



Constitutional Secularization: Religious Pluralism and the Canadian Courts¹

Secularização constitucional: O Pluralismo Religioso e os tribunais canadenses

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Resumo

Este artigo oferece um breve panorama da jurisprudência canadense desde a promulgação da Carta Canadense dos Direitos e Liberdades, em 1982. Ao mesmo tempo em que busca consolidar mais firmemente a liberdade religiosa, a Carta também tem colocado limites explícitos sobre o direito dessa mesma liberdade. Os Tribunais canadenses se mostram dispostos a intervir no funcionamento interno das instituições religiosas. A proteção legal foi ampliada no sentido de incluir não apenas as religiões não cristãs, mas também as crenças não religiosas em geral. O efeito cumulativo dessas decisões tem corroído efetivamente a separação de fato entre a Igreja e o Estado que tem se desenvolvido no Canadá. O valor relativo a um crescente respeito ao pluralismo religioso é potencialmente compensado pelo aumento de intervenção judicial e pela imposição de valores seculares. Os tribunais têm definido "religião" e "pluralismo religioso" em termos cada vez mais seculares.

Palavras-chave: Lei; Pluralismo Religioso; Tribunais Canadenses.

Abstract

This paper offers a brief overview of Canadian case law since the *Canadian Charter of Rights and Freedoms* was enacted in 1982. At the same time that it has more firmly entrenched religious freedom, the *Charter* has placed explicit limits on the right of religious freedom. Canadian courts have shown themselves willing to intervene in the internal workings of religious institutions. Legal protection has been extended to include not only non-Christian religions but also non-religious beliefs more generally. The cumulative effect of these decisions has been to effectively erode the *de facto* separation between Church and State that has developed in Canada. The value of increased respect for religious pluralism is potentially offset by increasing judicial intervention and by the correlated effective imposition of secular values. The courts have been defining "religion" and "religious pluralism" in increasingly secular terms.

Keywords: law; Religious Pluralism; Canadian Courts.

Artigo recebido em 30 de maio de 2011 e aprovado em 27 de junho de 2011.

¹ Elements of this paper were presented at the bi-annual conference of the *International Society for the Sociology of Religion*, Turin, Italy. Support for the research and presentation of this paper were provided by the Mount Royal College Scholarly Pursuits Committee and the United States Department of State. The Canadian Charter of Rights and Freedoms, and subsequent legal decisions based on it, rank religion on a par with secular belief systems; they subjugate both to an overarching frame of (broadly) liberal values (above all individual rights); effectively, though more subtly than in France, Canada has used State values to limit religion's place in the public sphere, privatizing and individualizing it and defining it in practical terms as personal beliefs, eliding its public and community-identity dimensions.

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1 Introduction

This paper looks at religious pluralism in Canada from one specific perspective: relations between religion and law. 'Religion' is not defined explicitly in Canadian law, a fact that points to the importance of examining specific cases in order to draw out implicit stances on religion and religious pluralism. To this end, the paper begins with brief discussions of religious pluralism in Canada and the Canadian legal system. It then examines a number of legal cases under four general headings: (1) the impact of the *Canadian Charter of Rights and Freedoms* (1982), which has entrenched freedom of religion in the Canadian Constitution; (2) the extent to which the *Charter* has led to increased restriction of freedom of religious expression; (3) intervention in the internal working of religious institutions, often under the banner of protecting individual rights; and (4) tensions between religious norms and the norms that guide legal judgments.

The general import of this paper is to suggest that the *Charter* has had an ambiguous impact on religion in Canada. On the one hand, the entrenchment of a fundamental right to freedom of religion has provided a strong legal basis for equality among religions in Canada during a time of increasing diversity due to multi-cultural immigration. According to scholar of religion William Wan, "Historically the issue was equality among Christian denominations. With the much broadened definition of religion in the context of a multicultural society, the clamour is now for equality among all religious traditions" (Wan 1990, 31). On the other hand, the *Charter* has resulted in greater limitations on religious freedom, primarily through legal interventions in religious institutions. As Canada's leading scholar on religion and the law, M.H. Ogilvie, puts it: "The American First Amendment was designed by their Founding Fathers to keep the State away from religion. Our Charter endows the State with control over religion" (1999, 80).

My overall conclusion is that the *Canadian Charter of Rights and Freedoms*, and subsequent legal decisions based on it have subjugated religious to secular values, an aspect of secularization that I call "constitutional secularization." These developments effectively rank religion on a par with secular belief systems; they subjugate both to an overarching frame of (broadly) liberal values (above all individual rights); effectively, though more subtly than in France, Canada has used State values to limit religion's place in the public

sphere, privatizing and individualizing it and defining it in practical terms as a system of personal beliefs, eliding its public and community-identity dimensions and relativizing all absolute claims.

2 Religious pluralism in Canada

Canada is a culturally diverse nation: the Aboriginal population in 1996 was about 800 000 (Statistics Canada, 2003a); colonization, gold rushes, settlement of the western agricultural regions, and late twentieth-century global demographic shifts have resulted in a very diverse population, this despite the fact that restrictive and racist immigration laws were liberalized only in 1952; about one sixth of the current population was born outside Canada; and several million Canadians have non-European ethnic origins and/or are considered members of ‘visible minorities.’² The country has had a federal minister responsible for multiculturalism since 1972.

