



RELIGIOUS FREEDOM IN A MULTICULTURAL SOCIETY

CARDUS

JANUARY 10, 2017

FAISAL BHABHA



ABOUT CARDUS

CARDUS IS A THINK TANK dedicated to the renewal of North American social architecture. Headquartered in Hamilton, ON, Cardus has a track record of delivering original research, quality events, and thoughtful publications which explore the complex and complementary relationships between virtues, social structures, education, markets, and a strong society. Cardus is a registered charity.

cardus.ca

In examining the impact of recent judicial rulings on cases under Section 2a of the Canadian Charter of Rights and Freedoms that enshrines freedom of conscience and religion, Faisal Bhabha draws our attention to how individuals' religious expression has been and is being accommodated within Canadian jurisprudence. Bhabha argues that the Supreme Court of Canada is striving in its decisions to reflect the multicultural nature of Canadian society by striking a balance between competing interests. In so doing, Bhabha posits, the Court is shifting from a posture of strong rights articulation to a weak rights application. The paper also highlights the emerging challenge of 'faithism' - a new form of discrimination increasingly manifested by public sceptics who ascribe negative characteristics or flawed values to people who profess a religious faith, and the impact that such discrimination can have on Canada's multicultural and multi-faith reality.



Table of Contents

5	INTRODUCTION
7	A. STRONG RIGHTS: STRICT SCRUTINY OF RESTRICTIONS ON RELIGION
11	B. WEAK RIGHTS: BALANCING INTERESTS AND JUSTIFYING LIMITS
20	C. UNDERSTANDING THE JURISPRUDENCE
23	CONCLUSION

Introduction

It is axiomatic that, within the liberal-democratic paradigm, one person's freedom only extends to the point at which it obstructs another's freedom.¹ Guarantees of religious freedom and religious equality under the *Canadian Charter of Rights and Freedoms* provide the basis for legal action to advance accommodation claims when members of faith groups are adversely affected by state action or legislation. Such claims usually arise when individuals or groups decide to challenge established policies and practices, underinclusive legislation, and overreaching administrative action. In recent years, with Canadian multiculturalism at a crest, such claims have garnered significant public attention.

Accommodation is usually understood as an important tool for promoting inclusion where neutral rules have a disparate impact on minorities. Accommodation, then, operates to combat structured social inequality for the individual. It is based on values of personal autonomy and dignity, and derives from a theory of justice in which individual freedom is paramount. The governing rule, which underlies the *Charter* interpretations of freedom, is that the state should not impinge another's freedom without justification relating to objectively identifiable harm. In constitutional rights analysis, harm has traditionally been considered as part of the balancing that occurs under the justificatory analysis of section 1 of the *Charter*. Where a religious expression is infringed, the courts employ proportionality analysis to weigh the relative harm, benefits, and any other relevant interests affected.²

By tracing the way the Supreme Court of Canada has identified harms and then balanced them in key cases involving claims of religion over the last dozen years, this paper will describe the trajectory of a court moving from a strong rights articulation to a weak rights application. Underlying this trend has been an embrace of proportionality and balancing as an analytical method, casting cases as raising competing interests, while diminishing the onus of justification on the state for incursions against religion. No doubt, religion has been a lightning-rod topic, and the public tend to be more sceptical of religious minorities manifesting their faith than of the state restricting the practice of religion. Public skepticism sometimes manifests as "faithism," a new form of discrimination that ascribes negative characteristics and values to individuals based on their beliefs.³ In particular, it propagates the stereotype that religious people are disrespectful of diversity.

1 * Associate Professor, Osgoode Hall Law School of York University, Toronto, Canada. The author is indebted to Glynnis Hawe for invaluable research support. He also thanks Melanie Adrian for constructive comments on an earlier draft.

Alex Fielding, "When Rights Collide: Liberalism, Pluralism, and Freedom of Religion in Canada," *Appeal* 13 (2008): 28.

2 See *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551; and *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256.

3 Ontario Human Rights Commission, *Policy on Preventing Discrimination Based on Creed*, September 17, 2015, www.ohrc.on.ca/en/policy-preventing-discrimination-based-creed.

Changing Canadian demographics and the growth of new religious communities have transformed Canada's religious mosaic. Cleavages that have formed in the social fabric percolate up into the courts, presenting challenges to adjudicating rights in this climate. How the courts consider religious claims often reveals a disjuncture between how the law conceives of religion and how religions conceive of themselves. These limitations of legal liberalism⁴ are embedded in the key legal instruments and institutions that frame religious rights claims. Thus, understanding how the law's structural and ideological boundaries can influence and shape the content of religious expression is essential to predicting how courts may deal with an issue.

What is apparent in the case law is that the more private the religious manifestation the higher the level of legal protection and the less likely a violation is to be justified. In balancing interests and harm, an intrusion that disrupts or coerces essentially private action attracts the strictest judicial scrutiny. However, where a religious action occurs in a public or semi-public space, the court appears increasingly quick to consider competing considerations. This paper concludes by observing that issues likely to arise in the future relate to collective religious expressions, associational rights, and claims where the intersection of equality and religious freedom deepen to compel the state to carve out or administer group-differentiated spaces in the commons. The Supreme Court of Canada is expected to ultimately decide the case of the private evangelical Christian post-secondary institution Trinity Western University, whose proposal for a law school has attracted controversy within the legal profession and the academy. While the court's judgment may not resolve the issues to the satisfaction of all, it will no doubt offer some clarity as to the principles governing the relationship between the state and religious communities.

⁴ Benjamin Berger, "Law's Religion: Rendering Culture," *Osgoode Hall Law Journal* 45, no. 2 (2007): 305-6.

