

Religious Freedom and the Rule of Law: A case study of the province of Quebec, Canada

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Abstract

This paper reviews the history of the province of Quebec, Canada violating the rights of religious minorities. In the 1950s, the Quebec government persecuted Jehovah's Witnesses, an unpopular religious minority. Court challenges established a foundation for religious freedom in Canada. The current Bill 21 attempts to shield the secular majority from all religious minorities in the province. A court action has challenged the constitutionality of this law. It is a discouraging irony if this law is upheld given that Canada adopted a Charter of Rights in 1982 to protect such rights. Harmonious relationships require the state to protect religious minorities from the majority.

1. Introduction

Canada was created as a federal country in 1867. The national government and 10 provincial governments exercise separate functions. The *Constitution Act, 1867*¹ sets out the powers of each level of government. Provincial governments have jurisdiction over "property and civil rights."² They also have the power to regulate municipal governments. The province of Quebec has a unique culture and history as it is the only province with a majority French-speaking population. The province of Quebec, as we will see, has used its powers to safeguard its language and culture but in a manner that discriminates against religious minorities.

In June 2019, the government of Quebec passed a law banning public workers in the province from wearing religious symbols or religious clothing in an effort to promote the stated Quebec ambition of "laïcité". On its face, this law violates constitutionally guaranteed freedom of religion, so the government invoked s. 33 of the Canadian Charter of Rights and Freedoms, the "notwithstanding clause", to avoid a successful court challenge.

This 2019 law, however, follows a long history in Quebec of violating the rights of religious minorities to shield the majority. In the 1950s, Premier Duplessis commenced a campaign against Jehovah's Witnesses. This campaign only ended when a Jehovah's Witness brought a successful court challenge against the Premier, arguing that the Premier violated the rule of law, by unjustifiably infringing the rights of this religious minority. The Premier was shielding the Roman Catholic majority from this religious minority. In the 1960s, the population of Quebec rejected Roman Catholicism and Quebec saw several religious institutions decline in membership, impact and scope of operations. The government of Quebec consequently adopted new laws to reinforce the resulting secularism, further reducing the role of religion for both the majority and minority religions, thereby shielding the new secular majority from religious minorities.

Heiner Bielefeldt and Michael Wiener identify several distortions of religious freedom that undermine its function. One of these is "protecting collective religious identities."³ This is clearly what the Quebec government is attempting whether it was protecting Catholicism in the 1940s and 50s or protecting secularism in recent times. Religious majorities are not in need of

¹ 30 & 31 Victoria, c. 3 (U.K.).

² *Ibid.*, s. 92(13).

³ Heiner Bielefeldt and Michael Wiener, *Freedom of Religion or Belief under Scrutiny*, (Philadelphia: 2019), at 64-65.

protection; it is minorities which require protection against incursions by the majority. In Quebec, however, there has been constant concern about preserving the unique culture and heritage of the province, the only part of North America with a fully French culture. However, this goal of enhancing cultural heritage is certainly possible without oppressing minorities. Pursuing both well creates a more harmonious place for flourishing for everyone.

2. Quebec's religious history

The earliest settlers in what is now the country of Canada were from France. They brought with them Roman Catholic missionaries, priests and members of religious orders. They established missions, schools and hospitals.⁴ In 1674, Pope Clement X appointed the first Bishop in Quebec.⁵

The Treaty of Paris transferred Quebec to British control in 1763 and the Catholic population was given very limited religious freedom. However, as the American colonies began to rebel against British control in the 1770s, the British government committed to the people of Quebec that they could maintain their language, religion and civil law so long as Catholic clergy pacified the population.⁶

At the time Canada formed as a nation in 1867, the Catholic religion had become synonymous with French culture. The Roman Catholic Church ran labour unions, hospitals, schools and social services. Until the 1960s, over 90% of the Quebec population attended church on at least a weekly basis. In the 1960s, the population of Quebec turned against the Church in a dramatic fashion. Many people in Quebec still identify as Roman Catholic on a census but they do not follow Catholic religious practices or teaching.

In addition to Roman Catholics, Quebec citizens represent many minority religions. In the most recent census in 2011,⁷ people identified with the following religious minorities:

- Protestant Christian – 4.7%
- Orthodox Christian – 1.4%
- Muslim – 1.5%
- Jewish – 1.25%
- Buddhist – 0.6%
- Hindu - .34%
- Sikh - .12%

3. Quebec's campaign against Jehovah's Witnesses (1925-1959)

Jehovah's Witnesses are a small sect that is an offshoot of Christianity, which originally developed in the USA. By 1914, it was actively evangelizing in Canada. It is known for door-to-door evangelism and distribution of literature, including its flagship publication, *The Watch Tower*. Jehovah's Witnesses were strongly anti-Catholic. When evangelizing in Quebec in the 1940s and 50s, Jehovah's Witnesses might often denounce the Pope as the anti-Christ.

