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RELIGIOUS FREEDOM – HOW FAR DOES IT EXTEND?

Freedom of conscience and religion is one of the fundamental freedoms enshrined in the *Canadian Charter of Rights and Freedoms*. Religion is also protected under human rights legislation. For instance, in Alberta, discrimination on the basis of religious beliefs is prohibited under the *Alberta Human Rights Act*.

The scope of religious freedom and the protection of religious beliefs has been considered in numerous cases over the years. Shortly after the Charter was enacted, the Supreme Court of Canada considered the scope and application of the fundamental freedom of conscience and religion in *Big M Drug Mart*. In that case, Big M Drug Mart was charged with being open on Sunday, in violation of the *Lord's Day Act*. At paragraphs 94-95, the Court described freedom of religion as:

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 characterized by the absence of coercion or constraint. [...] 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 to be forced to act in a way contrary to his beliefs or his conscience.

The Court discussed the purpose of the freedom at paragraph 123:

Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic 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.

In the years since *Big M Drug Mart*, the courts have continued to consider many interesting arguments involving freedom of religion and religious protections. For instance, in 2017, the Supreme Court of Canada in *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)* considered the question of whether a ski resort project that had received Ministerial approval violated the Appellant First Nation's constitutional right to freedom of religion. The Ktunaxa's traditional territories included an area of spiritual significance as it was home to one of its principal spirits, Grizzly Bear Spirit. The Respondent Glacier Resorts had sought and received government approval to build a year round ski resort in the area. The Ktunaxa were consulted but ultimately adopted the position that accommodation was impossible because the project would drive Grizzly Bear Spirit away from the area, thereby irrevocably impairing their religious beliefs and practices. After several efforts to continue consultation proved fruitless, the Minister approved the project. The Ktunaxa objected to the approval and alleged the project violated their constitutional right to freedom of religion.

The Court began its analysis by reviewing the scope of freedom of religion. The freedom of religion enshrined in s. 2(a) of the Charter has two aspects – the freedom to hold religious beliefs and the freedom to manifest those beliefs. At paragraph 68, the Court confirmed the two part test to determine whether there has been an infringement of a claimant's right to freedom of religion:

To establish an infringement of the right to freedom of religion, the claimant must demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned state conduct interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief.

In the case before it, the Court found, without hesitation, that the first part of the test was met. The Ktunaxa sincerely believed in the existence and importance of Grizzly Bear Spirit and believed the development would drive the spirit away. However, the second part of the test was not met in the case. The Ktunaxa had to demonstrate that the Minister's decision to approve the development interfered with either their freedom to believe in the Grizzly Bear Spirit or their freedom to manifest that belief. The Court found that it did neither of those things. In essence, the Ktunaxa's claim was that s. 2(a) of the Charter protected the presence of Grizzly Bear Spirit in the area. The Court considered this to be a novel claim and declined the invitation to extend the scope of s. 2(a) that far, noting at paragraph 71:

[...] The state's duty under s. 2(a) is not to protect the object of beliefs, such as Grizzly Bear Spirit. Rather, the state's duty is to protect everyone's freedom to hold such beliefs and to manifest them in worship and practice or by teaching and dissemination. In short, the *Charter* protects the freedom to worship, but does not protect the spiritual focal point of worship.

The court also expressed concern about requiring judicial scrutiny of religious beliefs, noting that such an inquiry would be inconsistent with the principles underlying freedom of religion, at paragraph 72:

The extension of s. 2(a) proposed by the Ktunaxa would put deeply held personal beliefs under judicial scrutiny. Adjudicating how exactly a spirit is to be protected would require the state and its courts to assess the content and merits of religious beliefs.

Ultimately the court dismissed the appeal, finding that the Minister's decision did not violate the Ktunaxa's freedom of religion.



The Ontario Court of Appeal decision in *McKitty v. Hayani*, released in October of this year, considered the *Ktunaxa* decision. That case involved a freedom of religion challenge to the medical criteria accepted by Ontario's common law and legislation when determining whether a person has died. The case arose when the Appellant was found unconscious on a sidewalk. She was taken to hospital and found to have suffered significant brain damage. Ultimately, the Respondent (the doctor) conducted diagnostic tests, determined that the Appellant met the neurological criteria for death, and completed a death certificate. The Appellant (by her parents as her substitute decision makers) claimed that the adoption of neurological criteria to establish death violated the freedom of religion of those who held a religious belief that life only ends when the heart stops beating.