A. Strong Rights: Strict Scrutiny of Restrictions on Religion

SYNDICAT NORTHCREST V. AMSELEM⁵

Religious freedom in the courts hit its high point in the 2004 Supreme Court decision in *Amselem*. This judgment summed up the law’s modern conception of the scope of freedom and the bounds of protection for constitutionally protected religious thought and action.⁶ The case dealt with the manifestation of religion in a space as close to one’s personal, private realm as one can get: the balcony of a home. The claimants, Orthodox Jews, wished to construct personal “succahs” (a form of straw hut) on their condominium balconies in honour of the Jewish harvest festival. The condominium corporation considered balconies to be part of the common space and therefore subject to shared ownership. This regime was created through standard form contracts, which the claimants had signed. The question on appeal was whether the condominium was required to accommodate the claimants’ desire to erect structures notwithstanding the contractual language.

Five justices answered the question affirmatively, and laid out the test for religious accommodation that is applied in courts and tribunals across the country. Four justices dissented, preferring enforcement of the plain meaning of the contract over an accommodation analysis that would impose burdens on others (fellow condo dwellers) to facilitate accommodation. The dissenters concluded that, “at the heart of this fact-specific case is the issue of the appellants’ acceptance, embodied in the contract with their co-owners, that they would not insist on construction of a personal succah on the communally owned balconies of the building.” Thus, a denial of accommodation would in fact constitute a fair application of contractual terms.

While *Amselem* remains the definitive religious-freedom precedent, I would suggest that the *Amselem* approach does not alone shape the Supreme Court’s current approach. Rather, it should be read in conjunction with the court’s 2007 judgment in *Bruker v. Markovitz*.⁷ In that case, the court did what the majority would not do in *Amselem*: use the *Charter* to pierce the religious veil. It is noteworthy that, in 2004, Justice Rosalie Abella was appointed to the court. Not having sat on *Amselem*, in 2007 Abella J. wrote for a seven-judge majority in *Bruker*. The court awarded a woman civil damages because her ex-husband refused to honour a prior agreement to grant her a Jewish religious divorce. In reaching this conclusion, the court had to consider

⁵ *Amselem*, para. 551.

⁶ It is worth noting that the Supreme Court in *Amselem* was narrowly divided, 5–4, with a strenuous dissent not favouring accommodation of the religious practice.

⁷ *Bruker v. Markovitz*, [2007] 3 S.C.R. 607.

the religious divorce agreement and ordered damages related to its breach. This judgment suggested that the separation of religious and secular law may not be inviolable. The *Charter* can serve as both a shield and a sword, driving into matters typically considered beyond the bounds of what courts may consider.

MULTANI V. COMMISSION SCOLAIRE MARGUERITE-BOURGEOYS⁸

The appellant Balvir Singh Multani and his son Gurbaj Singh Multani were orthodox Sikhs who believed that their religion requires them to wear the kirpan (a type of sacred dagger) at all times. In 2001, Multani accidentally dropped his kirpan, which he was wearing underneath his clothing, in the schoolyard. The school board, the Commission scolaire Marguerite-Bourgeoys (CSMB), sent a letter to his parents agreeing to accommodate his religious beliefs by authorizing their son to wear his kirpan to school provided that he ensured it was sealed inside his clothing.⁹ However, the school's governing board refused to ratify the agreement on the basis that wearing a kirpan at the school in any manner violated article 5 of the school's code of conduct, which prohibited the carrying of weapons and dangerous objects.¹⁰ The school board's council of commissioners agreed with the school board's decision.¹¹

Multani appealed to the Superior Court where Grenier J. held that the religious belief to wear a kirpan was sincere and based on the lack of evidence showing violent incidents involving kirpans, she allowed Multani to wear his kirpan at school under certain conditions.¹² This ruling was appealed and overturned by the Court of Appeal, which found that allowing the pupil to wear his kirpan even under certain conditions would undermine the school's safety standards and result in undue hardship. The decision was appealed to the Supreme Court of Canada.¹³

The court was asked to determine whether prohibiting a student from wearing a kirpan to school infringes the student's freedom of religion and whether this infringement could be justified by the need to create a safe school environment. The court held that the absolute prohibition against wearing a kirpan to school infringes the student's freedom of religion and cannot be justified because the prohibition does not minimally impair the right of the student.¹⁴ In arriving at this conclusion, the majority found that the boy sincerely believed his faith required him to wear a metal kirpan at all times and the fact that he transferred to a private school to comply with his religious belief shows that his belief was not trivial or insignificant.¹⁵ The majority judgment held that Multani's religious freedom had been violated.

⁸ *Multani*, para. 3.

⁹ *Ibid.*

¹⁰ *Ibid.*, para. 4.

¹¹ *Ibid.*, para. 5.

¹² *Ibid.*, para. 8.

¹³ *Ibid.*, para. 12.

¹⁴ *Ibid.*, para. 2.

¹⁵ *Ibid.*, paras. 36 and 40.

