Advocacy for religious freedom in Canadian law

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Abstract

Canadians enjoy strong constitutional protection for religious freedom. However, this protection is proving to be only as strong as the courts' interpretations of the Constitution. Early decisions under the Canadian Charter were made without religious organisations being involved. Religious organisations have intervened in more recent court cases to argue for a broad, inclusive understanding of religious freedom that protects individual religious practices but also recognises the communal aspects of religion.

Keywords Canada, human rights, religious freedom, group rights, advocacy.

The Canadian Charter of Rights and Freedoms came into force in 1982 with great fanfare. Given that Canada had a federal Bill of Rights since 1960, although it was not constitutional, many academics and lawyers were sceptical that the Charter would make a difference in Canadian law. They were wrong. Judges seized on the opportunity to tackle challenges to a wide variety of laws based on their conformity with the Charter. Until 1987, intervener rules at the Supreme Court of Canada were quite limited so religious individuals and organisations did not participate in initial significant court cases. When it became clear that courts would play a new and vital role in developing social policy and religious freedom, and when the rules changed to more readily allow interveners, religious organisations began to intervene in an effort to influence significant court cases.

In the last 30 years, Canada has become a more pluralistic and multicultural country. Note that the multicultural nature of Canadian society was reflected in the Charter in 1982 but immigration has increased the cultures and religions present in Canada. The role of religion has changed in society as well. In 1982, Canada was broadly Christian, although Christian influence was already waning. Shops were closed on Sundays by law. Church services were broadcast on radio stations on Sunday morning. School children

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in public schools started the day with the Lord's Prayer and the national anthem. This was gratifying for Christians, but religious minorities felt marginalised.

The Charter has several provisions that address religion. The Preamble affirms "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law." Section 2(a) affirms "freedom of conscience and religion" as "fundamental freedoms". That section also guarantees freedom of association and freedom of expression. Section 15 guarantees, "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on… religion…" All the rights in the Charter are subject to a general limitation clause, section 1, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

In the unanimous ruling of the Supreme Court of Canada in the *Reference re Same-sex Marriage* in 2004 the court affirmed strongly, "The protection of freedom of religion afforded by s. 2(*a*) of the Charter is broad and jealously guarded in our Charter jurisprudence"(Marriage Reference:para. 58). The court has strongly protected individual religious practices. The more public aspects of religion and the communal aspects have had more limited success. Religion, however, is frequently practised as part of a community and in houses of worship that are open to the public (Buckingham 2007:251). Recent cases show an encouraging willingness by courts to address these issues.

In this paper, I will examine the development of the law interpreting religious freedom in Canada. This paper does not begin to analyse the rich case law that has developed under the Charter, but rather focuses on several "waves" of cases that addressed similar themes. The early cases, of course, address the general meaning and content of freedom of religion. Religious individuals and organisations had little involvement in these cases, except Rev. Jones who faced criminal charges. The second wave addressed the place of the dominant religion, Christianity, in public schools and resulted in the secularisation of those schools. Religious individuals and organisations were involved as litigants and interveners in these cases. Indeed, they were involved from hereon. The third wave addressed the place of religious teachers and parents in the now secularised schools. The fourth wave concerned protection for individual religious practices. The fifth wave addressed the communal aspects of religion; including houses of worship. I conclude with some lessons learned from the involvement of religious individuals and organisations in advocating for a robust interpretation of religious freedom.

1. Early religious freedom cases under the Charter

The early cases under the Charter addressing religious freedom were criminal cases challenging Sunday closing laws, a public affirmation of the "sanctity of Sunday"

and reflecting the Christian character of Canada, and dealing with a home schooling parent. *R v Big M Drug Mart,* which challenged the federal Sunday closing law, the Lord's Day Act, was the first case considering s. 2(a) of the Charter to come before the Supreme Court of Canada. The case was provoked by a retail chain that defied the law in order to challenge it. Chief Justice Dickson ruled that the Act had a religious purpose; namely, coercing non-Christians into observing the Christian Sabbath. He struck down the law as violating s. 2(a).

In this first case, Chief Justice Dickson established the definition of religious freedom to be applied in all Charter cases under Canadian law:

> 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. Freedom can primarily be characterised by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free (Big M:para. 94, 95).

