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Religion and the Secular State in Canada

I. THE RELIGIOUS AND SOCIAL COMPOSITION OF CANADA

Canada is a country of 33.8 million people populating a vast geographic area of almost 10 million km^2, stretching 8,000 km from the Atlantic to the Pacific Oceans. Its current demographic composition is both a natural consequence of its founding peoples, the French Roman Catholics who settled New France (or Lower Canada, now the province of Quebec), the English Protestants who settled Upper Canada (now Ontario) and the aboriginal communities that lived here for millennia,[1] as well as the product of a robust immigrant population from around the world. These complexities make it difficult to pinpoint the religious and social composition of Canada in just one or two sentences. It would be most accurate to describe Canada as a bilingual, multicultural federation operating within a pluralistic society.[2]

The data pertaining to the religious and social composition of Canada that was used in the original prepration of this Report in 2010 was compiled in the 2001 census, at a time when Canada's population was only 30 million.[3] Its results reveal that seven out of every ten Canadians self-identified as either Roman Catholic or Protestant,[4] with almost

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1. At the time of the initial presentation of this Report, the most recent 2006 Canadian Census enumerated 1,172,790 Aboriginal people in Canada, comprising 3.8 percent of the country's total population. See Statistics Canada, *Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations* (Aboriginal Peoples, 2006 Census), Statistics Canada Catalogue no. 97-558-XIE2006001 (Ottawa: Minister of Industry, 2008), online: Statistics Canada, http://www12.statcan.ca/census-recensement/2006/as-sa/97-558/p2-eng.cfm. Since this Report was originally prepared, there has been a 2011 National Household Survey in Canada reporting the aboriginal population at 1.4 million or 4.3 percent of the population. See http://www.statcan.gc.ca/daily-quotidien/130508/dq130508a-eng.htm

2. Contrary to the "melting pot" notion prevalent in the United States, Canada sees itself as a mosaic celebrating multiple identities. In 1985, Parliament passed the *Canadian Multiculturalism Act*, R.S.C. 1985 (4th Su), c. 24 aimed at promoting the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society and is a fundamental characteristic of Canadian heritage and identity, and acknowledging the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage.

3. Although Canada conducts a census every five years, questions pertaining to religious affiliation are only asked every ten years and as such, the data from 2001 was the most recent official data on this subject at the time this Report was prepared. See Statistics Canada, *Religions in Canada* (2001 Census: analysis series), Statistics Canada Catalogue no. 96F0030XIE2001015 (Ottawa: Minister of Industry, 2003), online: Statistics Canada, http://www12.statcan.ca/english/census01/Products/Analytic/companion/rel/pdf/ 96F0030XIE 2001015.pdf (Statistics Canada, *Religions*). As mentioned in note 1 above, there has been a more recent census, the 2011 National Household Survey. Statistics that are significantly different from those obtained from the 2001 census will be highlighted.

4. Id. at 5. According to the 2001 census, 72 percent of the population identified as either Catholic or Protestant. The 2011 figures indicate that the population identifying as Christian is down to 67.3 percent.

13 million identifying as Roman Catholic (almost half of whom live in Quebec), and another 8.6 million identifying as Protestant.[5] It is worth noting, however, that this represented a decrease from the 80 percent mark of just a decade earlier. This decrease is due both to the significant immigrant populations that increasingly constitute the Canadian mosaic, as well as the fact that the percentage of people who claim no religious affiliation has increased dramatically over the past several decades. In the most recent 2011 National Household Survey, over 7.8 million people, representing 23.9 percent of Canadians, stated they had no religious affiliation, an increase from 16 percent in the 2001 census.[6] Further, the analysis of the 2001 census reported that, "the largest gains in religious affiliations occurred among faiths consistent with changing immigration patterns toward more immigrants from regions outside of Europe, in particular from Asia and the Middle East."[7] Among this group, those who identified as Muslim recorded the biggest increase.[8]

Statistics on the self-identification of Canada's religious groups do not, however, tell the whole story of the country's religious and social composition. While the census data records the religious identification of Canadians, it does not portray the extent of their religious practice or religiosity. As aptly pointed out in a recent article on secularization and religiosity in Canada, "[b]ecause the notion of religiosity is so complex, several different dimensions of *human* religious participation need to be considered."[9]

A report published in 2006[10] seeks to measure this more nuanced aspect to Canada's religious composition by way of an index of religiosity.[11] Its findings reveal that that while religion continues to play a significant role in Canada,[12] "the last several decades have witnessed an increasing share of the population reporting no religion and a decreasing share reporting monthly or weekly attendance at religious services."[13] This move toward secularization has been most acutely felt in Quebec which, over just

5. Id. at 16. A further 479,620 identified as Christian Orthodox and 780,450 as Christians not included elsewhere.

6. See https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011001-eng.cfm#a6. The 16 percent figure of no religious affiliation had itself been an increase from 12 ten years earlier. See Warren Clark and Grant Schellenberg, "Who's Religious?" *81 Canadian Social Trends* (2006): 2. This decline reflects a change not only amongst Canada's existing population but also reflects the religiosity of some of its immigrant populations. According to Statistics Canada, *Religions*, supra n. 3, one-fifth of the 1.8 million immigrants who arrived in Canada between 1991 and 2001 reported they had no religion, especially those from China (including Hong Kong) and Taiwan.

7. Statistics Canada, *Religions*, supra n. 3 at 8 (noting that the 2001 Census found that 579,640 people identified as Muslim, 329,995 as Jewish, 300,345 as Buddhist, 297,200 as Hindu and 278,410 as Sikh).

8. Id. (showing an increase from 253,300 in 1991 to 579,600 in 2001 representing an increase from 1 percent to 2 percent of the population). In addition, of the 1.8 million new immigrants who came to Canada during the 1990s, Muslims accounted for 15 percent, Hindus almost 7 percent and Buddhists and Sikhs each about 5 percent.

9. Mebs Kanji and Ron Kuipers, "A Complicated Story: Exploring the Contours of Secularization and Persisting Religiosity in Canada," in *Faith in Democracy?: Religion and Politics in Canada*, eds. John Young and Boris DeWiel (Newcastle: Cambridge Scholars, 2009), 18.

10. Clark and Schellenberg, supra n. 6. This report used the General Social Survey (GSS) and the 2002 Ethnic Diversity Survey (EDS) to track religious practice as distinct from religious identification. Id.

