

Freedom of Religion and Canada's Commitments to Multiculturalism

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Abstract

In this essay, the author explores the Canadian law of religious freedom in light of Canada's commitments to recognizing minority cultural communities and fostering intercultural dialogue. He posits that there are at least three recurring themes in the Canadian judicial approach to freedom of religion: individualism, the prevention of coercion, and reliance on the discourse of tolerance. Using each of these themes as a springboard for critical analysis, the author argues that the legal doctrine of religious freedom is inconsistent with Canada's multicultural ideas in ways that are usually unexplored. The individualism of the case law fails to take into account the collective dimensions and public of religious experience; the compulsion to speak in the language of rights may coerce litigants to adopt arguments that are inconsistent with their religious views; and the language of tolerance may subtly reinforce social hierarchies and impede cross-cultural dialogue. The author concludes that these "side-effects" of well-intentioned judicial doctrines are worth taking seriously in order for Canada to make good on its multicultural promises.

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1 Introduction

According to its legislation, Canada sees cultural diversity as something to celebrate.¹ The *Canadian Charter of Rights and Freedoms* states that it “shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”² Moreover, unlike many other countries with diverse populations, Canada has enacted legislation that specifically sets out a policy

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¹ Canada's increasing diversity has been a product of immigration. In Toronto, Canada's largest city, recent census data show 2.3 million people as being born outside Canada, with over 1 million of those immigrants coming from Asia and the Middle East: Statistics Canada, “Immigrant population by place of birth, by census metropolitan area (2006 Census)” online: <<http://www40.statcan.gc.ca/101/cst01/demo35c-eng.htm>>.; see also Lorne Sossin, “God at Work Religion in the Workplace and the Limits of Pluralism in Canada” (2008), unpublished manuscript on file with author, at 16. Further, 2001 census figures show that, among its a population of 29.6 million, Canada counted nearly 600,000 Muslims, over 300,000 Jews, approximately 300,000 each of Buddhists, Hindus, and Sikhs; about 4.9 million respondents indicated no religious affiliation (Statistics Canada, “Population by religion, by province and territory (2001 Census)” online: <<http://www40.statcan.gc.ca/101/cst01/demo30a-eng.htm?sdi=religion>>).

² *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, s. 27. See generally Faisal Bhabha, “Between Exclusion and Assimilation: Experimentalizing Multiculturalism,” *McGill Law Journal* 54 (2009): 45-90.

aimed at promoting multiculturalism;³ the legislation adopts the ideals of recognizing cultural communities and increasing inter-cultural dialogue.⁴

A significant test of Canada's adherence to these commitments and aspirations is its legal treatment of religious minorities and its protection of religious freedom. A particular focus on religious minorities is justified for three reasons. First, freedom of religion is given separate and explicit constitutional protection; this means that a substantial body of case law exists on the issue, and, arguably, that there is broad consensus that religious freedom is an important goal. Second, guarantees of freedom of religion date as far back as the end of the Wars of Religion, and thus have a longer history than other mechanisms for mediating inter-communal conflicts. Third, there is a conceptual distinction between matters of religion and other kinds of disputes. I do not go as far as some to claim that religious positions cannot be reduced to rational argument (See Dorfman 2008, 310-312), but rather take the view that religiously based arguments exist on a different plane than other political arguments. Because of religion's special qualities, questions of its appropriate place in public institutions persist.

In this essay, I examine three recurring discursive themes from recent freedom of religion case law in Canada. The jurisprudence in these cases is (1) individualist, (2) concerned with preventing coercion, and (3) infused with the rhetoric of tolerance. Using

³ *Canadian Multiculturalism Act*, R.S.C., 1985, c. 24 (4th Supp.), s. 3. See also *Multiculturalism Act*, R.S.N.S. 1989, c. 294; *Manitoba Multiculturalism Act*, C.C.S.M. c. M223; *Multiculturalism Act*, R.S.B.C. 1996 c. 321; *Multiculturalism Act*, S.S. 1997, c. M-23.01.