This is a strong definition that includes not only individual, but also community aspects of religion.

After the federal legislation was struck down, some provincial governments passed laws to restrict retail opening on Sunday. In a subsequent case, *R v Edwards Books,* decided in 1986, a retail owner again broke the law in order to challenge it. The Supreme Court upheld the provincial common pause day legislation as it did not appear to enforce a Christian Sabbath. The common pause day, now secular, was Sunday but there were exceptions for those observing a different day for their religious Sabbath. The legislation struck an appropriate balance to accommodate the religions of various retail owners.

In a third case, also decided in 1986, a pastor in the province of Alberta, Canada, had a small school in his church where he taught his own and other children. He was accused of "truancy" for not sending his children to the state school. He argued that teaching his own children was part of his religious responsibility. In *R v Jones,* the Supreme Court of Canada agreed that education of children could be part of religious freedom. However, there were provisions in the law for parents to provide alternative education for their children so long as they sought approval from local education officials. This Rev. Jones refused to do. The court said that it was reasonable to require Rev. Jones to obtain approval from local officials.

These cases made it clear that the courts would play a much stronger role in determining the parameters of religious freedom in Canada. However, they were

decided in 1985/86 when there were restrictive intervener rules. In both the cases dealing with Sunday closing laws there were no religious adherents addressing the rationale behind these laws. And while Rev. Jones advocated for parental responsibility over a child's education, the broader issues of religious communities and education were not put before the court.

2. The second wave: religion in public schools[2]

By the late 1980s, religious communities had begun to understand the new reality that important public policy decisions would be made by the courts. In the mid-1980s, a group of parents of minority faiths brought a court action to argue against the mandatory use of the Lord's Prayer as part of opening exercises in public schools in Ontario (Zylberberg). While students could opt out of reciting the Lord's Prayer, the parents sought a more inclusive approach to religious observance in schools. Instead, however, the court simply struck down the use of the Lord's Prayer as violating the religious freedom of non-Christians (Sokhansanj 1992). Other provincial superior courts followed the Zylberberg decision (Russow, Manitoba Association of Rights and Liberties).

A short time later, several parents of minority religions challenged regulations in the province of Ontario allowing for periods of mandatory religious instruction because the instruction given was indoctrinational in the Christian faith. A coalition of religious organisations intervened in the case to argue first that the opt-out clause accommodated religious minorities or, as an alternative, to retain some religious content in the school curriculum. In the decision, the court gave detailed advice on how schools should give religious education, not indoctrination (Elgin County:367). The court declared the regulations to be unconstitutional and ordered that the curriculum not be taught. The Ontario government responded by eliminating all religion from public schools, even to the point of excluding religious clubs during school hours (Ontario Ministry of Education and Training). Christian organisations advocated to the government an inclusive, educational curriculum about religion but it was rejected.

After religion was effectively removed in schools in Ontario, some religious schools that had government funding were de-funded. Parents from a variety of faiths joined together to challenge the lack of funding, arguing that it was discriminatory under s. 15 of the Charter; some religious schools were funded because there was a constitutional guarantee but other religious schools, that were established outside of the constitutional guarantee, were not funded. The court ruled

[2] The place of religion in education has been one of the most controversial issues in Canada for longer than it has been a country. This very brief description of a small number of cases does not begin to analyse the complexity of the issues.

that provisions of the Charter could not be used to challenge other constitutional provisions (Adler). It is significant that Christians advocated alongside those of other faiths for broader religious freedom for all.

The issue of the place of religion in public schools is on-going in Canada. A school in Toronto, Canada, for example, that has 90 per cent Muslim students, allows an imam to conduct prayers on Fridays so students need not go off-site. In parts of the province of Manitoba where there is a high Christian population, schools allow the Lord's Prayer as part of opening exercises. In both these situations, parents and students appreciate the opportunity to have a shared religious observance. However, minority religions and atheists feel alienated. In general, Canadian courts have defaulted to the secularising response rather than trying to find ways to be inclusive of other faiths in a non-coercive manner. Religious parents have often been on both sides of such conflicts: some arguing for an approach inclusive of all religions and others arguing that if their religion is not dominant, they prefer religion to be excluded.