The extent to which Canada is a religious nation is unclear. The country has no official religion. It is second only to Western Europe as an example trotted out to support a strong version of the secularization thesis (Hervieu-Léger 2001, 116).³ Despite clear evidence for the declining importance of religion, Canada remains a predominantly Christian nation, with over 80 per cent of the population claiming nominal affiliation.

² For example, the 1996 Census reported 1 271 450 Canadians of East and Southeast Asian origins, 590 145 of South Asian origins, and 188 435 of Arab origins (Statistics Canada. 2003b). The same Census reported a ‘visible minority’ population of 3 197 480 (11.2% of the total population) including 573 860 Black, 670 590 South Asian, 860 150 Chinese, 234 195 Filipino, and 244 665 Arab/West Asian Canadians, among other groups (Statistics Canada. 2003c). By comparison, at the end of the nineteenth century, aboriginal peoples and Germans were the only significant element of the population not tracing their origins to France or the UK (Clarke 1996, 265).

³ Attendance at religious services has fallen dramatically: in 1946 about 67 per cent percent of the adult population reported weekly attendance; by 2001 this figure had dropped to 20 per cent (Clark 2003, 2; cf. Statistics Canada, 2001). About twenty per cent of Canadians are actively involved with religious groups, with another ten per cent marginally affiliated (Bibby 2002, 49; cf. 1993, 169). Canadians continue to express spiritual needs, despite declining rates of adherence and participation (Bibby 2002). Belief in God among Canadians remains high: 95 per cent in 1949 and 86 per cent in 1990 (Grenville 1997, 431). In a national survey in 2000, 47 per cent of Canadians answered an unqualified “yes” to the question “Do you believe that you have experienced God’s presence?”; in addition, 20 percent answered “definitely” and 27% “think so” (Bibby 2002, 152). In 2000, 28 per cent of Canadians said that they pray daily, up from 26 per cent in 1975 (Bibby 2002, 158).

| | 1951 | 1971 | 1991 | 2001 |
|------------------|------|------|------|------|
| Catholic | 44.7 | 47.3 | 45.7 | 43.2 |
| Protestant | 50.9 | 44.4 | 36.2 | 29.2 |
| United Church | 20.5 | 17.5 | 11.5 | 9.6 |
| Anglican | 14.7 | 11.8 | 8.1 | 6.9 |
| Presbyterian | 5.6 | 4.0 | 2.4 | 1.4 |
| Lutheran | 3.2 | 3.3 | 2.4 | 2.0 |
| Baptist | 3.7 | 3.1 | 2.5 | 2.5 |
| Pentecostal | 0.7 | 1.0 | 1.6 | 1.3 |
| Other Protestant | 2.5 | 3.7 | 7.9 | 5.6 |
| Eastern Orthodox | 1.2 | 1.5 | 1.4 | 1.6 |
| Jewish | 1.5 | 1.3 | 1.2 | 1.1 |
| Muslim | - | - | 0.9 | 2.0 |
| Buddhist | - | - | 0.6 | 1.0 |
| Hindu | - | - | 0.6 | 1.0 |
| Sikh | - | - | 0.5 | 0.9 |
| No religion | 0.4 | 4.3 | 12.5 | 16.2 |
| Other | 1.4 | 1.2 | - | - |

Table 1. Religious Affiliation in Canada (%) (Source: Statistics Canada 2002, 3; 2003b, 18).

Despite sharp declines among Roman Catholic, Orthodox, and mainstream Protestant Christianities, modest growth in numbers is occurring among the Baptists and some smaller Protestant churches, including the Evangelical Missionary Church, the Adventists, and the Church of Jesus Christ of Latter Day Saints (Statistics Canada. 2003b, 18; cf. Bibby 1987, 47; 1993, 6).

However, there is an increasing shift away from traditional organized Christian denominations to more individual and eclectic approaches to religion. Canadians, in general, seek some form of spirituality, but “a considerable number of Canadians are failing to associate their interest in mystery and meaning with what religion historically has had to offer” (Bibby 1993, 177). Even among those who do follow traditional religious paths, similar shifts are occurring. A recent study of Canadian evangelicals concludes, “The fact that 75 per cent of Christians and 70 per cent of evangelicals agree that ‘my private beliefs about Christianity are more important to me than what is taught by any church’ only confirms that Christian belief in the 1990s is a predominantly private, personal affair” (Grenville 1997, 430).

Non-Christian religions, although greatly in the minority, show signs of vigor in Canada, primarily due to immigration. Though synagogue attendance is regarded as low,

Canada's Jewish community manifests a significantly greater degree of religious participation than that of the U.S., with strong participation among the young (Brym, Shaffir and Weinfeld 1993, 43-54; Bibby 1987, 22). The country has small but vibrant Muslim, Sikh, Hindu, Buddhist, and Baha'i minorities, though declining participation rates tend to mirror those among Christians (Bibby 1987, 22; 1993, 173). The number of Muslims, Sikhs, and Hindus doubled, and the number of Buddhists tripled, between 1981 and 1991 (Boyle and Sheen 1997, 102). Similar growth occurred between 1991 and 2001, with the largest growth among Muslims, whose number increased 129 per cent to 579,640, 2% of the national population (Statistics Canada 2003b, 8, 18). New Religious Movements also claim the active allegiance of a small number of Canadians (Bibby 1987, 146).

