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"God Keep Our Land . . .": Canadian Religious Pluralism and the Law

Introduction

Any young Canadian girl or boy who has attended a National Hockey League game in Canada has sung the words "God keep our land" as part of the National Anthem.

The Canadian Charter of Rights and Freedoms opens with the words:

"Whereas Canada is founded upon principles that recognize a supremacy of God and the Rule of Law",

and that Charter contains the basic guarantee of religious freedom in section 2 (a):

"Everyone has the following fundamental freedoms:

(a) Freedom of conscience and religion . . ."

In Canada, there is no official constitutional separation of church and state. The Supreme Court of Canada said in Big M Drug Mart [1985]:

"A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct."

Canadian constitutional law therefore promotes the active engagement of a diversity in religious views, the promotion and respect of all religious views in relationship to one another; it promotes a religious pluralism, not the absence of religion in state matters, but the encouragement of a diversity in religious views, practices, beliefs and observances as part of a Canadian state.

Religious Pluralism

When one speaks of religious pluralism, in the context of constitutional law, one envisions not merely diversity of religion or faiths but the active engagement, not merely tolerance, of such diversity, the active seeking of understanding of religious differences "not in isolation, but in relationship to one another".

In this context, religious pluralism is neither relativism, or normative pluralism, the philosophy of Quebec's "secular revolution", the belief that every spirituality is equal and no faith gives access to absolute truth, nor syncretism, the amalgamation of faiths, creeds and spiritualties, blended together as a shopping cart of spiritual understandings. Religious pluralism means allowing each believer their own religious identity, and their own religious commitment, but provides for the encounter of those commitments, holding religious differences not in isolation but in relationship. It is based on encounter, understanding and dialogue, examination and self-examination.

Chris Beneke in Beyond Toleration: The Religious Origins of American Pluralism, 2006, says that religious pluralism goes beyond toleration, because toleration is only the absence of religious persecution, and does not necessarily preclude discrimination; it is defined as "respecting the otherness of others: and accepting the given uniqueness endowed to each one of us" (Beneke, 2006).

Mark Silk in Defining Religious Pluralism in America: A Religious Analysis (2007) says that "it is a cultural construct that embodies some shared conception of how a country's various religious communities relate to each other and to the larger national whole", and involves dialogue between persons of different faiths, denominations and experiences for the goal of reducing conflict and achieving mutually agreed upon ends. Such pluralism entails "not competition but cooperation", both inter and intra religious groups.

The Canadian constitution, the Canadian Charter of Rights and Freedoms and Canadian case law attempts, not always successfully, to achieve a goal of religious pluralism, allowing each Canadian, individually, to practice their spirituality and faith, while recognizing, respecting and encouraging others to do the same, even though differently, as a different interpretation or path to the same end. This concept attempts to allow each individual to hold their own personal beliefs sacrosanct, while appreciating and respecting those of others.
A significant example of this religiously plural intent in the Canadian constitution is found in section 93(1) of the Constitution Act, 1867:
"In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions:-
(1) Nothing in any such Law shall prejudicially affect any right or privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union".

It is generally agreed that Confederation would not have been achieved in Canada without the protections accorded to denominational or separate schools that were forged largely by D'Arcy McGee in 1864 and Alexander Galt in 1866. The most often quoted excerpt to this effect is the speech in the House of Commons of Prime Minister Sir Charles Tupper in 1896:
"...I say it within the knowledge of all these gentlemen ... that but for the consent to the proposal of the Hon. Sir Alexander Galt, who represented especially the Protestants of the Great Province of Quebec on that occasion, but for the assent of that conference to the proposal of Sir Alexander Galt, that in the Confederation Act should be embodied a clause which would protect the rights of minorities, whether Catholic or Protestant, in this Country, there would have been no Confederation .... I say, therefore, it is important, it is significant that without this clause, without this guarantee for the rights of minorities being embodied in that new constitution, we should have been unable to obtain any confederation whatever" (Debates of the House of Commons, March 3, 1896, col. 2719-2724).

