McGuinty has since introduced the "Accepting Schools Act" which has elicited a new firestorm of debate.

Current research that challenges binary oppositions regarding religion and sexuality includes a recently completed study in Britain and Wales regarding religious and sexual identities of youth (Yip et al. 2011). Among the projects findings, respondents who articulated both religious and sexually diverse identities (i.e. gay, lesbian, etc.) often reported feeling a requirement to downplay their religious identities within particular LGBTQ communities. Respondents' who self-identified as both religious and lesbian/gay/bisexual, etc., did not however report internal struggles regarding these aspects of their identity, but rather that external communities and social forces required them to marginalize at least one part of the identity in contemporary British society. Queer religious women interviewed in the Los Angeles area have demonstrated that religious communities extended welcoming arms to the LGB community in the Los Angeles area for over 50 years, the participants themselves did not report personal identity conflict when addressing both religious and sexual aspects of their identity; rather, the consternation comes from external assumptions and impositions (Wilcox 2011).

Importantly religious identity is also complex, nuanced, fluid and resistant to essentialization. While there are clear voices of individuals who argue that sexual diversity and same-sex relations challenge their religious beliefs, we also have evidence that religious identity is as multifaceted and nuanced as is sexual identity. There is a wide body of literature on the differences between religious teaching and lived religion; or between what religion is assumed to be and how people practice their faith by contextualizing doctrine based on their own needs, experiences, and cultural influences (McGuire 2008). As diverse religious groups continue to cohabit in closer proximity to one another, it becomes increasingly evident that there is no one unified understanding of what being religious means (see Beyer 2008).

Additionally, scholars debate the supposed neutrality of 'the secular' within western countries. Janet Jakobsen and Ann Pellegrini (2008), among others, challenge the use of 'the secular' in its construction as rational, objective and without embedded ideologies, including religious ideologies. Rather, they, and Lori Beaman (2010), argue that the turn toward secularism as a universal, neutral dialogue in fact perpetuates ideological constructions regarding religion, gender and sexuality.

## REFLECTIONS AND RECOMMENDATIONS

How do we change policy to be reflective and yet also effective?

How do we ensure that the application of policy correlates to experiential context of contemporary society?

How do we bridge the gap between the policies that are formulated to promote inclusivity/ regulate discrimination and the experiences of the individuals on a daily basis regarding identity negotiation and equality?

In light of this, proposed further challenges regarding policy regarding religious rights and LGBTQ identity are to think on:

1. Intersections: consideration for the intersections of religion, gender identity and sexual orientation; the preconceived notion that they will necessarily be in competition ignores the challenges faced by individuals who might be discriminated against because of multiple aspects of their identity.
2. Transmission: it is part of the process that individuals will come to the courts or tribunals as a result of identity politics; when we continue to perpetrate the notion that religion and sexual diversity are inherently in conflict, we end up transmitting the message that one remains privileged over the other; and we miss transmitting from policy to application based on authentic experiences of individuals for whom policy is not so black and white.

## NOTES

<sup>1</sup> It is important to note that the *Code* includes consideration for grounds of intersection regarding policies of non-discrimination and protection. S 2.2 of the *Code*, regarding sexual harassment, states "A person may be especially vulnerable when they are identified by more than one *Code* ground." Citing multiple possible examples of vulnerability based on multiple grounds, such as race, disability, sexual orientation, it is stated "Where multiple grounds intersect to produce a unique experience of discrimination or harassment, we must acknowledge this to fully address the impact on the person who experienced it."

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# EQUALITY, HUMAN RIGHTS AND RELIGION OR BELIEF IN ENGLAND AND WALES

**Alice Donald** is Senior Research Fellow in the Human Rights and Social Justice Research Institute at London Metropolitan University. She is co-researcher and wrote a recent report on *Equality, human rights and religion or belief in England and Wales* for the Equality and Human Rights Commission, the national human rights institution for Britain. She has published widely on the implementation of human rights in public services and on the future development of human rights legislation in the UK.

## **ABSTRACT**

This paper presents selected findings of research commissioned in 2011 by the Equality and Human Rights Commission (the national human rights institution in Britain). The research explores the law in relation to equality, human rights and religion or belief in England and Wales and how it is understood and applied in the workplace, public services and the community. The paper examines some prominent legal cases and identifies areas where the law is unclear or contested. It includes a focus on situations where interests are perceived to conflict between claims based on religion or belief and those based on other 'protected characteristics'.

## **INTRODUCTION**

This paper presents selected findings of research commissioned in 2011 by the Equality and Human Rights Commission (EHRC)<sup>1</sup> and conducted by London Metropolitan University. The research explores the law in relation to equality, human rights and religion or belief and how it is understood and applied in the workplace, public services and the community. It focuses particularly on situations where interests conflict (or are perceived to conflict) between 'religion or belief' and other protected characteristics.<sup>2</sup> The researchers used various means to engage with religion or belief organisations and other interested groups, including 67 semi-structured interviews.

Section 2 provides information about religion or belief in England and Wales. Section 3 explains the law on religion or belief and introduces some prominent legal cases. Section 4 discusses and identifies areas where the law is unclear or contested. Section 5 examines public debate about religion or belief.

## **RELIGION OR BELIEF IN ENGLAND AND WALES**

Evidence about religion or belief in England and Wales is contradictory; differently worded surveys have produced widely varying results. However, some trends are clear: a decline in affiliation to historic churches; a rise in those stating that they have no religion; and (particularly in England) an increase in faiths associated with post-war immigration, especially Islam. Other trends are apparent:

for example, the greater significance attached to their religion by minority religious communities compared to those that state a Christian affiliation.

In terms of discrimination on grounds of religion or belief, there is one dominant trend: the greater prevalence and seriousness of discrimination against Muslims compared to other groups defined by their religion. In recent years, there has been an increase in concerns and claims relating to perceived discrimination against Christians; however, evidence has not been adduced to substantiate such claims at a structural level.

Debate about multiculturalism in Britain has become intertwined with concerns about Islamic 'extremism' and the perceived segregation of communities with distinct social values. One response to these concerns is said to be a 'muscular' liberalism in which minorities are required to live according to the presumed shared social norms of the indigenous majority.<sup>3</sup> By contrast, 'progressive' notions of multiculturalism seek to address the powerlessness **both** of minority groups in relation to the centralised state **and** of individuals within those groups whose interests may conflict with those of dominant members of the group. Such an approach recognises and respects individuals' membership of a cultural or religious community, whilst also recognising the internal diversity of most such communities and ensuring that all their putative members are able to be full citizens of a liberal political community and enjoy full equality before the law.

## THE LAW ON RELIGION OR BELIEF

In the past decade in the UK, both the quantity and the reach of the law on religion or belief have expanded as the state seeks both to facilitate and regulate the activities and practices of religious bodies in the context of a multi-faith society. There has been a considerable amount of litigation, much of which has been controversial.

### The right to freedom of thought, conscience and religion

The Human Rights Act (HRA) 1998 came into force across the UK in October 2000.<sup>4</sup> Previously, the right to freedom of thought, conscience and religion was not expressly protected under UK law. The HRA introduced this right into domestic law through Article 9 of the European Convention on Human Rights (ECHR), as well as safeguarding equality through Article 14 of the ECHR which requires non-discrimination in the enjoyment of all other Convention rights. Under Article 9(1), the right to freedom of thought, conscience and religion is absolute; it may never be interfered with. The right to manifest one's religion or belief, either alone or in community with others and in public or private 'through worship, teaching, practice and observance' is qualified; it may be interfered with in certain circumstances.<sup>5</sup>

### Discrimination on the grounds of religion or belief

Laws prohibiting discrimination on grounds of religion or belief are also of recent origin. In 2003, the Employment Equality (Religion or Belief) Regulations 2003 introduced obligations on employers not to discriminate, victimise or tolerate harassment on grounds of religion or belief, in line with European Union law. In a wide-reaching reform, the Equality Act 2010 replaced these regulations and a raft of other anti-discrimination laws. The Act prohibits direct and indirect discrimination, harassment and victimisation in relation to areas such as goods and services, employment and education. For the first time, it brings together all the 'protected characteristics' under one umbrella.<sup>6</sup>

The Equality Act also introduces a new single Public Sector Equality Duty, which applies (unlike the previous equalities duties) to religion or belief. The duty on public authorities is to have due regard to the need to eliminate discrimination, harassment and victimisation on grounds of religion and belief; and advance equality of opportunity and foster good relations between people of different religions or beliefs and none.

### Cases in domestic courts

The highest profile cases are those in which individuals or agencies have sought to abstain on grounds of religious conscience from providing goods or services to others on the grounds of their sexual orientation. In one leading case,

a civil registrar (a Christian) refused to perform civil partnership ceremonies, leading to her being disciplined and threatened with dismissal.<sup>7</sup> The Court of Appeal held that her employer's policy of designating all registrars as civil partnership registrars had a legitimate aim of fighting discrimination. Moreover, the claimant was employed in a public role; she was required to perform a 'purely secular task' as part of her job and her refusal to perform that task involved discriminating against gay people. As of March 2012, this case is pending at the European Court of Human Rights (ECtHR), along with that of another claimant who wished to abstain from providing counselling to same-sex couples.<sup>8</sup> The claimants argue that their right to freedom of religion is not sufficiently protected in UK law. The EHRC has intervened in these cases to argue that the domestic courts came to the correct conclusions.