It is not surprising that the Quebec population was deeply opposed to Jehovah's Witnesses. Because Roman Catholicism was synonymous with being a French Quebecer, denouncing Catholicism and the Pope challenged their very identity. Government officials

⁴ Terry Crowley, "The French Regime to 1760" in *A Concise History of Christianity in Canada*, Terrence Murphy and Roberto Perin, (eds.), (Toronto: 1996), 1-55, at 37.

⁵ *Ibid.*, at 20.

⁶ Gregory Baum, "Catholicism and Secularization in Quebec," (1986), 36 *Cross Currents* 436-68, at 437.

⁷ Statistics Canada, *Religion Reference Guide, National Household Survey, 2011*.

responded swiftly and strongly to suppress Jehovah's Witnesses. As early as 1925, Quebec officials prosecuted a Jehovah's Witness for the criminal offence of blasphemous libel.⁸ This Criminal Code offence was not defined and carried a maximum sentence of two years. The accused were distributing a pamphlet titled "The Golden Age," which denounced Roman Catholic and Protestant clergy for teaching lies about God. Justice Lemay dismissed the charges on the basis that blasphemy could only be against God, not against clergy or doctrines of the Church.

Quebec officials then began prosecuting Jehovah's Witnesses for seditious libel. Quebec courts dutifully convicted under this Criminal Code provision. They interpreted "seditious" as including "creating ill-will, discontent, disaffection, hatred or contempt towards...the established institutions of the country."⁹ The courts included the Catholic Church among these institutions.

The more Jehovah's Witnesses were prosecuted, the more virulent their literature became. A 1946 pamphlet, "Quebec's Burning Hate," detailed the persecution of Jehovah's Witnesses and blamed the Catholic Church. Aimé Boucher, among 260 arrests, appealed his conviction of seditious libel. In 1951, the Supreme Court of Canada overturned Boucher's conviction, ruling that "seditious" required that there be an intent to incite rebellion.¹⁰ This established a general right to distribute literature that may be insulting to others.

The Premier of Quebec, Maurice Duplessis, personally participated in oppression of Jehovah's Witnesses. In 1945, the provincial authorities made over 1,000 arrests of Jehovah's Witnesses. Frank Roncarelli, a restaurant owner and Jehovah's Witness, provided financial assistance to many of those arrested. In 1946, following the publication of "Quebec's Burning Hate," Duplessis ordered that the liquor license for his restaurant be revoked. Roncarelli brought a legal action against Duplessis personally, even though it was government officials who had actually revoked the license. It took until 1959 for the Supreme Court of Canada to decide the case and it decided in favour of Roncarelli. This case established that even the Premier of a province was subject to the rule of law and could not act without any legal justification in revoking a liquor license.

During the tumultuous year of 1946, when police were arresting Jehovah's Witnesses, Louise Lamb was arrested and kept in jail over a weekend. She was not charged with an offence and was released on the condition that she sign a release of liability for her detention. When she refused to sign, she was charged with participating in a conspiracy to publish "Quebec's Burning Hate," which she had nothing to do with. She brought a legal action against the police for wrongful imprisonment and malicious prosecution. The Supreme Court of Canada ruled in her favour in 1959.¹¹ This case put limits on police power to imprison a person who was peacefully distributing religious literature.

In yet another example of oppression of Jehovah's Witnesses, in September 1949 police entered a home without a warrant where Jehovah's Witnesses were meeting for bible teaching. The police seized some religious literature. The homeowner, Esymier Chaput, sued the police for damages. The Supreme Court of Canada ruled in 1955 that the police actions were unlawful. The

⁸ *R. v. Kinler* (1925), 63 RJQ 483.

⁹ William Kaplan, *State and Salvation: The Jehovah's Witnesses and their Fight for Civil Rights*, (Toronto: 1989), at 10-11.

¹⁰ *Boucher v. the King*, [1951] SCR 265.

¹¹ *Lamb v. Benoit*, [1959] SCR 321.

court stated that all religions enjoy the same degree of speech and thought.¹² This case established a peaceful right to assembly for religious practices.

