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Freedom of Religion in Canada – The Principled and the Pragmatic

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Article abstract

While much of Canada's early commitment to religious freedom was simply a pragmatic compromise to ensure social peace and political stability, the Supreme Court of Canada in a series of judgments that pre-dated the Charter sought to articulate a principled account of religious freedom as an "original freedom" that is an important "mode[] of self-expression" and "the primary condition[] of the community life". This understanding of religious freedom shaped the Supreme Court of Canada's initial reading of freedom of conscience and religion protected by s. 2 (a) of the Canadian Charter of Rights and Freedoms. However, the story of religious freedom in Canada is not simply that of a linear progression from the pragmatic tolerance of religious minorities to the principled protection of the individual's religious freedom. In its subsequent s 2 (a) decisions, the Court began to read freedom of religion as a form of equality right that requires the state to remain neutral in religious matters. The state must not prefer the practices of one religious group over those of another and it must not restrict the religious practices of a group unless it has a substantial public reason to do so. Underlying the Court's commitment to religious freedom is a recognition of the deep connection between the individual and her/his spiritual commitments and religious community and a desire to avoid the marginalization of minority religious groups. Concerns about inclusion and social peace that lay behind the extension of religious tolerance in Canada's early history continue to be important in the contemporary justification and interpretation of religious freedom. The Court's commitment to state neutrality in religious matters requires it to distinguish between the private sphere of individual or group spiritual life and the sphere of public secular life. However, the line between these two spheres is contestable, moveable, and porous.

Freedom of Religion in Canada – The Principled and the Pragmatic

Richard Moon[*]

While much of Canada's early commitment to religious freedom was simply a pragmatic compromise to ensure social peace and political stability, the Supreme Court of Canada in a series of judgments that pre-dated the Charter sought to articulate a principled account of religious freedom as an "original freedom" that is an important "mode[] of self-expression" and "the primary condition[] of the community life". This understanding of religious freedom shaped the Supreme Court of Canada's initial reading of freedom of conscience and religion protected by s. 2 (a) of the Canadian Charter of Rights and Freedoms. However, the story of religious freedom in Canada is not simply that of a linear progression from the pragmatic tolerance of religious minorities to the principled protection of the individual's religious freedom. In its subsequent s 2 (a) decisions, the Court began to read freedom of religion as a form of equality right that requires the state to remain neutral in religious matters. The state must not prefer the practices of one religious group over those of another and it must not restrict the religious practices of a group unless it has a substantial public reason to do so. Underlying the Court's commitment to religious freedom is a recognition of the deep connection between the individual and her/his spiritual commitments and religious community and a desire to avoid the marginalization of minority religious groups. Concerns about inclusion and social peace that lay behind the extension of religious tolerance in Canada's early history continue to be important in the contemporary justification and interpretation of religious freedom. The Court's commitment to state neutrality in religious matters requires it to distinguish between the private sphere of individual or group spiritual life and the sphere of public secular life. However, the line between these two spheres is contestable, moveable, and porous.

Les premiers engagements du Canada en faveur de la liberté de religion résultaient majoritairement d'un compromis pragmatique visant à assurer la paix sociale et la stabilité politique, mais, dans une série de jugements antérieurs à la Charte, la Cour suprême du Canada a tenté de formuler une définition juste de la liberté de religion en tant que « liberté primordiale » qui constitue un important « mode […] d'expression » et la « condition fondamentale de [l']existence au sein d'une collectivité ». Cette conception de la liberté de religion a façonné l'interprétation que la Cour suprême du Canada a initialement adoptée quant à la liberté de conscience et de religion protégée par l'alinéa 2a) de la Charte canadienne des droits et libertés. Cependant, l'évolution de la liberté de religion au Canada — de la tolérance pragmatique de minorités religieuses à la protection raisonnée de la liberté de religion individuelle — n'a pas suivi une courbe linéaire. Dans ses décisions postérieures portant sur l'alinéa 2a), la Cour a commencé à assimiler la religion à une forme de droit à l'égalité qui exige que l'État demeure neutre en ce qui a trait aux questions de religion. L'État ne doit pas privilégier les pratiques d'un groupe religieux par rapport à celles d'un autre et ne doit pas restreindre les pratiques

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religieuses d'un groupe à moins d'avoir un motif majeur d'intérêt public de ce faire. La mission de la Cour en matière de liberté de religion tire sa source de la reconnaissance de l'attachement profond qui unit une personne à ses engagements spirituels et à sa communauté religieuse, ainsi que du désir d'éviter la marginalisation de groupes religieux minoritaires. Les préoccupations liées à l'inclusion et à la paix sociale à l'origine de l'élargissement de la tolérance religieuse dans les débuts de l'histoire du Canada occupent encore de l'importance dans la justification et l'interprétation contemporaines des libertés religieuses. Le mandat de la Cour concernant la neutralité étatique dans les questions religieuses exige qu'elle fasse la distinction entre la sphère privée de la vie spirituelle d'un individu ou d'un groupe et la sphère de la vie séculière publique. La frontière entre ces deux sphères est toutefois contestable, fluctuante et perméable.

