Religious Rights and the Rule of Law: A Canadian Perspective

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Abstract

This paper focuses on some of the concepts, characteristics, manifestations, causes and consequences of the conflicts between religion and the rule of law in Canada. A few landmark court decisions addressed this conflict, in various contexts. The Canadian society is culturally diverse. Multiculturalism is enshrined in the Canadian Charter of Rights and Freedoms, and so is the freedom of religion. The features of some of the legal issues encountered in Canada regarding the conflicts between religion and the rule of law make Canada an interesting case study.

Keywords: *religion, human rights, rule of law, Canada*.

Originally, the Parliament of the United Kingdom passed the *British North America Act* (BNAA) creating the Dominion of Canada in 1867. The BNAA was officially renamed the *Canada Act* in 1982, when the Canadian Constitution was patriated. As Sheppard noted, "debates about accommodating diversity in pluralistic democracies have become more prevalent [nowadays], the debate in Canada goes back to the early era of nation building."[1] The BNAA did not explicitly refer to the freedom of religion, but the division of powers, term, expression that refers to the distribution of legislative jurisdiction under the Canadian Constitution, between the federal and the provincial governments ensured that the provinces would have legislative authority over certain aspects of life that intersect with religion. Originally, the main religions in Canada were Protestantism, mostly for the English-speaking population, and Catholicism, mostly for the French-speaking population[2]; where the lack of communication between these two populations had been described by Hugh MacLennan in his novel published in 1945 as the 'Two Solitudes'.

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[1] Colleen Sheppard, 'Constitutional Recognition of Diversity in Canada', (2013) 30 *Vermont L. Rev.* 463, p. 463.
[2] David H. Moore, 'Religious Freedom and Doctrines of Reluctance in Post-Charter Canada', (1996) *BYU L. Rev.* 1087, p. 1088: "When French rule yielded to British dominion in 1760, however, the Church of England assumed the position of privileged church. French Catholics were nonetheless permitted to practice their religion to the extent allowed by British law."

An author recalled that "Canadian attitudes toward immigration have blown hot and cold, often at the same time. ... Immigrants of many different cultures were thus essential tools in the building of the nation and yet, at the same time, their foreignness was regarded as problematic."[3] For an example of that, we may refer to what sadly happened to the Chinese population in Canada. They strongly contributed to the building of railways in Canada mostly on the west coast, e.g. "[o]ver the course of construction and by the end of 1882, of the 9,000 railway workers, 6,500 were Chinese Canadians",[4] but a few decades later, the Parliament of Canada enacted *The Chinese Immigration Act, 1923*, which banned most forms of Chinese immigration to Canada. This Act was repealed in 1947 after the Second World War.

This attitude toward immigration that blows hot and cold also occurred in various times in Canada. These events will help us to illustrate the conflicts that exist between the practice of religious beliefs and the respect of the rule of law in spite of what could be qualified as an idealistic legal framework that protects the fundamental rights and freedoms in Canada.

O'Halloran noted, "Canada has no official religion and its support for religious pluralism is an important part of Canada's political culture".[5] More precisely, the former Chief Justice of Canada, the Right Honourable Beverley McLachlin wrote, "Canadian law has always been concerned in some manner with freedom of religion, and the courts have, therefore, always been a forum in which these issues have been deliberated".[6] Canada is now "a multiethnic and multicultural country … which accentuates and advertises its modern record of respecting cultural diversity and human rights and of promoting tolerance of religious and ethnic minorities - and is in many ways an example thereof for other societies"[7]. From a legal standpoint, section 27 of the *Canadian Charter of Rights and Freedoms* ('Charter')[8], adopted in 1982, provides that "[t]his Charter shall be interpreted in a manner consistent with the preservation of the multicultural heritage of Canadians", heritage that often includes religion.

In addition, the *Canadian Multiculturalism Act*[9], enacted in 1988, also recognizes Canada's multicultural heritage and obliges the federal (national) administration to consider, and to favor multiculturalism in its decisions; its preamble also "recognizes the diversity of Canadians … as a fundamental characteristic of Canadian society". In that respect, Chief Justice McLachlin wrote, "in Canadian society there is the value we place upon multiculturalism and diversity, which brings with it a commitment to freedom of religion. But the beliefs and actions manifested when this

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[3] John Douglas Belshaw, *Canadian History: Post-Confederation*, Chapter 5.13 'Summary'. Retrieved from: https://opentextbc.ca/postconfederation/chapter/5-13-summary/.