In sum, despite the historical dominance of Christianity, Canada has experienced two important religious shifts over the last decades: a rising importance of non-Christian religions, primarily due to immigration; and a shift to more individual and eclectic approaches to 'spirituality.' Canadian scholar of religion, William Closson James, concludes that "A multilayered spirituality, cobbled together from various sources is more characteristic of religion in Canada today than an exclusive and hegemonic monotheism" (1999, 275).

3 The Canadian legal system⁴

The Canadian legal system combines both the common law and (in Québec) civil law traditions, a legacy of the two colonizing powers: Britain and France. The sources of Canadian law are complex: (i) the statutes of the eleven sovereign legislative bodies of the country: the Parliament of Canada and the ten provincial legislatures; (ii) case law from the common law system; (iii) in the province of Québec uniquely, the Québec Civil Code, based on the Napoleonic Code; and (iv) miscellaneous sources included the royal prerogative, custom and convention, the juristic writings of scholars, and the principles of morality.

There are about 2 000 judges in Canada, seven for every 100 000 Canadians. About half of these sit on the lowest of the four levels of the court system: the limited jurisdiction

⁴ This section draws on Gall 1995 and Greene, Baar, and McCormick 1997.

provincial trial courts. The next level consists of general jurisdiction provincial superior trial courts, the Federal trial court, and the federal Tax Court. Next are the over 100 federally appointed judges of the provincial Courts of Appeal and the twelve judges of the Federal Court of Appeal. The top level consists of the nine-member Supreme Court of Canada. The Supreme Court hears about 80 cases per year.

The Canadian constitution is complex.⁵ Prior to 1982, three statutes provided the basic framework: the Colonial Laws Validity Act of 1865; the British North America (B.N.A.) Act of 1867; and the Statute of Westminster of 1931. The B.N.A. Act possessed supremacy over all statutes enacted by the Parliament and legislatures of Canada. Canada's 'new constitution,' the Constitution Act of 1982, introduced three innovations: it officially ended jurisdiction of the British Parliament, though this had long been the case in practice; it introduced a formula for domestic emendation of the constitution; and, most significantly, it entrenched the *Canadian Charter of Rights and Freedoms*.

The legacy of the *Charter* is still hotly disputed in Canada. Although the U.S.A. was long considered unique with respect to the role that judicial power played on the legal stage, there is an increasing recognition that this is the case in many countries (Tate and Vallinder 1995; cf. Ogilvie 2003, 114). In Canada, this recognition that judges do not simply make decisions as a technical exercise but shape legislation began in the 1970s, when Chief Justice Bora Laskin shifted the Supreme Court to an increasingly contextualist stance. The most significant development in this direction, however, has been the introduction of the *Charter*. Judges now have sweeping powers to strike down legislation and to introduce precedents in order, as some have said, "to protect the glowing principles rather vaguely enshrined in the Charter" (Greene, Baar, and McCormick 1997, 225). Opinions are still starkly divided. "Charter skeptics" on the political left argue that the aging, male-dominated judiciary, drawn almost exclusively from elite law firms, will become an increasingly conservative force given their expanded powers. Sceptics of the right argue the opposite: i.e., that judges will be influenced by special interest groups on the left. Neutral critics point out that judges are not well trained to wield their new powers to

⁵ Canadian Federal legislation, including the Constitution Act, 1867, Schedule B of the Constitution Act, 1982 (including the Canadian Charter of Rights and Freedoms), and the Criminal Code of Canada (R.S. 1985, c. C-46) are accessible in both English and French at <http://laws.justice.gc.ca>

influence policy development. “Charter optimists,” on the other hand, argue that judges will learn to apply the *Charter* in more effective and proper ways as their experience grows.

4 Religion and the Law in Canada

This section considers a number of legal issues and cases under the heading of four broad points regarding relations between religion and the law in Canada at the beginning of the twenty-first century. First, one significant impact of the *Charter* has been to provide increased legal recognition of religious pluralism based in the s. 2(a) fundamental right of “freedom of conscience and religion.” Second, *Charter* has also increased the State’s restriction of freedom of religious expression in Canada. Third, a legal emphasis on individual rights effectively introduces a bias against certain, often non-Christian, religions. Fourth, normative standards rooted in Christianity and liberal individualism are still implicit in Canadian law.

5 Pluralism and the Charter

In legal terms, Canada is a religious country but not a Christian one. The preamble of the *Charter* states, “Canada is founded upon principles that recognize the supremacy of God and the rule of law.” This preamble resulted from lobbying by Evangelical Christians in political consideration of their importance in Western Canadian politics (Ogilvie 2003, 105). It has been interpreted extremely broadly in legal judgments. Justice Muldoon of the Federal Court, Trial Division, stated in a 1991 case⁶ that

“... this preamble ... is meant to accord security to all believers in God, no matter what their particular faith In assuring that security to believers, this recognition of the supremacy of God means that ... Canada cannot become an officially atheistic state. It does not make Canada a theocracy because of the enormous variety of beliefs of how God (apparently the very same deity for Jews, Christians and Moslems) wants people to behave generally and to worship in particular. (Cited in Ogilvie 1999, 73).