The majority had to subsequently determine whether a limit on the freedom was justifiable under the *Charter* by using the *Oakes*¹⁶ test. First, the majority judgment affirmed that ensuring safety in schools is a sufficiently important objective.¹⁷ The majority then engaged in the proportionality analysis, which is composed of the following three questions: Is there a rational connection between the challenged rule and the objective? Does the rule minimally impair the right being infringed? And do the benefits of the objective being attained outweigh the deleterious effects of the rule?¹⁸

Under the first stage of the proportionality analysis, the court held that there was a rational connection between banning the kirpan and ensuring the safety of individuals in schools.¹⁹ In examining whether the school board's actions were minimally impairing, the court compared the arguments in favour of a complete ban with arguments in favour of allowing kirpans under certain conditions. According to the board, "the presence of kirpans in schools, even under certain conditions, creates a risk that they will be used for violent purposes, either by those who wear them or by other students who might take hold of them by force."²⁰ The kirpan was also seen as a symbol of violence that would poison the school environment. The court relied on the fact that Multani did not have behavioural problems to conclude that he would not use the kirpan for violent purpose and the kirpan would be worn under strict conditions, which would make it difficult for other students to access the kirpan.²¹ The majority acknowledged that there were other school utensils such as scissors and baseball bats that could be used by other students as weapons.²² Therefore, the absolute ban on kirpans was not minimally impairing. The court briefly examined the third stage of the proportionality analysis and concluded that allowing Multani to wear the kirpan under certain conditions "demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities."²³

In concurring judgments Justices Abella and Deschamps agreed with the result but would have used an administrative-law framework to decide the case along the lines of *Charter* values, rather than as a *Charter* rights infringement subject to s. 1 justification.²⁴ Abella J. concluded

16 The *Oakes* test is a legal test created by the Supreme Court of Canada in the case *R v Oakes* (1986). *R v Oakes* provided the Court with the opportunity to interpret the wording of section 1 of the *Charter* and to explain how section 1 would apply to a case. The result was the *Oakes* test – a test that is used every time a *Charter* violation is found. Section 1 of the *Charter* is often referred to as the "reasonable limits clause" because it is the section that can be used to justify a limitation on a person's *Charter* rights. *Charter* rights are not absolute and can be infringed if the Courts determine that the infringement is reasonably justified. <http://ojen.ca/en/resource/in-brief-section-1-of-the-charter-the-oakes-test>

17 *Ibid.*, para. 45.

18 *Ibid.*, paras. 49–51.

19 *Ibid.*, para. 49.

20 *Ibid.*, para. 56.

21 *Ibid.*, paras. 57–58.

22 *Ibid.*, para. 58.

23 *Ibid.* at 79.

24 This concurrence was later adopted by the majority in *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395.

that “by disregarding the right to freedom of religion without considering the possibility of a solution that posed little or no risk to the safety of the school community, the council made an unreasonable decision.”²⁵ Meanwhile, in a separate concurrence, LeBel J. also opined that resort to the justification mechanism under s. 1 of the *Charter* may not always be appropriate in cases involving administrative discretion. As such, in his *Oakes* analysis, he disregarded the requirement that the state establish a pressing objective for rights violations. That would be unnecessary where the governing statutes were not challenged.²⁶ The question is whether the right can be minimally impaired through accommodation. He found that the school board had failed to meet this test.

While the results of competing analyses resulted in harmonized conclusions in *Multani*, the subsequent embrace, in *Doré v. Barreau du Québec*, of the minority view has raised questions about the further resort to quick balancing when *Charter* rights are at stake in administrative decision making. Indeed, the majority in *Multani* resisted this approach, warning that prematurely engaging in interests balancing can lead to a derogation from *Charter* rights: “In the case at bar, the Court does not at the outset have to reconcile two constitutional rights, as only freedom of religion is in issue here.”²⁷ When the court subsequently embraced the minority’s view in *Doré*, critics worried, not without justification, that a *Charter* values approach leads to watering down rights by compelling reconciliation without first requiring justification for rights infringement.²⁸

25 *Multani*, para. 99.

26 *Ibid.*, para. 155.

27 *Ibid.*, para. 29.

28 Audrey Macklin, “Charter Right or Charter-Lite? Administrative Discretion and the Charter,” *Supreme Court Law Review* 67 (2014): 561.

B. Weak Rights: Balancing Interests and Justifying Limits

The winds of change began to blow as the first decade of the new millennium wound down. Benjamin Berger argues that “law has no choice but to conceive of religion in terms cognizable within constitutional liberalism,”²⁹ which necessitates employing a culturally pluralist approach to the adjudication of religious claims. When the courts fail to do this, they tend to view religion through secular-liberal lenses, muting important dimensions of religion that matter to the affected group. After the high-water-mark cases of *Amselem* and *Multani*, the Supreme Court reached conclusions in a series of cases that engaged in more robust balancing, showing greater deference to competing interests, resulting in a more constricted scope for religious freedom.

ALBERTA V. HUTTERIAN BROTHERS OF WILSON COLONY³⁰

The shift in the Supreme Court’s approach came on the backs of a tiny Christian community of Albertan Hutterites, who take literally the Bible’s rule against graven images. Believing that being consciously photographed is a sin, they found themselves unable to obtain driver’s licenses. The community brought a constitutional challenge to uphold their right to drive without having to breach their religion.

The court surprised many observers when, by a narrow 4–3 split, it refused to grant the exception. The majority were persuaded that, although the requirement constituted a breach of religious freedom, the stated government objective of combatting identity theft was sufficiently pressing to justify a strict enforcement of the rule. Although the court found that the infringement of the claimants’ religious freedom was “not trivial,” the majority nonetheless ruled that the harm did “not rise to the level of seriously affecting the claimants’ right to pursue their religion . . . [the infringement does] not negate the choice that lies at the heart of freedom of religion.”³¹

This conclusion highlights Berger’s concern about courts constructing religious claims through the lens of liberalism. The fact that, for many Hutterites, the ban on intentional photography was not some obscure rule but rather a core doctrine of faith (i.e., the Second Commandment) did not get the court past its starting position that not all infringements of religious belief are equally serious. The most severe incursion is direct compulsion, which was not at issue here. In terms of indirect compulsion, the court viewed it as most severe (and least likely to be justified) where it operates to “effectively deprive the adherent of a meaningful choice.”³² In the case of

²⁹ Berger, “Law’s Religion,” 281.

