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Reasonable Limits in a Free and Democratic Society

In the Legally Speaking article published in the fall edition of the Catholic Dimension, we explored the concept of freedom of conscience and religion as guaranteed in section 2(a) of the Canadian Charter of Rights and Freedoms and reviewed a number of the primary cases addressing both freedom of religion and freedom of conscience in Canada.

However, in Canada such freedoms are not absolute. They are moderated and balanced as against the “collective good” by the justification provisions of section 1 of the Charter, which both guarantees the rights and freedoms set out in the remaining sections of the Charter and constrains them to reasonable limits expected in a free and democratic society:

“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.”

Legal proof pursuant to section 1 is divided into two criteria justifying the breach of other sections of the Charter: the “reasonable limits prescribed by law” requirement and the “demonstrably justified in a free and democratic society” criteria.

On the “reasonable limits prescribed by law” portion of section 1, the party wishing to rely upon justification for the breach of a Charter right, must show that the provisions of the imposed law are “reasonably accessible to those which it affects”, precise in that they enable those whom it affects to regulate their conduct pursuant to the law, are not vague, in that they provide a sufficiently clear standard, and are a proper exercise of discretion, in that the discretion granted by the law is appropriately constrained by legal standards (*Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2009 S.C.C. 31).

Further, a section 1 Charter defence requires proof on the “demonstrably justified in a free and democratic society” portion of section 1 that the provisions of the law are pressing and substantial, that the means employed in the law are rationally connected to that objective, minimally impair the rights of those which it adversely affects and produce salutary effects which outweigh the deleterious effects of a breach (*R v. Oakes*, [1986] 1 S.C.R. 103, and *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835).

The leading case on the application of “justification” pursuant to section 1 of the Charter, of a breach of the guarantee of freedom of conscience and religion under section 2(a) of the Charter is *Hutterian Brethren of Wilson Colony v. Alberta*, [2009] 2 S.C.R. 567. In that case, the Province of Alberta required that all driver’s licenses should have a photograph of the driver, which photograph would be kept in the province’s facial recognition databank for the purposes of identification and prevention of identity theft. The members of the Wilson Hutterite Colony objected to having their pictures taken on

the basis that it offended the second commandment:

“You shall not make for yourself a graven image, or any likeness of anything that is in heaven above” (Exodus 20:1-17, RSV).

The most comprehensive discussion of the section 2(a) guarantee of freedom of religion in this case came in one of the dissenting decisions, that of Madam Justice Abella:

“Freedom of religion is a core, constitutionally protected democratic value. To justify its impairment, therefore, the government must demonstrate that the benefits of the infringement outweigh the harm it imposes”.

Justice Abella said, however, that there were circumstances where “the nature of the particular religious duty brings it into serious conflict with countervailing and competing social values and imperatives” requiring that “religious freedoms (be) subject to such limitations ‘as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others...’.” In allowing for some impairment of the rights to conscience and religion, she said:

“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 ... 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’ (quoting from Big M Drug Mart).”

Justice Abella said that both individual and group aspects of freedom of conscience and religion were important to consider, including “the right to manifest one’s religion in community with others”. This recognition that freedom of conscience and religion is both individual and communal was concurred in by the majority of the Court which quickly found that the Hutterian Brethren’s rights to freedom of religion had been infringed given that they sincerely held “a belief or practice that has a nexus with religion; and ... the impugned measure interferes with (their) ability to act in accordance with (their) religious beliefs in a manner that is more than trivial or insubstantial”.

However, the majority decision, in applying the Oakes/Dagenais test set out above, found:

“The goal of minimizing the risk of fraud associated with driver’s licenses is pressing and substantial. The limit is rationally connected to the goal. The limit impairs the right as little as reasonably possible in order to achieve the goal; the only alternative proposed would significantly compromise the goal of minimizing the risk. Finally, the measure is proportionate in terms of effects: the positive effects associated with the limit are significant, while the impact on the claimants, while not trivial, does not deprive them of the ability to follow their religious convictions”.