⁶ *O’Sullivan v. Minister of National Revenue* [1991] 91 D.T.C. 5491 (F.C.T.D.)

Despite the apparent privileging (and this sort of naïve equation) of monotheisms, legal judgments in Canada have not privileged Christianity over non-Christian faiths in such an obvious way.

Although religious pluralism had been recognized in practice in common law, it was with the introduction of the *Charter* in 1982 that the rights of minority religions had a firm basis in law. The *Charter* lists “freedom of conscience and religion” as one of four fundamental freedoms, and it prohibits “discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”⁷ It is significant the many of the major cases regarding religious freedom since the *Charter* have explicitly referred to American jurisprudence. Arguably, “the Charter, in its pluralistic undergirding, draws the Canadian constitutional situation much closer to that of the American in relation to religious freedom” (Wan 1990, 30).

Neo-paganism provides a useful example of the *Charter*’s importance. Religious pluralism in this area shifted dramatically when the *Charter* superceded the common-law tradition, with its traditional biases. Drawing on the British *Witchcraft Act, 1735*,⁸ the *Criminal Code* prohibits “fraudulently” pretending “to exercise or to use any kind of witchcraft, sorcery, enchantment or conjuration,” telling fortunes, and using “an occult or crafty science” to find lost objects.⁹ Though not defined, “fraudulently” is generally taken to refer to “conduct which is dishonest and morally wrong” (Greenspan 1991, CC-439). However, the common law has determined that honestly believing in witchcraft is not a defence;¹⁰ engaging in the prohibited conduct is an offence in itself.¹¹ The rights of

⁷ The *Charter* states that “Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association.” (Section 2); “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” (Section 15 (1)) <http://laws.justice.gc.ca/en/charter/index.html#libertes>

⁸ 1735 (9 Geo II, c.5). See Ogilvie 2003, 184.

⁹ *Criminal Code* Section 365. <http://laws.justice.gc.ca/en/C-46/41558.html>

¹⁰ *R. v. Pollock* (1920) 54 D.L.R. 155 (Ont C.A.). cf. Ogilvie 2003, 184.

¹¹ *R. v. Milford* (1890) 20 O.R. 306 (C.A.); *R. v. Duncan* [1944] K.B. 713.

Wiccans and other pagans to practice their religion are now protected by the fundamental freedom of conscience and religion as set out in s. 2(a) of the *Charter*.¹²

Religious dress is another issue where legal recognition of religious pluralism is firmly based on the *Charter*.¹³ Canada's most famous case was in the Province of Québec, where, on September 10th, 1994, a 13-year-old high school student, Émilie Ouimet, was sent home from school for wearing the *hijab*. As in similar cases at that time in France, public debate over the case highlighted a number of public attitudes: fear of religious fundamentalism; characterizations of women's dress as a symbol of either oppression or liberation; and tensions concerning the integration of immigrants into Québec society (an argument made by La Société St-Jean Baptiste, a Québec nationalist organization). After other similar cases, the parents of Dania Bali, who was similarly asked to remove her *hijab*, filed a complaint with the Québec Human Rights Commission. The Commission ruled that Québec schools did not have the right to prohibit any student from wearing religious attire.¹⁴ It has also been found to be discriminatory to forbid a Sikh student to wear a turban to school.¹⁵ Exceptions exist in the case of private schools, which can limit attendance to students of a specific religious background.

Similar issues have arisen around use of religious artifacts.¹⁶ Members of the Sikh *khalsa* are required to wear the *kirpan* (dagger) as a religious obligation. This practice has led to conflict where authorities in schools, courts, and hospitals have requested that Sikhs not wear what is perceived to be a weapon. The right to wear the *kirpan* in schools and hospitals has been upheld in court.¹⁷ Grounds for these decisions include human rights legislation, and absence of proof that the practice is a threat to safety. Most interestingly, the Alberta Court of Queen's Bench held that by permitting Sikhs to wear the *kirpan*, "an

¹² In comparison, the religious rights of Wiccans in the U.S.A. were established by specific cases in the mid-1980s: *Georgia: Roberts v. Ravenwood Church of Wicca*, (249 Ga. 348) in 1982; and *Dettmer v Landon*, 617 F Supp 592 [E. Dist. Va.] in 1986. http://www.religioustolerance.org/wic_rel.htm

¹³ This paragraph draws on Ogilvie 2003, 352-353, 360.

¹⁴ <http://www.soundvision.com/Info/news/hijab/hjb.canada.asp> (Accessed July 5, 2003).

¹⁵ *Sehdev v. Bayview Glen Junior Schools Ltd*, (1988) 9 C.H.R.R. D/4881 (Ont. Bd Inq.); See Ogilvie 2003, 353. For an overview of European law, with a restrictive opinion on the case in Belgium, see <http://www.ministre.pierre.hazette.org/presse/news/foulard.pdf> (Accessed July 5, 2003).

¹⁶ This paragraph draws on Ogilvie 2003, 192, 352, 360.

¹⁷ *Tuli v. St Albert Protestant Separate School* (1985) 8 C.H.R.R. D/3906 (Alta. Q.B.); (1991) 80 D.L.R. (4th) 475 (Ont. Div. Ct.); *Singh v. Workmen's Compensation Board Hospital & Rehabilitation Centre* (1981) 2 C.H.R.R. D/459 (Ont. Bd. of Inq.). See Ogilvie 1996, 137.

opportunity would be provided for those unfamiliar with the Sikh religion to develop an understanding of another culture and religion” (Ogilvie 2003, 193).