Also contentious have been cases relating to religious dress codes. In one case, a Christian worker for British Airways challenged her employer's refusal to allow her to wear a visible cross because it conflicted with its uniform code;<sup>9</sup> in another, a hospital nurse challenged her employer's ban on wearing a crucifix on a neck chain for health and safety reasons.<sup>10</sup> These claimants were unsuccessful in part because the law on indirect discrimination required them to show that their employers' actions put Christians **as a group** at a particular disadvantage; it was not enough to show that they alone had suffered disadvantage on the grounds of their religion. Moreover, it was held that the cross or crucifix were not prescribed by the claimants' religion or belief. In March 2012, these cases are pending at the ECtHR. The EHRC has intervened to argue that the domestic courts may not have given sufficient weight to the claimants' right to manifest their religion or belief.

## AREAS OF CONCERN ABOUT THE LAW

This section highlights areas where our research indicates that the law on religion or belief is perceived to be unclear, under strain or vulnerable to challenge.

- There is concern that UK courts and tribunals have been too ready to dismiss religion or belief claims on the grounds that there has been no interference with the right, rather than considering in detail the justification for interference. This trend is not apparent at the ECtHR where establishing interference is generally a formality. Overall, there is a perception among some legal specialists and religious groups (particularly Christian ones) that Article 9 does not 'deliver the goods' and that the Equality Act 2010 provides a firmer basis for pursuing claims relating to religion or belief.<sup>11</sup>
- A related concern is that justification for restrictions on the manifestation of religion or belief should be assessed using sociological arguments rooted in the context of the

case, rather than arguments about whether particular beliefs or practices are prescribed by a religion or belief. This does not preclude scrutiny of the nature of beliefs and practices, but recognises the inherent difficulty that secular courts face in adjudicating doctrinal matters.

- Legal concepts have been stretched uncomfortably by the inclusion in the Equality Act 2010 of equality grounds which are qualitatively different from each other and which sometimes conflict. One effect has been to magnify conflicts – especially between the religion and sexual orientation ‘strands’ – which might not otherwise have become so visible or fraught.
- Underlying discussion of contentious legal cases are contested understandings about the nature of ‘religion or belief’ as a protected characteristic. The lack of consensus is particularly evident in relation to whether either ‘religion’ or ‘belief’ is a chosen or immutable characteristic. Less contestable is the observation that ‘religion or belief’ is distinct from other characteristics in having intellectual content and both proscribing and prescribing certain behaviour which impacts on adherents to the religion or belief and, indirectly, on others. As a result, some commentators suggest that religion or belief should enjoy an attenuated form of protection. By this account, a hierarchy between characteristics is inevitable - and is desirable if it prevents a levelling down of protection on other grounds; for example, if business needs can be used to justify indirect discrimination on grounds of religion or belief, then the same justification might in theory be introduced to justify sex or race discrimination. For others, the idea of prioritising some characteristics over others is anathema: the legal form of protection may differ, but the aim is to provide equivalence of protection.
- Tensions between the religion and sexual orientation strands have prompted calls, mainly from some Christians, for an extension of the right to conscientious objection to new and diverse situations. By this account, conscience (especially when religiously inspired) deserves special protection and can in most cases be accommodated without harming others. Other (both religious and non-religious) voices object to extending protection for conscientious objection where it allows an individual, on the basis of their religion or belief, to discriminate against others on another equality ground. A key principle established in case law is that employees or organisations that deliver public (and especially symbolic) functions cannot pick and choose who they serve on the basis of their beliefs. This principle was supported by a broad range of our interviewees, including some situated in the ‘religion’ strand, who viewed the ethos, reputation and reliability of public services as being at stake.

- A number of Employment Tribunal decisions have created a lack of clarity among employers about the definition of ‘belief’; for example, anti-fox hunting sentiments<sup>12</sup> and a belief in the moral imperatives arising from man-made climate change<sup>13</sup> have been found to fall within the definition. There is consequent uncertainty as to which beliefs warrant legal protection and which do not.
- There is concern that the extension of the Public Sector Equality Duty to include religion or belief may, if poorly implemented, be divisive. Concerns include the potential for vociferous religion or belief groups to ‘browbeat’ public authorities and the difficulty of identifying authentic representatives of communities defined by religion or belief. However, the new single duty has the potential to address persistent disadvantage associated with religion or belief and the exclusionary effects of certain policies or practices. Participants suggested that to fulfil this potential, public authorities need to develop substantive understandings of equality as a vehicle to foster social inclusion and promote participation among marginalised groups defined by their religion or belief.

## PUBLIC DEBATE ABOUT RELIGION OR BELIEF

A persistent theme of our research is the acrimonious nature of much public discussion about equality, human rights and religion or belief. Specific legal cases appear to act as a ‘lightning rod’ for a broader perceived gulf between the ‘religious’ and the ‘secular’. Some participants situated in the ‘religion’ strand were vehement in their criticism of what they perceived as a combative ‘secular’ agenda to constrain the significance of religion in public life. In this sense, there is evident strain between the ‘religion’ and ‘belief’ strands.

However, our research suggests that the lines of debate are not always clearly drawn. For example, members of religion or belief groups (including co-religionists) argued both for and against extending protection for conscientious objection on religious grounds. Legal cases often reflect ideological and theological disputes that are taking place **within** religious organisations. It is also important to remember that the rights of lesbian, gay, bisexual or transgender believers are centrally at stake in this debate – a perspective that is overlooked in debates framed as ‘religious’ versus ‘secular’.

Generally, participants spoke of the need to lower the emotional temperature of public discussion about religion or belief since ‘copy-cat’ claims for legal recognition and protection (between different religions or beliefs or different equality strands) were suppressive of debate.<sup>14</sup>

## Areas of consensus

Notwithstanding the polarised nature of the debate, our research found several areas of broad consensus among groups situated in both the ‘religion’ and ‘belief’ strands (as well as other equality strands). Most interviewees stated that religion or belief groups are legitimate interest groups but should have no **privileged** role in the formation of law and policy. In particular, most interviewees - including a majority of those situated in the ‘religion’ strand – suggested that there is no room for ‘truth claims’ based upon a particular religion or belief. This suggests a broadly-held desire to maintain an appropriate balance between religion or belief and democratic debate.

We found a high degree of consensus about the desirability of making reasonable accommodation for religion or belief in the workplace, particularly in matters of dress codes and working patterns - in strong contrast to debate elsewhere in Europe.<sup>15</sup> We also found broad agreement about the **type** of criteria which might reasonably restrict the manifestation of religion or belief in some circumstances. These included: health or safety concerns; detrimental impact on colleagues (excluding pure offence); business efficiency; requirements for uniformity; and the capacity to communicate.<sup>16</sup> Virtually all interviewees agreed that individuals whose religion or belief is important to them may have to make personal sacrifices to avoid conflict with the law or professional requirements.

Another area of consensus was the undesirability of pursuing litigation except as a ‘weapon of last resort’. Litigation may sometimes be necessary to challenge individual injustice or clarify the law. However, most interviewees stated that wherever possible, claims based on religion or belief should be pursued through action such as mediation, negotiation and public argument. Allied to concern about excessive litigation in this area is a view that the law is limited in its capacity to address complex questions of multiculturalism and social identity in modern Britain.

## CONCLUSION

Overall, our research suggests that the most productive level of engagement for those who wish to advance debate, practice and understanding in relation to religion or belief is with those on the ‘front line’ of decision-making, such as policy-makers, practitioners and workplace managers. This places the focus on the use of equality and human rights as frameworks for day-to-day decision-making – on implementation rather than litigation. Where the principles established in legal cases are contested, it is important that public debate is conducted in good faith and with respect for the integrity of different perspectives, however irreconcilable they may appear to be.