[4] Government of British Columbia, Canada, *Building the Railway*. Retrieved from: https://www2.gov.bc.ca/gov/content/governments/multiculturalism-anti-racism/chinese-legacy-bc/history/building-the-railway.

[5] Kerry O'Halloran, *Religion, Charity and Human Rights*, Cambridge University Press, 2014, p. 229.

[6] Beverley McLachlin, 'Freedom of Religion and the Rule of Law: A Canadian Perspective' in D. Farrow (ed.), *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy*, McGill-Queen's University Press, Montreal and Kingston, 2004, p. 16.

[7] *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, para. 87.

[8] *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. 1.

[9] R.S.C. 1985, c. 24 (4th Supp).

freedom is granted can collide with conventional legal norms. This clash of forces demands a resolution from the courts."[10]

The Supreme Court of Canada ('Court') also confirmed the protection of minorities, which includes religious minorities, as one of the four foundational principles of Canadian federalism.[11] Freedom of religion is protected under section 2(a) of the Charter. This freedom was analyzed in its seminal decision *R. v. Big M Drug Mart Ltd.*, which was a case about the then Sunday closing legislation where the court "rejected the *Lord's Day Act* as an affront to individual rights and to religion alike".[12] The Court stated:[13]

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

Also, section 15 of the Charter that pertains to equality rights protects citizens against discrimination based on several grounds, including religion. As I previously wrote, "[t]he Charter did not bring to life the existence in Canada of human rights and fundamental freedoms in the courts".[14] As Chief Justice McLachlin puts it, the Charter "did not introduce the concept of religious freedom into the Canadian legal landscape"[15], but clearly impacted on its interpretation[16], which certainly gives fundamental rights a dynamic and active role in the Canadian society.

Nevertheless, these strong, even unique to a certain extent, legal protections did not prevent the eruption in Canadian history of some concerning tensions in parts of the Canadian population in the early years of the twentieth century between, on one hand, the immigrant population, and on the other hand, the *pure laine*[17] French-speaking population of the province of Quebec, the second most populous province of Canada and the only province whose sole official language is French. French-Canadians, however, remain a minority in Canada, and as one author observed, "[t]he prospects of identity loss is likely to be more pressing for such founding minorities as the French Canadians".[18] What is required to explain these tensions goes way beyond a simple 'Clash

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[10] McLachlin, *supra* note 6, p. 22.
[11] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, paras. 79-81.
[12] John Von Heyking, 'The Harmonization of Heaven and Earth: Religion, Politics, and Law in Canada', (2000) 33 *University of British Columbia Law Review* 663, p. 677.
[13] [1985] 1 S.C.R. 295, para. 94.
[14] Shruti Bedi and Sébastien Lafrance, 'The Justice in Judicial Activism: Jurisprudence of Rights and Freedoms in India and Canada' in *The Supreme Court and the Constitution: An Indian Discourse*, Wolters Kluwer, 2020, p. 74.
[15] McLachlin, *supra* note 6, p. 29.
[16] *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, para 22 "Constitution is a *living tree* which, by way of *progressive* interpretation, accommodates and addresses the realities of modern life."; see also, for more details on constitutional law interpretation in Canada, Sébastien Lafrance, 'A Brief Overview of Quebec Civil Law and Constitutional Interpretation in Canada', Amicus Institute, Australia, 2020. Retrieved from: https://www.amicusinstitute.org/scholarship-series.
[17] Lexico Dictionary, powered by Oxford, "Of, relating to, or designating a French Canadian, especially a francophone Québecois descended from the original French settlers."
Retrieved from: https://www.lexico.com/definition/pure_laine.
[18] E. T. Durie, 'The Rule of Law, Biculturalism and Multiculturalism', (2005) 13 *Waitako Law Review* 41, p. 42.

of Civilizations'[19], even though some unfortunate and bitter statements, to say the least, were made that could resemble such a clash. For example, in 1995, the premier of Quebec blamed in his losing speech the loss of the second referendum on the independence of Quebec on 'money and ethnic votes'.[20] This questionable comment, to say the very least, marked the collective memory of many Quebeckers, and Canadians as well.