In fact, legal protection has been extended to include not only non-Christian religions but also non-religious beliefs more generally. The Supreme Court, in two important cases, has effectively elided any distinction between freedom of religion and freedom of conscience, thus extending the same protection to secular beliefs as to religious ones (Ogilvie 1999, 74-75; 2003, 144-145). Section 2(a) of the *Charter* grants a fundamental right of “freedom of conscience and religion,” where the 1960 *Bill of Rights* had protected only freedom of religion. Interpreting section 2(a) the Supreme Court held that “The purpose of 2(a) 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 being.”¹⁸ As Christian scholar William Wan puts it, “non-belief is coopted into the field of the religious so that it constitutes a form of belief that must not be discriminated against” (Wan 1990, 32). Nor does the reference to “God” in the preamble of the Constitution imply a special place for religious beliefs in Canada: In the words of Justice Muldoon (F.C.T.D.), “The preamble’s recognition of the supremacy of God ... does not prevent Canada from being a secular State” (cited in Ogilvie 1999, 74).¹⁹ In the wake of the *Charter*, then, the privileged place of Christianity has been ceded to a broader recognition of religious pluralism, yet, at the same, time, the status of religion as opposed to non-religion has been eroded.

6 Restriction of Religious Freedom

Freedom of religion in Canada derived historically from the absence of positive law and government action in the British tradition.²⁰ Disestablishment of the Anglican and Roman Catholic Churches in the nineteenth century introduced a pragmatic rather than legislative separation between Church and State. A series of cases in Québec during the 1950s (involving the activities of the Jehovah’s Witnesses and in which the Premier and

¹⁸ *Edward Books v. The Queen* (1986) 35 D.L.R. (4th) (S.C.C.)

¹⁹ *O’Sullivan v. Minister of National Revenue* [1991] 91 D.T.C. 5491 (F.C.T.D.)

²⁰ This paragraph draws on Wan 1990.

Attorney-General sought to intervene) led to public agitation for a Bill of Rights. Canada's *Bill of Rights* became law in 1960, and it enshrined religious freedom.

Since its inception in 1982, the *Charter* has more firmly entrenched religious freedom. However, at the same time, it has placed explicit limits on rights, including religious freedom, in Canada. Section 1 states that “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

In a 1986 decision, the Supreme Court held that in applying s. 1,

the courts must be guided by the values and principles essential to a free and democratic society: accommodation of a wide variety of beliefs’ respect for cultural groups and identities; and faith in social and political institutions which enhance the participation of individuals and groups in society. (Wan 1990, 27).

The courts also stated two criteria for limiting rights: pressing and substantial objectives for the limitation; and a proportionality test, involving a rational connection and proportionality between means and end, and minimal impairment of the right and freedom in question (Wan 1990, 27).

Since the *Charter*, the Canadian courts have consistently held that the rights of others can restrict freedom of religion. Recent cases have established four distinct limitations on religious freedom in Canada:

(i) the rights of others to public safety, order, health, or their own morals and fundamental rights and freedoms; (ii) the right of the State to impose burdens on religion which are “trivial or insubstantial”; (iii) the right of the State and the courts to impose unequal treatment on different religious groups in the promotion of freedom and equality; and (iv) the overriding s. 1 [*Charter*] right of the courts to inquire whether there are other “reasonable limits demonstrably justifiable in a free and democratic society,” so as to justify restricting or limiting freedom of religion. (Ogilvie 1999, 79).

For example, the right of parents to raise their children in their faith is qualified by considerations of potential harm and the child's best interests, with important ramifications for custody and access in cases of divorce (Ogilvie 2003, 369ff.). Courts have consistently intervened to override the religious beliefs of parents regarding medical decisions for their children (e.g., blood transfusions for Jehovah's Witnesses): the Supreme Court²¹ held that

²¹ *B. (R.) v. Children's Aid Society of Metropolitan Toronto* (1995) 122 D.L.R. (4th) 1 (S.C.C.)

parents' freedom of belief is secondary to their children's rights to safety, health, and life, and to live to an age where they might make rational choices concerning the religion they choose to follow (Ogilvie 2003, 383-385). Bible reading and reciting the Lord's prayer in public schools was held to impose Christian practices on non-Christian pupils.²² Neither of the two most significant cases²³ limiting majoritarian religious indoctrination addressed the issue of whether multi-faith religious education would be equally unconstitutional, though these decisions resulted in a *de facto* ban on religion in public schools in the province of Ontario (Shilton 1998, 212, 215).

Although virtually every case regarding the limitation of freedom of religion has relied on the distinction between trivial and substantial infringement on this freedom, the Canadian courts have yet to devise a test for this crucial distinction (Ogilvie 2003, 116). This illustrates the increasingly important role of judges in shaping Canadian law, and it indicates that freedom of religion is a key issue in debates between Charter skeptics and optimists.

