

## Invited but not welcomed

Where is the promised accommodation of separatist religious communities in Canada?

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### Abstract

Canada is generally viewed as a country that respects human rights, but groups that maintain separation from society as part of their religious practices offer particular challenges with regard to protecting their religious freedom. This paper examines three separatist Anabaptist minorities in Canada – the Amish, Hutterites and Mennonites – and their history of religious accommodation. Often, the national government promised these groups accommodation to encourage them to immigrate to Canada, but provincial or local governments subsequently sought to undermine these accommodations. As a result, these groups have sometimes been excluded rather than welcomed.

**Keywords** Anabaptist, religious minorities, accommodation, human rights, Canadian history.

### 1. Introduction

Canada is a multi-faith, multi-ethnic country that has traditionally welcomed groups persecuted in other countries. At least, this is part of the national myth. But it has not always been the case in practice. This paper looks at the experiences of three Anabaptist Christian communities – the Amish, Hutterites and some Mennonites – that have a strong view of the church's need for clear separation from society, which they perceive as worldly and evil.

Some of these groups were encouraged to immigrate to Canada with promises of accommodation of their specific religious needs. Provincial and local governments, however, have reversed some of these accommodations, and some separatist religious minority communities have had to fight court battles in an effort to maintain the freedom to practice their faith. Moreover, even the Canadian courts have not always been sympathetic to these minorities' peculiar religious practices.

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Richard Niebuhr identified five typologies concerning how Christians interact with the surrounding culture in his seminal 1951 book *Christ and Culture*. At the two ends of the spectrum are separatism and assimilation. Separatist communities believe that the surrounding culture is evil and that Christians must keep themselves as separate as possible to avoid sin. To achieve this goal, separatists tend to build a strong, self-sufficient culture within their religious communities and minimize interaction with and accommodation to the surrounding world.

At the opposite end of the spectrum, assimilationists see the surrounding culture not as evil but rather as conducive to practicing the Christian faith. Between these two extremes are dualists, synthesists and conversionists. These three moderate approaches to Christ and culture allow believers to live with varying degrees of accommodation to their surrounding culture.

The separatist Anabaptist groups who now live in Canada trace their history back to the Reformation in Switzerland in 1525. Although the three groups differ in organizational structure, dress, languages and modes of transportation, they share certain core beliefs. "Like all Anabaptists, these beliefs include adult baptism, the rigid separation of church and state, and the establishment of the church as a Christian *community* that follows Jesus in all areas of life." (Hamilton 2007:160; emphasis added) Beyond these core beliefs, each of these Anabaptist traditions includes a range of beliefs and practices.

All these groups "locate moral authority in the community . . . and not in the individual" (Steiner 2015:25). Donald Kraybill and Carl Bowman, who refer to these separatist groups as Old Order, explain further: "For them, such authority emerges from *traditional practice*, rests on *collective wisdom*, and covers a *broad scope* of behavior" (Kraybill and Bowman 2001:15). The opportunity to live in communities is therefore an important requirement for these religious minorities. On Niebuhr's typology, they are clearly separatists. They often separate themselves geographically from mainstream culture and may wear distinctive clothing. Their separation from society is an integral part of their religious beliefs and practices. All these groups have faced considerable persecution and, as a result, have a long history of migrations in search of a country or place where they could practise their communal, separatist lifestyles in peace.

This paper examines the ways in which Canadian governments and courts have addressed a variety of issues requiring accommodation for separatist Anabaptist groups in Canada. After examining the promises made to these groups when they immigrated to Canada, I then discuss how the promises were frequently broken. In many cases, the national government made promises but provincial and local governments subsequently sought to undermine the promised accommodations.

## **2. How the Canadian government system functions**

How could the national government make promises to separatist communities, only to have provincial governments effectively gut them? Canada operates under a federal system of government. The national government has robust powers but cannot legislate in areas of provincial responsibility (Canada 1867:ss. 91–92). Education and healthcare fall under provincial jurisdiction, whereas the national government is responsible for immigration, foreign affairs, defence and criminal law. This distinction is important because, sometimes years or even decades after the national government made commitments to religious minorities to encourage them to immigrate to Canada, provincial or local governments not bound by those commitments adopted laws or policies that sought to force religious minorities to assimilate.