## NOTES

- <sup>1</sup> The Equality and Human Rights Commission opened in 2007, covering England, Wales and Scotland (the Scottish Human Rights Commission covers devolved policy areas). A separate body covers Northern Ireland. The EHRC combines and extends the work of three former equality commissions (which covered race, disability and gender equality). It also takes on responsibility for other aspects of equality. It also has a mandate to promote understanding of the Human Rights Act (HRA) 1998. The research report, *Religion or belief, equality and human rights in England and Wales* was published by the EHRC in Spring 2012.
- <sup>2</sup> ‘Religion or belief’ is a ‘protected characteristic’ under the Equality Act 2010. ‘Religion’ means any religion and ‘belief’ means any religious or philosophical belief; the lack of religion or belief is also covered. The others are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, sex and sexual orientation. These are sometimes also called equality ‘strands’.
- <sup>3</sup> See David Cameron, speech at the Munich Security Conference on 5 February 2011; available at <http://www.number10.gov.uk/news/pms-speech-at-munich-security-conference/>.
- <sup>4</sup> The aim of the HRA is to ‘give further effect’ in UK law to most of the fundamental rights and freedoms in the European Convention on Human Rights (ECHR). The Act makes available in national courts a remedy for breach of a Convention right, without the need to go to the European Court of Human Rights (ECtHR) in Strasbourg.
- <sup>5</sup> Under Article 9(2), limitations must be ‘prescribed by law’ and ‘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’.
- <sup>6</sup> The Act contains exceptions permitting discrimination in certain limited and specified circumstances. Some of these relate to religion or belief and have proved highly controversial.
- <sup>7</sup> *Ladele v London Borough of Islington* [2009] EWCA Civ 1357
- <sup>8</sup> *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880
- <sup>9</sup> *Eweida v British Airways* [2010] EWCA Civ 80
- <sup>10</sup> *Chaplin v Royal Devon and Exeter NHS Foundation Trust* ET Case No. 1702886/2009, 6 April 2010
- <sup>11</sup> In *R (Watkins-Singh) v The Governing Body of Abedare Girls’ High School* [2008] EWHC Admin 1865, a Sikh pupil won her claim to be allowed to wear a *kara* bangle at school. Her legal team relied on race and religious discrimination rather than on Article 9. This distinction allowed the court to distinguish the claim from Article 9 case law. The judgment sidestepped the question of whether the wearing of the *kara* was obligatory to the claimant; disadvantage would also occur where a pupil was forbidden from wearing an item that was exceptionally important to his or her religion or race, even if it was not an actual requirement.
- <sup>12</sup> *Hashman v Milton Park, Dorset Ltd (t/a Orchard Park)* ET Case No. 3105555, 4 March 2011.
- <sup>13</sup> *Grainger Plc v Nicholson* EAT Case No. 0219/09/ZT, 3 November 2009.

<sup>14</sup> An example of conduct likely to accentuate conflict is that of a columnist in an independent Anglican newspaper, who described the leadership of gay rights organisations as ‘the Gaystapo.’ See ‘Anglican newspaper defends “Gaystapo” article,’ *The Guardian*, 8 November 2011. Available at: <http://www.guardian.co.uk/world/2011/nov/08/anglican-newspaper-defends-gaystapo-article>.

<sup>15</sup> In recent years, there has been fierce public debate in Europe about the wearing of the *hijab* (cloth hiding the hair and neck), *niqab* (cloth covering the face) or *burqa* (garment covering the whole body except the eyes) in public with a ban on the concealment of the face in France and legislative proposals tabled in several other states.

<sup>16</sup> This criterion was suggested by interviewees situated in both the ‘religion’ and ‘belief’ strands and other equality strands, including a Muslim participant. They suggested that it would often be reasonable to restrict the wearing of a full face veil in public-facing roles. In the case of *Azmi v Kirklees Metropolitan Borough Council*, UKEAT/0009/07/MAA, 30 March 2007, the Employment Tribunal found that it was proportionate for a school to suspend a teaching assistant who wished to wear the full face-veil when providing teaching support to young children.

### A BIT OF HISTORY...

#### *Bill 107 – the latest reform*

On June 30, 2008, Bill 107 came into force. This major reform of Ontario’s human rights system included:

- Changing the role of the Ontario Human Rights Commission to not have carriage of individual human rights complaints, focusing instead on working on systemic or root causes of discrimination
- Having people make complaints – called applications – directly to the Human Rights Tribunal of Ontario
- Creating a new organization – the Human Rights Legal Support Centre – to provide legal advice to people making complaints.

# ON RELIGIOUS ACCOMMODATION AND DISCRIMINATION IN THE EXPERIENCE OF JEWISH COMMUNITIES IN ONTARIO

**Anita Bromberg** is the national director of legal affairs for B'nai Brith Canada. She is also the human rights coordinator for the League for Human Rights of B'nai Brith Canada. A graduate of the University of Manitoba in Political Science and Judaic Studies, she moved to Toronto to obtain a law degree from the University of Toronto. Throughout her legal education and career, she has dedicated herself to the cause of human rights. During law school, she worked as youth director of the Children's Law Clinic for Justice for Children. After articling at the law firm of Minden, Gross, she went on to practice with the human rights law firm of Iler, Campbell and then to form her own legal research firm. She has lectured on human rights issues for many years. She joined B'nai Brith Canada in 2002. As human rights coordinator for B'nai Brith Canada's League for Human Rights, she is responsible for coordinating the activities of the League, its publications and educational initiatives. In particular, she has been responsible for the operation of its Anti-Hate Hotline and responding to incidents of antisemitism across Canada. She is the co-author of the League's annual Audit of Antisemitic Incidents. In her role as director of legal affairs, Anita has been responsible for numerous interventions dealing with constitutional rights, diversity issues, accommodation and racism.

## **ABSTRACT**

Jews came to Canada as early as the 19<sup>th</sup> century fleeing religious persecution in their homelands to become a small but well established minority in Canada and in Ontario in particular. Despite the antisemitism Jewish immigrants faced and their outsider status in a largely Christian society, they looked to Canada as a haven of tolerance. They sought and obtained religious accommodation while demanding few changes to the largely Christian community as they worked to strengthen human rights legislation and seek accommodation as they could. The paper explores new stresses on accommodation as traditionally sought by the Jewish community in light of growing religious diversity and competing rights. Hard earned accommodations have become a focus of debate as demands of multiculturalism are broadened and challenged. The difficulty around the debate will be explored in light of misunderstandings as to what accommodation entails and emerging messaging dissuading religious groups to ask for perceived special treatment.

Jews have had an ongoing presence in Canada since its early days. According to Statistics Canada there are some 348,605 Jews currently living in Canada.<sup>1</sup> Canada is in fact home to the fourth largest population of Jews around the world, coming after United States, Israel and France. Yet Jews make up only one percent of the country's total population.

From the outset Jews had to seek accommodation. Since the French had declared that only Roman Catholics could enter the colony, there were no Jews officially on record in the 18<sup>th</sup> century. After 1760, British records document the active presence of Jews in the British army. Ezekiel Hart, the son of a retired British general, became the first Jew elected to the Lower Canada legislature in 1807. However when he took the oath of office on a Hebrew Bible, the Catholic population was so incensed that Hart was expelled. Despite the support of the Governor General of Lower Canada and

his subsequent re-election, Hart was not allowed to take office. This would change a couple of decades later. In 1829, the law requiring the oath "on my faith as a Christian" was changed to allow Jews to not take the oath. In 1831, a law which granted full equivalent political rights to Jews was passed, a first for the British Empire.

As the number of Jews in Canada continued to grow, their very presence began to lay the foundation for Canada's multicultural approach. Jews arrived to find a Christian society not at first ready to accept a non-Christian group into their midst. However, their presence forced the Canadian polity to open the doors of accommodation. Jews also faced a French –English divide that on one hand through its duality recognized that Canada could be made up of differing groups. On the other hand, Jews would at times become the punching bag of tensions between that duality.<sup>2</sup>

According to Harold Troper<sup>3</sup>, Jews came to Canada for many reasons including a desperate need for refuge.

*Jews also came to Canada in search of refuge. Over the years there were those who arrived in flight from the pogroms of turn-of-the-century eastern Europe, those few who somehow survived the Nazi blood lust of the 1930s and 1940s, and still later, those who sought shelter from the anti-Jewish and anti-Zionist policies of Soviet and Arab regimes. Fleeing oppression in the old world, they hoped that Canada would provide a land if not free from antisemitism - that was too much to hope - then at least free enough from antisemitism that they and their children might have no fear for their personal safety. Canadians, not always appreciating the horror from which the oppressed were escaping and too often shutting their eyes and turning their backs on those in need, still provided sanctuary to those who managed to enter their borders.*

By 1850, there were still only 450 Jews living in Canada, mostly in Montreal. The population would start to grow significantly from 1880 until the end of World War One with the intensification of pogroms in Eastern Europe. Between 1880 and 1930, the Jewish population of Canada grew to over 155,000. Restrictive immigration policies in the years before and immediately after World War II which included placing Jews in Non-preferred categories at the very time they were facing a genocidal threat limited the growth of the Jewish community in Canada during those years.<sup>4</sup>

By the 1900's, there was evidence of Jewish communal institutions in all major cities of Canada. Excluded from Christian based organizations, Jews got busy setting up their own institutional structures that would provide social and other services. Where accommodation was not immediately available, Jews not wanting a confrontation or unable to make a change set up parallel organizations. Such was the case for example in the structuring of hospitals where Jewish medical students blocked by quotas or discrimination obtained training positions.

As the Jewish immigrants settled into their new life in Canada, Jews sought changes that would ensure legislative guarantees of respect and tolerance for all communities. They would seek religious accommodation at work, at school and in their living quarters. Jewish religious practices tested the willingness of the then dominant Christian majority to compromise, set against backdrop of continuing antisemitic attitudes. The observance of a Sabbath that

started on Fridays, differing religious days, varying religious garb (the kippah) — all gave rise to human rights questions at work places now reflected in the creed policies of the Commission and other institutions. Jewish students that did not fall into the practices of the Catholic or Protestant school systems (ex school prayer) gave rise to new challenges. Observant university students needed the right to write exams on days that did not conflict with their religious practices.