3. The third wave – religious parents and teachers

It was clear by the mid-1990s that public schools were to be secular. "The public school system is now secular. Its goal is to educate, not indoctrinate" (Bal:705). The next cases considered religious teachers and the place of religious parents. In neither case were religious adherents excluded, but there were limits placed on them.

A Christian university, Trinity Western University, established an education programme to train teachers. The British Columbia College of Teachers refused accreditation, on the basis that the university had a lifestyle policy that excluded gays and lesbians. The university brought an action for judicial review. Justices Iacobucci and Bastarache, writing for the majority, said that the lifestyle policy alone was not sufficient to establish that graduate teachers would be discriminatory against gays and lesbians (Trinity Western:para 33; Moon 2003). However, there was an expectation that if teachers were discriminatory, that would be dealt with through normal disciplinary measures applicable to all teachers. "The freedom to hold beliefs is broader than the freedom to act on them" (Trinity Western:para 36). The court ruled in 2001 that the teacher training programme should be accredited.

The issue of parental involvement in decisions about public schools was decided in 2002. A school board made a decision not to approve three books for classroom use because they featured same-sex parents. The decision was based largely on concerns expressed by religious parents, including Christians, Muslims and Sikhs. The B.C. School Act, s. 76, requires schools to be run on "strictly secular and non-sectarian principles." The B.C. Supreme Court ruled that the definition of "secular" meant non-religious so religious concerns could not be considered by the

school board (Chamberlain 1998). On appeal, the Supreme Court of Canada ruled that religious adherents had as much right as anyone else to participate in public decision-making. This was one of the few examples of a case where the reference to "supremacy of God" in the Preamble was used to interpret the parameters of religious freedom (Chamberlain 2002:para 137). However, the court ruled that acting on concerns of religious parents could not have the effect of excluding another group (Chamberlain 2002:paras 19-20; Benson 2007:138-140).

These cases affirm that there is still a place for religious adherents in public institutions, but it is no longer a dominant place. Coalitions of religious organisations intervened in both cases to advocate against the exclusion of religion from public schools.

4. The fourth wave – individual religious practices

Recent cases from the Supreme Court of Canada have affirmed strong protection for individual religious practices. Coalitions of religious organisations routinely intervene in these cases to advocate for broad protection for religious freedom.

In the 2004 case, *Syndicat Northcrest v Amselem* the Supreme Court of Canada affirmed religious freedom over commercial interests. The issue there was whether Jewish condominium owners could build succah huts[3] on their balconies in contravention of the condominium agreement. A significant question before the court was whether the practice was obligatory. Justice Iacobucci, after examining the meaning of "religion" summarised the law as follows:

> [F]reedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials (Amselem:579-580).

When the issue first arose at Syndicat Northcrest, a high rise condominium, it proposed setting up a communal succah beside the parking lot on the ground floor. The Canadian Jewish Congress, which advocates on behalf of Canadian Jewry but does not have doctrinal authority, approved this resolution. But the court ruled that the individual's religious practices are what must be accommodated. This definition also neglects the communal aspects of religion (Boonstra and Benson 2008:1).

In a 2006 case, the Supreme Court of Canada upheld the right of a Sikh high school student to wear a kirpan, a ceremonial dagger, at school as an exemption to

[3] These are temporary shelters for the celebration of the Jewish festival of Succat.

the no-weapons policy (Multani). Again, the issue was raised as to whether wearing an actual dagger was obligatory as some Sikhs wear a plastic replica. The court determined that it was up to the individual to make that decision.

5. The fifth wave – group rights

The Supreme Court of Canada has addressed the communal aspects of religion on a number of occasions, but has been reluctant to base decisions on group rights. As early as the 1986 Edward Books case, Chief Justice Dickson recognised the collective aspects of religion:

> In this context, I note that freedom of religion, perhaps unlike freedom of conscience, has both individual and collective aspects. Legislatures are justified in being conscious of the effects of legislation on religious groups as a whole, as well as on individuals (Edwards Books:para. 145).