In 1982, Canada adopted a Charter of Rights and Freedoms. Section 2(a) of this Charter guarantees freedom of “conscience and religion.” The Charter applies to laws and government policies and actions made by any level of government, whether national, provincial or municipal. Any law that violates religious freedom can be struck down or the courts can grant an appropriate remedy. As with many human rights documents, the rights guaranteed are subject to a limitation clause; that is, governments may limit rights under certain circumstances.

## **3. Three examples of ‘separated communities’ and their treatment by Canadian governments**

### **3.1 Old Order Mennonites and Old Order Amish in Ontario**

The Old Order Mennonites and Old Order Amish appear very similar to each other, but they differ in their historical and geographical development. The Amish split from the Mennonite/Swiss Brethren in 1693 over theological issues (Steiner 2015:27). The Old Order Amish broke away from the wider Amish community in the 1890s, largely over whether to worship in homes (the Old Order’s preference) or meetinghouses (Steiner 2015:154).

Old Order Mennonites separated from the Mennonite Church in Canada in 1889 (Steiner 2015:150–151). The issue in this instance was modernization, including such practices as holding religious services in English and having Sunday School. The Old Order Mennonites maintained German as their language of worship and eschewed modernization in other areas of life. Members of both the Old Order Amish and Old Order Mennonites hold their property privately but locate close to one another.

Old Order Amish immigrated to Canada in the 1820s and settled in Wellesley and Mornington Townships in the province of Ontario. To this day, many continue to use horses and buggies for transportation and therefore require accommodations in road access and signage. In the 1996 case *Mornington (Township) v. Kuepfer*,

several Old Order Amish from the hamlet of Newton were charged with keeping a horse in a barn contrary to the township's by-laws. A Justice of the Peace ruled that the by-law violated section 2(a) of the Charter of Rights and Freedoms, based on evidence of the importance of horses for transportation for the Old Order Amish, so they were not convicted.

Another more recent case shows the challenge Old Order Amish farmers face due to regulations intended to deal with modern agricultural realities. In *Stoll v. Kawartha Lakes (City) Committee of Adjustment* (2004), an Old Order Amish farmer sought permission to build a second house on his land for his daughter and her family. However, the official plan for the municipality did not allow a farm smaller than 200 acres in size to be severed. The purpose of the municipal law was to ensure that farms remained viable, but it assumed that farmers would use modern mechanical methods. The farmer failed to gain approval for the land division from the municipality and appealed to the Ontario Municipal Board, which granted the application in 2004. His argument was that if one was using Old Order Amish intensive farming techniques and no modern equipment, a farm almost 200 acres in size was too large. The Municipal Board considered that the farm was being operated in Old Order Amish style and would not be permanently severed, so it allowed Mr. Stoll to build another house on the property. It did not specifically consider the question of freedom of religion.

In these cases, although local municipalities made rules based on the practices of the majority population, courts were willing to override them to accommodate Old Order Mennonite and Old Order Amish populations.

### 3.2 Western Canadian Mennonites

The Canadian government encouraged German-speaking Mennonites to emigrate from Russia in the 1870s by negotiating accommodations to meet their religious requirements. John Lowe, Secretary of the Department of Agriculture, wrote a letter to the Mennonites promising exemption from military service, a reserve of eight townships in Manitoba for the settlement (since the Mennonites wanted to live in communities), the privilege of educating their children as they saw fit, and the ability to make affirmations rather than taking oaths (Epp 1974:338). With respect to education, the letter read, "The fullest privilege of exercising their religious principles is by law afforded without any kind of molestation or restriction whatever; and the same privilege extends to the education of their children in schools." The Department of Agriculture was responsible for immigration at that time. Seven thousand Mennonites immigrated to Manitoba on the basis of these commitments (Ens 1994:21).