The existence of such tensions in the Canadian society is also shown, but on a principled basis, in high-profile cases decided by the Court, which involved the application of fundamental human rights to a religious context. There is "a vast number of cases indicating that Canadians are repeatedly forced to sort out where the lines are to be drawn between 'church' and 'state' and what 'accommodation' is and how far 'religious freedom' extends"[21], but we will focus our attention only on a few of them.

One of these cases is *Multani v. Commission scolaire Marguerite-Bourgeoys*[22] that pertained to the wearing of a kirpan, a ceremonial dagger baptized Sikhs carry to symbolize their duty to stand up against injustice, Sikh knife, at school. While this issue is settled in Canadian law since *Multani* in 2006, the New South Wales government in Australia has put in May 2021 a temporary ban on Sikh students carrying a kirpan in public schools.[23] It is noteworthy to mention in that context that "Canada, South Africa and the United Kingdom have adopted a similar approach as Australia. In these countries, secularism means to permit, or even encourage, the expression of multiple faiths in schools to various degrees."[24] Indeed, secularism "does not necessarily entail the rejection of all notions of religion from public life."[25] This must be understood in the more general context where "The United States, Canada, New Zealand, South Africa and Australia are all former colonies of the British Empire, now the United Kingdom, and as such inherited much of the legal tradition of the British Empire, including the common law."[26] Therefore, what the Court had decided back in 2006 could eventually become relevant again, at least from a comparative perspective, to look into a legal issue like the wearing of the kirpan at school, which issue is now brought back to the fore, at least in Australia. However, contrary to Canada, "Australia is (in)famous for being the last western democracy not to have a Bill or Charter of Rights."[27]

In *Multani*, the Court recalled that it had "clearly recognized that freedom of religion can be limited when a person's freedom to act in accordance with his or her beliefs may cause harm to

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[19] Theory formulated by Samuel Huntingdon in his controversial book titled *Clash of Civilizations* published in 1996 providing that people's cultural and religious identities will be the primary source of conflict in the post-Cold War world.

[20] Canadian Broadcasting Corporation (CBC), 'Parizeau blames "money and the ethnic vote" for referendum loss' (October 30, 1995). Retrieved from: https://www.cbc.ca/archives/entry/quebec-referendum-reaction.

[21] Iain T. Benson, 'The Freedom of Conscience and Religion in Canada: Challenges and Opportunities', (2007) 21 *Emory Int'l L. Rev.*, p. 113.

[22] [2006] 1 S.C.R. 256.

[23] Renae Barker, 'A religious symbol, not a knife: at the heart of the NSW kirpan ban is a battle to define secularism', The Conversation (May 26, 2021). Retrieved from: https://theconversation.com/a-religious-symbol-not-a-knife-at-the-heart-of-the-nsw-kirpan-ban-is-a-battle-to-define-secularism-161413.

[24] *Ibid.*

[25] John Helis, 'God and the Constitution: the Significance of the Supremacy of God in the Preamble of the Canadian Charter of Rights and Freedoms', Master of Arts in Legal Studies, Carleton University, 2011, p. 50.

[26] Renae Barker, *State and Religion: The Australian Story*, Routledge, 2020.

[27] *Ibid.*

or interfere with the rights of others".[28] In *Syndicat Northcrest v. Amselem*[29], a case where Orthodox Jews set up succahs in pursuit of their religious beliefs on balconies of their co-owned property, "the Court ruled that, in order to establish that [someone's] freedom of religion has been infringed, the claimant must demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned conduct of a third party interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief."[30] Importantly, the Court in *Multani* rejected the argument that "the wearing of kirpans should be prohibited because the kirpan is a symbol of violence and because it sends the message that using force is necessary to assert rights and resolve conflict must fail. Not only is this assertion contradicted by the evidence regarding the symbolic nature of the kirpan, it is also disrespectful to believers in the Sikh religion and does not take into account Canadian values based on multiculturalism."[31] Based on the application of the latter legal test, the Court found that the student's freedom of religion was infringed by the school board's ban on kirpans. These two decisions, *Anselem* and *Multani*, brought forward an expansive interpretation of religious freedom with a duty of reasonable accommodation, but *Anselem* clarified that "No right, including freedom of religion, is absolute".[32]