Issues continue to arise from time to time needing redress or clarification by human rights commissions and the courts. For example, variation in religious practices and beliefs led to the Supreme Court of Canada recognizing that a sincerely held personal religious belief was to be accommodated.<sup>5</sup> Cases such as the “kirpan” case in which the League intervened established the right to express one’s religious beliefs through religious garb in public, subject of course to valid security concerns.<sup>6</sup> That reasoning has since been applied to a wide variety of cases. In a less known but more recent case, a Canadian government employee was subjected to harassment (even death threats) from an unidentified person who appeared to be employed by the same department after she requested accommodation regarding an onerous change in policy on absences relating to religious observances. She was also subjected to unwelcome comments about her manner of dress and her practice to not attend social functions in unkosher restaurants. It was found that there was an onus on the employer to investigate such concerns even if a detailed complaint was never filed.<sup>7</sup>

Issues surrounding requests for accommodation, despite clear legislation and policies, continue to arise. The League for Human Rights continues today to regularly provide support to those seeking legal accommodation. Recent cases include the observant pharmacy student whose annual licensing exam is scheduled on a Jewish religious day; and an owner of a condominium being suddenly told that she cannot affix a mezuzah, a widely observed religious practice, to her outer unit door. These can be seen as the ongoing evolution of the debate.

Certainly there is work to be done in this area. A recent media report on accommodation issues in the school system in Hamilton points out that there is the need for clear accommodation policies on religious practices. Such was the League’s experience when assisting Jewish families in areas of British Columbia for example as well.

However, a new challenge has also emerged as Canada’s religious diversity expands and the demands and challenges increase to keep the debate civilized.<sup>8</sup>

Misunderstandings about the very concept of reasonable accommodation have served to fuel this debate, creating a climate of animosity and mistrust towards new immigrants,

as well as existing cultural/religious communities. For example in 2007, A YMCA in Montreal agreed to frost its windows pursuant to a request from a religious house of worship situated next door that was concerned that its members would not be able to avoid viewing women in revealing exercise clothes, which is contrary to the group's religious convictions. This was a compromise entered into voluntarily between neighbors, and *not* a Reasonable Accommodation imposed by law, since there was no discrimination pursuant to the *Charter* at issue. Nonetheless, it resulted in racist comments in the public realm and a reversal of the compromise reached between the neighbors.

As pointed out by the League at that time, it is necessary to start from a clear understanding of what the concept of reasonable accommodation does and does not require, in the context of the overarching requirements of the law in terms of ensuring respect for all minorities in order to keep the discussion on the right track. Reasonable Accommodation is a compromise required by law to guarantee the equality of every individual. It is aimed at rectifying the unintentional discriminatory effects of standards, practices or policies that at first glance appear to be neutral. The purpose is to avoid the infringement of rights guaranteed by the Canadian *Charter of Rights and Freedoms* and/or in provincial human right legislation. Reasonable accommodation is not a matter of imposing individual needs on society as a whole, but a justifiable rights-and-freedoms measure in a free and democratic society. That requires the cooperation of all parties concerned.

Tensions can be seen in reactions to more and more demands for changes that challenge established ways. At times incoherent responses to 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. On one hand, the Jewish experience certainly serves as a model to other newer immigrant communities as they search out their place in Canadian society. However, the Jewish experience is also used as a means by leaders to send a message that there is a limit to what minority groups can or should ask for.<sup>9</sup>

So for example the recent debate in Ontario surrounding prayers in schools resulted in public comments about ending the renting of facilities to Jewish groups for after school religious activities. Such comments seem designed to dissuade minority religious groups to ask for what is perceived by the public as special treatment rather than the exercise of their right to legal accommodation it should be seen as.

The solutions clearly lie in intensifying province-wide efforts to promote tolerance and cross-cultural understanding while encouraging best practices across all segments of society that celebrate diversity and implementation of the current creed/religion policies.

#### NOTES

- <sup>1</sup> Statistics Canada 2001 See also The Jewish Population of the World. Jewishvirtuallibrary.org.
- <sup>2</sup> For more discussion on this see Michael Brown Not Written in Stone University of Ottawa Press 2003.
- <sup>3</sup> Ruth Klein editor, From Immigration To Integration, B'nai Brith Canada, Toronto Canada 2000., Chapter One.
- <sup>4</sup> See Troper for more discussion on this. See also St. Louis 2009 Conference hosted by League for Human Rights of B'nai Brith Canada [http://www.stlouis2009conference.ca/pages/English/Sessions/Audio\\_Recordings](http://www.stlouis2009conference.ca/pages/English/Sessions/Audio_Recordings) and its publication Welcome to Canada, Toronto, 2010.
- <sup>5</sup> *Syndicat Northcrest v. Amselem* [2004] 2 S.C.R. 551 <http://www.canlii.org/en/ca/scc/doc/2004/2004scc47/2004scc47.pdf>.
- <sup>6</sup> *Multani v. Commission Scolaire Marguerite-Bourgeoys*, 2006 SCC 6 <http://www.lexisnexis.ca/documents/2006SCC006.pdf>.
- <sup>7</sup> *Labrance v. Treasury Board* 2010 [http://pslrb-crtfp.gc.ca/decisions/summaries/2010-65\\_e.asp](http://pslrb-crtfp.gc.ca/decisions/summaries/2010-65_e.asp).
- <sup>8</sup> See stats <http://www.utoronto.ca/ethnicstudies/ReligionReligiosity.pdf>.
- <sup>9</sup> See Julian Bauer, "Jews as Symbols and Reality in Multicultural Canada", 2011 [www.jcpa.org](http://www.jcpa.org).

# DISCRIMINATION EXPERIENCED BY MUSLIMS IN ONTARIO

**Dr. Uzma Jamil** holds a PhD in Sociology and is currently a Postdoctoral Fellow at the University of Toronto in the Department of Sociology and Equity Studies in Education. Her current research focuses on the impact of the war on terror context on South Asian and Muslim communities in Toronto and Montreal, looking at themes of social relations and identity negotiation as part of the immigrant-host society context in Canada. She is also a member of the Transcultural Research and Intervention team at McGill University.

## **ABSTRACT**

Although Muslims have been living for decades in Canada, they became highly visible in the public eye after the terrorist attacks of September 11, 2001. Over the past decade, they have experienced increased scrutiny, negative stereotyping and discrimination as a result of pre-existing perceptions of Muslims as “different” from the rest of Canadian society, along with negative associations of their communities with violence and terrorism. Based on preliminary analysis of the data from a community research study, this paper discusses Islamophobia in Ontario society as part of the everyday experiences of Muslims living in Toronto and the GTA.

## **INTRODUCTION**

Muslims have become highly visible in the public eye since the terrorist attacks of September 11, 2001. The fear evoked by the attacks re-ignited existing perceptions of Muslims as “different” and reinforced their perceived connection to violence and terrorism (Razack, 2008). Instead of dying down over the past decade, the questioning of their belonging and position as members of society and as citizens has continued, reinforced by concerns about “homegrown terrorism” stemming from the Toronto 18 case. It is demonstrated through the heightened scrutiny, negative stereotyping and experiences of discrimination reported by many Muslim and Arab Canadians. These experiences are socially-situated and contextualized. Although they may not be the basis of legal action, they represent an important element of the social context within which we live and how we think about the equality of human rights for all Canadians. This paper aims to make a contribution by reflecting critically on the discrimination experienced by Muslims in Ontario as part of a discussion on human rights and the future of Canadian society.

## **WHO ARE THE MUSLIMS IN CANADA?**

According to 2010 data, there are 940,000 Muslims in Canada, accounting for 2.8% of the total population (Pew, 2011). The Muslim population in Canada has increased exponentially in the last 20 years, driven primarily by immigration. It is expected to increase to 2.7 million by 2030, or a projected 6.6% of the total population

(Pew, 2011). According to an Environics survey on Canadian Muslims in 2006, about 60% of all Muslims in Canada live in Ontario (Adams, 2007). Although census data from Statistics Canada is based on the 2001 census, it gives us some idea of the general characteristics of the Canadian Muslim population and the changes over time. In 2001, the Canadian Muslim population was 579,645. Most of it (352,525) was concentrated in Ontario and almost half (254,110) lived in Toronto (Statistics Canada 2003). About 85% of the Muslim population in 2001 considered themselves a visible minority (Selby).

## **COMMUNITY RESEARCH STUDY**

This paper draws on interviews conducted as part of an ongoing qualitative, community-based research study with Muslims. The study focuses on Muslim adults from various racial, ethnic and class backgrounds and currently living in different neighborhoods and areas in Toronto and the GTA. Participants included both people who were born and raised in Canada, as well as immigrants who had come to Canada as spouses or to work or study. This study looks at their experiences as Muslims living globally in the post 9/11, war on terror socio-political context, but locally as members of their communities and neighborhoods in Toronto/GTA, Ontario and in Canada. This paper is based on a preliminary analysis of the data. Given the diversity of Muslims who live in Ontario, the views of these study participants should not be generalized to the entire population.