However, the actual government policy approved by the Canadian Privy Council, the official advisory body to the Queen, in 1873 changed the wording of the

commitment regarding education. The Council's order read, "That the Mennonites will have the fullest privilege of exercising their religious principles, and educating their children in schools, *as provided by law*, without any kind of molestation or restriction whatever" (Canada 1873; emphasis added). That change allowed the government to remove the Mennonites' right to religious education. It was not made public until 1916, however, and the Mennonites relied on John Lowe's letter as proof of their rights.

Although many practical problems arose from the settlement of German-speaking Mennonites from Russia in Manitoba, the Canadian government was willing to negotiate resolution of the difficulties so that immigration by members of this minority group would continue. The most significant concession concerned the allotment of land. Under the Canadian settlement system, called homesteading, settlers were entitled to a land grant of 160 acres if they built a house, cleared a certain amount of land, and lived on the property for three years (Canada 1872:s. 33(11)). In Russia, the Mennonites lived in villages and farmed the surrounding land. When they settled in Canada, they wanted to adopt the same manner of living (Epp 1974:212). Therefore, they would not qualify for homestead grants because they did not live on the homestead property. The Canadian government amended the Dominion Lands Act in 1876, allowing the Minister of the Interior to waive the residency requirement. This provision, which became known as the Hamlet Privilege, allowed the Russian Mennonites to continue their communal way of life (Ens 1994:36).

Between 1916 and 1919, provincial governments in Manitoba and Saskatchewan "sought to use the schools to inculcate patriotic sentiments and to foster Canadian nationalism" (Epp 1982:97). In 1916 and 1917, respectively, Manitoba and Saskatchewan passed changes to their education legislation, requiring that English be the language of instruction and making school attendance compulsory. Public schools were built and staffed in Mennonite villages that previously had only private Mennonite schools. The new public schools either had English names or were named for significant battles in the First World War; the latter practice was clearly insulting to pacifist Mennonites. Some of the schools were even staffed by teachers who were war veterans (Ens 1994:124–138). Nevertheless, under the new law Mennonites were obligated to send their children to the new public schools.

In 1918, both Manitoba and Saskatchewan governments began to prosecute Mennonites for failing to send their children to public schools, even though the children were attending local private schools. Mennonite parents were fined and jailed and had their property confiscated (Ens 1994:138–146). In one of these prosecutions, *R. v. Hildebrand and Doerksen*, the parents challenged the validity of the provincial law, raising the national government guarantee. In that case, the Manitoba Court of Appeal ruled in 1919 that the provincial government

had exclusive jurisdiction over education and that the national government could not guarantee educational rights in the province. The John Lowe letter on which Mennonites had relied was declared not valid with respect to education, as it was superseded by the order of the Canadian Privy Council.

When it became clear to the Mennonites that Manitoba and Saskatchewan would no longer allow them to educate their own children and that the national government would not intervene on their behalf, they looked to emigrate. Some 6,000 Mennonites relocated from Canada to Latin America, mostly Mexico and Paraguay, in the 1920s (Janzen 1990:98) These separatist Mennonites made considerable financial sacrifices to live by their religious principles (Epp 1982:119–124).

Ironically, at the same time as some Mennonites were leaving Western Canada for Latin America, more German-speaking Mennonites in Russia sought to immigrate to Canada as they faced persecution after the Bolshevik revolution (Epp 1982:146). However, by then the Canadian government had adopted its 1919 Immigration Act, including a provision specifically designed to prohibit the immigration of Mennonites and Hutterites. Mennonites in Canada advocated strenuously for Canada to accept these new separatist believers as immigrants. After several years of negotiation, including negotiations between Canadian and Russian government officials, Canada allowed some 20,000 German-speaking Mennonites from Russia to enter the country between 1923 and 1930 (Epp 1982:152–179).