Canada seeks to advance, from a legal point of view, the right to equality, as well as the freedom of conscience, in implementing the concept of reasonable accommodation.[33] The development of reasonable accommodation of religious beliefs was, in fact, led by provincial human rights codes.[34] Let us recall that "human rights statutes have been enacted at the federal, provincial, and territorial jurisdictions."[35]

The facts of the *Multani* case caused a large-scale debate in the Quebec society, and in Canada by extension, and turned into a social crisis.[36] As Sossin explained, "the embrace of multiculturalism is complicated and exacerbated by linguistic politics and the province's role in [the] protection [of the] Francophone culture and society."[37] Reasonable accommodations existed since twenty-two year, but "it was only between 2006 and 2007, in the midst of political debate, that the cases were highly publicized, creating a gap between the reality ... and the perception of

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[28] *Multani*, *supra* note 22, para. 29.
[29] *Amselem*, *supra* note 7.
[30] *Multani*, *supra* note 22, para. 34, referring to *Syndicat Northcrest v. Anselem*, *ibid.*
[31] *Ibid.*, para. 71.
[32] *Anselem*, *supra* note 7, para. 61.
[33] Pierre Bosset, *Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable* [The Legal Foundations and Evolution of the Duty of Reasonable Accommodation], Human Rights and Youth Rights Commission, Québec, 2007, pp. 2-5; see also Monique Rochon et Pierre Bosset, *Le pluralisme religieux au Québec : Un défi d'éthique sociale* [Religious pluralism in Quebec: A Social Ethical Challenge], Human Rights and Youth Rights Commission, 1995.
[34] Pauline Cote and T. Jeremy Gunn, 'The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Canada', (2005) 19 *Emory Int'l L. Rev.*, pp. 698-699.
[35] Lorne Sossin, 'God at Work: Religion in the Workplace and the Limits of Pluralism in Canada', (2009) 30 *Comp. Lab. L. & Pol'y J.* 485, p. 492.
[36] Charlotte Le Coz, *Laïcité au Québec: De nouveaux enjeux sociaux et politiques, vers un nouveau modèle* [Secularism in Quebec: New Social and Political Issues, Towards a New Model], Master Thesis in Intercultural and International Communication, Université du Québec à Montréal, 2015, p. 14.
[37] Sossin, *supra* note 35, p. 501; see also Shruti Bedi and Sébastien Lafrance, 'The Linguistic Diversity of Pluralist Cultures: Comparing the Status of Linguistic Minorities in India and Canada' in *Diversity and Inclusion: Designing and Implementing Inclusive Education in International Contexts*, Cambridge Scholars Publishing, forthcoming.

the people."[38] In 2007, the Quebec's Consultation Commission on Accommodation Practices Related to Cultural Differences was launched by the Quebec premier in hope to solve this crisis concerning the reasonable accommodations of ethno-cultural and religious minority groups, mainly of Muslims, Sikhs and Jews by the Catholic French-Canadian majority population in the province. In 2013, the Quebec government led by the Parti Québécois introduced Bill 60, or the *Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests*[39], claimed to promote Quebec values, distinguishing them from Canadian values. This Charter also asserted the principle of equality between men and women, which supported, in turn, its intentions to address the issue of the wearing religious symbols in the workplace in the public service. This Charter never saw the light of day since the opposition party, the Liberal party, gained power through the 2014 Quebec election and rejected this Bill. Nevertheless, another Bill, Bill 62 - *An Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds in certain bodies*, came into force in 2017.[40] This Act "effectively prohibits niqab-wearing women from giving or receiving public services, is the results of a history of political debated in the province of Quebec starting in the early 2000's concerning reasonable accommodation."[41] Later, *An Act respecting the laicity of the State*[42] was tabled by the ruling Coalition Avenir Québec, a political party different than the two previous political parties mentioned above. This new Act was adopted in 2019. It established secularism "as a fundamental principle superseding the exercise of certain rights and freedoms and prevailing over the provisions of any subsequent law."[43]

In a nutshell, the uniqueness of (some parts of) the relevant legal framework in Canada, but also its possible connections with other jurisdictions in the world, when combined with the factual and legal experiences that Canada went through, make Canada an interesting case study in the examination of the conflicts that may exist between religious rights and rule of law.

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[38] Le Coz, *supra* note 36, p. 15. [translated from French by Sébastien Lafrance]
[39] Quebec National Assembly, 1st Sess., 40th Legislature, 2013.
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