

## The Rights of Religious Minorities

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Résumé de l'article

A travers l'évolution jurisprudentielle, l'auteur retrace la protection accordée au principe fondamental de la liberté de religion. Quel fut l'apport de la Charte canadienne des droits à cet égard ? La religion y fait l'objet de deux dispositions, soit l'article 2, et l'article 15 où est garanti le droit à l'égalité. La Charte se distingue des précédentes déclarations de droits en ce qu'elle insère la liberté de religion dans la Constitution du pays.

## The Rights of Religious Minorities

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Gordon FAIRWEATHER \*

*À travers l'évolution jurisprudentielle, l'auteur retrace la protection accordée au principe fondamental de la liberté de religion. Quel fut l'apport de la Charte canadienne des droits à cet égard? La religion y fait l'objet de deux dispositions, soit l'article 2, et l'article 15 où est garanti le droit à l'égalité. La Charte se distingue des précédentes déclarations de droits en ce qu'elle insère la liberté de religion dans la Constitution du pays.*

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I think preparing a short essay is rather like embarking upon a scientific experiment. When I was asked to give a paper on freedom of religion and minorities, I thought I knew what I was going to say, yet the further I ventured into the subject, the more I got diverted, or put another way, the more possibilities presented themselves. I am glad to be able to reflect upon an issue rather than always having to respond to a complaint of discrimination.

Group or minority rights inherent in language and religion have always intrigued me but merely saying this must not obscure the fact that the bargain that became Canada would not have been possible without an acceptance, by the majority of the population, of these fundamental entitlements of a minority.

Then, too, is it not ironical that some of the most egregious denials of freedom of religion came at the hands of a Quebec majority which had itself been the beneficiary of the freedom to practice and to profess its faith without interruption since 1760?

I want to thank Professor Irwin Cotler, of the Faculty of Law of McGill University, from whose work I have borrowed extensively.

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Professor Cotler provides us with an elegant and persuasive analysis of the subject in a chapter entitled, "Freedom of Conscience and Religion in Canadian Law" in *Canadian Charter of Rights and Freedoms: Commentary*,<sup>1</sup>.

The theme of the Third International Conference on Constitutional Law is *The Rights of Minorities* and my topic, the *Rights of Religious Minorities*, enables me to range more widely than would have been possible if the focus had been confined to individual rights.

It is reported in *The Review, International Commission of Jurists*<sup>2</sup> that Mr. (Justice) Jules Deschênes has been asked to draft a definition of the term "minority" in relation to article 27 of the *International Covenant on Civil and Political Rights*.

Article 27 says :

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The Review says: Mr. (Justice) Deschênes suggested the elimination from the definition of indigeneous populations, "non-citizens" and matters concerning the relationship between the individual and group to which he belongs. He proposed the following definition for discussion :

A group numerically smaller than the rest of the population of a state, in a non-dominant position, whose members — being citizens of the state — possess ethnic, religious or linguistic characteristics differing from those of the other members of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions or language.

Although the definition remains under discussion, it does provide a useful starting point for my paper and perhaps for others of the Conference.

By coincidence section 27 of the *Canadian Charter of Rights and Freedoms* also refers to minority heritage thus :

This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Although section 27 is interpretive and does not spell out any specific guarantees of what is meant by the phrase the "multicultural heritage of Canadians", it is an important departure in the fashioning of a constitution. The Charter must be interpreted in a manner consistent with the preservation and enhancement of that heritage.

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1. W.S. TARNOPOLSKY et G.-A. BEAUDOIN, *Canadian Charter of Rights & Freedoms: Commentary*, Carswell, Toronto, 1982, p. 185-211.

2. *The Review, International Commission of Jurists*, No. 33, Dec. 1984, p. 38.

