FREEDOM OF RELIGION IN CANADA AND THE CHALLENGE OF MULTICULTURALISM

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A) *Introduction*

This article will consider the legal and constitutional principles which have been developed in Canada to protect the exercise of freedom of religion. The central focus will be on those guarantees afforded under the newly-enacted *Canadian Charter of Rights and Freedoms* [1]. The *Charter,* which came into force in 1982, created constitutionally entrenched fundamental rights, including a right of freedom of religion and conscience. This was a step of monumental importance, for until 1982 there had been no comparable protections; and since that year the changes which have occurred in Canadian law as a whole have been profound [2].

To understand fully the impact of the *Charter* some contextual matters must first be addressed. In consequence, this paper begins with an overview of those concepts which lie at the foundation of Canadian legal and political institutions. Secondly, attention will be paid to patterns of ethnicity and religion. Canada, it will be seen, is a multi-cultural nation, a polity which purports to promote and celebrate its cultural and ethnic diversity. The implications which this has for the development of public policy will therefore also be briefly described. Thirdly, the legal protections for freedom of religion will be reviewed, and an attempt will be made to set the legal backdrop out of which the *Charter* emerged. Finally, issues of contemporary concern will be considered, primarily with regard to the challenges which religious and ethnic diversity pose for a secular state.

B) *The Canadian Political System: An Overview*

Canada, which presently has a population of over twenty-five million people, is a former British colony which was granted nation status in 1867. Part of its territories (now the Province of Quebec) had been conquered from France a century

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[1] Part I of the *Constitution Act, 1982,* being Schedule B of the *Canada Act,* 1982 (U.K.), 1982, c. 11 [hereinafter referred to occasionally as the '*Charter*'].

[2] *See generally* F. L. MORTON *et al.,* «Judicial Nullification of Statutes Under the Charter of Rights and Freedoms, 1982-88» (1990), 28, *Alberta Law Review,* 396, for a statistical review of the effect of the *Charter* on the validity of legislation in Canada during the first six years of its operation.

earlier. Indeed, from a cultural perspective, there are two founding peoples, the English and French, and logically Protestantism and Catholicism constitute the major religions. British political institutions were imported and adopted into Canada and these still dominate the formal structure of the political process. Hence, Canada is a constitutional monarchy, the Queen of England serving also as the Queen in Right of Canada. The national government is based on the parliamentary system with three component parts: a popularly-elected lower house (the House of Commons); an appointed upper house (the Senate); and the Queen's representative in Canada (the Governor General).

The House of Commons is comprised of 295 members (each representing a distinct geographic riding), who are elected (one for each riding) every several years. Most members of the House of Commons are tipically also members of a political party, and the party with the most seats is asked by the Governor General to form the government of Canada. The leader of that party assumes the position of Prime Minister. The party in power can continue to govern (normally for no longer than five years) so long as it retains the confidence of the House of Commons. This is easily done through strictly enforced party discipline, at least where the governing party holds a majority of the seats (which is common).

The Senate is comprised of 104 members who are appointed by the Governor General. Traditionally, the Senate has been seen as 'a chamber of sober second thought', a check on the excesses of the democratically-elected House of Commons. All legislation must be passed by both chambers and signed by the Governor General before becoming law. In practice, the Senate enjoys little political legitimacy; the real political power lies in the House of Commons. Likewise, the Governor General now fills a largely ceremonial role as the official head of state. However, he does have certain responsibilities, including the power to proclaim laws (after they have passed both Houses) and to dissolve Parliament. As in other constitutional monarchies today, the Governor General has almost invariably followed the advice of the party in power in the exercise of these exercise of these functions.

Canada is a federal state. That is, there is a distribution of law-making authority between the national (or federal) government —the Canadian Parliament; and ten regional or local governments— the provincial legislatures. Canada's constitution allocates this authority to each level of government. For instance, the federal government has power over such matters as the regulation of trade and commerce; taxation; the military; and criminal law. The provinces exercise sovereign jurisdiction over such areas as hospitals and health care; property and civil rights; the administration of justice; and generally all matters of a local or private nature [3].

The authority to make laws in relation to matters of religion is not specifically allocated to either the federal or provincial levels, and indeed both have constitutional authority resides at the federal [4]. Where there is a conflict between federal and provincial laws in relation to a given subject (such as religion) the federal law is paramount. A question of this nature can be resolved by any court; the highest appellate tribunal is the Supreme Court of Canada.

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[3] Dispute as to which level of government has jurisdiction over a given subject area is a constant theme in Canadian politics. With the advent of the welfare state, the interaction and overlap of areas of jurisdiction has increased. While some of these jurisdictional conflicts are resolved by litigation, most are solved through co-operation between the levels of government. For this reason, it is sometimes said Canada's political system is one of 'co-operative federalism'.

[4] *See Saumur v. City of Quebec* [1953], Supreme Court Report (hereinafter cited as S.C.R.), 299. *See generally* P. Hogg, *Constitutional Law of Canada* (2nd. ed., 1985), at 706.

C) *Religious and Ethnic Diversity in Canada*

i) *Religious Affiliation in Canada*

The demographic breakdown of religious affiliation suggests, perhaps deceptively, a high degree of homogeneity across Canada. In 1981, 89% of Canadians were either Protestant (belonging to one of its many denominations) or Catholic. About 7% of the population claimed to have no religious affiliation, while other religious groups accounted for 4% [5]. The representation of religions varies greatly across the country [6]:

SELECTED RELIGIONS IN CANADA

Total population Canada: 24,083,495

Religion	*Canada*	*% of Canadian population*
Anglican	2,436,375	(10%)
Baptist	696,850	(3%)
Buddhist	51,955	(.2%)
Eastern Orthodox	361,560	(1.5%)
Hindu	69,500	(.3%)
Islam	98,165	(.4%)
Jehova's Witness	143,480	(.6%)
Jewish	296,425	(1.2%)
L.D.S. (Mormon)	89,870	(.4%)
Other Protestant	240,890	(1%)
Pentecostal	338,785	(1.4%)
Presbyterian	812,105	(3.4%)
Roman Catholic	11,212,015	(46.6%)
Sikh	67,715	(.3%)
Ukrainian Catholic	190,585	(.8%)
United Church	3,758,015	(15.6%)
No Religious Preference	1,783,530	(7.4%)

Despite the prevalence of Christianity, Canada is, officially, a secular state; there is not, nor has there ever been, a state religion. However, at the same time, it is manifest that Christian values permeate deeply the fabric of Canadian society and law. Laws governing the permissibility of business activities on the Christian sabbath, the sale of liquor, or the regulation marriage and divorce, etc., stand as clear markers of the influence of Christian values.