11. Id. at 2. This index of religiosity is measured by the presence of four dimensions of religiosity: religious affiliation, attendance at religious services, frequency of private religious practice and importance of religion. Id.

12. Id. at 4 The report concluded that overall, 44 percent of Canadians place a high degree of importance on religion in their life and that, judging by the "four dimensions of religiosity," 40 percent of Canadians have a low degree of religiosity, 31 percent are moderately religious and 29 percent are highly religious. Id.

13. Id. at 6. Note, however, that as pointed out by Kanji and Kuipers, supra n. 9 at 24, "subjective assessments of religiosity are not the same as actual involvement in religious institutions."

several decades,[14] moved from being one of the most religious communities in Canada, with a population closely tied to the dictates of the Catholic Church, to one of its most secular.[15] Notwithstanding, or perhaps because of, what some would surmise is an increasingly secular society, there has been a steady stream of cases coming before Canadian courts asserting religious freedom and religious accommodation in both the public and private legal spheres. This Report will attempt to encapsulate the various dimensions of religion and its interaction with the secular state in Canada.

II. THEORETICAL AND SCHOLARLY CONTEXT

This Report on Religion and the Secular State attempts to analyze the relationship of religion and the state in Canada from a variety of perspectives, touching both the private law and public law dimensions of this complex issue. The national reporters have been asked to discuss "how the secular state deals with religion or belief in a way that preserves the reciprocal autonomy of state and religious structures and guarantees the human right to freedom of religion and belief."[16] The snapshot of the diverse and changing social and religious composition of Canada, provided in the introductory section to this Report, underscores the increasing relevance of this question. However, before devling into a more detailed analysis of this larger question, it is opportune to examine what is meant by the "secular state," or secularism, in Canada.

Understanding the concept of secularism is key because as legal theorists working in this field have pointed out, "the term 'secular' or the declaration that we live in a "secular state" is proposed as the main conceptual means by which Western Liberal societies deal with the expression of religious conscience."[17] The notion of secularism is "generally understood to mean the ordering of public life exclusively on the basis of non-religious practices and values. It is viewed by many as a neutral ground that stands outside religious controversy."[18]

At the risk of oversimplification, a closer examination reveals two different meanings that may be ascribed to secularism, one which may be termed "rigid secularism", the other "open secularism." These competing visions of secularism were at the forefront of the highly publicized Bouchard-Taylor Commission[19] that was constituted in Quebec in February 2007 to investigate the issue of accommodation practices in Quebec in light of it being a pluralistic, democratic and egalitarian society. The Report produced by this Commission aptly pointed out, "[w]e cannot grasp secularism through simple, unequivocal formulas such as "the separation of Church and

14. This occurred most notably during the 1960s, a period of intense social change in Quebec that is known as the Quiet Revolution.

15. See "Catholicism in Canada: Quebec Catholics" *CBC News* (2 October 2003), online: CBC News Indepth, http://www.cbc.ca/news/background/catholicism/quebeccatholics.html (noting that weekly church attendance in Quebec dropped dramatically between the 1950s and 2000 from 88 percent to just 20 percent). The heightened sensitivity of Quebecers to religion and religious accommodation culminated in the Bouchard-Taylor Commission. The Commission and its final report are discussed in more detail in the Theoretical and Scholarly Context section of this Report (Section II), below.

16. In their "questionnaire for the preparation of national reports for the IACL Congress," this was the central question that the general reporters, Professors Javier Martinez-Torron and W. Cole Durham, Jr., asked the national reporters to address.

17. Benjamin L. Berger, "The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State" *Canadian Journal of Law and Society* 17 (2002): 49 [hereinafter Berger, "Limits"].

18. Richard Moon, "Introduction: Law and Religious Pluralism in Canada," *Law and Religious Pluralism in Canada*, ed. Richard Moon (Vancouver: UBC Press, 2008), 6 [hereinafter Moon, "Introduction"].

19. Named as such for the Commission's co-chairs, Gérard Bouchard and Charles Taylor. Its formal title is the Consultation Commission on Accommodation Practices Related to Cultural Differences.

State", "State neutrality towards religions" or "the removal of religion from public space", even though all of these formulas contain part of the truth.[20]

According to the Commission, the four key principles constituting any model of secularism are: the moral equality of persons; freedom of conscience and religion; state neutrality towards religion; and the separation of church and state. Secularism takes on a different meaning depending on the importance given to each of these four principles.

A "strict" or "rigid" conception of secularism would accord more importance to the principle of neutrality than to freedom of conscience and religion, attempting to relegate the practice of religion to the private and communal sphere, leaving the public sphere free of any expression of religion.[21] Also termed "a-religiousness," this concept of secularism is obviously less compatible with religious accommodation, as well as antithetical to the recognition of the place of pluralism in the modern state.[22]

A more "flexible" or "open" secularism, on the other hand, is based on the protection of freedom of religion, even if this requires a relaxation of the principle of neutrality. In this model, state neutrality towards religion and the separation of church and state are not seen as ends in themselves, but rather as the means to achieving the fundamental objectives of respect for religious and moral equality and freedom of conscience and religion. In open secularism, any tension or contradiction between the various constituent facets of secularism should be resolved in favour of religious freedom and equality. This conception, which sees secularism as directed at state institutions rather than individuals, does not strive to neutralize or erase religion as an identity marker in society.

Open secularism is the model that is advocated by the Bouchard-Taylor Commission. Moreover, it is the model that recognizes that "secularism and pluralism are both realities of Canadian society."[23] According to Chief Justice Dickson's enduring words in the seminal case of *R. v. Big M Drug Mart*, "[a] truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct."[24]

By and large, the model of open secularism is applied by Canadian courts in their interpretation of the *Canadian Charter of Rights and Freedoms*.[25] A more detailed review of the Canadian position, with respect to the variety of contexts in which we have been asked to examine this issue, will provide a more nuanced and complex picture of religion and the secular state, a picture of what is essentially the "coexistence of religious and non-religious individuals and communities in a diverse contemporary society."[26]

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20. Gérard Bouchard and Charles Taylor, *Building the Future: A Time for Reconciliation* (Quebec City: Government of Quebec, 2008), 135, online: http://www.accommodements.qc.ca/documentation/rapports/rapport-final-integral-en.pdf.