### 3.3 The Hutterian Brethren

Jonnette Watson Hamilton notes:

From their very beginnings, the Hutterites' religious beliefs and practices have challenged the values and authority of the established state. Their history of relations with their host nations has therefore been one of broken promises, persecution and flight. (Hamilton 2007:161)

Hutterites are unique even amongst Anabaptist groups in their strong focus on close communal living. Their religious beliefs require that they hold property communally and live in 'colonies.' They have not been willing to compromise on this point. As Yossi Katz and John Lehr (2012:xi) point out, "The rural colony system is thus integral and vital to the practise of their faith." This unusual religious practice required that religious leaders negotiate with the government to ensure that they could get exemptions from typical landholding systems and that they could operate schools on Hutterite colonies that only Hutterite children would be permitted to attend.

Law professor Alvin Esau describes a Hutterite colony's self-perception as an "ark of salvation that leads to eternal life in heaven, while the rest of the world is

drowning in the flood of temporary selfish pride and pleasure leading to death” (Esau 2004:x). This is an allusion to the biblical story of Noah and the ark, according to which the world was flooded because of sin and only Noah’s family and the animals on the ark survived.

Hutterites began to emigrate from the United States to Canada after the First World War because they faced persecution due to their refusal to serve in the military. The sect originated in Eastern Europe and, like the Mennonites, migrated to Russia due to persecution. When Russia restricted exemption from military service, Hutterites immigrated to the United States. The above-noted prohibition on Hutterite immigration to Canada was lifted in the late 1920s.

During the Second World War, the Hutterites were quite unpopular in Alberta due to their pacifism. In 1942, the Alberta government passed the Land Sales Prohibition Act, which prohibited the sale of land to “any enemy alien or Hutterite.” After the war, this law was changed to the Alberta Communal Property Act (Alberta 1947; Janzen 1990:68–73) which replaced the outright ban with restrictions on the size of colonies, their proximity to one another and the amount of land Hutterites could own in any one county. But given their high birth rate, Hutterite colonies needed to be able to found nearby daughter colonies on a regular basis. Accordingly, the Hutterites filed a constitutional challenge against this discriminatory law, *Hatch v. East Cardston Colony*, which was decided in 1949. Their legal action was not successful, as the judge ruled that he did not have the jurisdiction to consider the constitutionality of the legislation.

The Alberta law was amended again in 1950 (in An Act to Amend the Communal Property Act, s. 1) to further restrict Hutterite colonies by requiring provincial cabinet approval for any new colony to be established. According to Hamilton (2007:167), however, the Hutterites found ways to “evade the restrictions when it became too difficult to acquire adequate land to sustain their way of life.” The Alberta government appointed the Hutterite Investigation Committee in 1958 and further changes were made, with the ultimate goal of achieving assimilation of the Hutterites (Hamilton 2007:167–168).

A second constitutional challenge, *Walter v. A.G. of Alberta*, was appealed all the way to the Supreme Court of Canada, which upheld the law in 1969. This time the applicants asked for a declaration that the law was beyond the legislative authority of the provincial government for the provincial government on the basis of three arguments: first, the legislation related primarily to religion; second, it was discriminatory and breached national government assurances made when the Hutterites immigrated to Canada; and third, it contravened the protections of religious

freedom contained in the 1960 Canadian Bill of Rights. The Supreme Court ruled, however, that the Act was within provincial jurisdiction since it governed property.

The Communal Property Act was finally repealed in 1972, on the basis that it violated human rights (Katz and Lehr 2012:147). The province of Alberta passed its own bill of rights and the Individual Rights Protection Act in that same year. A Hutterite Liaison Office was established to work with a Hutterite Committee of Elders on developing guidelines for Hutterite land acquisitions (Hamilton 2007:177).

In Saskatchewan, municipalities passed by-laws to restrict the proliferation of colonies. However, in the 1979 case *R. v. Vanguard Hutterian Brethren*, a colony accused of violating a resolution by undertaking construction without a permit was exonerated. The problem was that the rural municipality involved had refused to grant a permit. Under Saskatchewan's Planning and Development Act, municipalities may give notice that they are preparing a by-law and require that all development that may be affected by the by-law be subject to written consent from the council until the by-law is passed, for up to one year following the notice. The rural municipality gave such notice but did not prepare a by-law within the subsequent year. Its behaviour constituted clear evidence that this manoeuvre was not in good faith but was intended to frustrate the Hutterite colony's attempts to locate in the municipality. Accordingly, the Saskatchewan Court of Queen's Bench dismissed the charge against the colony.