⁴ Much has been written on the political implications of multiculturalism. See Charles Taylor, *Multiculturalism and the Politics of Recognition: An Essay* (Princeton: Princeton Univ. Press 1992), Jacob Levy, *The Multiculturalism of Fear* (Oxford: Oxford University Press, 2000), Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford : Clarendon Press, 1995), Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Oxford: Oxford University Press, 1998), Bhiku Parekh, *Rethinking Multiculturalism : Cultural Diversity And Political Theory*, 2nd ed., (New York : Palgrave Macmillan, 2006) and Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Mass.: Harvard University Press, 2001).

these three themes as starting points for critical reflection, I argue that the current judicial approach, while well-intentioned, bears unintended negative side-effects on religious individuals and communities. These side-effects are inconsistent with the goals of multiculturalism, as embodied in Canadian legislation. Though religious minorities in Canada have managed to be successful in asserting their religious freedom, my hope with this essay is to stimulate debate on how Canadian judicial doctrine can be further refined to meet the goals of Canadian multiculturalism.

2 Individualism

In the case of *Syndicat Northcrest v. Amselem*,⁵ Orthodox Jewish co-owners in a condominium-style building wished to install *succhoth* on their balconies. A *succah* (plural: *succhoth*) is a temporary structure that some Jews erect during the annual nine-day holiday of *Succhoth*. At issue was whether the condominium board could prevent some residents from erecting *succhoth* on their balconies on the basis of the building's regulations, to which all co-owners had agreed. The majority of the Supreme Court of Canada found in favour of the Jewish residents, holding that the board's arguments contained little of substance as compared to the right of religious freedom. In reaching this conclusion, the majority of the Court provided a definition of religion that is worth examining:

In order to define religious freedom, we must first ask ourselves what we mean by "religion"... Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. *In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and*

⁵ [2004] 2 S.C.R. 551 [*Amselem*]. See Shauna Van Praagh, "View from the *Sukkah* – Religion and Neighbourly Relations" in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 21 for an analysis of *Amselem* through the lens of the private law of nuisance and the similar Québec civil law concept of *voisinage* (neighbourhood).

*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.*⁶

This definition focuses on religion's significance to the individual. Its emphasis is on *personal* convictions, *individual* self-definition and spiritual fulfilment, and the spiritual practices of *individuals*. Further, the understanding that religious convictions are "freely" held implies that religious convictions are matters of individual choice. Indeed, the decision views the previous jurisprudence as articulating "an expansive definition of freedom of religion, which revolves around the notion of *personal choice* and *individual autonomy and freedom*."⁷

On this view, there is no need for the litigant to show the communal aspect of his or her religious belief or practice; the court's concern is only for the sincerity of the person's belief. Accordingly, expert testimony regarding the practice is illuminative only of the litigant's credibility, rather than the validity of the practice itself. There are, of course, sound reasons for such a policy. For example, it allows for the protection of a greater variety of religious expression. Further, judges are not suited to making decisions regarding the validity of a religious practice. Such a decision would curtail freedom of religion by narrowing the range of "valid" religious expression.

2.1 *Negative Side-Effects of Individualism*

Despite the sound reasons for viewing issues of religious freedom through an individualist lens, the approach has troubling consequences in light of Canada's commitment to recognizing the various cultural identities of Canadians. Prof. Benjamin Berger has argued that Canadian case law treats religion as an individualized

⁶ *Amselem, ibid.* at para. 39 (emphasis added).

⁷ *Ibid.* at para. 40 (emphasis added).

phenomenon in three respects: it views religion as (1) essentially individual, (2) centrally addressed to autonomy and choice, and (3) private (Berger 2007, 283). This three-pronged understanding of religion is likely discordant with the way that many Canadians experience religion.

Viewing religion as essentially individual denudes religious activities of their communal aspects. Given the historical and contemporary importance of communal places of worship and religious organizations,⁸ it stands to reason that for many people, certain religious experiences are unattainable in a purely individual setting. Further, the idea that a person's religion is a matter of pure autonomy and choice is also problematic. It is likely that a person who believes in a single, omnipotent God does not experience this belief as a matter of personal choice; for that person, God continues to exist regardless of his or her actions.⁹ Finally, while Canadian courts see the private sphere as the proper place for religion's exercise,¹⁰ pretending that religion is confined to the private sphere is, in effect, a failure to recognize those who believe that religious values should inform public policies. This latter is an especially complicated matter (see Rawls 1999, Habermas 2006, Nedelsky 2006, Audi and Wolterstorff 1997), which I do not explore here. My point for present purposes is that there is likely a disparity between the judicial version of religion and the actual experience of religious Canadians. If the