Other manifestations are more pronounced. The formation of Canada in 1867 was, in part, one political means of accommodating the conflicting interests of both French and English cultures. As part of the accommodation of this duality, the original Constitution sought to protect, among other things, religious-based education. This is reflected in the *Constitution Act, 1867,* which prohibits provincial governments from prejudicially affecting «any right or privilege with respect to denominational [i.e., religious] schools which any class of persons have by law in the province at the

[5] Statistics Canada, «Religious Affiliation in Canada», *Canadian Social Trends,* 12 (autumn, 1987).

[6] Statistics Canada, Catalogues 93-933, 93-930 (1981).

Union» [7]. Further, the Act confers equivalent powers, privileges, and duties on Roman Catholic schools in the (predominately protestant) Province of Ontario, and Protestant schools in the (predominantly Catholic) Province of Quebec.

ii) *The Mosaic of Canadian Multiculturalism*

Canada is a nation of immigrants. At the turn of the century the Canadian population was made up largely of people representing the two founding nations. However, during the first decades of this century and after the Second World War, large numbers of immigrants came to Canada from Western and Eastern Europe, as well as from Scandinavia. In the 1950s, a growing proportion of immigrants came from Southern Europe and the United States; in the 1970s and 1980s, immigrants have come primarily from Asia, Africa, the Caribbean, and Central and South America [8].

It is often said that in Canada immigrants are not exposed to pressures to assimilate into the dominant English of French cultures, but instead are encouraged to retain their own cultural traditions. It is sometimes said that Canada is a 'cultural mosaic', and is in this way quite distinct from the United States, where the ethos of assimilation conjures up images of a metaphoric 'melting pot'. An examination of the data on ethnic origin reflects the nature of the Canadian mosaic [9]:

British	6,332,725
French	6,093,160
North European	212,280
West European	1,321,465
South European	1,242,170
East European	888,195
Arab	72,315
West Asian	41,305
South Asian	266,800
East/South East Asian	600,530
Pacific Islands	6,620
Latin, Central & South America	32,240
Caribbean	48,475
Black	174,970
Aboriginal	373,260

The philosophy underlying the mosaic is sometimes referred to simply as 'multiculturalism' [10], which is a compendious term possessing various facets. Multiculturalism can embrace the ideas of preserving linguistic and cultural differences, as well as promoting equality (in political, economic and social terms) for all Canadians regardless of religious creed, or national or ethnic origin. A further conceptualisation of multiculturalism encompasses the protection of group rights within Canada, and would require the state to assume a positive legal obligation to protect and promote the group, not just individuals belonging to the group [11]. The Canadian government

[7] *Constitution Act, 1967* (United Kingdom), Vic. 30 & 31, chapter 3, section 93(1).

[8] Statistics Canada, «Ethnic Origins of the Canadian Population», *Canadian Social Trends,* 13 (summer 1989).

[9] *Dimensions: Profile of Ethnic Groups* (1986), at Appendix 2.

[10] *See generally Report of the Standing Committee on Multiculturalism: Building the Canadian Mosaic* (Supply and Services Canada, 1987), at 22-24.

[11] *See generally* Canadian Human Rights Foundation, *Multiculturalism and the Charter: A Legal Perspective* (1987).

officially recognized multiculturalism as a discrete element of policy in 1971, a position which a number of provincial governments have since mirrored. As will be seen below[12], this is now reflected, in concrete terms, in the *Canadian Charter of Rights and Freedoms.*

D) *Traditional Protections for Religious Freedom*

It would be a pleasant task to describe Canada's history as one full of virtue and tolerance, where in life, and in politics, citizens enjoyed freedom from bigotry and discrimination. Lamentably, that history cannot be honestly told. While the Canadian political culture is undoubtedly a moderate one, and while the Canadian experience stands up well against the tyrannies of other nations, its record of toleration has not been blameless. One need only ask the early waves of immigrants from the Pacific rim; the indigenous aboriginal population; the Jews who sought refuge from fascism prior to the second world war [13]; and the Japanese-Canadians interned during the war. For these and others there have been, at least until recently, few helpful legal restraints on discriminatory state action. The array of these legal mechanisms will now be explored.

i) *Constitutional Protections Before 1982: The Supremacy of Parliament and the Prerogative of Tyranny*

The British political system, as initially adopted in Canada, embraced fully the doctrine of Parliamentary supremacy. By virtue of that doctrine, governmental law-making powers are regarded as plenary, there being no realm of public or private life which is beyond legislative competence. In its Canadian form, this notion of supremacy must be modified to accommodate a federal structure in which legislative power is not centralized, but divided among eleven (one national and ten regional) governments. Consequently, in Canada (at least prior to 1982), the parliaments of Canada and the ten provinces had, collectively, unfettered power to protect —or fully deny— rights of religious freedom.