The Appellant sought, among other things, an order declaring that she was not dead. They argued that because under the precepts of her Christian faith she was still alive, she should continue to receive medical treatment. The applications judge dismissed the application.

The Appellant's heart had ceased beating prior to the hearing of the appeal, making the appeal moot, but the Court of Appeal nevertheless decided, and ultimately dismissed, the appeal. The Court accepted the use of neurological criteria to establish death under common law. However, it found that the applications judge had erred on a number of grounds, including those relating to the application of the Charter rights (although the Court did find that the Respondent was not acting as a government agent and thus the Charter did not apply to him).

The Court considered whether the first part of the two part test (quoted from *Ktunaxa* above) had been met, quoting from *Big M Drug Mart* at paragraph 63:

The protection of religious conscience is not a matter of protecting lifestyle choices, but of not interfering with what a person understands to be an obligation, regardless of whether it is something she desires or would much rather avoid. For this reason, "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 to be forced to act in a way contrary to his beliefs or his conscience".

Although the record of the Appellant's beliefs was sparse, the Court found it was sufficient to establish that the Appellant held the beliefs attributed to her by her parents, that those beliefs were sincerely held, and that they had the requisite nexus with religion to come within the protections of s. 2(a) of the Charter. The Court was unable to properly consider the second part of the test however due to deficiencies in the record caused by the absence of the Attorney General of Ontario which had declined to participate. In its decision, at paragraphs 70-72, the Court also expressed concerns about judicial scrutiny of religious beliefs, acknowledging the challenges faced by judges tasked with determining issues of freedom of religion:

Parties should not assume that judges share or can readily understand their religious commitments without assistance. As Prof. Dwight Newman recently cautioned in "Judicial Method on Rights Conflicts in the Context of Religious Identity" in Iain T. Benson & Barry W. Bussey, eds., *Religion, Liberty and the Jurisdictional Limits of Law* (Toronto: LexisNexis, 2017) 245 at p. 257:

[C]ourts within a more secularized society ... may simply not have sufficiently extensive knowledge about religion. Tests in the religious-freedom context are often designed so as to avoid the need for judges to inquire into the details of

religious beliefs ... but some understanding of religious beliefs will nonetheless be unavoidable in various contexts. Canadian courts have largely not tended to offer discussions of religion that show much understanding of religion's deep significance to those of faith.

[...]

Without adequate evidence, judges will not be well-placed either to provide an adequate description of a claimant's beliefs, or to understand the significance of the limitation from the perspective of the rights claimant. This places a judge in a difficult position throughout the constitutional analysis, but particularly when assessing whether a limit on freedom of religion is justified.

A recent case that potentially looks to expand the scope of the human rights protections involving religion stems from the Ontario Human Rights Commission's (OHRC) statement of the definition of "creed". While "creed" is often thought to be related to, or sometimes even synonymous with religion, the OHRC has made it clear that is not the case. "Creed" in Ontario's human rights legislation has been explained by the OHRC as follows:

Creed may also include non-religious belief systems that, like religion, substantially influence a person's identity, worldview and way of life. The following characteristics are relevant when considering if a belief system is a creed under the code. A creed:

- Is sincerely, freely and deeply held
- Is integrally linked to a person's identity, self-definition and fulfilment
- Is a particular and comprehensive, overarching system of belief that governs one's conduct and practices
- Addresses ultimate questions of human existence, including ideas about life, purpose, death, and the existence or non-existence of a Creator and/or a higher or different order of existence
- Has some "nexus" or connection to an organization or community that professes a shared system of belief.

Earlier this year, a firefighter in Ontario brought a human rights complaint against his employer alleging that the employer's failure to accommodate his request for vegan food constituted discrimination on the basis of creed. He claimed that his personal commitment to ethical veganism was a sincerely held belief that fell within the definition of creed under this new, broad definition. The employer denied that veganism was entitled to protection. This case has yet to be decided but it will be interesting to see how the definition of creed is applied.

A review of these and other recent cases demonstrates that freedom of religion and religious protections remain an important issue today. While the protection afforded to religion is broad, as the case law demonstrates, it is not unlimited and is subject to limitations and justification. It will be interesting to watch the law in this area continue to develop.