7 Individual Rights vs. Autonomy of Religious Institutions

Canadian legislation and case law privilege individual rights over collective rights.²⁴ Tensions between these two types of rights are often present at cross-cultural boundaries (Odgaard and Bentzon 1998). The legal status of religious institutions is a key point of tension and the focus of this section of this paper. In 1887, the Canadian courts defined a 'church' as "either a place of Christian worship or a collective body of Christian people having a common faith and doctrine, associated together for worship under a creed and

²² *Zylberberg v. Sudbury Board of Education* (1988), 65 O.R. (2d) 641 (C.A.); cf. Ogilvie 2003, 136.

²³ *Zylberberg op. cit.* and *Canadian Civil Liberties Association v. Ontario (Minister of Education)* (1990), 65 D.L.R. (4th) 1, 71 O.R. (2^d) 341 (C.A.)

²⁴ The relation between individual rights and collective rights, and the very existence of the latter, are contested (Freeman 1995). However, four issues indicate the relevance of this distinction in the Canadian context: (1) the status of Canada's First Nations, who have been achieving greater political and legal autonomy in recent years; (2) the status of Québec within the federation, where that jurisdiction places great emphasis on preserving French-Canadian culture and society often at the expense of individual rights and freedoms; (3) relations with immigrant groups from cultures where traditional social relations and customary law emphasize collectivities to a greater extent; and (4) relations with communitarian religious sects or institutions.

discipline” (Ogilvie 2003, 208-209).²⁵ Three aspects of this judgment shaped succeeding cases: (i) limitation of the word ‘church’ to Christian denominations; (ii) application to both individual and collective bodies; (iii) definition in terms of doctrine and discipline. The word ‘church’ retains its Christian bias in federal legislation, and legislation explicitly privileging Christianity’s role in the common law has not been overruled (Ogilvie 1997, 60). However, the *Charter* has established a legal respect for religious pluralism, and the federal language has been superceded in the post-*Charter* period by provincial legislation more open to religious pluralism.²⁶ Three legal contexts have driven this expansion of legal language regarding religious institutions: (i) the holding of property, beginning with the Salvation Army; (ii) recognition of authority to solemnize marriages, beginning with independent Protestant congregations and the Latter Day Saints; and (iii) conscription, first exempting a minister of the Church of Christ (Ogilvie 2003, 209-210).²⁷

Canadian courts have shown themselves willing to intervene in the internal workings of religious institutions for a number of reasons (Ogilvie 1997; cf. 2003, 217ff.). The courts intervene where ecclesiastical tribunals do not follow their own substantive and procedural rules, where civil or property rights are at stake, where rules of natural justice have been violated, and where a foreign religious society, incorporated elsewhere, is resident in Canada. The courts will not consider matters considered narrowly spiritual or doctrinal, but the line is a difficult one to draw (Ogilvie 2003, 218). In theory, and arguably in practice, the courts inevitably take a doctrinal stance by asserting their authority to judge religious practice and institutions according to the secular values entrenched in the Canadian Constitution.

Property issues have prompted one of Canada’s most important cases of legal intervention.²⁸ In 1989 a majority element of a Hutterite colony in Manitoba went to court seeking power to evict a minority that had been excommunicated. After appeals to the Supreme Court, the majority won, but only by paying a high price in autonomy. The court

²⁵ *Bliss v. Christ Church Fredericton (Rector, Churchwardens & Vestry)* (1887) N.B. Dig 315 (N.B. Q.B. [New Brunswick Court of Queen’s Bench]).

²⁶ The Provinces vary in their language: e.g., ‘religious society,’ ‘religious organization.’

²⁷ This issue of the legal definition of ‘church’ or ‘religious institution’ illustrates the importance of taking the specific jurisdictional landscape into account. Legal responses to increasing religious pluralism have taken shape within the context of Canadian federalism.

²⁸ *Lakeside Colony of Hutterian Brethren v. Hoffer* (1989) 63 D.L.R. (4th) 473 (Man. Q.B.); 77 D.L.R. (4th) 202 (Man. C.A.); 97 D.L.R. (4th) 17 (S.C.C.).

explicitly based its judgment on its duty to protect individual rights over against collective rights. Perhaps more significantly, the courts established their jurisdiction to consider whether the internal norms of the religious institution conformed to “natural justice” (Esau 1998; cf. Ogilvie 2003, 218-219, 305, 313).

The status of communications between religious experts and the laity is another area where no sharp line protects religious institutions from legal interference. The British common-law tradition has not held priest-penitent communication to have any absolute privilege. Canon law in the Roman Catholic Church and Church of England as well as the internal regulations of some other churches require this silence of their clergy. In Canada, the Provinces of Quebec and Newfoundland have enacted legislation protecting priest-penitent communication. In the other jurisdictions, precedent is set by a 1991 Supreme Court Case that allows judges to proceed on a case-by-case basis, taking into account the expectation and value of confidentiality, the attitude of the community, and potential injury. No formal practice of confession in the religious tradition is necessary, but the religious expert must be consulted in their official capacity.²⁹ Once again, the basic position is that Canadian law has the power to intervene within the sphere of authority of religious institutions. This power is limited to be sure, but the limitations are defined by the courts and are based ultimately on secular legal values, such as equality, fairness, and a calculation of risks and benefits made according to civil values.

Another area of intervention is in the funding of faith-based institutions. A recent survey of faith-based social agencies in Alberta found that governments do allow scope for these agencies to function according to their vision and values; however, those agencies choosing to have a statement of faith or requiring employees to assent to such a statement are more likely to have problems with government funding and regulations (Hiemstra 2002). Once again, Canada’s legal system draws no sharp line between Church and State and effectively intervenes in the sphere of religion according to secular criteria.