Mr. Justice Walter Tarnopolsky did just that in the case of *Re Regina and Videoflicks Ltd.*<sup>3</sup> when, speaking for a five judge Ontario Court of Appeal, he said :

It is [...] the clear purpose of s. 27 that, where applicable, any right or freedom in the Charter shall be interpreted in light of this section. Religion is one of the dominant aspects of a culture which it is intended to preserve and enhance. [...]

Section 27 determines that ours will be an open and pluralistic society which must accommodate the small inconveniences that might occur where different religious practices are recognized as permissible exceptions to otherwise justifiable homogeneous requirements.

The Charter contains two specific references to religion viz :

Fundamental freedoms

2. Everyone has the following fundamental freedoms :

(a) freedom of conscience and religion ;

(...)

Peter Hogg in *Canada Act 1982 Annotated*<sup>4</sup> reminds us that :

The reference to "conscience" is not found in s. 1(c) of the Canadian Bill of Rights or in the first amendment of the United States constitution. It is perhaps designed to protect systems of belief such as atheism or agnosticism, or possibly even quasi-religious cults, which might not be characterized as "religions". A possible application of "freedom of conscience and religion" is to resist the application of laws to practices allegedly demanded by a particular religion, although the practices are proscribed by law. For example, even in the absence of the Charter, Jehovah's Witnesses have successfully claimed exemption for their distribution of tracts from a municipal street by-law (*Saumur v. City of Québec*, [1953] S.C.R. 299); Hare Krishnas have unsuccessfully sought exemption for their chanting from a municipal anti-noise by-law (*R. v. Harrold* (1971), 19 D.L.R. (3d) 471 (B.C.C.A.)); and Hutterites have unsuccessfully sought exemption for their practice of communal landholding from a landholding statute. (*Walter v. A.G. Alta.*, [1969] S.C.R. 383). Sunday observance law has already been challenged as violating the "freedom of religion" guarantee of the Canadian Bill of Rights and the law has been upheld on the curious ground that its "practical result" is "purely secular and financial" (*Robertson and Rosetanni v. R.*, [1963] S.C.R. 651).

Section 15, the Equality Section, states that :

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 [...] religion...

3. *Re Regina and Videoflicks Ltd.*, (1984) 9 C.R.R. 193, p. 224 (Ont. C.A.).

4. P.W. HOGG, *Canada Act 1982 Annotated*, Toronto, Carswell, 1982, p. 15.

The Charter also includes the cautionary provision, 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 rights are those guaranteed by section 93 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,
- (2) All the Powers, Privileges and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissident Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec.

Subsection (3) provides an appeal to Governor in Council if Legislature purports to pass an act affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects...

By subsection (4), Parliament is authorized to act if a province fails to respond as per subsection (3).

Emancipation for Canadian Catholics has existed for two and one quarter centuries — since the Quebec Act of 1760.

Entitlements for Jews, both to practice their faith and to hold public office, also came about much earlier in Canada than in the United Kingdom.

Fundamental rights pertaining to language and religion always have been essential ingredients of Canadian federalism and provide an interesting term of reference to enable Canadians to understand and help interpret the preoccupation of many socialist countries of the Eastern Bloc for the supremacy of group rights over individual rights. As late as 1977, a researcher on the staff of the Pepin-Robarts Task Force on Canadian Unity, asked the Canadian Human Rights Commission for assistance in coming to terms with the concept of group rights. For me, language and religion seemed such obvious examples as to raise questions in my mind as to whether I had missed something.

Professor Irwin Cotler, in a comprehensive review of Freedom of Assembly, Association, Conscience and Religion in *Canadian Charter of Rights and Freedoms: Commentary*<sup>5</sup>, makes the point :

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5. *Supra*, note 1, p. 124.

Any inquiry into constitutional process in Canada since 1867 — and even into much of contemporary constitutional discourse — would expose a continuing preoccupation with the powers of government at the expense of the rights of peoples. More particularly, traditional constitutional analysis and reform has revolved around the division of powers between the federal and provincial governments, as distinct from concern with limitations on the exercise of power regardless of government. The result is that the powers of government have preceded and otherwise obscured the rights of people, when it is the rights of people that should precede the powers of government.