³⁰ *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567.

³¹ *Ibid.*, para. 99.

³² *Hutterian Brethren*, para. 94.

a driver's permit, which is a "benefit" (i.e., not a right), the judgment found that individuals are free to seek or not to seek that benefit. The court determined that this was not a significant impairment in the context of the Hutterite community. Choosing to drive was not a meaningful choice, but rather a convenience that could be dealt with through alternative means.

It is impossible to square the narrow majority's reasoning in *Hutterian Brethren* with the narrow majority's reasoning in *Amselem*. The three dissenters in *Hutterian Brethren* protested that a constitutional right was being breached on the basis of weak and unspecified grounds. They pointed out the minimal impact on the province of creating an exception for conscientious objectors as compared to the damaging impact that the breach would have on members of the religious minority community. The dissent framed the question not in terms of how valuable driver's licence photographs are generally but, rather, how valuable it would be for the province to compel these few individuals to go against a fundamental tenet of their religion: "Unlike the severity of its impact on the Hutterites, the benefits to the province of requiring them to be photographed are, at best, marginal."³³

R V. NS³⁴

In *NS*, the court again grappled with proportionality balancing between competing interests, with the majority setting up an elaborate scale for rights balancing that was doomed to collapse on use. The majority judgment, penned by McLachlin C.J. and endorsed by three others of the seven-member panel (Deschamps, Fish, and Cromwell J.J.), attempted to seize the middle ground between diametrically opposed positions: the minority judgment of LeBel J. (joined by Rothstein J.) drawing a principled line in the sand on religious accommodation; and Abella J.'s solo dissent, a plea for meaningful access to justice.³⁵ The majority judgment constructed a measuring scale with ideas drawn from moral and political thought, and articulated in the language of law.

The case was framed as a conflict of constitutional rights. The Supreme Court grappled with whether and to what extent the right of a witness to wear a niqab could be accommodated with the accused's right to face his accuser. NS had been called as a witness for the prosecution at a preliminary inquiry involving her uncle and cousin, who were charged with sexually assaulting her.³⁶ NS, who was a Muslim, wished to testify wearing a niqab, which is a veil that covers the face with the exception of the eyes. NS testified that her religious beliefs required her to wear

³³ Ibid., para. 115.

³⁴ R v. NS, [2012] 3 S.C.R. 726.

³⁵ Ibid., para. 2 (per McLachlin C.J.) ("A secular response that requires witnesses to park their religion at the courtroom door is inconsistent with the jurisprudence and Canadian tradition, and limits freedom of religion where no limit can be justified. On the other hand, a response that says a witness can always testify with her face covered may render a trial unfair and lead to wrongful conviction.")

³⁶ Ibid., para. 4.

the niqab in public, where men, with the exception of certain close family members, might see her.³⁷ The two accused stated that allowing NS to testify with her face covered by a niqab prevented them from effectively challenging the witness through cross-examination and interfered with the ability of the trier of fact to assess the credibility of NS.³⁸

Both the majority and the concurring minority characterized the issue as a conflict of rights. While LeBel and Fish J.J. found that religious freedom in these circumstances must yield entirely to trial fairness, the majority judgment outlined a framework for considering when a witness should be allowed to testify wearing a niqab. The analysis involves balancing competing interests and seeking reconciliation. According to the chief justice:

The answer is not to ban religion from the courtroom, transforming the courtroom into a “neutral” space where witnesses must park their religious convictions at the door. Nor does it lie in . . . holding that a witness may always wear her niqab while testifying. Rather, the answer lies in a just and proportionate balance between freedom of religion on the one hand, and trial fairness on the other, based on the particular case before the Court.³⁹

The court ruled that trial judges are best positioned to conduct the balancing, weighing the harm that would be caused by limiting the witness’s sincerely held religious practice with the benefits of removing the niqab. When examining the deleterious effects, the court must examine factors such as the importance of the practice to the claimant and the reluctance of sexual assault victims to report an offence.⁴⁰ The majority further outlined the salutary effects, which include ensuring fair trial rights and safeguarding the administration of justice.⁴¹

In her dissenting judgment, Abella J. held that it was not plainly evident that a niqab posed an actual threat to trial fairness, or that showing the entire face of a witness in every instance was a core component of the constitutional right to a fair trial. She did not accept that a concern for trial fairness should force NS to abandon her sincerely held religious belief,⁴² instead suggesting that the majority’s conception of trial fairness itself needed to be modified before compelling conduct by NS.

37 Ibid.

38 Ibid., para. 16.

39 Ibid., para. 31.

40 Ibid., paras. 36–37.

41 Ibid., para. 38.

42 Ibid., paras. 78 and 110.

SASKATCHEWAN (HUMAN RIGHTS COMMISSION) V. WHATCOTT⁴³

Another case in which the Supreme Court articulated a rationale for limiting religious freedom involved a case where the individual's manifestation of religious freedom did in fact cause harm to individuals. The freedom manifested in expressions that were anti-LGBTQ, and that were found by the court to be critical not only of gay acts but also of gay people, a significant distinction for the court. Four complaints were filed with the Saskatchewan Human Rights Commission concerning four flyers published and distributed by Whatcott, the respondent.⁴⁴ The complainants alleged that the flyers promoted hatred on the basis of sexual orientation, thereby violating section 14 of the *Criminal Code*.⁴⁵ Two of the four flyers were titled "Keep Homosexuality out of Saskatoon's Public Schools!" and "Sodomites in our Public School."⁴⁶ The commission referred the case to the tribunal.

