

EQUALITY AND RELIGIOUS FREEDOM: A CANADIAN PERSPECTIVE

Notes for Panel II

Conference on Church-State Relations and Religious Liberty: Comparative Perspectives
University of Notre Dame, Notre Dame, Indiana, September 22, 2008

Freedom of religion

Canada's Charter of Rights, which was adopted in 1982, contains a guarantee of freedom of religion in s. 2(a), as follows:

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

[(b), (c) and (d) go on to list freedom of expression, assembly and association.]

Freedom of religion has been given a wide definition by the Supreme Court of Canada.¹ In particular, the Court would not have decided *Oregon v. Smith* (1990)² the same way as the majority of the Supreme Court of the United States did. That was the case that decided that a ban on the use of narcotics applied to the ceremonial use of peyote in a religious service by the Native American Church. Our Court would have held that the guarantee of freedom of religion required the accommodation of the religious practice, which accordingly would have been exempted from the general ban.

Notable Canadian cases, decided on the basis of the constitutional protection of religiously-based practices, have upheld: the right of Jehovah's Witness' parents to deny a blood transfusion that was medically advised for their daughter;³ the right of a schoolteacher to disseminate anti-Semitic ideas which he honestly believed on religious grounds;⁴ the right of condominium owners to build dwellings on their balconies for the Jewish festival of "Succoth" in the face of by-laws prohibiting construction on balconies;⁵ and the right of a Sikh boy to wear a "kirpan" (a dagger with a metal blade) to school in the face of a school-board prohibition of weapons.⁶

It is important to notice that s. 1 of the Charter is a limitation clause of a kind common in international instruments which does not exist in the American Bill of Rights. Section 1 provides as follows:

¹ P. W. Hogg, *Constitutional Law of Canada* (Carswell, Toronto, 5th ed., 2007), ch. 42, Religion.

² *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

³ *B.(R.) v. Children's Aid Society* [1995] 1 S.C.R. 315.

⁴ *Ross v. New Brunswick School District No. 15* [1996] 1 S.C.R. 825.

⁵ *Syndicat Northwest v. Amselem* [2004] 2 S.C.R. 551.

⁶ *Multani v. Commission scolaire Marguerite-Bourgeois* [2006] 1 S.C.R. 256.

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Under s. 1, a law abridging a Charter right can be upheld if the Court decides that it is a “reasonable limit” on the right which “can be demonstrably justified in a free and democratic society”. A considerable case law has developed standards for the application of s. 1.⁷ For example, in the Jehovah’s Witness blood-transfusion case, the Court held that the statutory process to make the child who needed the blood transfusion a ward of the state so that she could be given the transfusion was a justified limit on the parents’ freedom of religion. However, in each of the other cases recited in the previous paragraph, the right to engage in the religious practice prevailed over the otherwise governing law.

Equal protection

Section 15 of the Charter is an equal protection clause, which provides as follows:

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.

[(2) goes on to authorize affirmative action programs.]

Section 15 has been interpreted as guaranteeing freedom from discrimination on the basis of sexual orientation.⁸ Same-sex relationships must be treated in the same way as opposite-sex relationships with respect to mutual support, pensions, income tax, etc. The issue of adoption has not been litigated, but the trend of the decisions would make it virtually certain that any state agency, including a private agency playing a role in a statutory process, would be unable to prohibit a same-sex couple from adopting if the reason was related to their same-sex relationship.

The common-law definition of marriage as the union of a man and a woman has been held in violation of s. 15 for excluding same-sex relationships. As the result of a series of judicial decisions, the federal Parliament of Canada (which has responsibility over “marriage and divorce”) has enacted the Civil Marriage Act, 2005,⁹ which is a national law legalizing same-sex marriage. Same-sex marriages are now commonplace in Canada. If a same-sex couple were actually married, the Canadian courts would almost certainly insist that they have the same adoption rights as opposite-sex married couples.