Even though there were no direct constitutional protections for freedom of religion, the division of law-making powers inherent in the federal structure always allowed for an indirect means of attacking legislation which attempted to regulate or prohibit religious practices. It could be maintained, for example, that legislation enacted by a provincial government is invalid because it dealt with matters over which the national government alone has legislative competence. While provincial and federal governments both may properly control some aspects of religion, the precise division of legislative authority is hard to draw clearly. In consequence, there have been a several cases in which the validity of legislation (usually provincial) controlling or adversely affecting various facets of religious practice has been challenged, and found to be invalid, on these grounds [14]. But, of course, such an approach really avoids

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[12] *See* discussion at § E), ii), *infra.*

[13] *See* I. ABELLA & H. TROPER, *One is Too Many* (1982), which chronicles a pre-war Canadian immigration policy which was decidedly anti-Semitic.

[14] *See e.g. Attorney General of Ontario v. Hamilton St. Ry.* [1903], Appeal Cases 524 (Privy Council); *Henry Birks & Sons v. City of Montreal* [1955], S.C.R. 799 (Supreme Court of Canada). These cases involved provincial laws which attempted to regulate religious observance. It was wound that the legislation, in essence, fell within the ambit of criminal law, which is a matter of federal jurisdiction. *Compare Lieberman v. The Queen* [1963], S.C.R. 643 (Supreme Court of Canada). *See generally* P. MACKLEM, «Freedom of Conscience and Religion in Canada» (1984), 42, *University of Toronto Faculty Law Review,* 50.

grappling with fundamental questions of freedom of worship. To hold that a province is not empovered to abridge religious freedom is to acknowledge that this power of abridgment resides at the federal level. Moreover, this mode of attacking legislation may fail for reasons unrelated to the appropriateness of preserving religious freedom. So, for example, a provincial statute which affected the rights of Hutterites to own land was upheld by the Supreme Court on the basis that the legislation was, in pith and substance, concerned with land tenure, a subject-matter which clearly fell within provincial legislative competence. That being so, the manifest unfairness of the legislation was beyond review [15].

Despite the acceptance in Canada of the principle of Parliamentary supremacy, several Supreme Court of Canada decisions rendered in the middle part of this century flirted with the notion that the *Constitution Act, 1867* contained with its four corners an 'implied Bill of Rights', emanating from the reception of British legal traditions, which guaranteed protection from state action for certain fundamental freedoms. Embraced within this irreductible core was said to be the freedom of religion. Hence, in a case in which the Supreme Court held invalid a provincial regulation designed to prevent Jehovah's Witnesses from distributing religious materials on public streets, one member of the Supreme Court asserted that «freedom of speech, religion and the inviolability of the person, are original freedoms» [16], the existence of which was not dependent on positive law.

The assertion of impliedly entrenched constitutional protections, which underlies such rhetoric while possessing a certain romantic appeal, proved to be rather inefficacious, and in recent times, this notion has been abandoned. In 1978, the Supreme Court of Canada concluded that «none of the fundamental freedoms inherited from the United Kingdom 'is so enshrined in the Constitution as to be beyond the reach of competent jurisdiction'» [17]. There the matter has rested.

ii) *The Canadian Bill of Rights: A Lost Opportunity*

In 1960, the federal government adopted a *Bill of Rights* [18], modelled somewhat on its American counterpart. The *Bill,* which remains in force, provides, in part, that:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist, without discrimination by reason of race, national origin, colour, *religion* or sex, the following human rights and fundamental freedoms, namely,
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> *a)* the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
> *b)* the right of the individual to equality before the law and the protection of the law;
> *c)* freedom of religion;
> *d)* freedom of speech;
> *e)* freedom of assembly and association; and
> *f)* freedom of the press.

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[15] *Walters v. Attorney General of Canada* [1969], S.C.R. 1 (Supreme Court of Canada).
[16] *Saumur v. City of Quebec, supra,* note 4, at 329 (*per* Mr. Justice Rand).
[17] *Attorney General of Canada & Dupond v. Montreal* [1978], 2 S.C.R. 770, at 796 (Supreme Court of Canada) (*per* Mr. Justice Boetz); cited with approval in *Attorney General of Canada v. Law Society of British Columbia* [1982], 2 S.C.R. 307, at 364 (Supreme Court of Canada).
[18] Revised Statutes of Canada, 1985, Appendix III.

The history of the Canadian *Bill of Rights* is a short and uncelebrated one, and since its inception (in 1960) it has done little to advance the cause of individual liberty in Canada. Indeed, the *Bill* has been invoked only three times to render legislation inoperative [19]. In retrospect, the *Bill*'s impotence is easily understood. First, it applied only to statutes passed by the federal government; provincial enactments and private relations were not within its ambit. Secondly, the *Bill* was an ordinary Act of Parliament and so lacked the normative and juridical weight of a constitutionally entrenched charted or rights. Related to this, is the deference which Canadian courts have shown to the principle of Parliamentary supremacy [20]. This has resulted in the courts, including the Supreme Court, giving a restrictive reading to the content of the *Bill of Rights*. So, for example, the *Bill* has consistently been interpreted as guaranteeing only those rights that existed when it came into force. This so-called 'frozen rights' interpretation was drawn from a reading of the text of the *Bill* itself, which provides that «[i]t is hereby recognized and declared that in Canada there have existed and shall continue to exist... the following human rights and fundamental freedoms» [21]. To determine the content of these frozen rights, it is necessary to examine both statute law and caselaw in force in 1960 [22].

Only one case concerning freedom of religion under the *Bill of Rights* has come before the Supreme Court. In *Robertson and Rosetanni v. The Queen* [23], two businessmen unsuccessfully challenged the constitutionality of the federal *Lord's Day Act* [24]. That Act required, among other things, the closing of commercial businesses on Sundays. To the Supreme Court, freedom of religion, read narrowly, meant only the freedom to believe in whatever faith one's conscience demands, and this was in no way impeded by the impugned legislation. A majority of the court could «see nothing in that statute which in any way affects the liberty of religious thought and practice of any citizen of this country» [25]. Neither could it be said that «the 'untrammelled affirmation of religious belief and its propagation'» [26] was curtailed in any way. If non-Sunday observers wished to observe another day of Sabbath they were free to do so. If as a result they were then required to close their business for two days each week, the practical result was nevertheless only secular; in other words, the impact was solely financial. This was so even if the avowed purpose of the Act was to preserve the Christian sabbath as the mandated day of rest:

> 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

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[19] *Regina v. Drybones* [1970], S.C.R. 282 (Supreme Court of Canada); *MacBain v. Lederman* [1985], 22 Dominion Law Reports (4th) 119 (Federal Court of Appeal); and *Singh v. Minister of Employment and Immigration* [1985], 1 S.C.R. 177 (Supreme Court of Canada).