21. As Richard Moon points out, "Introduction," supra n. 18 at 17, it is both difficult to draw the line between private and public and unrealistic to confine religion to private life and wholly insulate it from the impact of state law.

22. Berger, "Limits," supra n. 17 at 49–50.

23. Id. at 50. See also Benjamin L. Berger, "Law's Religion: Rendering Culture," *Law and Religious Pluralism in Canada*, ed. Richard Moon (Vancouver: UBC Press, 2008): 264.

24. [1985] 1 S.C.R. 295 at para. 94, 18 D.L.R. (4th) 321 [hereinafter *Big M* cited to S.C.R.].

25. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*]. See José Woehrling, "The 'Open Secularism' Model of the Bouchard-Taylor Commission Report and the Decisions of the Supreme Court of Canada on Freedom of Religion and Religious Accommodation," in *Religion, Culture and the State – Reflections on the Bouchard-Taylor Commission*, eds. Howard Adelman and Pierre Anctil (Toronto: University of Toronto Press, 2011), 86-99.

26. Shauna Van Praagh, "View from the *Succah*: Religion and Neighbourly Relations," *Law and Religious*

III. THE CONSTITUTIONAL AND LEGAL CONTEXT

A. Pre-Confederation Period (1759-1867) [27]

In Canada, neither state neutrality in matters of religion, nor the separation of church and state, is explicitly affirmed in the Constitution, but the courts have gradually inferred such principles from freedom of religion and the prohibition against religious discrimination. The foundations of religious freedom and equality date back to the 18th century and result from the political necessities which confronted Great Britain after its conquest of New France from the French Crown in 1759. Despite its initial plan to establish the Anglican Church and to apply, in Canada, the anti-Catholic measures that were in force in Great Britain and in other British colonies, the British government was rapidly impelled to guarantee freedom of worship to its new Catholic subjects in order to ensure their loyalty and dissuade them from joining the American colonists in their anti-British activities (*Royal Proclamation, 1763*). [28] *The Quebec Act, 1774*[29] confirmed this conciliatory policy by authorizing the Catholic Church to collect tithes.

In addition, the *Quebec Act* abolished the requirement of the "Test Oath", which required from Catholics seeking public office the abjuration of allegiance to the Pope and a statement against the dogma of transubstantiation and the worship of the Virgin Mary. In other British territories, and even in the United States, it was only several decades later that Catholics obtained similar relief. In addition, while the legislature of Lower Canada (present-day Quebec) passed a statute guaranteeing to persons of the Jewish faith "all rights and privileges of other subjects of Her Majesty"[30] as early as 1832, it was not until more than a quarter of a century later that the British Parliament fully recognized, in 1858, the political rights of Jews. A further milestone for the advancement of religious equality was the adoption of the *Freedom of Worship Act, 1851*, which forbid any restrictions on the free exercise of religion.[31] In 1854, another statute abolished the financial and material benefits that had previously been granted to the Anglican Church. [32] Separation of church and state was, from then on, clearly established.

B. Federal Constitution of 1867

The political tradition of separation of church and state thus established was confirmed in the constitutional instrument (adopted by the British Parliament at Westminster) that created the Canadian federation in 1867, the *British North America Act*.[33] The Constitution contained no provisions on the relationship between state and religion, and its preamble made no reference to God or to a Supreme Being. While the

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Pluralism in Canada, ed. Richard Moon (Vancouver: UBC Press, 2008): 22.

27. For an historical examination of the relations between the State and churches in Canada, see Douglas A. Schmeiser, *Civil Liberties in Canada* (Reprint of the 1964 Oxford Edition) (Aalen: Scientia Verlag, 1977), 54 ff.; Jacques-Yvan Morin & José Woehrling, *Les Constitutions du Canada et du Québec – Du Régime Français à Nos Jours* (Montréal: Éditions Thémis, 1992), 93 ff.; Siméon Pagnuelo, *Études Historiques et Légales sur la Liberté Religieuse en Canada* (Montréal : Beauchemin et Valois, 1872); Micheline Milot, *Laïcité dans le Nouveau Monde. Le Cas du Québec* (Turnhout: Brepols Publishers, 2002).

28. Adam Shortt & Arthur G. Doughty, *Canada, Constitutional Documents* (1921), 136-141.

29. *An Act for making more effectual Provision for the Government of the Province of Quebec in North America*, 14 Geo. III, ch. 83 (1774) [*Quebec Act*].

30. 1 Will. IV, ch. 57 (1831).

31. 14 & 15 Vict., ch. 175.

32. *Clergy Reserves Act*, 18 Vict., c. 2 (1854).

33. Renamed *Constitution Act, 1867* (U.K.), 30 & 31 Vict., ch. 3, L.R.C. 1985, app. II, n° 5.

earlier legislative measures protecting religion were maintained in force, the Constitution itself did not guarantee freedom of religion, or any other right or freedom for that matter. Such absence of any declaration or bill of rights was consistent with the British principle of parliamentary sovereignty that had been transposed into the Canadian context. It should be noted, however, that the Constitution of 1867 contained an exception to the equality of religions (still in force today) providing special protection, in matters of school administration, for Catholics and Protestants when they are in the minority (such a guarantee was considered necessary in 1867 to reassure religious minorities). [34] As is the case today, in the 1867 Constitution, there was no state religion, nor were religious activities subject to any constitutional restriction. No financial support was provided for churches and the state collected no taxes for redistribution to religious communities. Places of worship were not maintained at public expense. These principles of religious neutrality of the state and separation of political and religious authorities would, thereafter, be regularly reaffirmed in the decisions of higher courts.[35]

Thus, until 1982, the principles of religious freedom and equality, and separation of church and state, were implemented by ordinary legislation in Canada, rather than being provided for in the Constitution, and resulted from pragmatism and political expediency rather than from the application of general principles. This situation has evolved with the formal inclusion of freedom of conscience and religion in the Constitution in 1982.