The tribunal found that Whatcott contravened section 14 of *Saskatchewan Human Rights Code* because he expressed "hatred and ridicule" toward individuals on the basis of their sexual orientation and concluded that section 14 was a reasonable restriction on Whatcott's freedom of religion and expression.⁴⁷ Whatcott challenged the ruling as being an unconstitutional limit on his freedom of religion. The Saskatchewan Court of Queen's Bench upheld the tribunal's decision by applying the test for "hate speech" set out in *Canada (Human rights Commission) v. Taylor*, which prohibits "communication that involves extreme feelings and strong emotions of detestation, calumny and vilification."⁴⁸ The Court of Appeal overturned the lower court's decision, concluding that context should be given more importance.⁴⁹ The court reasoned, "Where, on an objective interpretation, the impugned expression is essentially directed to disapprobation of same-sex sexual conduct in a context of comment on issues of public policy or sexual morality, its limitation is not justifiable in a free and democratic society."⁵⁰

The Human Rights Commission appealed to the Supreme Court on the issue of whether s. 14(1)(b) of the *Saskatchewan Human Rights Code* infringes Mr. Whatcott's right to religious expression protected under section 2(a) and 2(b) of the *Charter*. Justice Rothstein, writing for a unanimous court, concluded that the prohibition on hate speech violates freedom of expression. The court unanimously found that the purpose of prohibiting hate speech was pressing and substantial because hate speech marginalizes groups and obstructs their ability to participate in democratic society.⁵¹ It moved on to balance the interests at stake.

43 Saskatchewan (Human Rights Commission) v. Whatcott [2013] 1 S.C.R. 467.

44 Ibid., para. 3.

45 Ibid., para. 9.

46 Ibid., para. 8.

47 Ibid., para. 10.

48 Ibid., para. 21.

49 Ibid., para. 16.

50 Ibid., para. 18.

51 Ibid., para. 75.

While undertaking the proportionality analysis, the court indicated that prohibiting expression that exposed vulnerable groups to hatred is rationally connected to the objective of reducing discrimination.⁵² The majority conceded that the words “ridicules, belittles or otherwise affronts the dignity of” in section 14(1)(b) were not rationally connected to the objective as they seem to broaden the notion of hatred by including offensive and insensitive statements as being part of hate speech.⁵³

The respondent argued that there were at least two alternatives that would minimally impair Whatcott’s freedom, namely, (1) trusting the marketplace of ideas to balance competing rights; and (2) prosecuting hate speech under the *Criminal Code* instead of pursuant to human rights legislation.⁵⁴ The court dismissed both approaches because the “marketplace of ideas” approach discourages the participation of minorities, while the *Criminal Code* only prohibits the most extreme forms of hate speech.⁵⁵ The court also found that promoting equality, respecting human dignity, and reducing discrimination outweigh the negative effects of minimally infringing freedom of expression.⁵⁶

The court then examined Whatcott’s freedom-of-religion argument and concluded that it did not matter whether the expression was religiously motivated or not; for if it amounts to hate speech, it cannot be justified.⁵⁷ The fact that the speech was religious does not, in and of itself, shield it from scrutiny as hate speech. The fact that LGBTQ rights are still a matter of public-policy debate did not justify subjecting members of that group to greater exposure to hatred and its effects. Therefore, the court unanimously confirmed that, while section 14(1)(b) of the *Code* infringes Mr. Whatcott’s right under both section 2(a) and 2(b) of the *Charter*, the infringement was justified.

SL V. COMMISSION SCOLAIRE DES CHÊNES⁵⁸

Whatcott confirmed that the latitude *Amselem* gave to religion would be curbed, as in *Braker*, by the use of *Charter* values. It appears from the court’s jurisprudence that it will not accept all beliefs as equally protected under section 2(a), nor all manifestations of said beliefs. The hierarchy of beliefs would place only those practices that are acceptable or tolerable to certain core values within the *Charter*’s protection. Those that offend a core Canadian constitutional value, like gender equality or multiculturalism, will fail to earn strong protection.⁵⁹ This does not mean that the courts will assert a power to police the beliefs and practices of the nation, nor does it

52 *Ibid.*, para. 80.

53 *Ibid.*, para. 92.

54 *Ibid.*, para. 102.

55 *Ibid.*, para. 104–5.

56 *Ibid.*, para. 148.

57 *Ibid.*, para. 163.

58 *SL v. Commission scolaire des Chênes*, [2012] 1 S.C.R. 235.

59 Note that this jurisprudential development has invigorated sections 27 (multiculturalism) and 28 (sex equality), which are, strictly speaking, interpretive provisions with no binding force.

mean that administrative actors infer *carte blanche* to persecute those who hold beliefs that are offensive to the *Charter*. *Charter* values work both ways: they can constrain religion, but they also protect religion from undue interference, while *Charter* rights continue to provide at least a baseline shield from direct compulsion and forced secularism. But even then, a case like *SL* raises questions about how far even a baseline principle of non-compulsion can go.

The case asked, What weight to give a parent's religious objection to secular public school education about religion? Should the objection be accommodated or should all pupils be compelled to learn identically? The appellants were devout Roman Catholics who asserted a right to withdraw their children from a mandatory middle school course on religious culture and ethics. Because the impugned course provided "neutral" (i.e., secular) instruction about various religions and philosophical traditions, the appellants argued that their right as parents to fulfill their religious duty to transmit their faith was obstructed.