[20] *See further* B. P. ELMAN, «Altering the Judicial Mind and the Process of Constitution-Making in Canada» (1990), 28 *Alberta Law Review*, 521.

[21] *Bill of Rights*, section 2. *See e.g. Robertson and Rosetanni v. The Queen* [1963], S.C.R. 651 (Supreme Court of Canada), for an exposition of this position.

[22] *See generally*, W. S. TARNOPOLSKY, *The Canadian Bill of Rights* (2nd. ed., 1975), at 170-74.

[23] *Supra*, note 21.

[24] *Lord's Day Act*, Revised Statutes of Canada 1970, chapter L-13.

[25] *Supra*, note 21, at 657.

[26] *Id.*

of preserving the sanctity of Sunday, cannot, in my view, be construed as attaching some religious significance to an effect which is purely secular insofar as non-Christians are concerned [27].

One member of the Supreme Court, in dissent, would have struck down the legislation, taking the view that «a law which compels a course of conduct, whether positive or negative, for a purely religious purpose, infringes the freedom of religion [28]. This remained the state of the law, until the issue of Sunday closing legislation was reconsidered under the *Charter of Rights* twenty years later. Before that jurisprudence is reviewed [29], some mention must be made of the governmental response to private acts of intolerance and bigotry.

iii) *Religious Freedom in the Private Sphere: Human Rights Legislation*

The battle for religious freedom has both public and private dimensions, and initiatives such as the *Canadian Bill of Rights* have sought, albeit poorly, to restrain governmental attempts to curb basic rights. Efforts to respond to acts of discrimination and religious intolerance in the private sphere have led to initiatives on several fronts. Under the criminal law, for example, it is an offence to advocate racial hatred towards an identifiable group [30]. While these provisions have been invoked recently in response to the dissemination of anti-Semitic hate propaganda [31], the institution of criminal prosecutions of this nature has been rare. In the area of private law, transactions which offend 'public policy' may be rendered unenforceable or void. Hence, as an example, a privately created scholarship, tenable by students at publicly-funded universities, but which is available only to 'white anglo-saxon protestants' has been invalidated on this basis [32]. When the validity of the scholarships came before the court, it was concluded that to declare such a trust, premised as it was on notions of racism and religious superiority, as being contrary to public policy, was «to expatiate the obvious» [33].

On a more general plane, all provinces in Canada, and the federal government, have enacted some form of human rights legislation designed, by and large, to deal with discrimination in the context of housing, employment and services. The fine details of these varios schemes differ greatly from province to province, but the general tenor of the governing statutes is essentially the same. Each Act prohibits discrimination on the grounds of race, religion, national origin, colour, sex or age. Typically, under these schemes a Commissioner is designated to deal with breaches of the law and to promote racial and ethnic tolerance.

All human rights statutes across Canada list 'religion' as one of the prohibited grounds of discrimination, though there is no uniformity in the terminology employed. For instance the following terms are used: 'religion', 'religious beliefs', 'creed', and 'religion', 'religious creed'. Yet, none of these terms seems to raise substantively different considerations. Understandably, the restrictions or discrimination based on religion (or other grounds) are not absolute. The statutes only apply to certain desig-

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[27] *Id.* at 657-8 (*per* Mr. Justice Ritchie).

[28] *Id.* at 661 (*per* Mr. Justice Cartwright).

[29] *See* discussion accompanying notes 44 to 59, *infra.*

[30] *Criminal Code,* Revised Statutes of Canada, 1985, chapter C-46, sections 319-20.

[31] *Keegstra v. The Queen* (1988), 60 Alberta Law Reports (2d) 1 (Alberta Court of Appeal). *See further* B. P. ELMAN, «The Promotion of Hatred and the Canadian Charter of Rights and Freedoms» (1989), 15 *Canadian Public Policy,* 72.

[32] *Re Leonard Estate,* Not yet Reported, April 24, 1990 (Ontario Court of Appeal).

[33] *Id.* (*per* Mr. Justice Robins).

nated activities, such as hiring, provide public services, the rental or sale of residential properties. Typically, the Acts also permit the introduction of 'affirmative action' programs, that is, overtly discriminatory practices which endeavour to give preference to members of a disadvantaged group. Additionally, the statutory regimes provide discriminatory action may be defensible in the employment context where based on a '*bona fide* occupational qualification or requirement'.

The proper application of human rights legislation in the context of alleged infringements of freedom of religion has been before the Supreme Court on two occasions. The first of these, *O'Malley v. Simpsons-Sears* [34], involved a large retail store which had required all full-time employees to work on two Saturdays of each month. One employee, a Seventh Day Adventist, who celebrated the sabbath on Saturday, alleged the store's work policy diescriminated against her on the grounds of religion. The Supreme Court of Canada agreed. The Court found that the employer had developed the policy for genuine business reasons. However, while that policy was neutral on its face, its *effect* was to discriminate against Saturday-observing employees, such as the plaintiff. That the employer did not intend this result was of no consequence [35]:

> [T]here is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictitive conditions not imposed on other members of the work force.

The Court held the employer had a duty to reasonably accommodate the religious needs of the employee, for example, by developing more flexible work schedules. This duty was not absolute and was limited by concerns for business rationality, and the avoidance of undue hardship for the employer. Nevertheless, the onus was on the employer to prove any such countervailing considerations.