Following the *Boucher* decision in 1951, Quebec municipalities immediately passed by-laws prohibiting the distribution of literature. A Quebec Jehovah's Witness challenged the validity of a Quebec City by-law. In 1953, the Supreme Court of Canada ruled that the by-law violated a provincial statute, the *Freedom of Worship Act*. As the province is a higher level of government, this legislation is paramount. Thus, the by-law was invalid.¹³ Implicit in this ruling is that freedom of religion encompasses distribution of religious literature. Unfortunately, the province of Quebec immediately amended the *Freedom of Worship Act* to allow prosecution of such groups.¹⁴

This lengthy body of legal rulings establishes significant human rights of religious freedom, distribution of literature, freedom of expression and freedom of assembly. The courts placed limits on the powers of political leaders and police to interfere with the lives and livelihoods of religious adherents.

4. The Quiet Revolution (1960-1969)

Premier Duplessis benefited from a strong, inter-dependent relationship with the Roman Catholic Church in Quebec. The Church supported him politically and, in turn, he supported the Church's dominance in education and healthcare. "With the fall of Duplessis's party and the election of a liberal government on 22 June 1960, all this changed."¹⁵ As the Church had resisted modernization, when its influence waned, Quebec moved forward with massive modernization in the 1960s.

A new Liberal government, was elected in 1960 in Quebec. It secularized institutions, creating a government ministry of education and one for health where these had previously been the exclusive purview of the Church. "As a consequence the Catholic Church found itself excluded from functions it had exercised over the years."¹⁶ Through the 1960s, churches emptied.¹⁷ Quebecers seemed to substitute the role of the Church in their lives with the role of the state in their lives. Rather than Catholicism being a defining feature of being a Quebecer, secularism became a defining feature. Quebec is now the least religious province in Canada with a mere 4% of the population attending church on Sunday.¹⁸

While the secularization of Quebec started in the 1960s, it took several decades for the full transformation to a secular society to be completed. When Canada was formed in 1867, the constitution contained s. 93, which guaranteed denominational education rights. The Quebec government went through a lengthy process, culminating in a constitutional amendment in 1997, to fully secularize their school system and reorganize it on a linguistic basis.¹⁹

5. Canadian constitutional reform – Charter of Rights and Freedoms (1982)

¹² *Chaput v. Romain*, [1955] SCR 834.

¹³ *Saumur v. City of Quebec*, [1953] 2 SCR 299.

¹⁴ S.C. 1953-54, c. 15.

¹⁵ Baum, "Catholicism and Secularization in Quebec," at 439.

¹⁶ *Ibid.*

¹⁷ Mark Noll, "What Happened to Christian Canada?" (2006), 75 *Church History* 245-273, at 252.

¹⁸ Philip Jenkins, "How Quebec went from one of the most religious societies to one of the least," *The Christian Century*, 28 April 2021.

¹⁹ Janet Epp Buckingham, *Fighting over God: A Legal and Political History of Religious Freedom in Canada*, (Montreal & Kingston: 2014), at 55-59.

In 1982, the government enacted the Canadian Charter of Rights and Freedoms²⁰ as part of a larger package of constitutional reform. The Charter had the support of all the provinces except the province of Quebec. The Charter guarantees a broad range of human rights. Section 24 allows anyone whose rights have been violated to obtain a remedy from a court of competent jurisdiction.

The Charter protects religious freedom in two ways. The first is in a section titled “Fundamental Freedoms.” Section 2 of the Charter guarantees:

2 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 15 guarantees equality without discrimination on the basis of, *inter alia*, religion:

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Intuitively, these two sections should give strong protection for religious freedom. Section 1 is a general limitation clause that “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.” This allows a government to justify violations of religious freedom.

An important additional exception to the operation of the guarantees in the Charter is contained in section 33 of the Charter. This clause, known as the “notwithstanding clause”, allows a government to override Charter rights guarantees for a period of five years:

33 (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

6. Quebec’s reaction to the adoption of the Charter

In 1982, when the Charter came into force, the province of Quebec passed legislation applying section 33 to all its legislation, insulating it from Charter review for a period of five years.

7. Background to Bill 21 (2006-2019)

While Quebec’s Bill 21 passed in 2019, its genesis dates back to a series of events in 2006. The Supreme Court of Canada decided a high-profile legal case concerning the Sikh minority in

²⁰ Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. Hereinafter “Charter”.

Quebec in 2006.²¹ A Sikh boy was expelled from high school for wearing a kirpan, a ceremonial dagger. The Supreme Court of Canada ruled that this violated the boy's religious freedom and that religious practices must be respected. As well, there were other controversial incidents where religious minorities asked to be accommodated.