The Supreme Court was unanimous in refusing to accept that the appellants had established in fact any interference with the fulfillment of their sincere belief. In a concurring judgment, LeBel J. (with Fish J.) found that there was not only insufficient evidence about the effects of the program but also insufficient evidence about the program's content and goals.⁶⁰ There could be no evidence that the program *actually* prevented the appellants from transmitting their faith to their children because the children had never been enrolled in the course. In fact, no student had yet even taken the course, and the parents' anticipation of interference could not ground an objective finding of religious encroachment. Essentially, the court found that the appellants were conflating the subjective and objective parts of the *Amselem* test, and prematurely asking the court to reach a conclusion to a hypothetical question.

While the reasoning appears to make sense—how can a claimant's subjective belief alone predict an objective finding of fact?—it obscures the more fundamental question of whether the school board had a duty to accommodate the parents' wishes. The claimants were asking the court to find a constitutional obligation on the public education system (which sets curriculum based on normative goals and public interests) to allow individuals to select items on the educational menu, and to reject others, in accordance with purely subjective religious belief, but the court required an objective factual basis on which to apply the duty to accommodate. The court rejected the appellants' belief that secular education about religion was inherently contrary to their religion as lacking factual foundation. The court left it to another day to explicate the relationship between religious freedom and religious education, and the nuanced consideration of who delivers it, how it is done, and in which normative framework it is situated.

60 *SL*, paras. 55–56: "Even after a careful reading, it is not really possible to assess what the program's implementation will actually mean. As a result, it is hard to tell what the emphasis [*sic*] the program will place on Quebec's religious heritage and on [*sic*] the cultural and historical importance of Catholicism and Protestantism in that province will mean."

LOYOLA HIGH SCHOOL V. QUEBEC⁶¹

The Supreme Court again considered the question of religious education in *Loyola*. In that case, a private religious school applied for an exemption from teaching the mandatory ethics and religion portion of the curriculum on the grounds that it would offer an equivalent course that aligns with its Catholic worldview. The minister of education denied the request because Loyola’s proposal was to teach Catholicism from a Catholic perspective. The court was troubled by this decision. While the state’s purpose in enforcing “neutral” education about religion is secular in nature, the effect was to improperly interfere with the core function of a religious institution to propagate its faith. Unlike the case in *SL*, the court noted that Loyola High School is a private school, and thus is entitled to a higher degree of deference to its religious mission. The minister’s decision was thus also found to undermine the liberty of members of the community who chose to manifest their faith collectively by participating in a denominational school.⁶²

The court applied the balancing exercise and found that in a context where private religious schools are legal, a decision to effectively ban a Catholic perspective from Catholic education could not be said to advance educational objectives. Measures such as this, which “undermine the character of lawful religious institutions and disrupt the vitality of religious communities represent a profound interference with religious freedom.”⁶³ The court was troubled by the apparent underlying assumption that engagement with one’s own religion on its own terms cannot be trusted to adequately impart the value of respect for others. The court ruled that the assumption was unfounded and had led to a disproportionate decision.

Yet, when it came to education about other religions, the court concluded that the imposition of “neutral” or secular education was proportionate to the objectives of transmitting a culture of respect for difference. The court accepted that religious education about other religions could lead to demeaning members of those religions. As such, it used *Charter* values and the respect for difference (recall *Braker*) as a justification to limit the religious freedom to learn about other religions from a faith-based perspective.

61 *Loyola High School v. Quebec (Attorney General)*, [2015] 1 S.C.R. 613.

62 *Ibid.*, paras. 63–66.

63 *Ibid.*, para. 67.

MOUVEMENT LAÏQUE QUÉBÉCOIS V. SAGUENAY (CITY)

Simoneau, a resident of the city, attended the public meetings of the municipal council of the city of Saguenay, where at the start and end of each meeting the mayor would recite a prayer after making the sign of the cross while saying “in the name of the Father, the Son and the Holy Spirit.”⁶⁴ In two of the council chambers, there was a Sacred Heart statue and a crucifix hanging on the wall. Simoneau was an atheist and argued that his freedom of conscience and religion was infringed, contrary to section 3 and 10 of the *Quebec Charter*.⁶⁵ He asked that all religious symbols be removed and prayers should cease.⁶⁶ The Human Rights Commission referred the case to the tribunal. In the meantime, the city created a bylaw where the wording of the prayer was changed and required a two-minute delay between the end of the prayer and the official opening of council meetings.⁶⁷ Simoneau and the Mouvement laïque québécois (MLQ) then asked that the law be declared of no force or effect.⁶⁸

The Quebec Human Rights Tribunal found that the prayer was religious in nature and breached the state’s duty of neutrality by showing a preference for one religion over others. The religious symbols infringed Simoneau’s freedom of conscience and religion in a nontrivial manner.⁶⁹ The decision was appealed. At the Court of Appeal, the court found that Simoneau had not been discriminated against on the ground of conscience and religion as the prayer expressed universal values and the religious symbols were simply works of art.⁷⁰ Gagnon J.A. stated that the diversity of beliefs must be reconciled with the right to preserve the religious heritage of the state.⁷¹ The case was then appealed to the Supreme Court of Canada.

In analyzing whether the prayer at the meeting and the enabling bylaw interfered with Simoneau’s freedom of conscience and religion, the majority judgment recognized the state’s duty of religious neutrality, which requires the state to neither favour nor hinder any particular belief, including non-beliefs.⁷² Justice Abella, in a concurring judgment, further stated that the standard used to analyze state neutrality should be the same as what is used to determine whether discrimination based on religion has occurred.⁷³ The court dismissed the arguments put forth by the city that preventing it from expressing its belief would give atheism and agnosticism precedence over religion.⁷⁴

64 *Mouvement laïque québécois v Saguenay (City)*, [2015] 2 S.C.R. 3 at para. 6, 382 DLR (4h) 385.

65 *Ibid.*, para. 8 and 11.

66 *Ibid.*, para. 9.

67 *Ibid.*, para. 12.