C. Freedom of Religion and Conscience in the Canadian Charter *(1982) and its Jurisprudential Interpretation*

The adoption of the *Canadian Charter of Rights and Freedoms*[36] in 1982 added to the Constitution an instrument of protection of rights and freedoms, which it was previously lacking, and guaranteed Canadians, *inter alia*, "freedom of conscience and religion" (art. 2(a)). In addition, while the Preamble of the *Charter* contains a reference to the "supremacy of God", this has not yet been given any significant meaning by the courts. As for freedom of conscience and religion, the courts, in particular the Supreme Court of Canada, have construed it as having a double significance. [37]

First, the Constitution protects both the positive and negative right to the free exercise of religion. The positive content lies in the freedom to hold religious beliefs, to profess them openly and to manifest them through worship, teaching, and propagation; the negative content reflects the right not to be forced, directly or indirectly, to embrace

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34. *Id.* art. 93. This aspect will be discussed later on in this report, at pp. 20-23, below.

35. For example, in the 1955 case of *Chaput* v. *Romain*, [1955] S.C.R. 834, at p. 840, Taschereau J. explained the applicable principles in the following manner: "In our country, there is no state religion. All religions are on an equal footing, and Catholics as well as Protestants, Jews, and other adherents to various religious denominations enjoy the most complete liberty of thought."

36. *Charter*, supra note 25. For an analysis of the interpretation given to freedom of conscience and religion by the Canadian courts, see José Woehrling, "Quelle place pour la religion dans les institutions publiques?," in *Le Droit, la Religion et le Raisonnable*, ed. Jean-François Gaudreault-DesBiens (Montréal: Éditions Thémis, 2009), 115-168; José Woehrling, "L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse," *McGill Law Journal* 43 (1998): 325-401; Richard Moon, "Liberty, Neutrality, and Inclusion: Religious Freedom under the Canadian Charter of Rights and Freedoms," *Brandeis Law Journal* 41 (2003): 563; Donald L. Beschle, "Does the Establishment Clause Matter? Non-Establishment Principles in the United States and Canada," 4 *University of Pennsylvania Journal of Constitutional Law* 451 (2002); Bruce Ryder, "State Neutrality and Freedom of Conscience and Religion," 29 *Supreme Court Law Review* (2d) 169 (2005); Paul Horwitz, "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond," 54 *University of Toronto Faculty of Law Review* 1 (1996).

37. In particular, see the *Big M* case, supra n. 24.

a religious conception or to act contrary to one's religious or conscientious beliefs. In this latter sense, the Supreme Court stressed that the protection afforded by freedom of conscience and religion also applies to "expressions and manifestations of religious non-belief and refusals to participate in religious practice."[38] Thus, atheism, agnosticism, skepticism and religious indifference are also constitutionally protected.

Second, Canadian courts have ruled that freedom of conscience and religion imposes on the state an obligation of neutrality in religious and conscientious matters. The aspect that has, however, not yet been clearly established is whether the neutrality imposed on the state only prevents it from favouring one religion in particular over others (this first aspect having been clearly recognized) or whether it also prohibits the state from promoting religion in general over other deeply-held convictions, particularly religion-skeptic or religion-hostile positions. If this second interpretation of the concept of neutrality were accepted, one would have to conclude that religious accommodations or exemptions are constitutionally prohibited, as they provide an "aid" to religious exercise (such a viewpoint is sometimes presented in the United States). As discussed later in this Report, however, Canadian courts recognize the existence of a duty to accommodate religious convictions, binding on the state on the basis of freedom of religion, which is inconsistent with an interpretation of the obligation of neutrality that would prevent the state from "aiding" religions in a non-discriminatory manner.[39] As will also be seen, half of the Canadian provinces have chosen to fund private religious schools, without this practice having ever been constitutionally challenged as being contrary to the principle of religious neutrality of the state.[40]

D. The Individualistic and Subjective Conception of Freedom of Religion Adopted by the Supreme Court of Canada

According to traditional Canadian law, a person claiming a religious precept must first prove the *objective* existence of the precept by establishing that it is based on the teachings of an existing religion. Then, she must demonstrate the sincerity of her belief in the precept, which is a *subjective* element. In recent times, however, Canadian courts have tended to rely more heavily – or even exclusively – on the subjective sincerity test in order to avoid both having to give an objective definition of religion and taking a position on the merits or value of beliefs or convictions. Thus, the Supreme Court has defined religious liberty as "the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function

38. Id. at para. 123, per Dickson C.J.: "Religious belief 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 refusals to participate in religious practice."

39. A number of Canadian authors share the view that the principle of religious neutrality of the state applying in Canada must be considered as less rigorous than the "non-establishment" principle applying in the United States; see among others: Peter W. Hogg, *Constitutional Law of Canada* (Scarborough: Thomson-Carswell, 2005), 945; Ryder, supra n. 36 at 174-179; Horwitz, supra n. 36 at 60-61 ("... aid to religion should be constrained by only two considerations. It must not create an "element of religious compulsion" on the part of any believers or non-believers in a given faith. Also, while government aid may properly create the impression that the state is supportive of religion as it is of other mediating institutions, it should not create the impression that it has singled out a particular faith, or religiosity over non-religiosity, for endorsement. Endorsement, even if it does not compel behavior on the part of the minority, defeats the pluralism and multiculturalism that are a central part of religion's value to society" [footnotes omitted]).

40. See the Section VI. B. "Financial Support for Religious Private Schools" below.

of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials."[41] Such an approach has the advantage of excusing the courts from having to examine the content of religious prescriptions or taking a position with respect to conflicts of doctrine existing within a community of believers. It does, however, also make it more difficult for the courts to reject eccentric or purely opportunistic claims founded upon alleged religious beliefs.

It should also be noted that all Canadian provinces and territories have also adopted human rights legislation that protects freedom of conscience and religion (among other rights and freedoms) and prohibits discrimination based on religion.[42] Although not "entrenched" in the usual constitutional sense, these human rights statutes (which are amendable following the ordinary legislative process) are accorded a kind of "quasi-constitutional" authority insofar as they can be contradicted by another act only in an explicit manner (rather than by mere implication). They can, therefore, serve as a basis for judicial review of provincial legislation, which will be invalidated if found incompatible with the rights and freedoms guaranteed in the applicable provincial human rights statute (unless the impugned legislation contains a provision expressly excluding the latter's application). Even more importantly, unlike the *Charter* that applies only to state action, provincial human rights statutes apply to both private relations and state action. As such, they can be invoked against private "actors", such as employers or providers of goods and services. Provincial human rights acts are ultimately enforced by the Supreme Court of Canada, which interprets and applies them using the same concepts as those it has developed for applying the *Charter*. Later in this Report, we will examine an important decision of the Supreme Court (the *Amselem* case[43]) in which the Court applied the provisions on freedom of religion found in the Quebec human rights statute.[44]

