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Freedom of Conscience and Religion

It is trite to affirm that Catholic separate school constitutional rights derive from Section 93(1) of the Constitution Act, 1867:

“... nothing in any such Law [in relation to education] shall prejudicially affect any right or privilege with respect to Denominational schools which any Class or Persons have by Law in the Province at the Union”;

and Section 17 of the Alberta Act, 1905:

“... nothing in any such Law [with respect to education] shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act under the terms of chapters 29 and 30 of the Ordinances of the North-west Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.”

It is also clear that those constitutional protections survive challenges under the Canadian Charter of Rights and Freedoms, as specified in section 29:

“Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.”

The law, however, provides another set of rights, apart from the constitutional protections specifically with respect to Catholic separate schools, which are of importance to the Catholic community; the Charter protection for freedom of conscience and religion.

Firstly, the preamble to the Charter states:

“Whereas Canada is founded upon principles that recognize the supremacy of God and the Rule of Law ...”.

Section 2(a) contains the basic guarantee of religious freedom:

“Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion ...”.

After the enactment of the Charter, the first decision of the Supreme Court of Canada to analyse the content and breadth of this guarantee of freedom of conscience and religion was *Big M Drug Mart* [1985], a case in which a convenience store in Alberta was charged with being open on Sunday, contrary to Alberta’s Lord’s Day Act.

Big M Drug Mart specifically addresses what is embodied in freedom of religion:

“A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and

pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms.... Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. 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 (para. 94).

Freedom can primarily be characterized 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

Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is forced to act in a way contrary to his beliefs or his conscience (para. 95).

... The Charter safeguards religious minorities from the threat of 'the tyranny of the majority' ". (para. 96).

In determining what rights are protected under section 2(a), and the rest of the Charter, the Supreme Court of Canada has adopted a purposive approach:

"The meaning of a right or freedom guaranteed by the Charter is to be ascertained by an analysis of the purpose of such a guarantee" (para. 117).

The Court also said that the interpretation of a fundamental freedom should be a "generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection" (para. 118).

The Supreme Court of Canada said in *Big M Drug Mart* that the purpose of such provisions is to protect the "notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation" (para. 122). It also stated:

"... an emphasis on individual conscience and individual judgment also lies at the heart of our demographic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government... (para. 123), and

... The values that underlie our political and philosophical traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided, *inter alia*, only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.... Equally protected, for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice" (para. 124).

In *Edwards Books*, the Supreme Court of Canada wrestled once again with the Sunday closing issue addressing the Ontario Retail Business Holidays Act determining that the Ontario statute had no religious purpose, required closing only “on holidays” and contained numerous exceptions, allowing the opening on holidays of corner stores, pharmacies, gas stations, flower stores, fresh fruit and vegetables stores or stands during the summer months, educational, recreational or amusement services, prepared meals, laundromat services, boat and vehicle rentals, business necessary to promote the tourist industry, and in limited circumstances, any business that was closed on Saturday for religious purposes. The Court found that even though the Act infringed or denied the “freedom of religion of Saturday-observing retailers” that infringement was justified under section 1 of the Charter, which both guarantees the rights and freedoms set out in the Charter and constrains them to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

However, the Supreme Court of Canada, in the *Edwards Books* case, made some further interesting comments on the scope of freedom of religion. It said that government interference with conscience and religion will be prohibited whether it is direct or indirect:

“It matters not, I believe, whether a coercive burden is direct or indirect, intentional or unintentional, foreseeable or unforeseeable. all coercive burdens on the exercise of religious beliefs are potentially within the ambit of s. 2(a)” (para. 97).

It also said, importantly:

“The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one’s perception of one’s self, human kind, nature and, in some cases, a higher or different order of being. These beliefs in turn govern one’s conduct and practices. The constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. For a state-imposed cost or burden to be proscribed by s. 2(a) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practicing or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial” (para. 98).

Another leading case with respect to the interpretation of section 2(a) of the Charter is the “succah” case from Montreal, *Syndicat Northcrest c. Amselem* [2004], under section 3 of the Quebec Charter of Human Rights and Freedoms, equivalent to section 2(a) of the Canadian Charter of Rights and Freedoms. In that case, a number of Orthodox Jews built succahs on the balconies of their condominiums; a 3-walled, open-roofed structure commemorating the forty year period during which the Children of Israel wandered in the desert, and in which they claimed they were to reside during the 9 day festival of Succot in late September or early October. The condominium association claimed each year that the balconies were communal property, and that the building of the succahs on the balconies infringed the condominium bylaws, building codes and adversely affected the aesthetics of the condominium building. The condominium association brought an action for an injunction requiring the succahs to be dismantled.