²⁹ This paragraph draws on Ogilvie 2003, 202-205.

8 Normative Standards in the Law

Canadian legislation and case law implicitly embodies many normative assumptions that not shared by all members of Canadian society. Two important sources of such assumptions are normative Christianity and liberal possessive individualism.

Polygamy offers an example of the first point. Polygamy is prohibited by common law and the *Criminal Code*. The Canadian legislation appears to have been framed to apply only to Latter Day Saints: it was enacted following similar legislation in the U.S.A., and the relevant section was originally headed “Polygamy and Spiritual Marriages” (Ogilvie 2003, 173). The law was also applied to “Blood Indians” in 1899 (Ogilvie 2003, 173).

The treatment of animals offers an example of the second point. Animal sacrifice is illegal in Canada. The *Criminal Code* contains provisions protecting animals from cruelty.³⁰ There is no exemption for religious rituals. The language is broad: it is prohibited to kill, maim, poison, damage, injure, or cause unnecessary pain or suffering to an animal or bird.³¹ “Wilful intent” is required, and this is not limited to “evil intent” (Ogilvie 2003, 183). Animals are considered as property, and, as a result, some ambiguity arises: stray cattle are covered, but not stray cats, for example. In the case of animal sacrifice, religious practices are forbidden not based considerations of property not suffering, despite recent indications of a shift in this stance.³² This seems a clear case of western economic values legitimizing restrictions on religious freedom.

In general, since the *Charter*, the Canadian legal system has intervened much more markedly in areas traditionally considered moral and religious. The most significant example is homosexuality. Two Canadian provinces have legalized gay marriages in 2003, Ontario in June and British Columbia in July. The federal government has decided not to appeal these decisions, though appeals from conservative religious groups are anticipated (“Conservative” 2003). The federal government is drafting a new law that would legalize same-sex marriages while allowing churches to decide which ceremonies they sanctify.

³⁰ *Criminal Code* Sections 444-446. <http://laws.justice.gc.ca/en/C-46/41869.html>. Accessed July 5, 2003.

³¹ This paragraph draws on Ogilvie 2003, 182-184.

³² In the wake of a recent case of cruelty to a stray cat, a proposed amendment to the Criminal Code and the Firearms Act, Bill C-10 aims to grant animals intrinsic rights rather than simply defining them as property: http://www.parl.gc.ca/common/Bills_ls.asp?lang=E&Parl=37&Ses=2&ls=C10&source=Bills_House_Government. Accessed July 5, 2003.

Debates concerning homosexuality have also resulted in significant and very public tensions within, and between, Canadian churches in the last decades. One case in particular, centering on moral repugnance regarding homosexuality, has served as a focus of contention. In 1991, Delwin Vriend, an employee in a private Christian college in the province of Alberta, was fired when he refused to resign after the College Board adopted a position statement on homosexuality. His homosexuality was the sole reason for his dismissal. No extra-legal appeal was available because Alberta was, at that time, one of three provinces in Canada not prohibiting discrimination on the basis of sexual orientation in its human rights legislation. Vriend took the case to court and won, with the judge basing his decision on the Charter of Rights and Freedoms. The government of Alberta appealed to the Alberta Court of Appeal and won; whereupon Vriend appealed to the Supreme Court of Canada. An important development occurred during the period when the case was pending: on June 20th, 1996, section 3(1) of the *Canadian Human Rights Act* was amended to prohibit discrimination on the basis of sexual orientation. The Alberta Civil Liberties Association, the Canadian Jewish Congress, and the United Church of Canada supported Vriend's 1997 Supreme Court case. Various religious organizations took opposing positions, including the Evangelical Fellowship of Canada (EFC) and Focus on the Family. According to EFC legal counsel Gerry Chipeur, the latter were concerned about "serious ramifications for the right of religious organizations to require employees to adhere to moral standards based on the organization's religious beliefs" ("Supreme Court" 1997). The Supreme Court ruled in favour of Vriend in 1998, citing section 15 of the Charter, which guarantees "equal protection and equal benefit of the law without discrimination." The Vriend decision was a key step leading to the Canadian House of Commons considering passing federal legislation removing legal distinctions between married couples and cohabiting homosexuals, though parity regarding pensions and other benefits also remains contested.

A related Supreme Court case has offered more hope to conservatives who worry that religious values are being undermined. In 1985, Trinity Western University (TWU), a private institution associated with the Evangelical Free Church of Canada, began to offer a four-year TWU teacher education degree program. In 1996, the British Columbia College of Teachers (BCCT) denied TWU's application to offer a required certification year. The

grounds of the BCCT's decision were that TWU required students to sign a "Community Standards" document that condemned homosexual behaviour, and which, as a result, could potential lead to the certification of teachers who would promote intolerance in the public school system.³³ After two decisions in TWU's favour, by the B.C. Supreme Court and, to a lesser extent, the British Columbia Court of Appeal, the Supreme Court of Canada dismissed the BCCT's appeal. The Supreme Court decision was based in part on the view that "the pluralistic nature of society and the extent of diversity in Canada are important elements that must be understood by future teachers because they are the fabric of the society within which teachers operate and the reason why there is a need to respect and promote minority rights" (*Trinity* 2001). The role of interveners, groups offering expert opinion to the Court, is an important one in such cases, effectively adding a public voice to the proceedings. It is significant that civil liberties groups and conservative religious groups—including The Evangelical Fellowship of Canada, the Canadian Conference of Catholic Bishops, and the Seventh-Day Adventist Church in Canada—converged in opposing the BCCT's position before the Court. A liberal emphasis on liberty and a conservative emphasis on biblical values found common ground here, despite a fundamental contrast in modes of ethical thinking.