I. INTRODUCTION: RELIGIOUS TOLERANCE IN CANADA

Canada's early history as colony and nation was marked by periods of harsh religious suppression and moments of pragmatic religious tolerance.[1] The early efforts of European colonizers, first the French and later the British, to convert Indigenous peoples to a version of Christianity sometimes involved the active suppression of spiritual practices. Cultural suppression became standard practice with the growth of European settlement and the extension of political control by colonial and Canadian authorities over lands occupied by Indigenous communities.[2] The removal of Indigenous communities from their traditional lands undermined their economic viability but also interfered with their spiritual practices, which were often tied to particular locations. Perhaps the most significant program of cultural suppression was the residential school system, which involved the forcible removal of Indigenous children from their families and communities and their placement in state-sanctioned residential schools, where they were prevented from speaking their language and engaging in the practices of their culture.

Yet the country's early history was also marked by significant acts of religious tolerance. With the conquest of New France by the British in the middle of the eighteenth century, a Protestant monarch came to rule over the colony's French Catholic population. The practice, common at the time in which the conquering power imposed its faith on its new subjects, gave way to the practical necessities of government in colonial Canada. The *Quebec Act*, 1774, of the British Parliament, formally extended to the colony's inhabitants the right to maintain the French language, the civil law system, and the Roman Catholic faith.[3] The British government's motives, though, were entirely pragmatic: to ensure the stability of the newly founded Quebec colony and the loyalty of its inhabitants at a time when the American colonies were becoming disenchanted with British rule. The political accommodation between Roman Catholic and Protestant communities, while always imperfect and often precarious, shaped the new country's response to the growth of religious plurality in the late nineteenth and early twentieth centuries. This response involved the general protection of individual liberty in religious practice but also the pragmatic accommodation of certain minority group practices, within the context of a general public privileging of Christian or non-denominational Protestant practices.

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1 For an extended discussion of the history of religious freedom in Canada see R. Moon, *Freedom of Conscience and Religion* (Toronto: Irwin, 2014) c.1.

2 In the late 1800s, spiritual practices, such as spirit dancing in the Prairies and the potlach on the West Coast, were banned by the federal government.

3 *The Quebec Act*, 1774 (UK), 14 Geo III c. 83.

While much of Canada's early commitment to religious freedom was simply a pragmatic compromise to ensure social peace and political stability, in a succession of judgments in the 1950s, concerning the Jehovah's Witness community in Quebec, the Supreme Court of Canada sought to articulate a principled account of religious freedom. In *Saumur v City of Quebec*, the Court struck down a bylaw that forbade the distribution of literature in the streets of Quebec City without the prior consent of the chief of police – a bylaw that was understood by all as intended to limit the proselytizing activities of the Jehovah's Witness community.[4] After setting out some of the history of religious tolerance in Canada, Justice Rand, in *Saumur*, described religious freedom as one of the "original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of the community life within a legal order."[5] Rand J. went on to hold that the provinces lacked the authority, under the constitutional division of powers, to restrict religious freedom – that "legislation 'in relation' to religion and its profession is not a local or private matter…; the dimensions of this interest are nationwide;… it appertains to a boundless field of ideas, beliefs and faiths with the deepest roots and loyalties; a religious incident reverberates from one end of this country to the other…".[6]

This understanding of religious freedom shaped the Supreme Court of Canada's initial reading of freedom of conscience and religion protected by s. 2 (a) of the *Canadian Charter of Rights and Freedoms*.[7] However, the story of religious freedom in Canada is not simply that of a linear progression from the pragmatic tolerance of religious minorities to the principled protection of the individual's religious freedom. In its subsequent s 2 (a) decisions, the Court began to read freedom of religion as a form of equality right that requires the state to remain neutral in religious matters. The state must not prefer the practices of one religious group over those of another and it must not restrict the religious practices of a group unless it has a substantial public reason to do so. Underlying the Court's commitment to religious freedom is a recognition of the deep connection between the individual and her/his spiritual commitments and religious community and a desire to avoid the marginalization of minority religious groups. Concerns about inclusion and social peace that lay behind the extension of religious tolerance in Canada's early history continue to be important in the contemporary justification and interpretation of religious freedom. The Court's commitment to state neutrality in religious matters requires it to distinguish between the private sphere of individual or group spiritual life and the sphere of public secular life. However, the line between these two spheres is contestable, moveable, and porous.