IV. THE STATE AND RELIGIOUS AUTONOMY

The purpose of this section is to examine whether the state may intervene in the life or organization of religious communities and how far secular law may go in restricting the autonomy of religious communities to govern themselves. The short answer to this question is that in Canada, the state and religious communities operate in separate spheres and, in principle, it is not the role of the state, or secular courts, to intervene in their organization, nor to interfere in their autonomous governance. As Justice Iacobucci of the Supreme Court of Canada stated, "the State is in no position to be, nor should it become, the arbiter of religious dogma."[45]

However, as with most issues canvassed in this Report, the immediate response requires a more nuanced analysis. One way to provide such analysis is to focus on a recent Canadian case where this issue arose and where judges, and the academic community commenting on their judgments, responded with different reactions. The case is *Bruker v. Marcovitz*, and its facts turn on a promise made in the context of a

41. *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R.. 551 at para. 46 [*Amselem*].

42. See e.g. *Charter of Human Rights and Freedoms*, L.R.Q. c. C-12, art. 3, 10 [Quebec *Charter*]; *Human Rights Code*, L.R.O. 1990, c. H.19, art. 1-3, 5-6 (Ontario); *Human Rights Code*, R.S.B.C. 1996, c. 210, ss. 7-11, 13-14 (British Columbia); *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5, ss. 3-5, 7-9; *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, ss. 4, 9-19.

43. Supra n. 41.

44. See the section entitled "Freedom of Religion and Contractual Promises," Part V.A below.

45. *Amselem*, supra n. 41 at para 50.

corollary relief settlement entered into upon the divorce of a married couple. The settlement contained a so-called "*get* clause"—a commitment on the part of the husband to appear before the *Beit Din*, or rabbinic tribunal, for the purpose of obtaining a *get*, or Jewish divorce, thereby releasing his wife religiously from the marriage.[46] The husband refused to appear before the *Beit Din* for over 15 years and the wife initiated an action in the secular courts for monetary damages to compensate her for this extended non-compliance with the commitment to consent to a *get.*[47]

A unanimous Court of Appeal, as well as two dissenting judges of the Supreme Court, found that as the substance of the obligation to consent to the *get* was exclusively religious in nature, any alleged breach could not be enforced by secular courts. The Court of Appeal held the issue to be non-justiciable before secular courts, since such courts must refrain "from becoming involved in disputes between parties that are internal to their religions."[48] Justice Deschamps, writing for the dissent in the Supreme Court, echoed this view stating "secular law has no effect in matters of religious law … . Where religion is concerned, the state leaves it to individuals to make their own choices. It is not up to the state to promote a religious norm. That is left to religious authorities."[49]

The majority of the Supreme Court, however, found the obligation consented to by the husband to be an enforceable contractual obligation, notwithstanding its link to religion.[50] While it is arguable that religious obligations are merely moral obligations and therefore unenforceable, in this instance, the husband was seen as having transformed his moral obligation into a civil or juridical one by voluntarily consenting to perform it in a non-religious contract.[51] Moreover, notwithstanding the husband's argument to the contrary, the enforcement of this contractual obligation was found not to be contrary to his rights based on freedom of religion.[52]

The complicating factor in this case is that by virtue of internal Jewish religious law

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46. According to Jewish law, a marriage remains in effect until a *get* is given by the husband, supervised by the rabbinic tribunal (*Beit Din).* Without such *get*, a Jewish woman cannot re-marry with religious sanction and any civilly consecrated marriage will not be recognized by Jewish law. Moreover, any children issuing from a subsequent union are considered illegitimate according to traditional rules of Orthodox Judaism. Rabbi Jonathan Reiss, "Jewish Divorce and the Role of Beit Din," *Jewish Action* (Winter 1999), online: Jewish Law http://www.jlaw.com/ Articles/divorcebeit.html.

47. *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607, 288 D.L.R. (4th) 257 [*Bruker* cited to S.C.R.]. For some of the academic commentary generated by this judgment see generally Rosalie Jukier and Shauna Van Praagh, "Civil Law and Religion in the Supreme Court of Canada: What Should We *Get* out of *Bruker v. Marcovitz*?" 43 *Supreme Court Law Review* (2d) 381 (2008); Margaret H. Ogilvie, "*Bruker v. Marcovitz*: Get(ting) Over Freedoms (Like Contract and Religion) in Canada," 24 *National Journal of Constitutional Law* 173 (2009) [hereinafter Ogilvie, "*Bruker*"]; Richard Moon, "*Bruker v. Marcovitz*: Divorce and the Marriage of Law and Religion," 42 *Supreme Court Law Review* (2d) 37 (2008) [hereinafter Moon, "*Bruker*"]; Benoît Moore, "Contrat et Religion: À la Volonté de Dieu ou des Contractants? Commentaire sur L'affaire *Marcovitz* c. *Bruker*," 43 *Revue juridique Thémis* 219 (2009); Louise Langevin *et al*., "L'affaire *Bruker c. Marcovitz*: Variations sur un Thème," 49 *C. de D.* 655 (2008).

48. *Marcovitz v. Bruker*, 2005 QCCA 835, 259 D.L.R. (4th) 55 at para. 77, [2005] R.J.Q. 2482 [hereinafter *Bruker* QCCA cited to D.L.R. (4th)].

49. In *Bruker*, supra n. 47 at para 132.

50. As pointed out by John C. Kleefeld and Amanda Kennedy, "'A Delicate Necessity' *Bruker v. Marcovitz* and the Problem of Jewish Divorce," 24 *Candian Journal of Family Law* 205 (2008) at 275, "the mere existence of a religious element in a dispute should not isolate it from a judicial lens."