In *Bhinder v. C.N.R.* [36] the Supreme Court of Canada considered whether the requirement that an employee wear a hard hat at a work site unfairly discriminated against a Sikh, who, by virtue of this religious tenets, was required to wear a turban. The governing statute provided that an employment policy was not a discriminatory practice if the employer could prove that the policy was based on a *bona fide* occupational requirement. In this case, the relevant work was conducted in a railway yard, and it was sensible to conclude that the wearing of a safety hat was a *bona fide* requirement. That being so, the majority of the Court held that the employer need not examine the individual predicament of a specific employee, such as Bhinder [37]. The Supreme Court held that employer's duty to accommodate the religious needs of

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[34] (1985), 7 Canadian Human Rights Reporter D/3102 (S.C.C.).

[35] *Id.* at 3106 (*per* Mr. Justice McIntyre).

[36] (1985), 7 Canadian Human Rights Reporter D/3093 (S.C.C.).

[37] This debate was rehearsed again in a recent case, *Human Rights Commission v. City of Saskatoon* (1990), 103 National Reporter 161 (S.C.C.), where the Supreme Court affirmed its ruling *in Bhinder*. The Court held that a mandatory retirement policy which required all firefighters to retire at sixty years of age was a reasonable occupational requirement. An employer did not have to test all sixty year old firefighters to prove each was unfit before requiring retirement. Since there were no reliable testing procedures, a blanket policy of mandatory retirement at age sixty was justified. It thus appears that individuals may be lumped together by age, for example, and treated as a class, without regard to individual differences.

the Sikh employee was foreclosed by the fact that the requirement of wearing a hard hat was *bona fide* in the circumstances [38]:

> [T]he duty to accommodate will arise in such a case as *O'Malley,* where there is adverse effect discrimination on the basis of religion and where there is no *bona fide* occupational requirement defence. The duty to accommodate is a duty imposed on the employer to take reasonable steps short of undue hardship to accommodate the religious practices of the employee when the employee has suffered or will suffer discrimination from a working rule of condition. The *bona fide* occupational requirement defence... leaves no room for any such duty for, by tis clear terms where the *bona fide* occupational requirement exists, no discriminatory practice has occurred. As framed in the *Canadian Human Rights Act,* the *bona fide* occupational requirement defence when established forecloses any duty to accommodate.

This result prevailed in the face of a strong dissent by the Chief Justice, who argued that the duty to accommodate was incorporated in the notion of a *bona fide* occupational requirement. However, at present, there is no requirement of accommodation where there is a legitime reason, relating to employment qualifications, for abridging the religfiious practices which affect employment. This has led one commentator to conclude that the duty to accommodate, given apparent force in *O'Malley,* is now «very weak indeed» [39].

E) *The Advent of the Charter of Rights and Freedoms*

As alluded to above, the introduction of the *Charter of Rights and Freedoms* in 1982 stands as one of the most significant developments in Canadian legal history, and the brief review above highlights the void which the *Charter* has filled. Unlike these earlier efforts, even at this early stage of development the *Charter* has played a prominent role in the public and juridical debates over the freedoms which Canadians prise. Patently, it represents the strongest commitment to date to the notions of tolerance and ethnic diversiy which were described earlier as an inherent, and valued, feature of Canadian society.

i) *An Overview of the Charter*

Canada is, at root, a liberal democratic state and so it shoult not be surprising that the *Charter,* like the *Bill of Rights* before it, enshrines and protects traditional liberal values. As a result, the *Charter* provides for various political rights; safeguards in the conduct of the criminal justice process; and basic human rights, such as the right to freedom and religion, which is contained in section 2(a) of the *Charter.* Included also is the basic right to be free from governmental discrimination. In particular, it is provided that «every individual is equal before and under the law and has the right to the equal protection and the equal benefit ot the law without discrimination, and in particular, without discrimination based on... religion...» [40].

The *Charter* does not impose an obligation on the state to take affirmative action, rather its focus is to limit or control state power. In the words of one member of the Supreme Court, the *Charter* «[e]rects around each individual, metaphorically speaking,

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[38] *Supra,* note 36, at 3096 (*per* Mr. Justice McIntyre).
[39] B. VIZKELETY, *Proving Discrimination in Canada* (1987), at 100.
[40] *Charter,* section 15(1). Section 15(2) allows for affirmative action programs.

an invisible fence over which the state will not be allowed to trespass» [41]. Correlatively, the *Charter* does not apply to disputes between private individuals; it is only relevant as a means to constrain state power.

The absolute protections contained within the *Charter* are modified in two important ways. Section I provides, in wording similar to that found in the European Convention on Human Rights, that all of the rights conferred are subject to «such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society». This provision recognises that some restrictions on fundamental freedoms may be appropriate, though it is clear that the state (be it the federal or a provincial government) must carefully demonstrate that there is a need for the limitations which have been imposed. Even apart from section 1, and unlike the European Convention, certain of the protections contained in the *Charter,* including the protection for freedom of religion, may be overridden by express provision in federal and provincial law [42]. Realistically then, the entrenched protections remain dependent of parliamentary sufferance, for in cases of national crisis (for instance), the power to override the *Charter* can be used. Still, despite these limits, the early history of the *Charter* has been a promising one, with Canadian courts, led by the Supreme Court, accepting willingly the immense power of judicial review which the *Charter* bestows upon them. This is, indeed, in marked contrast to the reticent judicial attitude evident in the earlier *Bill of Rights* jurisprudence [43].

ii) *The Freedom of Religion Cases*

The first Supreme Court of Canada decision outlining the contours of the right to freedom of religion and conscience, *The Queen v. Big M. Drug Mart* [44], concerned the validity of federal *Lord's Day Act,* the same statute that was unsuccessfully challenged under the *Bill of Rights* in the earlier case of *Rovertson & Rosetanni.* In contrast to the result reached in the *Rosetanni* case, on this occasion the Supreme Court hel that the federal Act violated the constitutional right to freedom of religion and conscience and was therefore invalid. This difference in outcome illustrates well the enhanced potency which the *Charter* has enjoyed.