I acknowledge, sadly, that this result is inevitable in a federal state where the complexities inherent in the division of power tend to cloud the fundamental principle sought to be asserted. The good news for the preservation of the principle of freedom of religion is that the Charter should greatly reduce the need to locate a particular right jurisdictionally. The “double override” of parliamentary supremacy and legal federalism has been relegated to a secondary role in constitutional interpretation.

Might I go so far as to predict that as a consequence of the supremacy of the Charter, language used by judges may assume a new eloquence of form and style. Although it would be hard to match the force and eloquence of Chief Dickson as he defined the meaning of freedom of religion in the case of *R. v. Big M Drug Mart*<sup>6</sup>, pre-Charter jurisdictional searches did not lend themselves to ringing declarations about rights and freedoms — finding one’s way out of the maze of s. 91 and 92 of the *Constitution Act of 1867* left little scope for poetry. As Tom Berger put it in *Fragile Freedoms*<sup>7</sup>, Canada is an idea that goes deeper than the division of powers.

The 1950’s proved to be a high water mark for the Supreme Court of Canada as it sought to assert an independent constitutional existence and value for certain “preferred” fundamental freedoms. Freedom of religion provided several opportunities for this assertion and the judgments of Mr. Justice Ivan Rand analyzed the origins of fundamental rights as being essential to the bargain from which Canada sprang.

I return to Professor Cotler who said:<sup>7a</sup>

An excellent case-study of legal federalism as the organizing frame of reference for the determination of “religion”, and the confusion rendered thereby, can be found in the case of *Saumur v. City of Québec*<sup>8</sup>.

The case dealt with a by-law of the city which forbade the distribution in the street of any book, pamphlet, circular, tract, etc., without prior permission of

6. *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295.

7. T.R. BERGER, *Fragile Freedoms: Human Rights and Dissent in Canada*, Toronto, Irwin Publishing, 1982, p. xviii.

7a. *Supra*, note 1, p. 196 to 199.

8. [1953] 2 S.C.R. 299.

the Chief of Police. A Witness of Jehovah challenged the validity of the by-law on the grounds that, *inter alia*, it abridged freedom of religion. In a five to four decision, the Supreme Court held that the by-law was invalid.

Unfortunately, it is almost impossible to determine the essential ratio of the decision, dramatizing the problem of the "double override". Professor (now Chief Justice) Laskin summed it up in 1959 as follows:

The awkward result of the case was that while *six* Justices *denied* provincial competence at least in *some circumstances*, *five* Justices *affirmed* provincial competence, at least in *some circumstances*; and while *four* Justices affirmed *federal* competence in some circumstances, *five* Justices denied federal competence at least in some circumstances; and yet only three Justices denied any federal power while four Justices denied any provincial power.<sup>9</sup> [emphasis added]

Another way of summarizing the result of the case is that four judges held that the by-law was *ultra-vires* as being in relation to freedom of religion and therefore beyond provincial jurisdiction, four judges held that it was *intra vires*, but only two held that freedom of religion was within provincial jurisdiction. The other two held that the by-law was not in relation to freedom of religion, but that it was *intra vires* since it was in relation to the use of streets, parks, and sidewalks (s. 92.13). The swing vote was cast by Chief Justice Kerwin, who held that the by-law was *intra-vires* but in breach of the Freedom of Worship Act of 1851 and therefore invalid. Accordingly, Jehovah's Witnesses, and for that matter any religious group, would not have to seek the permission of the Chief of Police for the distribution of their literature.