51. For a contractual analysis by Jukier and Van Praagh see supra n. 47 at 388-398. See also Moore, supra n. 47.

52. The husband's claim was that the judicial enforcement of this obligation would be contrary to his freedom to abstain from participating in a religious obligation or to appear before a religious tribunal, protected by the Quebec *Charter*, supra n. 42, s. 3. This issue is discussed in more detail in Section V of this Report, below.

and practice, the power to deliver the *get* is asymmetrical, lying primarily in the hands of the husband, thereby making its effects potentially discriminatory and contrary to the equality rights of women that are protected in Canadian society. Undeniably, Jewish women have sometimes been coerced to consent to unreasonable terms and conditions in order to obtain this religious release from their marriage and to avoid alienation from their community and its religious norms. However, this raises the delicate question of whether the majority's decision stepped over the line of the secular courts' jurisdiction by indirectly furthering gender equality for religious women.[53] Some see the decision as an inappropriate interference in internal religious decisions and autonomy since "it is not the role of secular courts to palliate the discriminatory effect of the absence of a *ghet* on a Jewish woman who wants to obtain one."[54]

On the one hand, viewed from the perspective of the dissent, this case may be seen as a crucial test of the state's secular identity and its commitment to viewing personal faith and law as operating within two parallel universes. On the other hand, viewed from the perspective of the majority, it may be seen, more simply, as a case where religious people happened to have entered into a valid consensual agreement, albeit one with religious overtones, but nonetheless, a case of an ordinary contract to which ordinary contract principles apply.[55] To hold otherwise, "might unfairly deny religious individuals the power to make binding legal arrangements based on their values, practices and interests."[56]

The *Bruker v. Marcovitz* decision provides the ideal factual framework to examine the Canadian position on the state and religious autonomy, but it is by no means the only circumstance in which this issue arises. In *Bruker*, the courts had to grapple with enforcing an ostensibly religious obligation that had been consented to in the context of a civil agreement. The reverse may also occur. Canadian courts have been called upon to enforce contractual provisions (seemingly non-religious ones such as the payment of money) within the context of a religious contract. This has occurred with respect to the enforcement of the payment of the *mahr* (a lump sum payment claimed by the wife upon divorce) agreed to in the Islamic marriage contract. There is not, as of yet, unanimity on the subject of enforcing such a promise amongst Canadian courts.[57]

The larger question of the effect given by state courts to decisions made by religious bodies or tribunals is also tied to the question of the state and religious autonomy, which

53. See e.g., Moon, "*Bruker,"* supra n. 47 at 62. Moon is generally favourable to the decision but states that Madam Justice Abella, writing for the majority, was "acting to mitigate the inequity of the divorce rules of Judaism."

54. *Bruker* QCCA, supra n. 48 at para 76. See also Ogilvie, "*Bruker,*" supra n. 47 at 173, who sees this decision as advocating "a more interventionist role for the civil courts in disputes involving religious issues than has previously been the case in Canadian jurisprudence. One of his criticisms of the decision, expressed at 186, is that "the majority privileged its understanding of the dignity of Jewish women and the equality of women and children in law over Marcovitz' religious freedom".

55. This is largely the conclusion adopted by by Jukier and Van Praagh, supra n. 47.

56. Moon, "*Bruker*," supra n. 47 at 47.

57. See *Kaddoura v. Hammoud* (1998), 168 D.L.R. (4th) 503, 44 R.F.L. (4th) 228 (Ont. Ct. J.) (refusing to enforce the payment of the *mahr*). Compare with cases in which the *mahr* was enforced: *M. (N.M.) v. M. (N.S.)*, 2004 BCSC 346, 26 B.C.L.R. (4th) 80, 130 A.C.W.S. (3d) 333; *Amlani v. Hirani*, 2000 BCSC 1653, 194 D.L.R. (4th) 543, 13 R.F.L. (5th) 1; *Nathou v. Nathou* (1996), 68 A.C.W.S. (3d) 487; *Nasin v. Nasin*, 2008 ABQB 219, 443 A.R. 298, 53 R.F.L. (6th) 446. In *Nasin*, the *mahr* was not enforced because it did not meet the requisite statutory formalities for a pre-nuptual contract; however, at para. 24 the court stated that "[a]s to the religious aspects of the Mahr, if parties enter into pre-nuptial agreements in a religious context, they will be enforced if they meet the requirements under the *Matrimonial Property Act* and the courts do not find the contracts invalid for other reasons." Id. See generally Pascale Fournier, "In the (Canadian Shadow) Shadow of Islamic Law: Translating *Mahr* as a Bargaining Endowment," 44 *Osgood Hall Law Journal* 649 (2006).

is canvassed in more detail in a subsequent section of this Report dealing with the larger issue of the civil legal effects of religious acts.[58]

V. Legal Regulation of Religion as a Social Phenomenon

In Canada, religious affiliation of individuals has no legal consequences under state law. Pursuant to the equality clause of the Canadian *Charter of Rights and Freedoms*,[59] all Canadians benefit from equality before and under the law without discrimination based on a variety of factors including religion.

The question of whether freedom of religion, protected by section 2(a) of the *Charter*, may entitle individuals to be exempt from laws or contractual clauses on the basis of conscientious objection is a broader question that merits a more nuanced answer. This section will examine this question first in the context of private law, namely the extent to which freedom of religion entitles individual parties to claim exemption from contractual clauses of general application. It will then examine the question in the context of public law and the requirement that the state provide individuals reasonable accommodation from laws of general application on the basis of religious objection.

A. Freedom of Religion and Contractual Promises

At the outset, it should be noted that the protective function of the federal *Charter of Rights and Freedoms* is limited to state action, namely laws of general application or governmental action.[60] Private agreements between individuals are thus not subject to the federal *Charter* and any religious protections must be found in equivalent provisions in provincial human rights codes or the Quebec *Charter of Human Rights and Freedoms*.[61]

The precise question of whether freedom of religion entitles a contracting party to be exempt from a provision in a private agreement arose in the Canadian context in the seminal case of *Syndicat Northcrest v. Amselem*.[62] That case concerned a private contract entered into by a co-owner of an apartment unit in a Montreal condominium. Under the terms of the by-laws in the declaration of co-ownership, the owners of the individual units contractually agreed not to erect any constructions of any kind on their balconies. While the purpose of such restriction was to create a clean and uniform outward appearance of the building, it resulted in a legal battle over the right of one of the condominium owners to erect a temporary structure, a Succah (a form of hut), on his balcony in order for him to observe the week-long Jewish High Holiday of Succot.[63]

The unusual aspect of this claim to freedom of religion was that it was not, as is most often the case, being asserted against the state. The assertion of the right to

58. See Section VII of this Report, below, Civil Legal Effects of Religious Acts, in particular, Part C: Civil Effects of Religious Decisions outside the Family Context.

59. *Charter*, supra n. 25, s. 15.

60. *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174.