The Supreme Court of Canada, in holding for the Jewish residents, recognized the foundational principal set out in Reference re: Secession of Quebec [1998] that an important feature of the Canadian constitution was respect for minorities “which includes, of course, religious minorities” and that “respect for and tolerance of the rights and practices of religious minorities is one of the hallmarks of an enlightened democracy ... exist(ing) in a matrix of other correspondingly important rights (and) ... coexist(ing) alongside societal values that are central to the make-up and functioning of the free and democratic society” (para. 1). Importantly, for constitutional purposes, the Court set out a definition of both “religion” and “freedom of religion”. The Court said:

“...religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual’s spiritual faith and integrally linked to one’s self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith” (para. 39).

In defining freedom of religion, the Court said that it:

“...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 dogma or is in conformity with the position of religious officials (para. 46).

... this freedom encompasses objective as well as personal notions of religious belief, ‘obligation’, precept, ‘commandment’, custom or ritual. Consequently, both obligatory as well as voluntary expressions of faith should be protected It is the religious or spiritual essence of an action, not a mandatory or perceived-as-mandatory nature of its observance, that attracts protection” (para. 47). “Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the Court in the affairs of religion” (para. 50).

In the context of that definition of religion, the Supreme Court of Canada articulated an expansive definition of freedom of religion “which revolves around the notation of personal choice and individual autonomy and freedom” (para. 40), “integrally linked with an individual’s self-definition and fulfillment and ... a function of personal autonomy and choice” (para. 42).

The Court said:

“...these decisions and commentary should not be construed to imply that freedom of religion protects only those aspects of religious belief or conduct that are objectively recognized by religious experts as being obligatory tenets or precepts of a particular religion. Consequently, claimants seeking to invoke freedom of religion should not need to prove the objective of the validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for Courts to make.... a person must show ‘sincerity of belief’... not that a particular belief is ‘valid’ ” (para. 43).

The Supreme Court of Canada held that in analysing one's right to freedom of religion, one must only examine whether the belief is "sincere" and not "valid", because "a Court is in no position to question the validity of a religious belief" and it is not the role of a "Court to decide what any particular religion believes" (para. 44).

However, the Court was careful to point out that the individual enjoyment of religious practice could not impair the rights of others:

"This is so because we live in a society of individuals in which we must always take the rights of others into account. In the words of John Stuart Mill: 'the only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it' " (para. 61).

The Court indicated that "freedom of religion, like all other rights ... may be made subject to overriding societal concerns":

"...they will still have to consider how the exercise of their rights impacts upon the rights of others in the context of the competing rights of private individuals. Conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular Charter right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises" (para. 62).

In *R v. S (N)* [2012], a Muslim female plaintiff in a sexual assault case refused to remove her niqab while testifying in Court. The issue arose as to the balance between her guaranteed right to freedom of religion and the accused's right to a fair trial. The Supreme Court of Canada began its analysis by explicitly rejecting the "secular response" that would require "witnesses to park their religion at the Courtroom door (as) inconsistent with the jurisprudence and Canadian tradition, and limit(ing) freedom of religion where no limit can be justified" (para. 1). The Court said:

"The long-standing practice in Canadian Courts is to respect and accommodate the religious convictions of witnesses, unless they pose a significant or serious risk to a fair trial" (para. 2).

"... the Canadian approach in the last 60 years to potential conflicts between freedom of religion and other values as been to respect the individual's religious belief and accommodate it if at all possible. Employers have been required to adapt work place practices to accommodate employees' religious beliefs Schools, cities, legislatures and other institutions have followed the same path the need to accommodate and balance sincerely held religious beliefs against other interests is deeply entrenched in Canada law. For over half a century this tradition has served us well" (para. 54). Recognizing the importance of the guarantee of religion, the majority in the Supreme Court of Canada held that a witness wearing an niqab would only be required to remove it if necessary to prevent a serious risk to the fairness of a trial, reasonable available alternative measures would not prevent that risk, and the salutary effects of removing the niqab on trial fairness outweighed the deleterious effects of doing so, including the effects on the witnesses' freedom of religion. Where a conflict could not be avoided between equally guaranteed rights, a determination should be made on a case-by-case basis.

We should not forget, in our concentration on the constitutional protection of Catholic separate school rights in Alberta, the broad range of protection given to all rights related to conscience and religion by section 2 (a) of the Charter. When read together, these twin protections offer a broad coverage of the right and privilege to hold beliefs founded upon conscience and religion, and to teach those beliefs in a fully-permeated Catholic educational system in Alberta.