This convergence of contrasting positions in the Trinity Western case illustrates the tensions implicit in the spectrum of Canadian social values, but it also underlines the important role of structured public debate in finding effective compromises.³⁴ These two cases illustrate recent efforts by Canada's Courts and Legislatures to balance protection of

³³ The TWU document required faculty and students, in part, to "Refrain from practices that are biblically condemned. These include but are not limited to drunkenness (Eph. 5:18), ... abortion (Ex. 20:13; Ps. 139:13-16), involvement in the occult (Acts 19:19; Gal. 5:19), and sexual sins including premarital sex, adultery, homosexual behaviour, and viewing of pornography (I Cor. 6:12-20; Eph. 4:17-24; I Thess. 4:3-8; Rom. 2:26-27; I Tim. 1:9-10)" (*Trinity* 2001).

³⁴ A current example underlines this point: the Justice Committee of Canada's Parliament is presently considering a Private Member's Bill (C-250) that seeks to add "sexual orientation" to the list of grounds for prosecution under hate propaganda legislation in Canada. (The existence of such legislation is, in itself, an indicator of the degree to which Canada attempts to strike a greater balance between individual and collective rights than is the case in the U.S.) The Committee's decision on whether to bring the Bill back to Parliament for further debate is expected in early May 2003. The significant point here is that public letter and email campaigns, primarily by conservative Christians against the Bill and by a broader spectrum of voices for the Bill, will likely have a decisive effect on the vote. The committee consists of four Alliance Party members, who oppose the Bill in part due to significant connections between that political party and the Christian right, four other opposition members, who support the Bill, and ten members of the ruling Liberal party, which tends to be very responsive to public opinion.

Human Rights with a respect for the plurality of religious and ethical stances, both of which are fundamental to public social debate in Canada. In sum, since the *Charter*, the courts have increasingly intervened in issues with clear moral and religious implications, including abortion, assisted suicide, homosexuality, medical intervention, and judgments made by ecclesiastical courts.

Conclusions

There has never been a Constitutional separation of Church and State in Canada. As a result, legal responses to increasing religious pluralism have taken shape through substantive engagements with specific religious issues. This is especially so since the advent of the *Charter* in 1982. The above examination of selected aspects of these interactions between religion and law in Canada leads to several tentative conclusions:

- a) The *Charter* has entrenched religious freedom and respect for religious pluralism in the Constitution. This is an important development at a time when immigration is resulting in a increasingly multi-cultural landscape.
- b) At the same time, this development contains a potential threat to religion because the *Charter* extends the same protection to secular beliefs as to religious ones. That is, religion is increasingly defined in legal terms as the object of an individual act of free choice and conscience. It is one thing to note, along with sociologists, the descriptive fact that religion has become increasingly individualistic and voluntarist over recent decades. It is another to entrench this conception in a nation's jurisprudence.
- c) On a related note, the *Charter* has led to increased judicial independence at a time when Canada, like the U.S.A., faces decreasing community activity and group membership (Jenson 1998; cf. Putnam 2000). Some scholars see a potential threat here, insofar as "these two trends may combine to erode democratic politics" (Greene, Baar, and McCormick 1997, 238). That is, the traditional social space within which democratic discussions have taken place is being vacated by individualistic withdrawal from civic participation at one end and by a shift to top-down legal decision-making at the other:

the judges are making more decisions with broad social and moral import at the same time that the individual voices of Canada's citizens are increasingly silent.

- d) This development is correlated with the increasing prominence on the religious landscape of possessive individualist, liberal Enlightenment values. That is, as the courts assert increasing jurisdiction over religious practices and institutions, religious freedom is constrained by a legal system that effectively imposes these modern western values, whether or not they fit with religious values. Muslim women are free to wear the *hijab* in Canada because the courts protect their individual rights, not because Canadian society respects Islamic religious practice *as religious practice*. This same normative stance prevents Jehovah's Witnesses, children and their parents, from making free decisions over medical treatment in certain situations.

In conclusion, an increasingly blurred line between Church and State is especially problematic in the Canadian legal system. The value of increasing respect for religious pluralism is potentially offset by increasing judicial intervention and by the correlated effective imposition of western secular values. This recent development in relations between religion and the law in Canada may well have serious implications. Ogilvie goes so far as to suggest that,

Should procedural intervention today become substantive intervention tomorrow and should issues of moral theology be viewed as issues of equality in the future, the potential for conflict between Church and State in Canada may well erupt into an open conflict far greater than any other in the Canadian past.... (1997, 72).

We can only hope that, in the ongoing debate between Charter skeptics and Charter optimists, the latter are correct that Canada's judges will learn to handle their increased powers with care and sensitivity.

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