II. THE CHARTER OF RIGHTS – LIBERTY AND EQUALITY

When the *Charter* was enacted, religion was generally regarded as a private matter, with little visible presence in the country's political life.[8] There were, of course, individuals and groups who were motivated by a religious commitment to take political action, but their objectives were almost always civic – to eradicate poverty, or ban landmines, or prohibit abortion – and not to advance the particular practices of their faith. Indeed, political actors seldom spoke publicly about their faith and were not inclined to justify their public actions explicitly on religious grounds. Some of the early support for a charter of rights in Canada had been a reaction to acts of state suppression of religious and cultural practices, such as the 'war

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4 *Saumur v City of Quebec*, [1953] 2 SCR 299 [*Saumur*].
5 *Ibid*, at 329.
6 *Ibid*.
7 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11 [*Charter*].
8 *Ibid*.

without mercy' against the proselytizing activities of the Jehovah's Witness community in 1950's Quebec.[9] But by 1982, the state seemed no longer to be engaged in the direct suppression of religious practices.

Yet, at the time of the *Charter*'s enactment, there were also several reasons to think that issues of religious freedom might again become significant. Those who had predicted the ineluctable decline of religious belief had begun to rethink this assumption. Religious commitment seemed not only to be stubbornly persistent, but indeed, to be experiencing a revival in evangelical, fundamentalist, and spiritual forms. Even if most religious adherents accepted that religion and politics should remain separate, they did not always agree about where the line between private spirituality and public secularism should be drawn. As well, immigration in the later part of the twentieth century had significantly added to the religious diversity of the country. The number of adherents to non-Christian belief systems, including Sikhism, Islam, and Hinduism, grew significantly in this period. This growth in diversity raised questions about the historic ordering of public life on the basis of Christian practices. Even if the majority of the country saw the imprint of Christian practice on public life as 'just the way things were', or as cultural rather than religious in character, other religious groups viewed the public traces of Christian practice differently. In the freedom of religion cases that arose in the first decades of the *Charter*, the courts and other state actors were asked to remove the vestiges of Christian practice from the public sphere or to exempt religious minority group member from legal standards that privileged mainstream Christian practice and failed to take account of minority practices.

The first freedom of religion case to reach the Supreme Court of Canada, following the enactment of the *Charter* in 1982, was an appeal from the conviction of a Calgary drug store, Big M Drug Mart, for operating on Sundays contrary to the Federal *Lord's Day Act*.[10] The Act, which dated from 1906, prohibited a variety of commercial activities on Sundays, including retail sales. The store argued that the Act breached section 2 (a) of the *Charter* (freedom of conscience and religion), and that this breach could not be justified under section 1, the *Charter*'s limitations provision.[11]

In *R v Big M Drug Mart*, the Court took the opportunity to set out what it saw as the purpose or foundation of s. 2(a). It held that the section protects the liberty of the individual in matters of religion or conscience: the individual must be free "to hold and to manifest whatever beliefs and opinions his conscience dictates, provided inter alia only that such manifestations do not injure his or her neighbours…".[12] According to Dickson CJ, the protection of freedom of religion rests on "the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation".[13] No one should "be forced to act in a way contrary to his beliefs or his conscience" except when necessary to protect important public interests or individual rights.[14] The freedom precludes the state from compelling an individual to engage in a religious practice and from restricting her/her religious practice unless this is necessary to protect the rights and interests of others.

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9 Quebec Premier Maurice Duplessis, quoted in William Kaplan, *State and Salvation: The Jehovah's Witnesses and Their Fight for Civil Rights* (Toronto: University of Toronto Press, 1989) at 230.

10 *R v Big M Drug Mart,* [1985] 1 SCR 295 [*Big M*].

11 *Ibid*; *Charter*, *supra* note 7 ("[t]he *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", s 1).

12 *Ibid*, at para 123.

13 *Ibid*, at para 121.

14 *Ibid*, at para 95.

The Court *in Big M* found that the *Lord's Day Act* breached section 2(a) because its 'true purpose' was to compel a religious practice – the observance of the Christian Sabbath.[15] The Chief Justice then found that the law could not be saved under section 1, as a justified limit on the right, because its purpose was to compel a religious practice: "The characterization of the purpose of the Act as one which compels religious observance renders it unnecessary to decide the questions of whether section 1 could validate such legislation whose purpose was otherwise".[16] Such a purpose could not be considered pressing and substantial, and so it was unnecessary for the Court to address the other elements of the section 1 proportionality test.

But, while there could be little doubt that the law's purpose was religious, it was less obvious that its purpose was to coerce a religious practice. After all, the *Lord's Day Act* did not require anyone to honour the Sabbath, by attending church or reading the Bible or reflecting upon their spiritual commitments. It prevented individuals from working but did not require that they worship or even that they rest.[17] Its religious purpose might simply have been to encourage people to keep the Sabbath or to reduce the financial costs of doing so.

The Court, though, seemed prepared to find a breach of religious freedom simply because the law had a purpose that was religious in character. Near the end of his judgment, Dickson CJ stated that it was "constitutionally incompetent for the federal Parliament to provide legislative preference for any one religion at the expense of those of another religious persuasion".[18] More specifically, about the law at issue in this case, he said:

> To the extent that it binds all to a sectarian Christian ideal, the Lord's Day Act works a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and non-believers alike. The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their difference with, and alienation from, the dominant religious culture.[19]

In holding that the *Lord's Day Act* breached section 2(a), Dickson CJ seemed to say not only that the state must refrain from coercion in religious matters, but that it must also refrain from supporting or preferring the beliefs and practices of a particular religious group – that the state should remain neutral in religious matters. Freedom of religion, understood as a liberty, precludes the state from compelling an individual

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15 *Ibid*, at para 136.