61. See examples given in supra n. 42.

62. *Amselem*, supra n. 41.

63. This seminal case has been discussed above in Section III.D of this Report dealing with the Constitutional and Legal Contexts, as this case provided the factual context in which the Supreme Court articulated the subjective definition of religion. As such, it mattered little for the majority that expert religious testimony did not support the religious obligation of erecting one's own succah. Mr. Amselem's sincere, subjective belief in his religious requirement to erect his own Succah sufficed to ground his claim in freedom of religion.

freedom of religion in this case effectively pit one party's contractual rights against the religious freedom of the other contracting party. Notwithstanding the express contractual stipulations of the parties, a narrow majority (5 to 4) of the Supreme Court found in favour of the condominium owner's claim to freedom of religion, thereby entitling him to an exemption from the contractual restriction in question and entitling him to erect his Succah on his balcony. The net result of this decision was, in effect, to extend the reasonable accommodation principle to the private contractual arena.

The very weight one dissenting judge, Justice Binnie, placed on the private contract voluntarily made between the parties caused him to rule in favour of the applicability of the contractual restriction, notwithstanding its potential to violate one of the party's religious freedoms. He concluded that "there is a vast difference … between using freedom of religion as a shield against interference with religious freedoms by the state and as a sword against co-contractants in a private building."[64]

While the circumstances under which a party may waive a fundamental right, such as religion, are not precisely delineated in the *Amselem* decision, Justice Iacobucci, writing for the majority, implies that if done properly, clearly and with full consent, such a waiver is possible.[65] However, he found there to be no valid waiver in this case because it was not "voluntary, freely expressed and with a clear understanding of the true consequences and effects."[66] In fact, it was made in the context of a non-negotiated adhesion contract, to which the co-owner had no choice but to adhere. Further, it was not explicit given that the restriction on erecting *any* structures on the balconies was so general that it would hardly convey to ordinary individuals a waiver of their right to freedom of religion.[67]

On the other hand, the *Bruker v. Marcovitz* case, discussed in a preceding section of this Report,[68] may be seen as an instance where a court enforced a contractual waiver in the context of a religiously-protected right. Although waiver did not form an explicit part of the Supreme Court judgment, the fact that the majority enforced the husband's contractual promise to appear before the religious tribunal, despite his claim that this would interfere with his freedom of (or rather from) religion, is implicit recognition that a contractual waiver is indeed possible. The problem becomes how to distinguish *Amselem*, where the Court did not accept such waiver and freedom of religion trumped private contract law, and *Bruker*, where contract seemed to trump freedom of religion. For one, there is no doubt that the factual bases of the two decisions are different. On the

64. *Amselem*, supra n. 41 at para. 185. Note that there were two dissenting opinions in this case. Bastarache J, with whom 2 other judges concurred, dissented on grounds related to the definition of religion itself. Binnie, J. dissented on his own based on contract waiver.

65. Moon, "*Bruker*," supra n. 47 at 55-57. The waivability of fundamental rights has been examined in other contexts: see e.g., *R. v. Smith* [1991] 1 S.C.R. 714, 104 N.S.R. (2d) 233 (right to counsel); *R. v. Turpin*, [1989] 1 S.C.R. 1296, 96 N.R. 115 (right to a jury trial); *R. v. Richard*, [1996] 3 S.C.R. 525, 182 N.B.R. (2d) 161 (right to be presumed innocent and right to a fair an public hearing by an independent and impartial tribunal); *Mills v. The Queen*, [1986] 1 S.C.R. 863, 67 N.R. 241 (right to be tried within a reasonable time); *R. v. Wills* (1992), 7 O.R. (3d) 337, 12 C.R. (4th) 58 (C.A.) (right to be secure against unreasonable search and seizure); *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647, 89 D.L.R. (4th) 653 (right to privacy); *Dell Computer Cor v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, 284 D.L.R. (4th) 577 (right to refer one's dispute to a court of law is implicitly waived in an arbitration agreement). Only fundamental rights that form part of public order, arguably human dignity, cannot be waived.

66. *Amselem*, supra n. 41 at para. 96.

67. For further comments on the *Amselem* decision see Richard Moon, "Religious Commitment and Identity: *Syndicat Northcrest v. Amselem*," 29 *Supreme Court Law Review* (2d) 201 (2005); Ryder, supra n. 36; David M. Brown, "Neutrality or Privilege? A Comment on Religious Freedom," 29 *Supreme Court Law Review* (2d) 221 (2005).

68. See Part IV above, the section entitled The State and Religious Autonomy.

facts of *Bruker*, it would be hard to assert lack of knowledge or consent to the explicit and clear obligation contained in a negotiated agreement, prepared with the assistance of legal advice, to appear before the religious tribunal to obtain a religious divorce.

As does the *Bruker* case, *Amselem* demonstrates that an inquiry into religion and law is not exclusively a public law narrative, nor one that always takes the form of drawing lines around state power. The *Amselem* decision is potentially far-reaching in its holding that contractual obligations may be unenforceable if they infringe individual religious freedom, defined broadly as encompassing not necessarily what religious authorities state is a religious obligation, but anything that a person views as a religious practice, according to his or her conscience.[69] After *Bruker*, however, this holding may be nuanced depending on the circumstances of the contract and its effectiveness in waiving this fundamental right.

B. Freedom of Religion and State Law – Reasonable Accommodation

Under provincial (and federal) human rights legislation, Canadian courts have established the existence of a "duty to accommodate" religious beliefs or practices that is imposed on private actors as well as on public authorities acting in their executive or administrative capacity. The courts also admit, but with more reservation, the existence of a similar obligation imposed on state authorities when the latter adopt rules of general application, such as laws or regulations. In such instances, rather than "reasonable accommodation", one will speak of a "constitutional exemption", which can then be claimed under a provincial or federal human rights statute or under the *Charter*.[70] The duty to accommodate, or the obligation to provide for an exemption, can be based on freedom of religion (in the case of an infringement of that freedom) or on the prohibition against religious discrimination (when religious discrimination has been established).