68 *Ibid.*, para. 13.

69 *Ibid.*, para. 15.

70 *Ibid.*, para. 21.

71 *Ibid.*, para. 20.

72 *Ibid.*, para. 72.

73 *Ibid.*, para. 168.

74 *Ibid.*, para. 95.

The court summarized the evidence presented at the tribunal to support the conclusion that the prayer infringed Simoneau's freedom of religion and conscience. The tradition of reciting a prayer was implemented only in 2002 and the words of the original prayer were associated with Catholicism and religion.⁷⁵ The actual prayer combined with the circumstance in which the prayer was recited such as the making of the cross and saying "amen" showed that there was preferential treatment of theistic beliefs.⁷⁶ While the court acknowledged that the city added the period of two minutes between the end of the prayer and the official beginning of the meeting to accommodate citizens who did not want to attend the recitation of the prayer, the accommodation was inadequate. Inviting citizens to leave the chamber for the duration of prayer would force individuals to reveal they are non-believers and lead to isolation, exclusion, and stigmatization.⁷⁷ Therefore the court concluded that the tribunal's decision was reasonable.

In this case, the court rejected the competing rights frame advanced by the city. Unlike Loyola, which was a religious institution, the city did not have a competing right in peril. Instead, the court held that the guiding principle is that public authorities must not favour one religion over another, or compel religion on anyone. Accommodation is understood as part of the protection from interference with religious practice, not a vehicle for imposing ritual on others. Thus, if members of Saguenay Council wished to pray prior to council meetings they could seek an accommodation that would enable them to excuse themselves or provide time and space for that accommodation to take place.

75 Ibid., para. 99.

76 Ibid., para. 102.

77 Ibid., para. 121.

C. Understanding the Jurisprudence

The cases can be divided into two categories. In one category are cases that can be defined primarily as challenging restrictions on individual expressive freedom. State muzzles are rarely justifiable, except, as in *Whatcott* and *NS*, when a compelling competing interest is identified and protecting the right in question will cause harm to another person's rights. The case law is not definitive—both *Whatcott* and *NS* raise deep divisions and strenuous dissents. The second category consists of cases that either directly or indirectly raise a group or collective interest in religious freedom.

Group rights under the law are much more difficult to establish and protect than individual rights. In *Loyola*, the court ruled against the Crown that a religious institution could and does hold rights to religious freedom. Meanwhile, the *Charter* can protect an individual's interests as a member of a religious group within Canadian society, but not as an individual within that group. Religious organizations are not subject to the *Charter* and are statutorily shielded from human rights legislation. As a result, members of minority communities can use the law to remove barriers and claim greater autonomy and space only in relation to those outside their group. While a woman can claim a constitutional right to testify in court in a niqab, she cannot assert a constitutional right to assume the *minbar* (pulpit) in her mosque. There is no legal obligation on religious communities to create *Charter*-compliant conditions within their institutions, families, and social practices.

Thus, while contentious cases such as prayer in school cafeterias, niqabs in court, scrolls in cabs,⁷⁸ and so on are framed, at law, as claims by an affected individual against the “neutral” public, what is often at play is a deep disagreement about how a diverse society is, and should be, structured. Accommodation analysis frames such cases as mostly involving private interests of conscience and identity. Yet the public interests are present and often captivate media attention. This was apparent in the highly publicized Ontario case involving Muslim prayers in the cafeteria of Valley Park Middle School in Toronto's Thorncliffe neighbourhood.

In a way, the Valley Park Middle School case is the flip side of the *Saguenay* case. Starting around 2008, the school began accommodating its Muslim population of more than eight hundred pupils.⁷⁹ It did so as a result of the fact that each week, about half of the school's Muslim population—that is, about four hundred students—would leave the school to attend congre-

78 In 2011, a Jewish taxi driver in Montreal was ordered, pursuant to municipal law, to remove religious objects from his taxi. While his argument for religious freedom was unsuccessful before a municipal board, he reached a compromise with city officials and dropped his appeal. See Ingrid Peritz, “Montreal Cabbie Wins Right to Display Religious Objects in His Taxi,” *Globe and Mail*, March 24, 2011, <http://www.theglobeandmail.com/news/national/montreal-cabbie-wins-right-to-display-religious-objects-in-his-taxi/article573915/>.

79 Natasha Fatah, “Allah in the Cafeteria: Inside the School Prayer Scandal at Valley Park Middle School,” *Toronto Life*, March 21, 2012, <http://torontolife.com/city/allah-in-the-cafeteria/>.

gational Friday prayers and many would not return to school for afternoon classes.⁸⁰ In an effort to encourage students to stay at school on Friday, the principal initiated a plan to enable students to organize weekly congregational prayers in the school cafeteria.⁸¹ This arrangement functioned without incident until 2011, when activists led by a group called Canadian Hindu Advocacy shone a light and condemned the arrangement as threatening to Canadian values of freedom and democracy.⁸²

There was little dispute that the arrangement was, strictly speaking, legal.⁸³ Indeed, under a strict application of the *Amselem* test for religious accommodation, subject to any practical limits—cost, safety, and so on—there appeared to be no sound reason to deny the accommodation, assuming the students could demonstrate a sincere belief that attending weekly congregational prayers at the stipulated time is a religious obligation. For some, the fact that Muslims were holding mass prayer sessions in the public school cafeteria was wrong for other reasons. To critics, there was nothing neutral about accommodation in this instance: it gave public endorsement to a particular religion. This raised both a moral problem⁸⁴ and a political problem.⁸⁵ According to one unhappy commentator:

The school may be following a policy of accommodating special requests, but there's a striking difference between designating a room for a handful of students and converting the largest room in the building for group prayer. The school becomes, in effect, a mosque.⁸⁶