The ability of a community of faith to build a house of worship was at issue in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*. A Jehovah's Witness congregation had been blocked at every turn by the municipality in their quest to find land to build a Kingdom Hall. During the hearing, the judges wrestled with whether building a house of worship was legitimately protected under s. 2(a) of the Charter. The majority avoided the issue but Justice LeBel, dissenting on another point, was quite clear on this point:

Freedom of religion includes the right to have a place of worship. Generally speaking, the establishment of a place of worship is necessary to the practice of a religion. Such facilities allow individuals to declare their religious beliefs, to manifest them and, quite simply, to practise their religion by worship, as well as to teach or disseminate it. In short, the construction of a place of worship is an integral part of the freedom of religion protected by s. 2(*a*) of the Charter (Congrégation des témoins:para 73).

To religious adherents, the right to build a house of worship seems to be an essential part of freedom of religion, and is a right frequently violated around the world.

A religious community that owns property and farms communally, the Hutterian Brethren, tried to make an argument for an exemption from mandatory photographs on driver's licences. Hutterian Brethren object to being photographed[4] on a religious basis. They argued that having a driver's licence was necessary to preserve their communal way of life, at a minimum to get their farm products to market. The Supreme Court of Canada ruled against them in 2009. The Chief Justice wrote the majority decision and was of the opinion this was not a case of "group rights", but rather individu-

[4] The objection is in relation Exodus 20:4 that commands believers not to make a "graven image".

als wishing to be exempted from the requirement for a photo driver's licence, which would then have an impact on the community (Alberta:para 31). However, two dissenting judgments set out a strong foundation for the communal aspects of Hutterian religious practices (Buckingham 2010:110-112). Justice LeBel states eloquently:

> Religion is about religious beliefs, but also about religious relationships. The present appeal signals the importance of this aspect. It raises issues about belief, but also about the maintenance of communities of faith. We are discussing the fate not only of a group of farmers, but of a community that shares a common faith and a way of life that is viewed by its members as a way of living that faith and of passing it on to future generations (Alberta:para. 182).

Justice Abella, also dissenting, drew heavily on cases from the European Court of Human Rights to establish the nature of communal rights for religious communities (Alberta:para 130-131; 170).

6. Lessons learned

6.1 Presence

Proponents of religious freedom can be pro-active in advancing a more inclusive approach to religion. Canada is an example of a country which has a strong legal system and allows interventions in important legal cases. Some of the important decisions defining religious freedom were brought by religious adherents or communities. While some question whether it is right to use the courts in this way, if decisions are being made and religious adherents are not present, the decisions may serve to further limit religious freedom.

In Canada, interventions by religious adherents have made important differences in the definition and interpretation of religious freedom. This is a work in progress and it is vital that religious advocates be present on an on-going basis to advocate for a robust definition of religious freedom.

6.2 Working with others

Promotion of a more robust definition of religious freedom requires that religious adherents be inclusive. This means, for example, that when an argument is made for inclusion of education about religion, it must include all religions, not merely be indoctrination in one religion. Coalitions of religious organisations have been very successful in making arguments advocating for broad and robust definitions of religious freedom. This is very important in Canada due to the social understanding that it is a multi-religious country. It has made a very powerful statement for various religions to stand together to advocate a common position that will advance religious freedom for all. It has sometimes been a challenge when everyone is well

aware that there are disputes between religions; perhaps that is why it is a powerful statement to say, "On this we can agree."

6.3 Presence in public debate

Issues of the place of religion are much debated in Canada. There are multiple points of entry into this dialogue from participation in public consultations through engagement with the media. The debates also take place in legislatures and in courts, and proponents must be prepared to advocate their cause there as well. Courts are only one place where religious freedom is determined.

6.4 Awareness

Religious freedom is a global issue. International agreements like the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief protect religious freedom. One can draw on decisions from the UN Human Rights Committee, Resolutions from the UN Human Rights Council, and Statements from the UN Special Rapporteur on Religious Freedom.

Canadian courts have shown a willingness to refer to decisions of other courts and international tribunals (Buckingham 2010:116). Other national courts have looked to comparative and international sources as well (Buckingham 2001:461). Those who advocate for religious freedom should be aware of and use both international law and law from other countries to support their positions.

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