That provision which applies in Ontario, was modified for Manitoba by the Manitoba Act, 1870, for Alberta by the Alberta Act, 1905 and for Saskatchewan by the Saskatchewan Act, 1905. It applied in Quebec until 2000 when it was removed by constitutional amendment. A similar provision as set out in Newfoundland's Terms of Union applied until 1998, when also removed by constitutional amendment. It remains protected in section 29 of the Canadian Charter of Rights and Freedoms:
"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."

Distinction from the American Approach
The American Constitution, as it addresses fundamental rights, is based interpretively on the words in the Declaration of Independence, July 4, 1776:
"We hold these truths to be self-evident, that all men are created equal; that they are endowed by

their creator with certain unalienable rights; that among these are life, liberty, and the pursuant of happiness."
Life, liberty and the pursuant of happiness are all individualistic rights, granted to persons, enforceable by persons on an individual basis.
On the other hand, the animating words, describing the powers of the Canadian federal government in section 91 of the Constitution Act, 1867, are:
"It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order and Good Government of Canada...".
Peace, order and good government are collective rights, possessed by all of the peoples of Canada, commonly in a federal system.
The First Amendment to the Constitution of the United States, the "separation of Church and state" pronouncement, reads in part as follows:
"Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof...".
The United States Supreme Court in Thomas v. Indiana Employment Review Board, 450 US 707 (USSC, 1981) in interpreting these American constitutional provisions adopted a subjective, personal and deferential definition of freedom of religion, centered upon sincerity of belief:
"The guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect ....Courts are not arbiters of scriptural interpretation" (quoted in Syndicit Northcrest c. Amselem, para. 45).
A similar conclusion was reached in Frazee v. Illinois Dept of Employment Security, 489 US 829 (US Ill. S.C., 1989).
Canadian Religious Pluralism is different than the American Separation of Church and State

As a result, the Supreme Court of Canada has indicated in Big M Drug Mart Ltd. [1985] 1 S.C.R. 295, that "recourse to categories from the American jurisprudence is not particularly helpful in defining the meaning of freedom of conscience and religion" in Canada (para. 105).

The Supreme Court of Canada addressed the distinction between the American constitutional protection in the area of conscience and religion and that given by the Canadian Charter of Rights and Freedoms in R. v. Videoflicks Ltd. ("Edwards Books"), [1986] 2 S.C.R. 713 where it acknowledged: "the difference between the Canadian and American constitution is not just in respect of the wording of the provisions relating to religion, but also regarding the absence of a provision such as s. 1 of the Canadian Charter in the American instrument" (para. 86). It acknowledged that when strictly read, the American Constitution asserted "that First Amendment rights were absolute, that is, not subject to the sort of balancing which is undeniably required in Canada under s. 1 of the Charter " (para. 93), even though in addressing freedom of religion arguments in the United States, the Supreme Court there "was engaged in the balancing process which, under a constitution like Canada's, would properly be dealt with under a justificatory provision such as s. 1" (para. 94).

The importation of American, individualistic fundamental freedoms which are absolutist in nature, do not have a "justification" exception, and are based upon an express separation of church and state, are therefore difficult to transport into a Canadian understanding, which is traditionally collective in nature, subject, however, to a degree of individualization expressed in the Canadian Charter of Rights and Freedoms, but modified by a justification for breach of rights in section 1 of the Charter, without

an express provision of separation of church and state, and based upon an historic religiously plural experience and intent.

Conclusion

Canadian society, informed by the Canadian constitution, is one which values tolerance, multiculturalism, respect for minorities and respect for both collective and individual rights. Canadian emphasis on religious pluralism, encouraging and respecting a diversity of religions or faiths and active engagement in understanding of religious differences is reinforced by the constitutional text and case law interpretations. Religious pluralism entails cooperation and understanding between religious denominational groups, respect for and encouragement of beliefs, and the holding of those religious differences in relationship. Religious rights in Canada are a product of Canadian legal sociology, the addition of individual rights and protections in sections 2 through 15 of the Canadian Charter of Rights and Freedoms, as modified and balanced by the “justification” section, section 1, and the attempt of the courts in this country to respect "sincere belief” without engaging the secular courts in the quagmire of “validity” of religious beliefs. That is the quintessential Canadian way.

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