16 *Ibid,* at para 142.

17 This was the view of the Supreme Court of Canada in an earlier case *Robertson and Rosetanni v The Queen* [1963] SCR 651 decided in 1963 under the federal Bill of Rights, a statue that limited federal action: "The practical result of this law on those whose religion requires them to observe a day of rest other than Sunday, is a purely secular and financial one in that they are required to refrain from carrying on or conducting their business on Sunday as well as on their own day of rest. In some cases, this is no doubt a business inconvenience, but it is neither an abrogation nor an abridgment nor an infringement of religious freedom, and the fact that it has been brought about by reason of the existence of a statute enacted for the purpose of preserving the sanctity of Sunday, cannot, in my view, be construed as attaching some religious significance to an effect which is purely secular in so far as non-Christians are concerned." (at 658-59).

18 *Big M*, *supra* note 10, at para 134.

19 *Ibid*, at para 97.

to engage in a religious practice and from restricting his/her religious practice without a legitimate public reason. It does not, however, preclude the state from supporting a religious practice, unless we adopt a very attenuated understanding of coercion, and it does not require the state to compromise its policies to accommodate a religious practice. Within the *Big M* decision then were the seeds of a different conception of religious freedom – one that was based not simply on individual liberty but was concerned instead with the equal treatment of different religious belief systems or communities.

III. THE JUSTIFICATION FOR STATE NEUTRALITY

The requirement that the state remain neutral in religious matters was affirmed in later judgments of the Supreme Court of Canada. Deschamps J, writing for the majority of Court in *SL v Commission scolaire des Chênes* accepted that: "Religious neutrality is now seen by many Western states as a legitimate means of creating a free space in which citizens of various beliefs can exercise their individual rights…"[20] According to the Court, the state is precluded from supporting or preferring the practices of one religious system over another (or religious belief over atheism and vice-versa) and from restricting religious practices unless there is good reason to do so, or put more positively, the state has a duty to make some accommodation for religious practices.[21] The neutrality requirement, though, rests on a very different understanding of the freedom's purpose than that set out by the Court in *Big M*. Religious freedom on this account is a form of equality right that treats religious practices as the equivalent of individual traits or characteristics (as aspects of the adherent's identity) that should be bracketed off from politics – both excluded and insulated from political decision-making.

The separation of religion and politics (the exclusion and the insulation of religion from political decision-making or at least political contest) rests on a recognition of the deep connection between the individual and her/his religious or cultural group and on a concern about the status or vitality of religious groups. Accommodation should be made for the beliefs or practices of different religious groups, because these groups are a source of identity and meaning for their members. Indeed, if the individual's religious beliefs or moral commitments are deeply held or rooted (and should sometimes be insulated from politics), it is because they are part of a shared tradition or group culture to which his/her identity (his/her world view and sense of place in the world) is tied. More practically, accommodation should sometimes be made to avoid the marginalization of religious groups within the larger political community. If the law prevents the members of some religious groups from fully participating in society, their identification or connection with that society may be negatively affected and this in turn may result in social conflict. The ties between religious group members, which may be intergenerational and comprehensive, make the group particularly vulnerable to suspicion, discrimination, and marginalisation.[22]

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[20] *SL v Commission scolaire des Chênes* 2012 SCC 7, at para 17 [SL] and *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 [*Mouvement laïque*]. The concurring judgement of LeBel J in *SL* expressed a similar view: "Moreover, in the modern Canadian political system, the state in principle takes a position of neutrality. And it is barred from enacting private legislation that favours one religion over another…".

[21] See R Moon, *Freedom of Conscience and Religion* (Toronto**:** Irwin Law, 2014).

[22] The courts have had difficulty acknowledging the group or collective character of religion, and religious freedom, perhaps, because within any religious community or tradition there is an enormous diversity of belief and practice. The followers of a religious tradition may interpret scripture or apply the practices of the tradition in different ways, and yet still understand themselves to be members of that tradition – as Christians

The shift in the Court's understanding of the freedom's justification, from liberty to equality, has been accompanied by a narrowing of the freedom's scope. If the requirement that the state accommodate religious practices—that it treat religious practices as a matter of cultural identity that lies outside the scope of politics—is tied to the role of these practices in the life of a religious group, then accommodation may not (often) extend to an individual's non-religious practices. Freedom of conscience, like freedom of religion, may only protect practices that can be bracketed-off from political contest and treated as part of personal or communal life. This seems to be what is meant when non-religious practices are described as 'deeply held': that they are part of a distinctive world view that runs contrary to conventional morality or mainstream practice. As a practical matter, it may be that such practices are seldom sustained outside cultural or religious communities. Despite the apparent breadth of s 2(a) and the Court's formal acknowledgment that freedom of conscience and religious protects both religious and non-religious (fundamental) values and beliefs, the former have been at the centre of the courts' s. 2(a) cases. The protection of non-religious beliefs and practices (the conscience component of s. 2(a)) appears to be limited to practices that resemble in content and structure familiar religious practices.[23]