In 2007, the Liberal Party won the Quebec election with a minority government. The Official Opposition was a new political party, the Action démocratique du Québec (ADQ), which had campaigned on accommodation of minorities going too far. In order to address the issues, Premier Jean Charest established a Commission chaired by two eminent scholars: Gérard Boucher (a legal scholar) and Charles Taylor (a philosopher). The Bouchard-Taylor Commission held public hearings across Quebec and issued a report, titled *Building the Future: A Time for Reconciliation*, in 2008.²²

In the report, Bouchard and Taylor documented the numerous incidents in 2006-2007 of accommodating minorities, from an Orthodox Jewish school requesting a neighbouring fitness centre frost its windows to prevent male students from seeing women working out to Muslims requesting meals without pork.²³ They comment that all the incidents were resolved to the satisfaction of both parties. Bouchard and Taylor state that participants in the consultation strongly endorsed secularism as an underlying social principle in Quebec. They explicate the nature of Quebec secularism and endorse open secularism as the preferred approach, meaning that the state should be neutral towards religion but recognize the importance of religion to many citizens.²⁴

Bouchard and Taylor note that many people appearing before the Commission argued that religion should be a private matter; it did not belong in the public square.²⁵ Bouchard and Taylor argue against this position as it weakens the freedom of religious minorities to fully participate in society. However, politicians recognized that this ideology is popular in Quebec so have continued to promote it as a policy. Both the Parti Québécois and the ADQ promoted excluding religion from the public square.

Premier Pauline Marois's Parti Québécois government in 2013 was the first to introduce a Quebec Charter of Values that would prohibit government employees from wearing "conspicuous" religious symbols. Bill 60 would also have prevented anyone wearing a face covering to receive government services. The bill died on the order paper when Marois called an election in 2014, an election she lost.

A new political party, the Coalition Avenir Québec formed in 2011 and merged with the ADQ in 2012. The CAQ won a majority in the 2018 election with a platform to protect French language and culture, setting the stage for the drafting and introduction of Bill 21. The new law, passed in 2019, is similar in effect to the Parti Québécois' Bill 60 except that it prohibits all religious symbols, visible or invisible. The legislation is titled "An act respecting the laicity of the state." Those arguing in favour of the legislation focused on the importance of the neutrality of the state and the right of people not to be exposed to officials' religion.

8. Bill 21 (2019)

²¹ *Multani v. Commission scolaire Marguerite-Bourgeois*, [2006] 1 SCR 256.

²² Gérard Bouchard and Charles Taylor, *Building the Future: A Time for Reconciliation*, (Quebec:2008).

²³ *Ibid*, at 48-58.

²⁴ *Ibid*, see ch. VII.

²⁵ *Ibid*, at 142.

Bill 21²⁶ prohibits most employees of the government of Quebec from wearing religious symbols, whether visible or invisible. The list of employees is quite long and includes teachers, nurses, doctors in hospitals, some judges, police officers, prosecutors, bus drivers, politicians, daycare workers and all bureaucrats. Those already employed by the government at the time the legislation passed are not subject to the restrictions; it is only new employees that must choose between religious practices and a job.

The law defines religious symbols in section 6 as follows:

A religious symbol, within the meaning of this section, is any object, including clothing, a symbol, jewelry, an adornment, an accessory or headwear, that

- (1) is worn in connection with a religious conviction or belief; or
- (2) is reasonably considered as referring to a religious affiliation.

Many religious minorities in Quebec have specific religious dress requirements. Baptised Sikhs wear a turban and a kirpan (small ceremonial knife). Some Muslim women wear a hijab (headscarf). Some Jewish men wear kippas or yarmulke, a small skullcap. Some Christians wear a crucifix or cross. Whether or not they are required by the religion, adherents who wear religious symbols find them spiritually significant.

The CAQ government recognized that Bill 21 violates religious freedom. Section 34 of the bill states, “This Act and the amendments made by Chapter V of this Act have effect notwithstanding sections 2 and 7 to 15 of the Constitution Act, 1982 (Schedule B to the Canada Act, chapter 11 in the 1982 volume of the Acts of the Parliament of the United Kingdom).” This specifically invokes section 33 of the Charter, the notwithstanding clause, to insulate the legislation from Charter review for a period of five years.

9. Court challenge to Bill 21 (2021)

Not surprisingly, there was an immediate legal challenge to Bill 21. Supported by a leading human rights organization, the Canadian Civil Liberties Association, Ichrak Nourel Hak, a Muslim teacher, challenged the new law as violating religious freedom. The Quebec Superior Court released a 365 page decision on 20 April 2021.²⁷ It is clear that Justice Blanchard finds the law abhorrent. He states:

[70] For many, the legislator sends the explicit message that their faith and the way they practice it do not matter and that it does not carry the same dignity or require the same protection on the part of the State. For them, [Bill] 21 postulates that there is something fundamentally wrong or harmful with religious practices, especially some of them, and that the public must be warned. Thus, it conveys an explicitly exclusive message to people who are told that they cannot participate fully in the public institutions of the State only because of their intimate convictions.²⁸

Justice Blanchard also denounces the blanket use of the notwithstanding clause to insulate an unconstitutional law from judicial review:

²⁶ *Act respecting the laicity of the State*, CQLR c. L-0.3.