The confusion seemed to abate somewhat in the *Birks*<sup>10</sup> case, where the Supreme Court of Canada, in a unanimous decision, came somewhat closer to resolving the jurisdictional issue respecting "religion" by deciding that the matter of "holy" day observance is within the criminal law power and not within provincial jurisdiction. In a way, this was merely an extension of the decision in 1903 of the Judicial Committee of the Privy Council that "Sunday Observance" legislation was in relation to criminal law.<sup>11</sup> In any case, although only three of the nine judges went so far as to state that the provinces could not legislate with respect to freedom of religion, the other six making no statement on this point, many Canadian constitutional experts have argued that this is the clear effect of the case.<sup>12</sup>

The only decision of the Supreme Court of Canada respecting "religion" under the Canadian Bill of Rights lends further support to the view that "freedom of religion" is essentially within the jurisdiction of Parliament. In 1963, in the case of *Robertson and Rosetanni v. The Queen*,<sup>13</sup> the Supreme Court dealt with the effect of the Canadian Bill of Rights, and the declaration therein on freedom of religion, on the Lord's Day Act. Although the majority held that the Bill of Rights did not repeal the Lord's Day Act, they also declared that the position

9. B. LASKIN, "An Inquiry Into the Diefenbaker Bill of Rights, (1959) 37 Can. Bar Rev. 77, p. 116-117.

10. *Henry Birks & Sons (Montreal) Ltd. v. Montreal*, [1955] S.C.R. 799.

11. *Attorney General Ontario v. Hamilton Street Ry.*, [1903] A.C. 524.

12. See, for example, the symposium in (1959) 37 Can. Bar Rev.

13. [1963] S.C.R. 651.

of religious freedom in the Canadian system was that outlined by Mr. Justice Rand in the *Saumur*<sup>14</sup> case, who was one of the four who held it to be beyond the jurisdiction of the provinces, at least in the sense of laws "in relation thereto". Admittedly, the judgment in this case itself is somewhat confusing. In the *Robertson*<sup>16</sup> case the court looked at the effect of the Lord Day's Act, considered it to be secular, and held that it did not conflict with freedom of religion, and by implication, was not federal.

Finally, there are some important *dicta*<sup>17</sup> in the *Saumur* case by Rand and Locke JJ. that may be relevant, if not persuasive, not only regarding the interpretation and application of freedom of conscience and religion under the Charter, but for s. 2 as a whole. Indeed, when these *dicta* in the *Saumur* case alone, are joined together with those in *Alberta Press*,<sup>18</sup> *Winner*,<sup>19</sup> *Switzman*,<sup>20</sup> *Roncarelli*,<sup>21</sup> *Henry Birks*<sup>22</sup> and, to a lesser extent, *Oil Chemical*<sup>23</sup> and *McKay v. The Queen*,<sup>24</sup> there is a formidable jurisprudence that may be invoked as authoritative precedent under the Charter. Witness the following:

*On Freedom of Religion :*

From 1760... to the present... religious freedom has... been recognized as a principle of fundamental character; and although we have nothing in the nature of an established church, that the untrammelled affirmations of religious belief and its propagation, personal or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable.<sup>25</sup>

*On Freedom of Speech & Religion :*

[F]reedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order.<sup>26</sup>

[...]

Also, although not generally considered an exposition of the implied bill of rights theory, Mr. Justice Casey's opinion in *Chabot v. School Commissioners of Lamorandière*<sup>27</sup> is deserving of mention here. The Quebec Court of Appeal held that the Education Act did not apply as to deny the right to control the

14. *Supra*, note 8.

15. *Supra*, note 10.

16. *Supra*, note 13.

17. *Supra*, note 8.

18. *Re Alberta Statutes*, [1938] S.C.R. 100.

19. *A.G. Ont. v. Winner*, [1954] A.C. 541 (P.C.).

20. *Switzman v. Ebling*, [1957] S.C.R. 285.

21. *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

22. *Supra*, note 10.

23. *Oil, Chemical and Atomic Wkrs. International Union v. Imperial Oil Ltd.*, (1961), 30 D.L.R. (2<sup>nd</sup>) 657 (B.C.S.C.).

24. [1965] S.C.R. 798.