As a result, the limits placed on the Hutterian Brethren’s freedom of religion by the requirement to be photographed if they wished to hold a driver’s license, was “justified” under section 1 of the Charter. Another case before the Supreme Court of Canada which addressed section 2(a) protection but justified a breach of freedom of conscience and religious rights by reference to section 1 was *Whatcott v. Saskatchewan Human Rights Tribunal*, 2013 SCC 11. In that case, Mr. Whatcott distributed flyers in Regina and Saskatoon targeting homosexuals. The Saskatchewan Human Rights Commission determined that the material “promoted hatred against individuals because of their sexual orientation”. One of the defences raised was freedom of religion, on the basis that:

“objection to same-sex sexual activity is common among religious people. They object because they believe this conduct is harmful; and many religious people also believe that they are obligated to do good and warn others of the danger”.

The Supreme Court of Canada dealt with the freedom of religion argument briefly. They said that “the protection provided under s. 2(a) should extend broadly”, that the “Court has consistently refrained from formulating internal limits to the scope of freedom of religion in cases where the constitutionality of a legislative scheme was raised”, found that the claimant sincerely held a belief or practice that had a nexus with his religion, and that the Human Rights provision interfered with Mr. Whatcott’s ability to act in accordance with his religious beliefs, which interference was more than trivial or insubstantial. As a result, the Court found a breach of the guarantee of conscience and religion and turned to the section 1 “justification” analysis.

Applying the Oakes/Dagenais test set out above, the Supreme Court of Canada found that the breach of this fundamental freedom was justified, recognizing that “s. 1 both guarantees and limits Charter rights”, and in the present circumstances:

“it does not matter whether the expression at issue is religiously motivated or not. If, viewed objectively, the publication involves representations that expose or are likely to expose the vulnerable group to detestation and vilification, then the religious expression is captured by the legislative prohibition”.

A similar result was reached by the Supreme Court of Canada in *Multani c. Marguerite-Bourgeois (Commission scolaire)*, [2006] 1 S.C.R. 256 where a Sikh boy was initially prohibited from wearing a kirpan in public school. The Court acknowledged that an absolute prohibition of a mandatory religious requirement was a breach of the section 2(a) guarantee of freedom of religion, that his belief was sincere and that the infringement was neither trivial nor insignificant. The issue then turned to whether the prohibition was justified under section 1. The Court found that the school boards’ object to provide a safe and secure school environment was pressing and substantial, and the prohibition against the wearing of a kirpan had a rational connection with that object, but that the absolute prohibition against wearing a kirpan did not minimally impair the student’s right as it stifled the promotion of values, multiculturalism, diversity and the development of an educational culture respectful of the rights of others. Finally, the deleterious effects of prohibiting the wearing of a kirpan outweighed the salutary effects such that this infringement was not justifiable in a free and democratic society.

An identical result was held in the case of a mature 14 year old Jehovah witness girl with Crohn’s disease and serious dilution of hemoglobin after initial treatment with IV fluids, refusing a blood transfusion for religious reasons, which was administered under Court order at the request of the Director under the Manitoba Child and Family Services Act. In *Manitoba (Director of Child & Family Services) v. C. (A.)*, [2009] 2 S.C.R. 181 the Court found:

“The limit on religious practice imposed by the legislation emerges as justified under s. 1”.

The Canadian Charter promotes the active engagement of diversity in religious views, the promotion and respect of all religious views in relationship to one another; it promotes religious pluralism, rather

than relativism or syncretism. Its protection of conscience and religion it is both individual and collective in nature, not based upon an expressed separation of Church and state, and plural in experience and intent. It recognizes a broad definition of both religion and freedom of religion, and places particular emphasis on the protection of the minority with respect to religious rights. However, freedom of religion in Canada is not absolute. It is subject to justification, in that rights may be infringed where that infringement is pressing and substantial, rationally connected to a legitimate objective, minimally impairs the rights of those which it adversely affects, and where the salutary effects of the breach of rights outweigh the deleterious effects. In this very Canadian way, the individualistic protection of rights in the Charter is balanced by the traditional communal, pluralistic values of the Canadian Constitution.