Indeed, when you have a school full of Muslims, a sizeable number of whom observe weekly congregational prayer that happens to occur during school hours, the practical solution is to transform part of the school into a space for worship. The problem, it seems, stems from the

80 Ibid.

81 Jackson Doughart, "Muslim Prayer in School Exposes Flaws of Religious Accommodation," *National Post*, July 11, 2011, <http://news.nationalpost.com/holy-post/muslim-prayer-in-school-exposes-flaws-of-religious-accomodation..>

82 Ron Banerjee, "Response to 'Opposing Prayer in Toronto public Schools, with Dignity,'" *Macleans*, July 29, 2011, <http://www.macleans.ca/general/reponse-to-opposing-prayer-in-toronto-public-schools-with-dignity/>: defending himself against accusations of being driven by Islamophobia in opposing the Valley Park accommodation: "We have formed a multi faith coalition with the Christian Heritage Party and Jewish Defence League of Canada. We will work to restore Canadian values of democracy and freedom, which are themselves a combination of both Hindu and Judeo Christian principles."

83 Doughart, "Muslim Prayer": "While the formation of faith-based extra-curricular student groups is defensible on the grounds of free association, allowing religious groups to conduct services in public schools during school hours is an encroachment of religion into secular education, to which both religious and non-religious people should object."

84 The moral problem arose from endorsing, or appearing to endorse, the content and form of religious practice. For example, the prayer sessions were gender segregated, which concerned some observers. Much of the service involved recitation in Arabic, the content of which could not be monitored, which also concerned some observers.

85 The political problem concerned the separation of church and state, and what was perceived by some to be an improper injection of religion in public administration that could have coercive effects, or undermine the dignity of non-believers. One commentator analogized it to the Lord's Prayer issue of the 1980s, when the Ontario Court of Appeal ruled that the daily Christian ritual, practiced in schools for generations, was unconstitutional. See *ibid.*: "At Valley Park Middle School, it is certain that having Friday Muslim prayers will result in unfair pressure on students who choose not to participate. . . . Protecting non-conformists is an extremely important characteristic of public education that cannot be compromised in the name of religious accommodation."

86 Fatah, "Allah in the Cafeteria."

social fact of people of particular religious backgrounds becoming concentrated in particular neighbourhoods. Where there are many Muslims who share a high level of religious observance, the public space will necessarily be transformed. Such are the practical implications of applying religious-freedom doctrine in the light of the constitutional commitment to multiculturalism.

Much of what makes contemporary religious-freedom cases so challenging is that diversity compels a re-examination of basic concepts. In *Multani*, the Supreme Court required the school board to re-examine the concept of a “weapon” when a student sought accommodation for a religious object that, to the uninformed eye, looks like a knife. Similarly, the Valley Park school decided to re-examine the concept of a school cafeteria when a large number of its students required congregational prayer space.

The technical exercise of applying accommodation analysis does not occur in a vacuum. These events occur in highly politicized contexts. Fear of “the other” is present in the subtext, if not on the face, of many of the objections. Socially tolerated hostility to religion in general,⁸⁷ as well as to certain types of religion (those typically with visible signs),⁸⁸ shapes the social context in which legal issues arise. When it comes to adjudicating such claims, what presents a challenge is the need to analyze claims through an intersectional lens, given that many contemporary religious-freedom claims pertain to ethnic, racial, and religious minorities and involve compounded vulnerabilities related to class, citizenship status, and gender.

⁸⁷ Ontario Human Rights Commission, *Policy on Creed*, defining “faithism” as a form of discrimination based on stereotypes about religious people.

⁸⁸ Note, in particular, Islamophobia. *Ibid.*

Conclusion

This paper has reviewed the case law since the Supreme Court of Canada's lead judgment in *Amselem* and has described a religious-freedom jurisprudence that affords a higher level of protection to religious practices that are primarily private in nature. The higher the level of legal protection, the less likely a violation is to be justified. However, where a religious action occurs in a public or semi-public space, the Supreme Court appears increasingly amenable to considering competing interests.

In its latest ruling in *Loyola*, the court has addressed the question of religious group rights, by affirming that religious freedom includes both the individual and the collective aspects of religious belief. The law must reflect the “socially embedded” nature of religious belief, and the “deep linkages” between this belief and its manifestation through communal institutions and traditions.⁸⁹ So it is not just individual manifestation that is protected; in this understanding it is implied that an integral aspect of manifesting individually held belief is to manifest it in association with others.

The frontiers and limits of group religious rights are yet to be charted. A significant case on its way to the Supreme Court of Canada concerns the proposal to launch a private evangelical Christian law school in British Columbia.⁹⁰ The legal challenge will address questions concerning the scope of collective religious expressions, associational rights, and how the intersection of equality and freedom operate to facilitate or restrict access to the commons for collective religious expressions.

⁸⁹ *Loyola*, para. 60.

⁹⁰ See *Trinity Western University v. Law Society of British Columbia*, [2015] B.C.J. No. 513, 2015 BCSC 2326 (B.C.S.C.); *Trinity Western University v. Law Society of Upper Canada*, [2015] O.J. No. 3492, 2015 ONSC 4250, 126 O.R. (3d) 1 (Ont. Div. Ct.), affd [2016] O.J. No. 3472, 2016 ONCA 518 (Ont. C.A.); *Trinity Western University v. Nova Scotia Barristers' Society*, [2015] N.S.J. No. 32, 2015 NSSC 25, 355 N.S.R. (2d) 124 (N.S.S.C.), affd 2016 NSCA 59.



CARDUS

cardus.ca/law