⁸ See e.g. *Congrégation des Témoins de Jéhovah de St-Jérôme Lafontaine c. Municipalité du village De Lafontaine*, [2004] 2 S.C.R. 650, rev'g 2002 CanLII 41250, [2002] R.J.Q. 3015 (Qc. C.A.); *Congregation of the Followers of the Rabbis of Belz to Strengthen Torah c. Val-Morin (Municipalité de)*, 2008 QCCA 577, [2008] 4 R.J.Q. 879, (2008), 66 C.C.E.L. (3e) 280, leave to appeal to S.C.C. denied, 2008 CanLII 48619.

⁹ On the issue of how the notion of free choice pervades American law and sits uncomfortably with freedom of religion, see David C. Williams & Susan H. Williams, "Volitionalism and Religious Liberty," *Cornell Law Review* 76 (1990): 769.

¹⁰ This is often manifested in courts' tendency to discuss religion in terms of belief rather than practice, or to reinterpret practices as matters of belief (Berger 2007, 303).

Canadian state is committed to recognizing minority viewpoints, the moments of misrecognition inherent in the individualism of current legal doctrine are worth taking seriously.¹¹

3 Avoiding Coercion

The theme of avoiding coercion has been present in the Canadian judicial discourse since the earliest jurisprudence under *The Canadian Charter of Rights and Freedoms*. In a case dealing with federal Sunday-closing legislation, the Court stated:

Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.¹²

This theme played heavily in the cases that dealt with the place of religion in public schools. For example, Ontario's Court of Appeal drew on the value of avoiding coercion in justifying its finding that the practice of reciting the Lord's Prayer in public schools is unconstitutional, even if students can be exempted from the exercises.¹³ The Court held that the existence of pressure or compulsion must be assessed from the standpoint of members of religious minorities, and, "in particular, from the standpoint of pupils in the

¹¹ See Charles Taylor, *Multiculturalism and the Politics of Recognition: An Essay* (Princeton Univ. Press, 1992), 25, for a discussion of the harms of non- and misrecognition.

¹² *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at para. 95.

¹³ *Zylberberg v. Sudbury Board of Education* (1988), 65 O.R. (2d) 641 at 648 (C.A.). Though the Supreme Court of Canada has never considered this issue, the holding in *Zylberberg* has been followed in other provinces and can be considered the leading statement of the law on this issue, see *Russow v. B.C. (A.G.)* (1989), 62 D.L.R. (4th) 98; *Manitoba Assn. for Rights and Liberties Inc. v. Manitoba (Minister of Education)* (1992), 94 D.L.R. (4th) 678. The issue of coercion also played heavily in the Ontario Court of Appeal's decision that religious instruction that amounts to indoctrination is unconstitutional when carried out in public schools, see *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341 (C.A.).

sensitive setting of a public school.”¹⁴ The fact that the parents before the Court did not seek the exemption for their children was seen as evidence that the children and their parents felt compelled to conform to the religious practices of the majority.¹⁵

3.1 ***Avoiding Coercion: Inspiring Critical Reflection***

While there might be little that can be said in critique of courts’ concern with avoiding coercion, this aspect of the jurisprudence can inspire more general questions about the current judicial approach to religious freedom. Is it possible that the rights-based approach to freedom of religion itself has coercive effects on litigants? In two important respects, the jurisprudential imperative to speak in rights language can pressure litigants into adopting positions that are inconsistent with their religious views.

First, rights language discursively treats the state as the ultimate authority, and thus subordinates other sources of normative authority (Minow 1995, 355).¹⁶ This may be inconsistent with the views of litigants who view a divine actor as the most authoritative. Second, rights language can encourage litigants to put forward a simplified version of their religious beliefs or their sense of identity; it tends to neglect the reality that people often have multiple, overlapping identities.¹⁷ Because the rights-based paradigm encourages litigants to emphasize the religious aspects of themselves to the potential

¹⁴ Zylberberg, *ibid* at 654.

¹⁵ *Ibid.* at 655.