25. *Supra*, note 8, p. 327.

26. *Id.*, p. 329.

27. (1957), 12 D.L.R. (2d) 796 (Québec Q.B.).



religious education of his children. Thus a Jehovah's Witness parent was permitted to compel the school authorities in Quebec to accept his children and to insist that they be exempted from Roman Catholic religious instruction.

After citing the dictum of Rand J. in the *Saumur*<sup>28</sup> case, Casey J. said :

What concerns us now is the denial of appellant's rights of inviolability of conscience, a denial that is coupled with or effected by... active interference with his right to control the religious education of his children... the rights of which we have been speaking, find their source in natural law... if these rights find their source in positive law they can be taken away. But if, as they do, they find their existence in the very nature of man, then they cannot be taken away and they must prevail should they conflict with the provisions of positive law.<sup>29</sup>

Freedom of conscience and religion under the Charter may not be "inalienable" in the sense in which Casey J. has spoken of them, but they are certainly more fundamental under the Charter than the ordinary positive law, which Casey J. felt "can be taken away". Admittedly, the new override of s. 33 coupled with the s. 1 limitations clause may yet create a new "double override"; and the "double override" of the past, while now contained, has not been removed. But a new order of fundamental freedoms has been entrenched. And it is to be hoped that the preferred freedoms will not be taken away, while freedom of conscience together with religion now has the distinguishable status of which Casey spoke.

At the second reading of the British North America Bill in the Imperial Parliament, on 19 February 1867, Lord Carnarvon who was sponsoring the measure, spoke as follows in reference to section 93 :

This clause has been framed after long and anxious controversy, in which all parties have been represented, and on conditions to which all have given their consent... and I am bound to add as an expression of my own opinion that the terms of the arrangement (for separate schools) appear to me to be both equitable and judicious.

Despite the fact that section 93 is really only a restatement of a statutory entitlement agreed to a century earlier, its inclusion in the *Constitution Act of 1867* did not end the debate. A bargain was renewed by Her Majesty's Protestant and Catholic subjects (to employ the term of the day) yet the equity and judiciousness of the bargain did not extend to protect the minorities who happened to be Witnesses of Jehovah.

The *War Measures Act* was utilized in both World Wars to jail Jehovah's Witnesses and censor and ban their publications. The *Criminal Code*, municipal by-laws, and liquor licensing statutes are but some of the

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28. *Supra*, note 8.

29. *Supra*, note 27, p. 807.

majoritarian compulsions utilized in an attempt to foreclose freedom to believe and to profess one's religion by a minority group.

Mr. Justice Walter Tarnopolsky has said :

The best testing of the standard of civil liberties in a society is the way that society treats its dissenters and minorities. Few dissenters, and no other religious minorities, have put Canada to the test quite so acutely in this century as have the Witnesses of Jehovah.<sup>30</sup>

To return to the *Big M Drug Mart Ltd.* case<sup>31</sup>, consider these paragraphs from the judgment of the Chief Justice :

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. But the concept means more than that.

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. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint...

By its decision the Supreme Court of Canada did not seek to emphasize individual rights at the expense of collective or minority rights. Canada has always been committed to the protection of both and despite what I believe to have been an overly differential approach to jurisdiction, an element of the bargain was recognition of the entitlement of a minority of Canadians to practice their religion. Federalism requires a balancing of individual and community interests. Homogeneity may have application to the cultures from whence Canadians sprang but it never found root in this new land.

Judge Rosalie Abella has provided me with an elegant aphorism with which to conclude this essay. "There is no absolute morality in majority interests, any more than there is in minority ones". Freedom of religion for individuals and for groups is now secure as part of the fundamental law of Canada.

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30. M.J. PENTON, *Jehovah's Witnesses in Canada: Champions of Freedom of Speech and Worship*, (1978) 59 *Can. Historical Review* 259 (Book Review).

31. *Supra*, note 6, p. 336.