There are five aspects of the decision in *Big M* which have a direct bearing on religious freedom. First, the Supreme Court of Canada expressly rejected the limited conception of freedom of religion adopted under the *Bill of Rights.* Secondly, it was recognised that in *Charter* analysis generally it is necessary to examine both the *purpose* and *effect* of the legislation to determine whether a constitutional right has been violated. This is analogous to the analysis taken up by those decisions rendered under the human rights statutes. It was decided that if the purpose of the impugned legislation is found to contravene a constitutional right, there is then no need to proceed to examine the effects of that legislation. An unconstitutional purpose cannot be sustained. But even a statute with a valid purpose may be held contrary to the *Charter* if its effect is to violate a protected right. In this case, the Chief Justice was of the view that the purpose of the *Lord's Day Act* was essentially religious; this had been recognised under the *Bill of Rights.* It objective was said to be to secure observance of the Christian Sabbath, and was not merely directed toward the secular goal of securing a universal day of rest for workers. Again, even if some of the effects of the statute were benign, the unconstitutional purpose of the statute was fatal to its validity.

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[41] *Regina v. Morgentaler et al.* [1988], 1 S.C.R. 30, at 164 (Supreme Court of Canada) (*per* Mme. Justice Wilson).

[42] *See Charter,* section 33.

[43] *See* ELMAN, *supra,* note 20.

[44] [1985], 1 S.C.R. 295 (Supreme Court of Canada).

Thirdly, i was said that freedom of conscience and religion could only be understood in light of the interpretive principles set out in section 27 of the *Charter,* which calls for a reading of fundamental rights which is «consistent with the preservation and enhancement of the multicultural heritage of Canada». A law compelling a universal day of rest, even one which is observed by a majority of Canadians, would offend those adhering to other religious beliefs, or those who held no such beliefs whatsoever. It was recognized that in Canada today, there are a multiplicity et organised religions.

Fourthly, the protection of 'religion' was described as containing both a freedom to manifest one's beliefs and freedom from being required to comply with the beliefs of others. The freedom to manifest one's beliefs encompassed «the right to entertain such religious beliefs as a person chooses; the right to declare religious beliefs openly and without fear of hidrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination» [45]. The freedom from conformity concerns primarily the absence of coercion or constraint, including indirect forms of control which determine or limit alternative courses of conduct available to others» [46]. It was found that on a purposive reading of the *Charter* both of these aspects were contemplated.

Finally, the Supreme Court of Canada adopted a definition of 'conscience' which is rather expansive [47], including witthin its scope «the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrains its manifestation» [48]. Additionally, the Chief Justice of the Court said that:

> 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. Religious beliefs and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter.* Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusal to participate in religious practice [49].

The issue of Sunday-closing legislation was re-visited by the Supreme Court in the case of *Edwards Books & Art Ltd. v. The Queen* [50]. The judgement of the Court in that case echoes that in *Big M* as to the general meaning to be attributed to the protection of conscience and religion, and the relevance of multiculturalism. However, in its application to the facts, *Edwards* seems to offer a form of diluted protection for religious freedom. At issue was the constitutional validity of the *Retail Business Holidays Act* [51], a statute enacted by the government of the Province of Ontario. That Act required the closing of stores on holidays including Sundays, but contained an exemption for those who observed the sabbath on Saturday. This exemption applied to small businesses which remain closed on Saturdays (instead of Sundays). The legislation was challenged by a Saturday-observing retailer. In the end, the Act was upheld.

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[45] *Id.* at 336 (*per* Chief Justice Dickson).

[46] *Id.* at 336-7.

[47] *See* I. COTLER, «Freedom of Conscience and Religion», in Beaudoin & Ratushny, eds., *The Canadian Charter of Rights and Freedoms* (2nd. ed., 1989), at 174.

[48] *Supra,* note 44, at 346.

[49] *Id.* at 346-7.

[50] [1986], 2 S.C.R. 713 (Supreme Court of Canada).

[51] Revised Statutes of Ontario 1980, chapter 453.

The Chief Justice, writing for a majority of the Court [52], developed further the definition of 'coercion' introduced in *Big M*. To the majority, it did not matter «whether a coercive burden is direct or indirect, intentional or unintentional, foreseeable or unforesseable. All coercive burdens on the exercise of religious beliefs are potentially covered by section 2(a)'[53]. The key to understanding this position lies in the term 'burden', for not every burden on religious freedom will constitute a violation of a constitutional right:

> The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perceptions of oneself, humankind, nature, and in some cases, a higher of different order of being. Thees beliefs, in turn, govern one's conduct and practices. The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might *reasonably* or actually be threatened. For a state-imposed cost or burden to be proscribed by s. 2(a) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial [54].

While the Chief Justice's reasoning intuitively makes sense, the open question is how broadly or narrowly 'trivial breach' will be defined [55]. The court observed, that the freedom of religion did not require the elimination of «every state-imposed cost associated with the practice of religion» [56]. For example, a general tax which applied to all products including those necessary for religious worship would not be impeachable. Still, in this case, the Chief Justice found that the infringements which resulted were not insubstantial or trivial. Economic pressure existed on some Saturday-observers to abandon their religious practices; Saturday-observing consumers were also affected. But to the Chief Justice, the Act could be saved as a reasonable limitation on freedom of religion. Allowing for a regular and established day of rest was rational, and choosing a day which co-incided with school schedules, practices in the manufacturing sector, and general community patterns also seemed sound. Additionally, the government of Ontario had carefully designed the legislation to achieve its purpose. A serious effort had been made to take account of the rights of Saturday-observers, even if it did not provide a more complete exemption.