¹⁶ Minow writes: “Rights claims deployed to ensure respect for ethnic, racial, or cultural differences... do not jeopardize unity because they channel dissent and opposition into a communal language and secure participation and respect for the dominant structures of law... Framing their assertions in rights terms, the claimants at least gesture toward obedience to the dominant legal system and the state that maintains it.” (See also Minow 1988, 970-971).

¹⁷ For a consideration on how the multiple identities of litigants affects the analysis of claims for equality, see Maleiha Malik, “Complex Equality: Muslim Women and the ‘Headscarf’,” *Droit et Société* 68(1) (2008): 127-152.

exclusion of other aspects, parties before the courts may feel compelled to present distorted representations of themselves. And because questions of religious freedom are so closely bound up with the personal and communal identities of litigants, the harm sustained when they are forced to adopt the language of rights can be understood as an instance of misrecognition.

4 The Discourse of Tolerance

A third major theme in the Canadian judicial approach to freedom of religion is the reliance on the discourse of tolerance to justify decisions. In *Chamberlain v. Surrey School District No. 36*,¹⁸ the Supreme Court of Canada reviewed a school board's decision to exclude books about same-sex families from a kindergarten curriculum. The decision had been based in part on parents' religious opposition to same-sex relationships. In applying the relevant legislation, the Court relied on a provision requiring that "[a]ll schools... be conducted on strictly secular and non-sectarian principles."¹⁹ The Court's interpretation of the term "secular" shows the power of the concept of tolerance (here framed as the prohibition on excluding other views):

The Act's insistence on strict secularism does not mean that religious concerns have no place in the deliberations and decisions of the Board... What secularism does rule out, however, is any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community.²⁰

¹⁸ [2002] 4 S.C.R. 710 [*Chamberlain*]. For a more in-depth discussion of this case, see Benson, Iain T., "Notes Towards a (Re)Definition of the 'Secular'," *University of British Columbia Law Review* 33 (2000): 519-550.

¹⁹ *School Act*, R.S.B.C. 1996, c. 412, s. 76.

²⁰ *Chamberlain*, *supra* note 18 at para. 19.

In this passage, the value of tolerance changes the meaning of the word “secular,” which is ordinarily defined as “not having any connection with religion.”²¹ “Secular” comes to mean “not exclusive of other views”; in other words, to be secular is to be tolerant of religious and non-religious concerns.²²

4.1 ***Problematic Aspects of Tolerance***

A state that advocates tolerance is clearly the better option than one that pursues an intolerant agenda. However, some scholars have begun to rethink the idea of tolerance, exposing some of its harmful side-effects. In the Canadian context, Prof. Lorne Sossin has noted that the narrative of tolerance and accommodation is opposed in important ways to the competing narrative of pluralism.²³

More specifically, two main problems with the discourse of tolerance are relevant here. First, the language of tolerance implies that there is a tolerating group, which is in a position of power, and a tolerated group, which seeks exemptions and accommodations

²¹ *Cambridge Advanced Learner’s Dictionary*, s.v. “secular”, online: <<http://dictionary.cambridge.org/define.asp?key=71094&dict=CALD>>. See also *Merriam-Webster Online Dictionary*, s.v. “secular”, online: <<http://www.merriam-webster.com/dictionary/secular>>: “1 a: of or relating to the worldly or temporal... b: not overtly or specifically religious <secular music> c: not ecclesiastical or clerical... 2: not bound by monastic vows or rules; specifically : of, relating to, or forming clergy not belonging to a religious order or congregation.”

²² The value of tolerance was also significant in *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 [*Multani*], where the Supreme Court held that a school board’s absolute prohibition against wearing kirpans (ceremonial daggers traditionally carried by baptized male Orthodox Sikhs) was an unjustifiable violation of a Sikh student’s freedom of religion. The Court held at paragraph 76:

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 instil in their students this value that is... at the very foundation of our democracy.