IV. THE LIMITS OF NEUTRALITY

The Canadian courts, though, have not enforced the neutrality requirement in a consistent way. The problem is not simply that religious beliefs often involve claims about what is true and right, which may be viewed as a matter of judgment (rather than cultural practice) and open to contest within the public sphere. The more fundamental difficulty with the requirement of state neutrality is that religious beliefs sometimes have public implications.

The Supreme Court of Canada has limited the application of the neutrality requirement in a few ways. First, the Court has recognized that religious practices have shaped the traditions or customs of the community and cannot simply be erased from the public sphere. In *Mouvement laïque*, the Court said that "the state's duty of neutrality does not require it to abstain from celebrating and preserving its religious heritage".[24] The Canadian courts have not demanded that governments (literally or metaphorically) sandblast religious symbols and practices from physical and social structures, some of which were constructed long ago. Yet, it may often be difficult to determine when the use of religious symbols or practices by the state is simply an acknowledgment of the country's religious history, and when it amounts

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or Jews or Buddhists. They may identify with a religious tradition or belief system in different ways, with different levels of commitment and degrees of involvement. This is a reminder of the way in which religion is both a matter of cultural identity and personal commitment – that it is a system or tradition that individual members understand, and identify with, in ways that may be particular or personal.

[23] Richard Moon, "Conscience in the Image of Religion" in John Adenitire (ed) *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Oxford: Hart/Bloomsbury, 2019). The only reported Canadian case, in which freedom of conscience under section 2(a) was found to have been breached, involved a refusal by the federal prison authorities to provide an inmate with vegetarian meals: *Maurice v Canada (AG*), 2002 FCT 69. The inmate's claim in that case was helped by the similarity of his practice, vegetarianism, to a recognized religious practice and indeed by the fact that he had previously been provided with vegetarian meals on religious grounds. The court may also have been willing to protect a belief/practice that in ordinary circumstances is simply a private or personal matter. Outside the prison context, vegetarianism is a practice in which the individual is free to engage and that has no obvious impact on the rights or interests of others. The state ordinarily has no direct involvement in the individual's dietary choices. Within the prison, however, all aspects of an inmate's life are controlled by the prison authorities.

[24] *Mouvement laïque,* at para 116.

to a present affirmation of the truth of a particular religious belief system. Indeed, it may be that the acknowledgment of history or tradition always involves some form of contemporary affirmation.[25]

Secondly, the courts have recognized that religion is important in the personal and communal lives of citizens. If a large part of the population is Christian, it is difficult to see how the state could not take the practices of this group into account, when, for example, selecting statutory holidays or establishing a 'pause day' from work.[26] As long as religion remains an important part of private life, it will sometimes affect the shape of public action.

The third and most significant exception to the neutrality requirement involves religious beliefs that address civic matters. Religious belief systems often say something about the way we should treat others and about the kind of society we should work to create. In *Chamberlain v Surrey School District No. 36*, the Supreme Court of Canada held that elected officials may draw on their religious values (or the religious values of their constituents) when making political decisions. Chief Justice McLachlin recognized that, "[r]eligion is an integral aspect of people's lives, and cannot be left at the boardroom door".[27] When religious belief addresses, or relates to, civic matters, the courts will treat it as a political or moral judgment that may play a role in public decision-making, rather than as a cultural identity towards which the state should remain neutral.

In deciding that the state is not required to remain neutral towards religious values, the court relies, at least implicitly, on a distinction between the spiritual and civic elements of a religious belief system. A religious belief should not play a role in political decision making if the action it calls for is spiritual in character (is concerned with the worshipping or honouring of God). However, if the religious belief relates to a civic matter (individual rights or collective welfare), then it may play a role in political decision making, and the action it calls for will be viewed as public or civic. Religiously grounded beliefs about civic issues may be adopted or rejected by law makers based on a public judgment about their contribution to human good or public welfare.