## ISLAMOPHOBIA

In contemporary usage, the term “Islamophobia” dates from the 1990s. The British Runnymede Report of 1997, titled *Islamophobia: A Challenge for Us All*, defined Islamophobia as “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” (Kalin, 2011, p.8). After 9/11, the term was used in a 2002 report published by the European Monitoring Centre on Xenophobia and Racism (EUMC), documenting incidents of violence and discrimination against Muslims in Europe (Cesari, 2011, p.21). Although contested, the word has come to refer to both anti-Muslim (group of people) and anti-Islam (the religion) sentiments. These may overlap with racism, xenophobia, anti-religious and anti-immigrant views as well (Cesari, 2011, p.24). Islamophobia does not stem only from the events of 9/11, but is part of the pre-existing ways in which Muslims are perceived as “different” from the larger society.

## ISLAMOPHOBIA IN CANADA

Community surveys, focus groups and polls indicate that many Muslims feel there is discrimination against them in Canada after 9/11 (Helly, 2004; CAIR-CAN, 2002; Adams, 2007). Within the larger population, a recent poll by Ipsos Reid found that 60% of people surveyed felt there was increased discrimination against Muslims, in comparison to ten years ago (Chung, 2011). In another study conducted by the Association of Canadian Studies in 2011, less than half, 43 percent of the 2,345 people polled, expressed “very positive” or “somewhat positive” perceptions of Muslims (Boswell, 2011). Incidents such as the Kadri case, where a niqabi Muslim woman was attacked at a Mississauga mall (CBC News, 2011) only serve to highlight the hostility that is directed towards Muslims in Canadian society. While the media often covers the most prominent cases, Islamophobia can take much more subtle forms expressed in the ways that people relate to Muslims in their workplaces and in society. Without minimizing the severity of the cases that do make into the media, this paper focuses on the latter as a way to broaden and contextualize how Islamophobia is present in Ontario society.

## RESULTS

As Canadian Muslims living in Ontario, most respondents expressed positive views about their rights and freedoms to practice their religious beliefs. They viewed it as an important element of being Canadian. While some mentioned specifically the provisions of the Canadian *Charter* or the Ontario *Human Rights Code* that protected their religious rights, most people spoke generally about it.

With regard to school policies on religious accommodation for Muslim students involving religious holidays, fasting or prayers, people also had positive views about the current provisions. Some of the respondents had been involved for the last 10 or 15 years with the Toronto District School Board (TDSB) as schoolteachers, educators or administrators and had worked towards the creation and implementation of these policies.

Despite these positive views of the application of laws and policies, respondents felt there were widespread negative social attitudes and perceptions about Islam and Muslims in Canadian society. Many spoke about the predominance of negative perceptions of Muslims and their association with violence and terrorism. They believed that people’s ignorance and these negative views fed the perception that the entire Muslim community was the same. “Unfortunately it tends to be, everybody gets tarred with the same brush as the old saying goes. Right?” said a Muslim woman in her 60s who lives in Toronto. Furthermore, Muslims felt they were deemed collectively responsible for explaining or justifying the differences between them and terrorists/violence if they were going to challenge these assumptions. It involves a balancing act, as one Muslim woman in her 30s from Mississauga, said. “So to kind of have to explain their behaviors or their choices is – I won’t say its not fair, it is what it is. But...you almost have to explain to people that you’re different.”

Being “different” was experienced more concretely by Muslim women who wore the hijab. While most women who wore the hijab had not had any negative experiences, a few were targets of negative comments in public spaces. In one example, a young Muslim woman in her 30s asked for directions on the GO train of fellow passengers, a middle-aged, white man and his wife. His wife started yelling at her and making negative comments about Muslims. Although her husband seemed apologetic, he didn’t say anything to stop her. In another instance, an elderly, white woman at a shopping mall told a Muslim woman (in her 40s) to “go back where you came from.”

Respondents also felt “different” as a result of living with a sense of collective scrutiny which engendered a feeling of self-consciousness. The study participants were aware of how their actions and words as individuals would be seen by others who already held negative views about their communities. This can have a disturbing, silencing effect. A Muslim woman in her 30s who works in a public high school in Mississauga gave an example of being in a staff meeting where some of her colleagues were joking about a Muslim student in their class, saying, “I wonder if he’s a terrorist.” She wanted to say something, but also felt uncomfortable challenging them. “It was like this double-edged sword thing where its like I want to speak up because

I want to tell them they're wrong. But its actually quite challenging changing their perceptions." She also worried that if she spoke up, they would associate her with terrorism too. "I feel uncomfortable because its like are you supporting that then, if you're defending it? Do you support terrorism, you know?" Another respondent, a Muslim man of Pakistani origin who works for the provincial government, put it much more succinctly. "A white person may say one thing. But if a brown person or a Muslim says the same thing, it will be taken in a different context."

His comment highlights another theme that emerged from participants' interviews. Anti-Muslim views were sometimes mixed together with anti-immigrant and/or racial and ethnic-based prejudice and bias. One respondent, a Muslim schoolteacher in Toronto, wore a shalwar kameez to school one day as part of a class project on India. Another teacher made a negative comment, comparing her to South Asian immigrant women. "Uh! You look just like them! Like nice suit and crappy runners [sneakers]. That's how they go shopping, you know." In recounting the incident to the interviewer, the respondent said, "I think she [the teacher] meant anybody in shalwar kameez. And runners. So it could have been them Muslims, but I think it was probably them immigrants. And I said to her, well I am Muslim. And I wear shalwar kameez a lot." In fact, the respondent was a white Muslim woman married to a South Asian man. The teacher's comment illustrates the overlapping of categories of religion, race, gender and ethnicity into a singular negative perception of a Muslim.

One of the implications of being seen as "different" was a feeling of not belonging. While some study participants who were immigrants to Canada felt that they would always be perceived as not quite belonging in Canadian society, other participants who were born and raised here also felt the same way, based on the perceptions of the society around them. "Its unfortunate people don't see us as being Canadians. Because we're a visible minority," said a 32-year old Muslim woman of South Asian origin from Mississauga. Another study participant, a young Muslim woman in her late 20s who was born and raised in Canada and currently lived in Markham, worried about how her young daughter would cope with the comments and criticisms about Muslims in society when she was older. She worried that her daughter would still be perceived negatively as "not belonging," despite being a second-generation Canadian Muslim. Her concern raises questions about inter-generational effects of the current social context for Muslims.

As a response to the Islamophobia in Canadian society, many people spoke of the importance of portraying themselves and their communities as Canadians and as Muslims in positive ways in their everyday social interactions. They stressed being involved and engaged with other groups and communities, taking the opportunity to speak up and to dispel stereotypes through their actions as individuals. Most of them were highly involved in their local communities currently, some in interfaith work, some with local volunteer groups, and others through their professional roles as educators. As one Muslim woman put it, "That's why you have to go out and you have to speak and you have to talk. And those people who can write need to write. And say, just because I'm Muslim doesn't make me a terrorist. Just because I'm a woman doesn't make me a Muslim who can't speak."

## IMPLICATIONS AND CONCLUSION

These preliminary results of this community research study show us that Islamophobic social attitudes and views are present in Ontario society in many ways which do not always make into the media spotlight. The social implications of these results are disturbing because they can contribute to silencing, marginalization or exclusion of Canadian Muslims if they are seen as not quite belonging or if they always have to justify and explain themselves in ways which other Canadians are not expected to do so. Furthermore, while the conflation of categories of Muslim with racialized minority and/or immigrants may reflect socio-demographic changes in Canadian society, it also reflects the ways in which different kinds of discrimination may overlap. This reinforces negative views of Canadian Muslims, leading to social divisions which are detrimental to social cohesion.

Based on these preliminary results, there are several suggestions for countering anti-Muslim discrimination in Ontario society. First, the government should continue to support the protection of religious rights and freedoms of Canadian Muslims under the law. Second, in the realm of education, it is important for schools and for the Ontario government to continue to support diversity and equity education, including hiring Muslim teachers and educators who reflect the increasing number of Canadian Muslim schoolchildren. This may also help address negative effects on future generations. Lastly, in order to counter negative perceptions of Canadian Muslims as a distinct minority group, it important to support inter-community initiatives which foster better social relations among *all* Canadians and which build social cohesion.

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## A BIT OF HISTORY...

*Professor urges legal action*

"This prejudice, like all others, will break down only when the two groups take part in interaction. What is needed is a change in relationship, and to attain that, the laws can and must be used."

Source: Professor Everett W. Bovard, University of Toronto, as quoted in the *Globe and Mail*, November 1, 1954

# ON CANADIAN BUDDHIST ENGAGEMENT WITH RELIGIOUS RIGHTS DISCOURSE AND THE LAW

**Matthew King** is a PhD. Candidate in Buddhist Studies at the University of Toronto. His doctoral research focuses on early twentieth-century Mongolian Buddhist historiography in the context of the dissolution of the Qing empire and nascent socialist movements. He has served as a volunteer and a board member for various Canadian and international Buddhist organizations for the past 15 years.

## **ABSTRACT**

The contemporary ‘convert-immigrant’ make-up of the Canadian Buddhist population not only complicates accommodating the diversity of Buddhist-Canadian religious rights, but also challenges the very definition of “creed” as it is currently formulated in the *Ontario Human Rights Code*. This paper highlights these dynamics as they pertain to two institutional settings: the penal system and the health care system. This paper concludes by urging the OHRC to consider the unique needs of split convert-immigrant religious traditions, such as Buddhism, in order to not privilege the rights of minority convert populations over majority immigrant “cradle” populations.