²⁷ *Hak c. Procureur général du Québec*, 2021 QCCS 1466.

²⁸ This is not an official translation.

[754] However, by definition, in a society concerned with respecting the fundamental rights it grants to its members, the use of the notwithstanding clause should be done in a parsimonious and circumspect manner. Some may think that the use made in the case under consideration by the Quebec legislator trivializes it, all the more so since the exemption occurs before any judicial debate on the constitutional validity of the provisions of Bill 21.

Despite Justice Blanchard's clear sympathy for the religious claimants, the use of the notwithstanding clause tied his hands. He was able to find only a small sliver of a remedy. Justice Blanchard found in favour of the English boards of education. The notwithstanding clause does not apply to section 23 of the Charter, which protects the rights of French and English minorities to education in their mother tongue. He stated, "the English-language school boards and their teachers or directors attach particular importance to the recognition and celebration of ethnic and religious diversity."²⁹ So that is the small exemption for religious minorities in Quebec – those within the English school division. Teachers and principals in that system are permitted to wear religious symbols. This decision has been appealed to the Quebec Court of Appeal but there has not yet been a decision.

In the Jehovah's Witness cases decided in the last century, the Quebec courts generally upheld the government actions. It was the Supreme Court of Canada that developed the law in a manner that respected fundamental rights such as freedom of religion, freedom of expression and freedom of peaceful assembly. It would be a disturbing irony if court rulings on religious minorities developed human rights principles before the advent of the Charter but were not able to protect religious freedom with the constitutional protection of the Charter.

10. A better way forward

The province of Quebec has a long history of oppressing religious minorities to shield its religious majority, whether that be Roman Catholic or secular. This has made Quebec a hostile place for those from minority religions. It is clear that state rhetoric and actions have created heated controversy within the province. Social harmony is not advanced when people are forced to choose between their jobs and the expression of their faith. Nor does it create social harmony to arrest and jail people for peacefully distributing literature. Is there a better way forward?

Many academics have made strong arguments for why open secularism is the most harmonious approach for the state. Bouchard and Taylor proposed this in their 2008 report.³⁰ Brian Grim and Roger Finke argue in their 2012 book that there are economic benefits when the state respects religious freedom.³¹ Finally, Bielefeldt and Wiener state, "Without taking freedom of religion or belief seriously, human rights would not be able to do justice to the complex needs, yearnings, and vulnerabilities of human beings. Indeed, without freedom of religion or belief, human rights would cease to be fully humane."³²

The most pressing rationale for protecting the freedom of religious believers to practise their faith is that it is core to their very being. It is crucial to recognize that the metaphysical

²⁹ *Hak*, at para. 983.

³⁰ Bouchard and Taylor, *Building the Future*, at 140-141.

³¹ These benefits include many humanitarian benefits that religious adherents contribute to their communities, including food, education, healthcare and housing for those living in poverty. Brian J. Grim and Walter Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century*, (Cambridge: 2012).

³² Bielefeldt and Wiener, at 9.

aspects of faith are central for believers. It is how they understand who they are in relation to a deity, to government and to one another. When believers are denied the freedom to follow their beliefs, it is as if a plant is cut off from its roots – it will wither.

When believers are free to follow their religious beliefs, conscience and practices, they flourish and contribute to the society. When believers live in a society that respects all beliefs and allows them to flourish, everyone is free to flourish. Believers do not have to hide their faith for fear of reprisal, be it from the government or from their neighbours. Respecting diversity allows a society to be like a symphony with many instruments playing together harmoniously. This is in contradistinction to a society where only a few musicians, such as the strings section, are allowed to play and all other musicians must keep silent.

The province of Quebec, in Canada, has at several junctions tried to use the power of the state to exclude the contribution of religious minorities to the social harmony of the province. The result of the current Bill 21 is that school children will not be able to hear from a Sikh teacher about his or her beliefs and practices. Patients in a hospital will not know if their doctor is a practicing Jew. Worse yet, these faith community professionals may choose to either leave their professions or leave the province. The state is requiring conformity with a secular ideal and does not allow room for diversity to flourish, leaving society generally worse off.