The courts then must draw a line between the spheres of spiritual and civic life, even if that line is contestable and often seems porous or moveable. Where the line between the civic and spiritual elements of a religious belief system is drawn will reflect the courts' views about the nature of human welfare, and the proper scope of political action. The claim that a religious belief or value may play a role in political decision-making when there is a parallel secular argument (when the same or a similar position can be stated in non-religious terms) points to this distinction between spiritual and civic. When a religious value or position (such as supporting the eradication of poverty or banning drug use, or abortion) has a secular analogue, it will be seen as addressing a public or civic concern — as seeking to advance the public interest or to prevent harm to others. Even if these reasons are set out in scripture, and valued by adherents on that basis, they can be understood by non-adherents as concerned with public welfare, and so as civic values. However, when there is no parallel secular argument, non-adherents are bound to see the religious 'practice' as simply the way in which adherents choose to honour God's will. In other words, a religiously motivated action will be viewed as a spiritual practice (as the worshipping or honouring of God) if non-

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[25] This is the point made in *Mouvement laïque,* at para 87: "[T]he Canadian cultural landscape includes many traditional and heritage practices that are religious in nature. Although it is clear that not all of these cultural expressions are in breach of the state's duty of neutrality, there is also no doubt that the state may not consciously make a profession of faith or act so as to adopt or favour one religious view at the expense of all others". Consider the cross that sits at the top of Mount Royal in Montreal, which is meant to commemorate the founding of the city in the 1600s. The current cross though was erected in the 1920s.

[26] *R v Edwards Books and Art Ltd* [1986] 2 SCR 713.

[27] *Chamberlain v Surrey School District No 36,* 2002 SCC 86 at para 19.

adherents cannot understand it as relating to human welfare. If the state were to support Sunday Sabbath observance or a particular form of prayer or the wearing of hijab or if it were to ban the consumption of pork, it would be seen as supporting a spiritual practice contrary to freedom of religion. These actions are viewed as exclusively spiritual, as acts of worship, because they cannot be understood by non-adherents as concerned with the advancement of human good.[28]

If lawmakers are permitted to draw on particular religious beliefs/values when formulating public policy, they should also be free to reject or repudiate those beliefs/values. In other words, (religiously grounded) civic values should be neither excluded nor insulated from political decision-making. The state may remain neutral in spiritual matters, such as when or how to pray or what clothes to wear, but it cannot be neutral on civic issues, such as the recognition of same sex-marriage, the prohibition of gender discrimination, or the regulation of abortion.[29]

Behind the courts' partial or inconsistent application of the religious neutrality requirement lies a complex conception of religious commitment in which religion is viewed as both an aspect of the individual's identity and as a set of judgments or beliefs made by the individual about truth and right. The challenge for the courts is to find a way to fit this complex conception of religious commitment (as deeply held or foundational) and its value (as a source of meaning, purpose, and identity for the individual and group) into a constitutional framework that relies on a distinction between individual choices or commitments that should be protected as a matter of liberty, and individual attributes or traits that should be respected as a matter of equality. The constitutional framework (and perhaps more deeply, our conception of rights) imposes this distinction, between judgment and identity, on the rich and complex experience of religious commitment.

V. RELIGIOUS ACCOMMODATION – PRIVATE SPIRITUALITY

Freedom of religion, understood as a liberty, precludes the state from restricting a religious practice because it is the wrong way to worship God. The state must have a public reason to restrict a religious practice, but any public reason will do. This was John Locke's position. According to Locke, the government may prohibit a practice such as animal slaughter provided the prohibition has a civic purpose and is not enforced exclusively against those who engage in animal slaughter for religious reasons, as a

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[28] In the case of some (religiously based) state actions, such as a ban on public nudity, it may be more controversial whether the action should be viewed as relating to human welfare or as simply a matter of honouring God's will – depending on whether this ban may be supported by other belief systems or may be defended on grounds that are more generally accessible.

[29] In R Moon, "Conscientious Objection and the Politics of Cake-Baking", 9 Oxford Journal of Law and Religion 329 (2020) I argue that: "[T]he issue in conscientious objection cases is whether the individual's religiously-based objection should be viewed as an expression of personal religious conscience that should be accommodated (if this can be done without noticeable harm to others) or whether it should be viewed as a (religiously-grounded) civic position or action that may be the subject of legal regulation. In determining whether a particular (conscientious) objection should be viewed as a personal/spiritual matter or instead as a civic/political position, two factors may be relevant. The first is whether the individual is being required to perform the particular act (to which she/he objects) because she/he holds a special position not held by others, notably some form of public appointment. The other factor is the relative remoteness/proximity of the act that the objector is required to perform from the act that she/he considers to be inherently immoral. The more remote the legally required action, the more likely we are to regard the refusal to perform it as a position about how others should behave or about the correctness of the law, rather than as an expression of personal conscience."

form of worship.[30] The Canadian courts, though, have adopted a different approach to the justification of limits on religious practice and have held that any time the state restricts a religious practice in a non-trivial way (even when it is advancing a legitimate public interest), it must justify the restriction under section 1, the Charter's limitations provision, by balancing the competing civic and religious interests. In other words, they have (or appear to have) treated s. 2(a) as a form of equality right that requires the state sometimes to compromise its policies to accommodate religious practices.

In practice, though, the Canadian courts have required very little justification from the state. They have asked the state to make space for religious practices and religious communities, only when this can be done without any real impact on state policy. In other words, the courts will only protect a religious practice when it can be treated as personal to the individual or internal to the group, even if the boundary between personal/private and civic is subject to contest.[31] While the courts have given section 2(a) the form of an equality right, they have – at least in many cases – given it the substance of a liberty right.