²³ Lorne Sossin, “God at Work: Religion in the Workplace and the Limits of Pluralism in Canada” (2008), unpublished manuscript on file with author.

from the tolerator.²⁴ This paradigm reinforces existing power imbalances and can tend to further marginalize minority communities. As Prof. Wendy Brown has stated:

Like patience, tolerance is necessitated by something one would prefer did not exist... As compensation, tolerance anoints the bearer with virtue... It offers a robe of modest superiority in exchange for yielding... (Brown 2006, 25)

Moreover, the concern with tolerating the “other” can ultimately essentialize those groups that are the objects of tolerance. Members of minority groups come to be defined by a single trait (*e.g.* Jews are defined by their Jewishness) (Brown 2006, 186). When a member of a minority group is reduced to a single defining characteristic, he or she is misrecognized in a manner inconsistent with Canada’s multicultural promises.²⁵ Further, because minority communities are marked as different in primordial ways, this reductionist tendency may also frustrate the legislated goal of encouraging cross-cultural dialogue²⁶ by making communication seem more difficult.

Second, the language of tolerance can lead to a focus on the troubling aspects of minority practices without an equal reflection on the similar elements of dominant practices. In the discourse of tolerance, the tolerator is always pictured as neutral. Brown shows the deep flaws in the conceit of neutrality by taking up the example of attitudes towards women’s clothing:

²⁴ See Bernard Williams, “Toleration: A Political or Moral Question?” *Diogenes* 44(4) (1996): 36. Williams provides a nuanced distinction between tolerance as an attitude and tolerance as a political practice (ultimately concluding that practices of toleration are generally supported by an array of attitudes rather than by a single attitude of toleration). Rainer Forst draws a similar distinction (2004, 315). Williams argues that the asymmetry of power is a constant feature when tolerance is a political practice, as is the case in applications of the law. Forst calls this asymmetrical relationship the *permission concept* of toleration, which is distinguishable from the *respect conception*, under which tolerating parties exhibit reciprocal toleration. Brown apparently believes that the discourse of tolerance generally implies the kind of toleration associated with Forst’s *permission concept*.

²⁵ This is related to the second problem of rights language discussed above in section 3.1.

²⁶ See *Canadian Multiculturalism Act*, *supra* note 3, ss. 3(1)(a), (b), (c), (f), (g), 3(2)(b).

the contrast between the nearly compulsory baring of skin by American teenage girls and compulsory veiling in a few Islamic societies is drawn routinely as absolute lack of choice, indeed tyranny, “over there” and absolute freedom of choice... “over here.” This is not to deny differences between the two dress codes and the costs of defying them, but rather to note the means and effects of converting these differences into hierarchalized opposites. If successful American women are not free to veil, are not free to dress like men or boys, are not free to wear whatever they choose on any occasion without severe economic or social consequences, then what sleight of hand recasts their condition as freedom and individuality contrasted with hypostasized tyranny and lack of agency? (Brown 2006, 188-189)

Canadian courts have at times shown themselves to be sensitive to the dangers of such a one-sided view. In *Multani*, a case about whether a Sikh high school student could bring his *kirpan* to school, the Court went to some lengths to show how a *kirpan* is above all a religious symbol,²⁷ and that other objects might be as dangerous as a *kirpan*, such as “scissors, compasses, baseball bats and table knives.”²⁸ Nonetheless, the discourse of tolerance tends to paint dominant cultural practices as unbiased. For instance, one Canadian court recently justified a reference to God in a county council’s opening prayer as being neutral.²⁹ This is troubling from the perspective of the notions of equality which are said to be essential to Canada’s form of multiculturalism; if all cultures and religions are equal and should be recognized as such, none can be neutral.

5 Conclusion

It would be an overstatement to claim that the rights-based approach to freedom of religion has done more harm than good for Canada’s minority communities. Members of minority religious groups have often been successful in litigation, and Canadian courts have shown a special sensitivity to the needs of these populations. Nonetheless, the

²⁷ *Multani*, *supra* note 25 at para. 47.

²⁸ *Ibid.* at para. 46.

²⁹ *Allen v. Renfrew (Corp. of the County)* (2004), 69 O.R. (3d) 742 (S.C.J.).

aspirational tone of Canada's multicultural commitments prompts a constant re-examination of how Canada can manage its social diversity in a manner more consistent with its stated ideals. I have argued that the prevailing Canadian legal framework is in some ways inconsistent with these ideals, signalling that further thought is necessary regarding paradigms that may meet the ends of justice without frustrating the goals of recognizing cultural communities and fostering inter-cultural dialogue.

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