If we are to broach the topic of Buddhist encounters with, and negotiations of, Canadian religious rights discourse and the law in a comparative context, even in the cursory way which time allows us here, it seems necessary to first unpack our terms somewhat. At the very least, it seems necessary to corrupt them just enough so that they lose their naturalized, ‘universal’ human references and begin to appear as concepts which are profoundly local, perhaps alien to many, and increasingly in transit well-beyond the territory of their production. This also allows us to appreciate the agency which will naturally spring from any legal definition of religion: such definitions will not only *protect* religious belief, practice and identity, but will also, significantly, *create and delimit* those very beliefs, practices and identities whose protection is their charge, and whose parameters they circumscribe. As other papers included here will no doubt have noted, critical reflexivity is vital, even when the goal is to instantiate and not dismantle, legal frameworks. Such reflections are particularly relevant, I believe, in relation to any religion in Canada which is both connected to immigrant populations *and* widely adopted by non-immigrant convert populations. In light of this, we must wonder just whose Buddhism is recognized and protected by provincial and national law, and whose is not.

According to Statistics Canada, in 2001 there were over 300,000 Buddhists in Canada, a figure that represented a formidable 83% growth in total population since 1991.<sup>1</sup> This leap was tied to trends in increased immigration from

Buddhist nations in Asia, as well as a quickly growing (though comparatively small) Canadian convert community. Statistics Canada has projected that by the year 2031, Canada’s Buddhist population will grow to 607,000.<sup>2</sup> Back in 2001, nearly half of the total population of Buddhists nationwide lived in Ontario, and a similarly heavy distribution in this province ought to be expected in the years to come. In this paper I will briefly examine the contemporary face of Canada’s diverse Buddhist population in relation to two types of institutional engagement- end of life care and the penal system. I will then return to broader questions relevant to Canadian Buddhist engagements with, and representations by, “creed” in the conclusion of this paper.

## **END-OF-LIFE CARE**

Buddhism, perhaps more than some of our more popular theistic traditions in this country, is a religion very much focused upon death and the dying process. Dying in a particular way, in a particular environment, with particular supports and preparation, is one of the most important religious experiences of one’s life, and effectively constitutes a central religious practice for laity and clerics alike. Importantly, the Buddhist construction of the death process is one that extends far beyond biological death as it is defined by our medical sciences. For Buddhists, it is vital to not disturb or even touch a corpse for some time, ideally as long as a day or two, in order to ensure a positive transition

to the next life. This is so since from their perspective, someone is far from dead when the heart stops beating and the last breath is taken. The conflict should be obvious enough- it is simply impractical and against operational procedures to leave a corpse untouched and in a private setting in our large hospitals for too long. Bodies must be handled, manipulated, moved and stored. This disjuncture routinely causes Buddhists in end-of-life scenarios in Canada a great amount of hardship and stress. The answer would seem to lie in an extra-institutional support network, such as a Buddhist hospice, that could work alongside, or even within, the health system to adequately accommodate the right to die according to religious beliefs. However, a 2007 research group based in the Department for the Study of Religion at the University of Toronto found that, while in other parts of the world there are such groups who specialize in Buddhist-oriented care of the chronically and terminally ill, in Ontario such an organization is both absent, and greatly needed.<sup>3</sup>

In this we see a larger trend in terms of the interface between Buddhist populations and institutional settings in Canada and other traditionally non-Buddhist nations- while there certainly are legal frameworks aimed at accommodating Buddhists in, for instance, our health-care system, *in practice* the particular needs of this population are generally only met by non-governmental organizations, if at all. In California and New Zealand, for instance, we find a long and celebrated history of cooperation between regional health care systems and hospice networks to meet the rights of terminally-ill Buddhist patients to die according to tradition. In many cases, they are funded in part by the government to carry out their work. That they do so even in cases when *per capita* Buddhist populations are lower than here in Canada might give us pause.

## PRISONS

Canadian institutions *in theory* accommodating the religious rights of Buddhist populations, but *in practice* requiring (largely absent) non-governmental and grass roots support to meet those rights, is a pattern that is also currently replicated in the Canadian penal system. While this is also a common situation in other nations such as America<sup>4</sup>, the United Kingdom and Australia (details of which are in my longer paper), there we find much more developed co-operation between non-governmental bodies and the state to ensure that Buddhists can access their minimal religious freedoms while incarcerated. In Canada, there is currently no central Buddhist chaplaincy organization to provide support and resources for incarcerated Buddhists<sup>5</sup> (which are numbered at about 1000, though many more non-Buddhist prisoners regularly access Buddhist chaplaincy services).<sup>6</sup> Such services include

ministering, group meditation instruction, lifecycle and calendric rituals, as well as faith-based therapy. This despite the fact that the law says that such resources must be available to those who request them, provided they do not pose security threats.<sup>7</sup> Buddhist chaplaincy is most commonly contracted-out on an individual basis,<sup>8</sup> who, along with a corps of volunteers, are heavily relied upon by the Canadian penal system to meet the barest religious needs of Buddhist inmates. In June of 2011, the University of British Columbia's Contemporary Buddhism program hosted a workshop that in part examined the current state of Buddhist religious rights in Canadian prisons. The participants, which included chaplains, prison volunteers and researchers, concluded that the system is currently woefully under-staffed by Buddhist chaplains, and that Canadian prisons in practice very rarely have interfaith facilities or proper resources to accommodate Buddhist ministering (even when a Buddhist chaplain is occasionally available). They also cited the current lack of sustained governmental support for not only adequate chaplain staffing, but for a range of interfaith resources that could greatly aide prison rehabilitation- for instance, faith-based addiction counseling.<sup>9</sup> We are reminded of how important such services are by McIvor's interpretation of statistical information regarding our current Canadian prison population:

*In sum then, the typical inmate who might be served by Buddhist prison outreach is likely to be a young man with limited supports outside of prison, a social network comprised on criminal peers, low education and a possible mental illness. In addition to coping with his time behind bars, he may also be struggling with substance abuse and other pressures.<sup>10</sup>*

In light of the steep growth projection of the Canadian Buddhist population and new legislation<sup>11</sup> that promises to significantly expand the number of inmates and correctional facilities in Canada, we must expect that these numbers will rise in the near future. Faced with such increased institutional pressures, how long can Canadian prisons guarantee the religious rights of minority religious populations, such as Buddhists?

## CONCLUSION

Beyond these sketches of institutional engagement by Canadian Buddhists, I would like to conclude with an observation related to our definition of "creed" in light of the particular make-up of the Canadian Buddhist population. The current Policy defines religion or creed as, "a professed system and confession of faith, including both

beliefs and observances of worship”<sup>12</sup> which does not include “secular, moral, or ethical beliefs or political convictions.”<sup>13</sup> Yet, where then does Buddhism as a central organizational pillar for diaspora communities, fit in? Are their Buddhist-inflected minority identities limited to the “secular”? It is clear that “Buddhism” functions more commonly for recently arrived immigrant groups in ways more akin to dialect or costume than some sort of privatized ‘faith’ whose ‘practice’ (in the sense of some sort of private communion) must be legally guaranteed on the death bed, in the prison cell, or at the work place. The current scholarship suggests that such a definition of faith is often alien both doctrinally and sociologically outside of the normative Judeo-Christian tradition, as Prof. Seljak reminded us at the January 2012 OHRC Policy Dialogue opening keynote lecture. This is significant in terms of the Canadian Buddhist population, which you will remember is comprised of a small but vocal convert community of Judeo-Christian heritage, and a majority of “ethnic” or “cradle” immigrant or first-generation Buddhists.

The point is simply that the current OHRC definition of “religion” or “creed” in fact privileges what has long been criticized in scholarship and Buddhist circles alike as ‘white, privileged, middle class’ Buddhism (an individualized, faith-based tradition which draws heavily upon liberal Protestantism), and obscures significantly the more social, exteriorized and community-based experience of hundreds of thousands of “ethnic” Buddhists in Canada and elsewhere. For this majority Canadian Buddhist population, 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. The point, it seems to me, is whether, and how, the charter ought to accommodate “religious rights” that have little or nothing to do with belief or practice, but which foreground instead troubling dynamics of class-based asymmetries (marked in different ways by religion) in contemporary Canadian society. As the primary migratory religious tradition in Canada today comprised of both local converts and immigrants or first generation Canadians, Buddhism offers us an interesting lens by which to reconsider what types of religion our definitions require, and what types they exclude.

## NOTES

<sup>1</sup> Exact number in 2001 was 300, 345 (1.0% of total population). “Major Religious Denominations, Canada, 1991 and 2001” (<http://www12.statcan.ca/english/census01/Products/Analytic/companion/rel/tables/canada/cdamajor.cfm>).

<sup>2</sup> Statistics Canada—Catalogue number 91-551-X. “Projections of the Diversity of the Canadian Population, 2006 to 2031.” ([www.statcan.gc.ca/pub/91-551-x/91-551-x2010001-eng.pdf](http://www.statcan.gc.ca/pub/91-551-x/91-551-x2010001-eng.pdf))

<sup>3</sup> For research produced by this group thus far, as well as relevant scholarly resources, see <http://homes.chass.utoronto.ca/~fgarrett/hospice/> and <http://buddhisthospicecareproject.blogspot.com/>.