In *Edwards,* the Court stressed again the importance of analyzing both the 'purpose' and 'effect' of legislation. The majority found that the Ontario Act had a valid

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[52] Two Justices agreed with Dickson C.J. (Chouinard J. and Le Dain J.); two (Beetz and McIntyre) said s. 2(a) was not infringed; Wilson J. said s. 2(a) was infringed and could not be saved under s. 1; Laforest J. said that it would not have been saved under s. 1 without the statutory exemption contained in the Ontario statute.

[53] *Supra,* note 50, at 759.

[54] *Id.* at 759 (emphasis added).

[55] The notion of a trivial breach was first introduced in *Regina v. Jones* [1986], 2 S.C.R. 284 (Supreme Court of Canada). That case dealt with The Alberta Education Act which allowed for the development of private schools, provided that the schools received certification from the provincial education authorities. Jonesthe owner of a religious school, refused to apply for a certificate on the basis that it would require him to recognize the supremacy of the province over God in matters of educational; this he was not prepared to do. A majority of the Supreme Court held that this constituted a breach of the right to freedom of religion under constituted a breach of the right to freedom of religion under section 2(a), but the legislation was saved under s. 1 of the *Charter* as a reasonable limitation on that right. Madam Justice Wilson, in a concurring judgment viewed the requirement that a certificate be sought as trivial, which did not violate section 2(a). In her view, therefore, an analysis of section 1 was not required.

[56] *Supra,* note 50, at 760.

(secular) purpose to ensure that workers were accorded a day of rest. But despite this, was the *effect* of the law to abridge freedom of religion and conscience? On this point, the Court identified two types of effects: the burdens which would be imposed on those who have a non-Sunday religious practice [57]; and the effect of non believers who would be required to observe a day of rest on Saturday or Sunday. Here, the majority developed differing standards for assessing the effects on religious adherents, and non-believers, maintaining that «[f]reedom from conformity to religious dogma [is] governed by somewhat different considerations than the freedom to manifest one's own belief» [58]. In other words, «legislation with a secular inspiration does not abridge the freedom from conformity to religious dogma merely because statutory provisions coincide with the tenets of a religion» [59].

While *Big M Drug Mart* and *Edwards Brooks* remain the leading judgments on the constitutionalisation of the right to freedom of religion, several lower decisions have shed light on the purview of these guarantees. In particular, two lower court decisions from the Province of Ontario have addressed the validity of religious exercise [60] and religious education [61] in the public school system. At issue here was a provincial regulation providing for religious exercises, which were to be conducted in within non-denominational public schools. An exemption is provided for students whose parents do not want their children participating in these religious activities.

This regulatory scheme has been found to violate the freedom of conscience and religion provision as contained in the *Charter*. It was held that the purpose of the legislation was to promote or impose the dominant religion; given the earlier Supreme Court holdings, this patently violated the *Charter*. Moreover, the regulations could not be regarded as a reasonable limitation on that freedom (under section 1 of the *Charter*) since there were other, less intrusive means of providing religious education in a way which did not abridge the constitutional rights of members of religious minority groups. The exercises required under the impugned law imposed Christian observances on non-Christian pupils, and religious observances on non-believers [62]. The curriculum was plainly directed towards one religious faith, and did not purport to deal with 'religion' or 'religions' in general. It was reasoned that if the curriculum was truly directed towards legitimate educational objectives —and not indoctrination— then it was curious that a statutory exemption, available to some students, had been inserted into the regulatory scheme. Additionally, it was found that the exemption, far from saving the regulations, itself discriminated against pupils who were members of religious minorities. It was reasoned that those who took advantage of the exemption ran the risk that they would be stigmatized as non-conformists. Forcing students to choose to invoke the exemption —thereby declaring themselves as different— was itself regarded as a *Charter* violation.

Matters of religious education are considered elsewhere in tthe Constitution of Canada. As discussed above, by virtue of section 93 of the *Constitution Act, 1867,* religious denominational education has been guaranteed to Catholics and Protestants from the earliest days of nationhood. The Supreme Court of Canada recently re-examined these rights and their interrelationship with the *Charter*. In *Reference*

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[57] The burden identified was the legislation made it more expensive for them to practice their religion because stores would be closed Sunday and on the other day of religious practice *i.e.* Friday or Saturday.

[58] *Supra,* note 50, at 760.

[59] *Id.* at 761.

[60] *Re Zylberberg et al. and the Director of Education of Sudbury Board of Education* (1988), 65 Ontario Reports (2d) 641 (Ontario Court of Appeal).

[61] *Canadian Civil Liberties Association v. Ontario (Minister of Education),* Not yet Reported, January 30, 1990 (Ontario Court of Appeal).

[62] *Supra,* note 60, at 654.

Bill 30 [63], the government of the Province of Ontario sought the Supreme Court's opinion on the constitutional validity of proposed legislation designed to grant full funding to Catholic schools. The concern was that this violated the freedom of conscience and religion protections, and it was also suggested that it might contravene the right to equality under the law (guaranteed under section 15 of the *Charter*), because funding was not extended to other religious schools.

The Supreme Court of Canada upheld the proposed *Bill,* principally on the basis that the *Charter* cannot be used to overrule or invalidate other parts of the Constitution. Section 93 of the *Constitution Act, 1867* contains a very specific grant of legislative jurisdiction over 'separate schools' (i.e., Catholic school) funding; the *Charter* could not be used to obliterate that grant. Additionally, section 29 of the *Charter* provides that «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». While ostensibly relevant to the instant case, this provision was not relied upon in the Supreme Court's reasons for judgment. The fact that section 93 was a the result of fundamental compromise entered into at the time Canada became a nation in 1867 was enough to uphold the validity of the legislation [64].