Religious practices (forms of worship) that are 'personal' in character are sometimes indirectly or incidentally limited by state action. A police uniform requirement may have the effect of excluding individuals who wear head coverings for religious reasons, or a school schedule may not take account of the holidays of some religious groups.[32] An exemption to a uniform requirement made for an individual who wears a turban or hijab as an expression of his/her faith or identity will have an impact on state policy, but only a minor one. Allowing a government employee to take a day off work for a religious holiday that is not included in the list of statutory holidays will not disrupt the unit's operations in any significant way. These practices may be viewed as personal and treated as private since they are not concerned directly with public policy and do not noticeably compromise the state's objectives.[33] The courts, in seeking to protect religious life, then, may sometimes carve out 'private' space for a religious practice so that the practice is exempted from the application of an otherwise justified law.[34]

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30 John Locke, *A Letter Concerning Toleration* (1689: repr, Irvington, 1979) at 199.

31 Note the contrast between *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6 and *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567. In *Multani* the Court held that the wearing of a kirpan (ceremonial dagger) by a Sikh student in a public school was a protected practice because it did not represent a real threat to school safety. In *Wilson Colony*, however, the Court decided that an exemption from the photo requirement for a provincial driver's licence was not required by the Charter because such an exemption would compromise the state's scheme for preventing identity theft. There were very few claimants in the *Wilson Colony* case. Had they been granted an exemption, the impact on government policy would have been minor. McLachlin CJ, though, seemed concerned about the possibility of more claimants coming forward at a later date. But on this reasoning no exemption could ever be given, since the law's purpose might be significantly undermined if additional claimants were to come forward at some future time. Or, as in *Multani*, an exception could be made only if it was not truly an exception in the sense that its recognition (regardless of how many people sought "exemption") would not undermine the law's purpose.

32 *Commission scolaire régionale de Chambly v. Bergevin* [1994] 2 SCR 525.

33 Moreover, we know that police and other uniform requirements or statutory holidays often reflect, or already take account of, the cultural and religious practices of historically dominant groups.

34 Sometimes, however, the conflict between law and religious practice is more direct, in the sense that the law is pursuing a policy (a public value) that is directly at odds with the religious practice. In such a case, the conflict between the law and the religious practice cannot be avoided or reduced by the state simply adjusting the means it has chosen to advance its civic purpose. The courts task in these cases is not to decide the proper

Despite what the courts often say, religious freedom claims are not, and cannot be, resolved through the balancing of civic and religious interests. A court has no way to attach value or weight to a religious belief/practice.[35] From a secular or public perspective, a religious belief/practice has no necessary value; indeed, it is said that a court should take no position concerning its value -- that the court should remain neutral on the question of religious truth.[36] To the believer it is wrong to restrict his/her ability to engage in certain practices, because those practices express or reflect a deeper truth. Secular institutions such as the courts do not – cannot – value the practice for the reason the believer values it - because it is true. The belief/practice is significant, from a civic-secular perspective, only because it matters 'deeply' to the group and its members -- because it is part of their cultural identity, and how they understand, and live in, the world -- and because its restriction may lead to the marginalization or alienation of a minority religious group. This harm (and any assessment of it by the courts) rests on a secular concern about the subjective experience of the believer or the community of believers.[37] But there is no way to balance the subjective value of the practice (and the secular concern about group identity) with the civic purpose or value of the restrictive law. [38]

The courts' task then is not to trade off or balance specific competing values/interests but is instead to mark out a protected space for religious communities or ways of life -- to define the scope of personal or communal religious practice that can be practically insulated (and excluded) from legal regulation. Religious freedom, as a constitutional right in a democratic political system, must be limited in what it protects to matters that can be viewed as private and outside the scope of politics. The protection of religious freedom requires the courts to draw a line between the spheres of spiritual and civic life, even if that line often appears to be pragmatic and moveable.[39]

VI. THE ACCOMMODATION OF RELIGIOUS GROUPS

Sometimes an accommodation claim is made not by an individual, who is seeking exemption for a specific practice, but instead by a religious/cultural organization or community, which is claiming a degree

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trade-off or balance between competing normative views but is instead to determine if the belief or practice should be treated as personal to the individual or internal to the religious group.

35 For a more general argument that balancing has very little role in rights' adjudication – and that the distinction between the scope and limits on rights is often artificial – see R. Moon, "Limits on Rights: The Marginal Role of Proportionality Analysis", 50 Israel Law Review 1 (2017).

36 *Syndicat Northcrest v. Amselem*, 2004 SCC 47, at para 67.

37 It also means that claimants in these cases must argue before the courts that their practice should be protected not because it is true and right (as they believe) but because it matters deeply to them. In other words, they must also adopt an external, secular, perspective in making their case.

38 In this way religious freedom is different from freedom of expression, which is protected because there is value in the activity of expression (its contribution to democracy, knowledge, individual agency).