<sup>4</sup> The Buddhist Relief Mission, one of the oldest and largest organizations involved with Buddhist prison advocacy in America, has documented how hostile American prisons have been to Buddhists or other non-Christian religionists who are incarcerated, despite laws that guarantee rights to religious practice. This stems in most cases from conservative Christians who in many cases occupy cases positions of authority in chaplaincy organizations, and who have been notoriously resistant to accommodating non-Christian religious programs. This despite successful campaigns by organizations such as The Buddhist Relief Mission and the Prison Liberation Project to have federal and state institutions guarantee basic Buddhist needs in their facilities. Internationally, Angulimala is a British-based Buddhist prison chaplaincy organization established in 1977, with chapters and affiliates in places as diverse as Nepal and Russia. In each of their affiliate countries, Angulimala works closely with the correctional system to grow proper systematic support for Buddhist inmates, and to advocate for increased religious sensitivity in prisons.

<sup>5</sup> Koppedprayer, Kay and Mavis L. Fenn (2006). “Buddhist Diversity in Ontario,” in ed. Matthews, B. (2006). *Buddhism in Canada*. London, Routledge. p.68-9.

<sup>6</sup> This is McIvor’s estimation of the 2011 Buddhist inmate population, projected from the 2006 census data. See McIvor (2001), p.71.

<sup>7</sup> For instance, “An inmate is entitled to reasonable opportunities to freely and openly participate in, and express, religion or spirituality, subject to such reasonable limits as proscribed for protecting the security of the penitentiary or the safety of persons.” (*Corrections and Conditional Release Act* 1992 c20, section 25).

<sup>8</sup> It seems that “Awake in Action”, a U.S.-based Buddhist prison chaplaincy organization, currently does provide some support and resources for contract chaplains in Canada. However, it seems that the Interfaith Committee on Chaplaincy is the Canadian organization is the most common support network for Buddhist chaplains.

<sup>9</sup> “Workshop Report: Buddhists working in Prison, Corrections, and Rehabilitation: Volunteers, Chaplains and Teachers”. <http://ubcbuddhism.wordpress.com/2011/06/22/1581/>. Retrieved Jan. 8, 2011.

<sup>10</sup> McIvor, Paul. (2001). *Outsider Buddhism: A Study of Buddhism and Buddhist Education in the U.S. Prison System*. M.A. thesis: University of South Africa. pp.71-2

<sup>11</sup> Such as the ‘*Truth in Sentencing Act*,’ Bill c26, introduced in 2009.

<sup>12</sup> Policy on Creed and the Accommodation of Religious Observances, Ontario Human Rights Commission, October 20, 1996, pg. 2

<sup>13</sup> *Ibid.*

# HUMBUG! SEVENTH-DAY ADVENTIST CONSCIENTIOUS OBJECTORS IN WWII STANDING BEFORE THE MOBILIZATION BOARD

**Barry W. Bussey**, is a native of Newfoundland, Canada. He has two undergraduate degrees (B.A. in Theology and LL.B. in Law); two master degrees (M.A. in Political Science, and LL.M. in Constitutional Law); and is currently studying for his PhD in Law at Osgoode Hall Law School at York University (Toronto). He was in-house counsel for Seventh-day Adventist Churches in Canada from 1996 to 2008. From 2009-2011 he was an Associate Director of the Public Affairs and Religious Liberty Department at the General Conference of Seventh-day Adventists working in Washington, D.C., New York, and Geneva. In July 2011 he commenced work with the Canadian Council of Christian Charities as the V-P Legal Affairs.

## **ABSTRACT**

This paper tells the story of Canadian Seventh-day Adventist conscripts in WWII who appeared before Mobilization Boards to verify their claim to be conscientious objectors (CO). The Boards acted as gatekeepers. Early in the war, to be classified as a CO meant the young man was sent off to an alternative service work camp. While the loss of personal freedom was regrettable their lot was much more agreeable than those denied CO status. Religious men who were denied the CO status meant he faced ridicule, imprisonment, and hard labour for maintaining their refusal to bare a rifle in the regular forces. The Board's refusal to exempt such men was due, in no small part, to the capricious nature of its chair.

## **INTRODUCTION**

“There is however a lot of humbug put forward by some of these men who lay claim to conscientious objections,” declared Judge A.M. Manson. “This particular man says he is a Seventh Day Adventist (sic) and therefore a combatant (sic).” He continued,

*There is nothing in the tenets of the Seventh Day Adventists so far as I know that prohibits a perfectly good member of that organization from bearing arms, and while their Sunday is not our Sunday, nevertheless they lay claim to be followers of Christ and certainly Christ made it clear in his teachings that the Sabbath was made for man, not man for the Sabbath. In the emergency of war there is no reason why the Seventh Day Adventist should not continue with his Army duties on Sunday as the Jews do who are in the Army.<sup>1</sup>*

Thus Manson declined to recognize Private Linden Watts, born and raised a Seventh-day Adventist, as a conscientious objector in WWII. The treatment that Watts and other Adventist conscripts suffered was indicative of a Canadian society that had much to learn about the complexities of religious freedom and the extent to which people of faith were willing to resist government action that violated their conscience.

## **THE SEVENTH-DAY ADVENTIST CHURCH**

The Seventh-day Adventist Church (hereinafter “Church”) is a Protestant Christian church officially organized in 1863. The name “Seventh-day Adventist” derives from two of its distinctive teachings – keeping the weekly Sabbath from Friday sunset to Saturday sunset, the seventh day of the week (the Fourth Commandment), and the teaching of the imminent return of Christ (the Second Advent).

Currently, the Church has some 17 million adult members worldwide. It is still a relatively unknown entity and is often confused by the public with Mormons and Jehovah's Witnesses.<sup>2</sup> During WWII the Church in Canada had some 9,300 adult members.<sup>3</sup>

## THE ADVENTIST POSITION ON BEARING ARMS

The Church had a robust tradition of encouraging its members not to bear arms arising from the crucible of the American Civil War. In 1864 the General Conference Executive Committee addressed a statement to the Michigan Governor informing him that Adventists took "...the Bible as their rule of faith and practice..." of which "...its teachings are contrary to the spirit and practice of war; hence, they have ever been conscientiously opposed to bearing arms."<sup>4</sup>

In 1940, the Church published a detailed statement on the relationship between itself and civil government.<sup>5</sup> In this, the Church stated, "...the first and highest duty of the Christian is embraced in his relationship to God; that he should also... be subject unto the "powers that be" – that is, the civil government – and that he will perform his obligations to the civil government, not because of fear, but "for conscience' sake."<sup>6</sup> While the Christian will be loyal to government, "The requirements of God come first. This has been attested through the centuries by the loyal martyrs who have gone to the stake rather than compromise their conscientious convictions."<sup>7</sup> "Non-combatants conscientiously object to taking human life ... They do not, however, condemn those who take part in war."<sup>8</sup>

In essence, the non-combatant will do whatever he can to assist the government, even in time of war, except the bearing of arms. Thus, being a cook for the army, being a field medic, caring for the sick and wounded, burying the dead, transportation of men, food, and clothing – though indirectly assisting the government at war - was nevertheless non-fighting. "The non-combatant is not a coward; he simply and conscientiously and courageously objects to taking human life, so far as his participation is concerned."<sup>9</sup>

## CONSCRIPTION CRISIS

Prime Minister King won the election of March 1940. There was concern over conscription in Quebec. King maintained that should there be conscription, no conscript would be forced to go overseas. He had hoped there would be no need, but Germany's Blitzkrieg hammered the allies to the shores of Dunkirk, France. More men were needed. Ottawa, the "quietest war capital in Christendom," suddenly became "a cauldron of excitement."<sup>10</sup>

On June 21, 1940, Parliament passed the National Resources Mobilization Act<sup>11</sup> (NRMA) giving government broad powers.<sup>12</sup> It implemented compulsory military service but only conscripts who volunteered would go overseas.

## CONSCIENTIOUS OBJECTION

During the NRMA debate in the House, King made reference to conscientious objectors and promised to respect the rights of the Mennonites and other religious communities who were promised on their settlement in Canada that they would not have to bear arms.<sup>13</sup> An order-in-council in 1873 exempted the Mennonites and in 1898 exempted the Doukhobors. The National War Services Regulations stated the protection was a "postponement of their military training."<sup>14</sup>

In December 1940, the regulations were changed, broadening conscientious objection to those who were not members of the Mennonite and Doukhobor communities.<sup>15</sup> Adventists claimed their access to the exemption under this provision before the Mobilization Boards.

## MOBILIZATION BOARD

The federal government appointed "Mobilization Boards" to determine the veracity of a conscript's assertion that he was a conscientious objector. The government claimed that the Board "spared no efforts to make the soundest possible decisions," recognizing that it was the application of judgement and opinion.<sup>16</sup> The Board had broad powers of investigation, including access to the questionnaire that each applicant had to answer, the investigative services of the RCMP, the National Employment Service. It was also authorized to compel a claimant to answer any question arising from his application.