Section 15, like the other Charter guarantees, is subject to the limitation clause of s. 1. However, courts have generally been reluctant to apply s. 1 to laws that have been held to be discriminatory under s. 15.

⁷ Hogg, note 1, above, ch. 38, Limitation of Rights.

⁸ Hogg, note 1, above, sec. 55.22, Sexual orientation.

⁹ S.C. 2005, c. 33.

Priority between competing Charter rights

The Supreme Court of Canada has never developed any coherent jurisprudence to deal with cases presenting conflicting Charter rights. There have been a few such cases,¹⁰ but none dealing with conflict between freedom of religion and equal protection. This is uncharted territory.

The New Hope Case

1. In Canada, a provincial Legislature would have the authority to enact the Equality Law (applicable to matters within provincial jurisdiction) and the authority to provide for and regulate the adoption of children, including the licensing of adoption agencies.
2. The Canadian courts would accept that same-sex couples were entitled to equal treatment with opposite-sex couples in the matter of adopting children, at least if that entitlement did not come into conflict with another constitutional principle, in this case, freedom of religion.
3. The Canadian courts would accept that a sincerely held religious belief opposed to homosexual activity was worthy of constitutional protection, at least if it did not come into conflict with another constitutional principle, in this case, equal protection.
4. The Canadian courts would not require the Roman Catholic Church to change its beliefs or its practices respecting homosexuality. The courts would not require the Church to ordain a practising homosexual; nor would the courts require a Catholic priest to recant his belief that homosexuality is immoral; nor would the courts require a Catholic priest to celebrate a same-sex marriage (or bless a same-sex relationship); nor would the courts force the Church to make the Church premises available for those purposes. I have no doubt that the equality guarantee would accommodate the traditional functions of the Church by relieving them of compliance with equality norms that contradict Catholic doctrine and practice.
5. In carrying out *secular* functions, however, the claim to protection of the Church's religious beliefs seems much weaker. It cannot be the case that whatever activity in which the Church chooses to engage in the wider community is automatically relieved of equality norms. (I note that the Charter has no application to purely private activity, but here the adoption agency is part of a statutory process leading to a change in the legal status of the adoptive parents and the adopted child.) The Church is not required by Catholic doctrine to operate an adoption agency. It does so as a service to the community. In carrying out secular functions that are not the traditional preserve of the Church, it seems to me that a Canadian court is likely to decide that (outside the private realm) the Church must comply with constitutionally-protected equality norms, because that has a much shallower impact on the values or practices of the Church.
6. Assuming that the Equality law (reinforced by the Charter of Rights) validly required a Church adoption agency to place children with same-sex couples, the Catholic agency would have two choices. The first choice would be to obey the law. The second choice would be to

¹⁰ Hogg, note 1, above, sec. 36.8(f), Conflict between rights.

close the adoption agency. Neither of these choices impacts deeply on the values or practices of the Church, as I hope to show in the next two paragraphs.

7. As to obeying the law, the Church adoption agency might decide to do that on the basis that it wanted to continue to provide adoption services, despite the existence of a law of which it profoundly disapproves. Neither the Church's beliefs nor its religious practices would be directly offended by bowing to the force of the law in carrying out adoption services. I note that the New Hope agency has already allowed children to be adopted by same-sex couples on the basis that the children would otherwise be left in foster care.

8. If the Church adoption agency decided, on religious or moral grounds or for any other reason, that it could not obey a law that required it to treat same-sex couples equally with opposite-sex couples, then it could close the adoption agency. That way, it would not be compromising its values or practices except in the most tenuous sense. It would simply be ceasing to provide a service to the community that can be provided by other state-sanctioned agencies for whom the recognition of same-sex relationships is not a religious or moral issue.

9. My conclusion is that the Canadian courts would decide that the Essex legislature is entitled to impose its equality law on adoption agencies, including those operated by the Catholic Church. That way, the legislative and constitutional goal of banishing discrimination on the basis of sexual orientation is fully met, and the constitutional goal of permitting freedom of religious belief and practice is not compromised in any traditional Church functions.