The protections contained in section 2(a) for freedom of religion have also arisen in a host of other contexts. For example, it has proved relevant in cases involving the medical treatment of children. All provinces possess laws which allow the state to interfere with family decision-making, where this is seen as necessary to safeguard children who are thought to be in need of profection. Such action may be taken where parents, because of religious beliefs, refuse essential treatment, such as blood transfusions and insulin injections, for their children. Typically, a state agency will intervene to ensure that these medical procedures are undertaken. Does this violate the *Charter?* Universally the Courts have said 'no'. While there can be no doubt that religious freedom is abridged, there is a consensus that the current limitations, designed to promote the best interests of children who are in peril, constitute a reasonable limitation on the rights conferred in section 2(a) [65].

F) *Some Final Reflections*

This paper has sought to highlight the emerging role of the *Canadian Charter of Rights and Freedoms* in the protection of freedom of religion in Canada. It is possible, however, to overstate the importance of the *Charter* in the daily lives of Canadians and to ignore the harsh reality which festers behind the veneer of freedom purportedly conferred by the *Charter.* In two important ways, daunting challenges to freedom and tolerance remain. The first of these draws us back to the conceptualisation of negative freedom contained within the *Charter.* The liberal conception views the state as the principal adversary in the pursuit of freedom, and holds only the state accountable for erosion of the protected rights. Such an approach is hardly novel, and in fact predominates in domestic constitutions in many liberal democracies. What this ignores, however, is the vast power which the state recognises to its citizenry through protecting preexisting rights of private property. The wielding of power through financial dominance cannot be directly checked by the *Charter* protections. In a similar way, the guarantee of freedom of religion can be seen as a

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[63] [1987], 1 S.C.R. 1148 (Supreme Court of Canada).

[64] *ee further* D. GIBSON, «Public Funding for Denominational Schools» (1988), 67, *Can. Bar Rev.,* 142.

[65] *See e.q., Re S.E.M. and the Director of Child Welfare* (1986), 4 Reports of Family Law (3d) 363 (Alberta Queen's Bench).

delegation of power. The right of individuals to follow or apply a prescribed religious dogma can permit the control and domination of religious adherents in a way that can be as coercive as any formal law. This is the power which is unleashed by insulating the state control of religious activity. Indeed, the ironic twist in all of this is that a given religious precept, which is protected from state interference by the *Charter,* may itself be quite illiberal. A religious practice which is, for example, sexist, may not be subject to challenge as being constitutionally invalid.

The second matter relates to Canada's claim to be a society which is tolerant and multicultural. A society is forged from shared social values. While the degree of cohesion and commonality will range, from those which are homogenous, to those which are pluralistic, there must exist some critical mass of commonly-held fundamental beliefs to make a society viable. How can this necessary level of social cohesion be achieved in a nation of immigrants which promotes both multiculturalism and equality?

As alluded to above, there are two responses to this question in North America; recall the metaphors of the American 'melting pot' and the Canadian 'mosaic' [66]. Under the first, social subgroups strain against the yoke of public authority and the cultural vice into which divergent cultures are pressed. Canada's political history *purports* to tell a different story. Under the ethos of the mosaic, the state seeks to mediate competing social claims, and by this means enrich the fabric of Canadian life.

Yet his image is misleading, perhaps false. A mediator must be impartial; he must not have a purchase in the outcome of the dispute. But here lies the problem: it is not enough, or even possible, to be impartial when the competing social and cultural claims vie against each other at the most fundamental levels. Governments must ultimately make policy in all realms of life, and underlying this, one inevitably finds that the norms and expectations of a given cultural (or religious subset) have won out over others. Additionally, in this process it is not surprising that the values of dominant cultures will often prevail. In a governmental system premised on majority rule, the views of a 'majority' culture are bound to predominate. Take for example the case of family law, a sphere in which moral (and religious) values lie close to the surface. In Canada, polygamous marriage is not part of the dominant culture and is therefore not permitted, notwithstanding that certain religious faiths permit this form of matrimony. By contrast, divorce is universally acceptable, even where this would contravene the religious doctrine of a given group.

A current issue, which has reached national dimensions, captures the problem well, though to the outside observer is mist seem both innocuous and thite. It is also an issue which appears simple, though on examination what is revealed are the difficulties of cultural accommodation alluded to above. In brief, the question concerns the uniform worn by members of Canada's national police force, the Royal Canadian Mounted Police. More specifically, a controversy has arisen as to whether those members of the Sikh religion, who are also members of this force, should be allowed to wear the Sikh turbans in place of the rather distinctive R.C.M.P. stetson hats required to be worn under police regulations. To the Sikhs, the turban is of profound religious significance. To some Canadianas, an issue of national identity —as exemplified by the Mountie uniform— is raised. In the end, the government was prepared to allow the wearing of turbans as a limited exception to the standard dress code. The debate which preceded (and followed) this decision has been only superficially about the value of requiring uniformity among members of the national police. What is really at play is a clash of cultures. Police attire has changed over time as a response to a number of considerations, including social preferences and values. Turbans have never been adopted by the dominant culture; even now they will only be tolerated

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[66] *See* discussion on § C), ii), *infra.*

as an exception. At the same time, the stetson it itself an import, having been adopted from the uniform of the American 'Texas Rangers'.

All of this is intended to illustrate tha the state is hardpressed to act neutrally in matters of cultural accommodation; it must multimately choose sides. The intense public debate surrounding the turban debate also demonstrates that the tolerance of Canadians is somewhat mythic. Many Canadians regarded the introduction of the turban as an unwelcome threat to the fragile Canadian identity. It was seen as a challenge to one of the few potent Canadian symbols —The Royal Canadian Mounted Police— an icon which Canadians perceive as enjoying international recognition. If anything, the wearing of turbans by some Mounties ought to be seen in just the same way, as a vital symbol of tolerance and respect and commitment to the goals of multiculturalism. A symbol, such as the *Canadian Charter of the Rights and Freedoms* itself, which represents an earnest and meaningful response to religious freedom.