39 The Quebec government recently banned many civil servants, including police officers, prison guards, and teachers, from wearing religious symbols at work. (*An Act respecting the laicity of the State*, Statutes of Québec: 2019, chapitre 12). What most would view as a personal expression or manifestation of faith, is treated by Bill 21 as a state act that is incompatible with the principle of state neutrality or laicity. Yet it is difficult to imagine that when a civil servant wears a religious symbol, others will think that their government is supporting, or affirming the truth of, a particular religion. And of course, it is hard to see this as a concern since relatively few civil servants wear religious symbols and the few who do come from a variety of religious groups.

of autonomy in the governance of its affairs — in the operation of its internal decision-making processes. In these institutional autonomy cases, the key question for the court is whether the exemption from state law will impact the rights and interests of others – of non-members. The right of the Catholic Church, for example, to exclude women from the priesthood (to discriminate against women) is not decided by balancing the religious claim or interest against the claim to gender equality. Because the Catholic church is viewed as a private religious organization or institution, it is free to govern its internal affairs according to its own norms and to be insulated from public anti-discrimination requirements. Similarly, a religious school may dismiss a teacher who enters a same-sex relationship contrary to church doctrine, not because the religious interests of the group or school outweigh the public value of sexual orientation equality but simply because the school is understood to be a private religious organization.[40] Religious organizations, though, operate in the larger world and their actions will almost always have some impact on outsiders. The question is what kind or degree of impact is sufficient to say that the organization is no longer operating as simply a private religious association?

The courts have generally treated religious organizations as voluntary associations (of individuals pursuing common ends) that should be free to operate as they choose. If the members of a group have voluntarily submitted to the group's rules or decision-making processes, then the state ought not to intervene – should remain neutral. An individual's membership in the group may be seen as voluntary as long as she/he is free to leave the group (and live under ordinary state law) if she/he disagrees with the group's actions. But, of course, individuals are often born into a religious community and feel bound to it by ties of kinship and friendship. More significantly, the individual's identity may be tied to the group so that exit is difficult even when there are few material barriers. The state may sometimes intervene in the affairs of a religious community characterized by hierarchy and insularity when the prevailing practices in that community are thought to be harmful to some of its members, even though the members have, in at least a formal sense, chosen to be or to remain part of the community.[41] The deep communal connections that are part of the value of religious life and commitment (a source of meaning and value for adherents) may also be the source of what the courts regard as harm – the lack of meaningful choice or opportunity open to the members of such communities or the oppression of vulnerable group members.[42]

In most institutional autonomy cases, though, the issue is simply whether the organization's actions impact outsiders to the group – a matter of drawing the line between the civil sphere (of government action) and the personal or communal sphere (of religious practice). The commitment to state neutrality in matters of religion depends on this divide – a divide that is contestable, moveable, and porous. The state may take action within the civic sphere, including actions that may be contrary to the religious beliefs of some in the community. However, within the sphere of private spirituality (the personal or communal) the state should, ordinarily at least, not intervene – and should refrain from taking positions on the truth or rightness of particular religious beliefs or actions.

VII. CONCLUSION

In *Big M*, the Supreme Court of Canada's first decision under s 2(a) the *Charter*, the Court described freedom of religion as a liberty that protects the individual from state coercion in spiritual matters. Yet in

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40 See *Caldwell v Stuart* [1984] 2 SCR 603.

41 See *Bruker v Marcovitz*, 2007 SCR 54.

42 The protection of the group's autonomy rests on the group being viewed in both these ways – as a voluntary association and as a source of identity - even if these are not entirely compatible perspectives.

this decision were the seeds of a different, competing, conception of the freedom – that required the state to remain neutral in spiritual matters. In subsequent judgments the court has stated more clearly that religious freedom is not simply an individual liberty but also a form of equality right that requires the equal treatment by the state of different religious belief systems or communities. The neutrality requirement rests on a recognition of the deep connection between the individual and her/his religious or cultural group and on a concern about the standing of such groups and their members in the larger society. The practices of a religious group are treated as part of the cultural identity of the group's members and excluded and insulated from politics, because experience has taught us that the restriction of these practices may contribute to the marginalization of the group and the exclusion and alienation of its members from the larger society.

This understanding of religious freedom requires the courts to distinguish between the spheres of public/secular and private/spiritual life. However, the line between these two spheres rests on a variety of practical considerations and is contestable, moveable, and porous. The story of religious freedom in Canada then may not be simply that of a linear progression from the pragmatic tolerance of religious minorities to the principled protection of the individual's religious freedom. The same concerns about social peace that lay behind the extension of the religious tolerance in Canada's early history continue to be important in the contemporary justification and interpretation of religious freedoms. The courts, though, may be reluctant to embrace openly this pragmatism, since the legitimacy of their role as interpreters of the Charter rests on the claim that they are a 'forum of principle', adjudicating rights issues on the basis of principle rather than policy.[43]

[43] Ronald Dworkin, *A Matter of Principle* (Cambridge Mass: Harvard Univ. Press, 1986).