The province of Manitoba also placed restrictions on Hutterite colonies from 1957 to 1971. These restrictions were repealed as a result of a negotiated settlement between the Hutterites and the Union of Manitoba Municipalities. However, as late as 1982 the Union was still contemplating the possibility of making a formal request to the provincial government to reinstate restrictions (UPI 1982). By that time, the Charter of Rights and Freedoms had come into force and the provincial government said that such restrictions would violate the Charter.

The most recent issue relating to government treatment of Hutterites is the Alberta government's requirement (Operator Licensing and Vehicle Control Amendment, Regulation 137 of 2003) that all driver licences must contain a photograph of the driver. Some Hutterites object to having their photograph taken, believing that this would constitute a violation of Exodus 20:4, which prohibits the making of graven images. The colony sought to have the government's regulation declared invalid on the basis that it infringed upon the Hutterites' religious freedom, since they could not get a driver licence without violating a tenet of their religious beliefs. The Supreme Court of Canada ruled against the Hutterites in the 2009 decision *Alberta v. Hutterian Brethren of Wilson Colony*.

Chief Justice McLachlin, writing for the majority of the Supreme Court, ruled that there was indeed a violation of religious freedom. However, she considered



that infringement justified by the significant objective underlying the requirement of photo identification, namely, protection against fraud and identity theft. She also found that the minimal impairment test was met; the law was proportional to the objective, there were no alternative ways to meet the government's objective of maintaining the integrity of the driver's licence system, and the government was not obligated to accommodate the Hutterites' religious practices.

Chief Justice McLachlin stated that the Hutterites could hire drivers if they did not want to have their photographs taken. This suggestion mischaracterizes the importance of the colony's separation from the rest of society. Hutterite colonies deliberately limit contact with the outside community (Koshan and Hamilton 2010:para. 7). At the time of the decision, colony members publicly discussed driving without licences (Komarnicki 2010) or emigrating from Alberta (White 2009).

Professor Richard Moon argues that, sadly, this decision is consistent with previous Supreme Court of Canada rulings: "The Court's adoption of this weak standard of justification under section 1 reflects an ambivalence about the nature of religious commitment and its place in the public life of the community" (Moon 2010:para. 66). As lawyer Marshall Haughey comments, "The decision in Wilson Colony marks another chapter in the struggle for Hutterian colonies to maintain their way of life" (Haughey 2011:para. 70).

#### **4. Conclusions**

At various times in Canada's history, the national government has actively encouraged separatist Anabaptist minority religious communities to relocate to Canada with promises of various accommodations for their communal and religious lifestyles. However, the national government has not 'practiced what they preached' but rather has allowed these promises to be undermined or even overridden by zealous provincial and municipal governments. In other situations, changing circumstances have made these separatist groups less popular. The groups have pursued legal action to protect their religious freedom, but the courts have usually been less than sympathetic.

Provincial governments have placed restrictions on the religious practices of separatist Anabaptist religious communities, pushing believers to conform, engage in civil disobedience or even emigrate from Canada in order to maintain their religious traditions and educate their children in what they considered an appropriate manner. Recently, the Supreme Court of Canada has failed to respect the Hutterites' religiously based need for an alternative to driver licences with photos, thereby creating hardship for Hutterite colonies.

Although the separatist religious communities described in this paper comprise very small populations in Canada, the lack of accommodation for their beliefs in-

dicates the country's incomplete respect for religious difference. How countries accommodate minority religious communities whose religious practices diverge significantly from those of mainstream society is a bellwether for freedom of religion more generally. Canada has invited these religious communities to immigrate, but its subsequent treatment of them has been very cool. As a country that touts its commitment to inclusion and diversity, Canada can do better.

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