The Boards acted as gatekeepers – they decided the fate of the young religious men that stood before them seeking conscientious objector status.<sup>17</sup> A religious man who refused to take a rifle and who was denied the CO status by the Board, faced an extremely trying time as he navigated life in the regular army. Such faced ridicule, imprisonment, and hard labour for maintaining their refusal to bare a rifle. The Board's refusal to exempt such men was due, in no small part, to the capricious nature of its chair.

The Boards were generally chaired by a local superior court judge. As he had experience determining the truthfulness of witnesses while on the bench, much deference was given to him. The Boards took on the chair's character – for good or ill. Two individual Board chairs stand out as the epitome of the flagrant abuse experienced by Adventist men in this study. They are Judge A.M. Manson of the Vancouver Board and Judge J.F.L. Embury of the Regina Board.

## JUDGE A.M. MANSON

The Hon. Mr. Justice A. M. Manson, chairman of the Mobilization Board Administrative Division “K” in Vancouver. Manson has been described as a “feisty old judge” who made no particular effort to hide his bias.<sup>18</sup> Private Linden Watts, born and raised into the Adventist faith, appeared before Manson in the summer of 1943. He was denied conscientious objector status, though he stated that he was a Seventh-day Adventist. Manson ordered Watts to take the regular military training.<sup>19</sup> Inevitably, trouble ensued as Watts refused to take the rifle. He along with two other Adventists and a Mennonite refused the rifle.<sup>20</sup> He was given 14 days for disobeying an order by a superior officer. Upon the completion of his sentence he was again ordered to take the rifle. He refused. He further exacerbated the situation when he refused to do any work on Sabbath during incarceration. It was evident to the officers in the camp that Watts should have been classified as a conscientious objector and sent to a work camp – not the army. In a subsequent court martial Watts was found guilty for disobeying a lawful command and sentenced 28 days detention. Manson’s prejudice was indicative of the systemic prejudice throughout the military toward Adventism (as well as other religious minorities).

## JUDGE J.F.L. EMBURY

Judge John Fletcher Leopold Embury was another Board chair in the same vein as Judge Manson – opinionated and self-assured as to his own view of things and just as troublesome to the Ottawa bureaucrats.<sup>21</sup> A decorated veteran of WWI who was wounded during the Battle of the Somme,<sup>22</sup> – he ensured that those who appeared before him knew of this negative opinion of conscientious objectors.

Alexander Aab was unable to go to the National War Services Board in time during the summer of 1941 because he received the notice too late. His subsequent application to meet the board was denied.<sup>23</sup> He was sent to Regina and told his platoon sergeant that he was a conscientious objector. The sergeant threw the rifle at him to catch, but he stepped back and let the rifle fall on the pavement. “And if you ever heard anybody swear he could swear, he put me right from there into the guard house.”<sup>24</sup> He was given 28 days detention. During detention, Aab applied again for conscientious objector status – a rehearing of the Board was held on September 18, 1941 before Judge Embury. When asked what he would do if a German attacked his sister, Aab said, “God would give me grace to help me.” The

Judge pressed, “What would you do to protect your sister?” “Well sir,” replied Aab, “I do not know what I would do. I couldn’t protect her if I had to kill.” At that point Judge Embury proclaimed, “I do not believe you are a Christian if you would not protect your sister and I will not admit that you are a Conscientious Objector.”<sup>25</sup>

After his 28 day detention, he was marched to the equipment office for the issuing of the rifle. For a second time he refused a direct order. The sergeant demanded whether he knew the seriousness of his refusal. He replied that he did. He remained firm. During the subsequent court martial the sergeant noted that Aab “was calm and courteous, but refused to take the rifle because of his religion.”<sup>26</sup> He was arrested and placed in further detention until the court martial which was more than six weeks later. The defence argued that the court should “take into consideration not only Army Law, but also the laws that bring the soldiers into the Army,” particularly section 18 of the National War Services Act, as Aab was a member of the Seventh-day Adventist Church. Despite the evidence, Aab was found guilty and sentenced 15 days. The Church made multiple contacts to both the military and the civil service to educate the particular nuances of Adventist belief in the hope that once its beliefs were explained, allowances would be made – yet the Church was consistently rebuffed.<sup>27</sup>

## CONCLUSION

The Adventist experience is unique amongst the other Christian peace churches of WWII in that not only were the young men refusing to bear arms, but they had the additional matter of conscience – i.e., not performing unnecessary work on the Sabbath. These young men were ripped away from their farms and family during a time of national crisis. They loathed the term “cowards” and wanted to prove their patriotism by serving the country – even if that meant going on the front lines as medics.

Certainly there are no excuses for judgeship such as Manson or Embury in today’s society. Yet there are cases in Canada that cause one to question the extent to which our courts properly understand the predicament of religious conscience of minorities vis-à-vis the state.<sup>28</sup>

The question now is, “Does there exist in Canadian jurisprudence a ‘domain of conscience being a moral power higher than the State’ and what can we learn from the real experiences of our past, like these Adventists, to assist us in our quest of a Canada that exhibits the ideals of a liberal democracy?”

## NOTES

- <sup>1</sup> Letter Hon. Mr. Justice A.M. Manson to Lt. Col. F. J. Simpson, V.D., 15<sup>th</sup> November 1943.
- <sup>2</sup> Malcolm Bull & Keith Lockhart, *Seeking a Sanctuary* (Bloomington and Indianapolis: Indiana University Press, 2007) at page 1.
- <sup>3</sup> W.B. Ochs, "President's Report, Second Quadrennial Session," *The Can Un Mess*, March 25, 1942, p. 1, the exact number was 9,275.
- <sup>4</sup> As quoted by Francis McLellan Wilcox, *Seventh-day Adventists in Time of War* (Takoma Park, Wash., D.C.: Review and Herald, 1936) at p.58.
- <sup>5</sup> Gen. Conf.Com. of Seventh-day Adventists, "Seventh-day Adventists and Civil Government," September 25, 1940.
- <sup>6</sup> *Ibid.*, p. 3.
- <sup>7</sup> *Ibid.*, p. 4.
- <sup>8</sup> *Ibid.*, p. 12.
- <sup>9</sup> *Ibid.*, p. 12.
- <sup>10</sup> Kaplan, p. 46 quoting C.P. Stacey, *Canada and the Age of Conflict II: 1921-1948* (Toronto: University of Toronto Press, 1981), p. 298-9.
- <sup>11</sup> The National Resources Mobilization Act, 1940, George VI, Chap. 13, *Acts of the Parliament of Canada, 1939-1940* (Ottawa, 1940), 43.
- <sup>12</sup> NRMA, 43.
- <sup>13</sup> Debates (H.C.), 1940, Vol. 1, p.904, as quoted in J.A. Toews, *Alternative Service in Canada During World War II* (Winnipeg: Canadian Conference of the Mennonite Brethren Church, 1959), at p.43.
- <sup>14</sup> National War Services Regulations, 1940, (Recruits) as consolidated in 1941 and approved by Order-in-Council P.C. 1822 (March 18, 1941) as noted by Toews at p.44.
- <sup>15</sup> Section 18(1) of National War Services Regulations, 1940 (Recruits) as amended by the Order in Council December 24, 1940, PC 7215.
- <sup>16</sup> Toews, p. 45.
- <sup>17</sup> Letter, Westman to Divisional Registrar, July 14, 1943, as quoted by Toews, p. 46.
- <sup>18</sup> See Thomas R. Berger's biographical account of appearing as a lawyer before Justice Manson in *One Man's Justice* (Vancouver: Douglas & McIntyre, 2002) p. 39, 61.
- <sup>19</sup> Interview, Linden Watts, Reel 20, 20:21:20, May 30, 2008.
- <sup>20</sup> Interview, Linden Watts.
- <sup>21</sup> Michael D. Stevenson, *Canada's Greatest Wartime Muddle*, (Kingston and Montreal: McGill-Queen's University Press, 2002), p. 26.
- <sup>22</sup> Obituary for Judge J.F.L. Embury, 1948. Mennonite Heritage Centre vol.1159 file 1. <http://www.alternativeservice.ca/uncertainty/judge/judgeembury.htm>.
- <sup>23</sup> Letter J.P. McIsaac, Divisional Registrar, Court House, Edmonton to F.C. Wilson, Divisional Registrar, National War Services, Regina, September 2, 1941. Library and Archives Canada Reel T-15545, File 55-A-99 Pte. Aab, Alexander.
- <sup>24</sup> Interview, Alexander Aab, Reel 19, 19:07:22, May 29, 2008.
- <sup>25</sup> National War Services Board decision – L-601862 – Pte. Aab, Alexander. Library and Archives Canada Reel T-15545, File 55-A-99 Pte. Aab, Alexander.
- <sup>26</sup> Proceedings of a District Court-Martial held at Regina, Saskatchewan, November 7, 1941. Library and Archives Canada Reel T-15545, File 55-A-99 Pte. Aab, Alexander.
- <sup>27</sup> On November 11, 1941, A.E. Millner, and C.G. Maracle met with the Acting Dep. Min. of the Dept. of Nat Def seeking a review of the case - it proved to be unsuccessful. Library and Archives Canada Reel T-15545, File 55-A-99 Pte. Aab, Alexander.
- <sup>28</sup> *Albert v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, July 24, 2009.