Thus, in *R.* v. *Videoflicks Ltd*.,[71] the Court of Appeal for Ontario found that the *Retail Business Holidays Act* of Ontario, which prohibited retail business activities on Sundays, infringed the freedom of religion of Jewish business owners. For sincere religious reasons, the latter closed their businesses on Saturdays, but could not avail themselves of the exemption provided in the statute, the benefit of which was restricted to small businesses not exceeding a certain number of employees. The Court of Appeal therefore held that the law was of no force or effect *as to them*, which amounted to the creation of a "constitutional exemption" to their benefit with respect to the law insofar as it infringed their freedom of religion. The decision of the Court of Appeal for Ontario was, however, overturned by the Supreme Court of Canada in *Edwards Books*.[72] In that decision, the majority of the Court held the *Retail Business Holidays Act* to be valid without finding it necessary to enlarge or add to the exemption already provided in the statute by the legislature. The Court began by recognizing that the law had a valid secular objective, which was to secure a common weekly day of rest for all workers.[73] It

69. For further discussion on the subjective conception of religion see Section III of this Report, The Constitutional and Legal Context, above.

70. Supra n. 25.

71. *R. v. Videoflicks Ltd*., (1985) 14 D.L.R. (4th) 10 (Ont. C.A.).

72. *R. v. Edwards Books*, [1986] 2 S.C.R. 713.

73. In the *Big M* case, supra n. 24, the Supreme Court found the federal *Sunday Act* invalid because it imposed the closing of businesses on Sunday for reasons of religious observance. The court held that the purpose of the legislation was to compel the entire population to observe Christian religious dictates, which was incompatible with freedom of religion. In the *Edwards Books* case, the purpose of the Ontario statute, which similarly prohibited retail business on Sunday, was the secular one of providing a common day of rest for retail employees. The Court obviously considered such a purpose as legitimate and validated the law after concluding that it restricted freedom of religion in a justifiable way.

also accepted that the law had the effect of restricting the freedom of religion of those who observed the Sabbath by imposing upon them an additional financial burden not suffered by those who observed Sunday as a religious day. Specifically, they would be forced to close their businesses for two days a week, Saturday for religious reasons and Sunday as a result of the law, while Sunday observers could close only on Sunday and simultaneously satisfy not only their religious requirements but the law's as well. While acknowledging that the Ontario legislature was required to accommodate, as far as possible, those whose religion required them to close a day other than Sunday, the majority took the view that the exemption already provided in the law constituted an adequate accommodation, and that enlarging the existing exemption for larger businesses would endanger the effectiveness of the legislation. This completely reversed the findings of the Ontario Court of Appeal, which had held that the legislature had not gone far enough in the way of accommodation and should have granted an exemption to all businesses that close on Saturday for religious reasons, whatever the number of their employees. Subsequently, and despite the favourable Supreme Court judgment, the Ontario government took the initiative to extend the exemption to all businesses, regardless of their size, closing on any day other than Sunday for religious reasons.[74]

The limits of the duty to accommodate imposed on private actors or public authorities acting in an executive or administrative capacity are assessed through the concept of "undue hardship" (the proof of excessive financial cost or administrative inconvenience, or infringement of rights of others, extinguishing the duty).[75] The extent and limits of the duty of state authorities to provide for religious exemptions when enacting rules of general application (acts of the legislature or executive regulations) are assessed by applying the limitation clauses of the various constitutional or legislative human rights instruments. For example, the limitation clause contained in section 1 of the *Canadian Charter of Rights and Freedoms* permits "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". In order for a restriction on a right or freedom to be considered justifiable, section 1 has been interpreted as requiring that such restriction be imposed for a purpose that is "pressing and substantial", and that the means used by the legislature be rationally connected to this purpose, be the least restrictive possible and, finally, that the beneficial effects of the restriction be proportionate to its harmful effects.[76]

A 2009 decision of the Supreme Court of Canada illustrates how this "test" has been applied in respect of an application for a religious exemption. In that case, members of a Hutterian community in Alberta claimed an exemption from the requirement to provide personal photo identification to obtain a license to drive motor vehicles.[77] Although the Supreme Court acknowledged that this requirement did infringe

74. The Canadian Parliament and the provincial legislatures have adopted on their own initiative, without any constitutional obligation being imposed on them by the courts, numerous laws that contain religious exemptions or accommodations. For example, the *Canada Evidence Act*, R.S.C., 1985, c. C-5, s. 14, allows a person to make a solemn affirmation instead of taking an oath; the *Canada Labour Code*, R.S.C. 1985, c. L-5, s. 70, exempts members of a bargaining unit from paying union dues on the basis of religious objection; the Ontario *Immunization of School Pupils Act*, R.S.O. 1990, c. I.1, s. 3(3), exempts parents who have filed a statement of conscience or religious belief from immunizing their children; the Quebec *Animal Health Protection Act*, R.S.Q., ch. P-42, s. 55.9.15, permits ritual practices involving animals prescribed by the laws of a religion.

75. See the commentary on the *Amselem* case in the previous sub-section.

76. *R. v. Oakes,* [1986] 1 S.C.R. 103.

77. *Alberta* v. *Hutterian Brethren of Wilson Colony*, 2009 CSC 37, [2009] 2 R.C.S. 567. For a commentary, see José Woehrling, "L'arrêt *Alberta* c. *Hutterian Brethren of Wilson Colony:* Quand la Cour Suprême S'efforce de Restreindre les Accommodements en Matière Religieuse," in *Proportionnalité et*

their freedom of religion, the Court nonetheless refused to uphold the constitutional exemption which had been granted at the lower levels by the court of first instance and the Court of Appeal for Alberta.[78] The Supreme Court, by a majority of four out of seven judges, held that the legislative purpose of preventing identity theft related to the use of a fraudulent driver's license would not be achieved with sufficient efficacy if the exemption sought by the Hutterian Brethren was granted. In addition, the majority considered that the deleterious effects on freedom of religion were less important than the beneficial effects of the impugned regulation. In this regard, they stressed that freedom of religion does not protect believers against all ancillary costs associated with their religious practice and that the denial of a driver's license was not, in this case, a cost high enough to deprive complainants of the freedom to make a meaningful choice as to religious belief or practice (to the extent that they could arrange third party transport or hire someone for this purpose).

Conversely, the three dissenting judges emphasized the tradition of communal rural life and self-sufficiency of the Hutterian claimants, and noted that the survival of this tradition demanded that some of their members be able to drive cars to ensure necessary contact with the outside world. For the minority, the obligation of the photo on the license was a form of indirect coercion, having the effect of placing the plaintiffs in an impossible situation where they had to choose between remaining faithful to their religious beliefs or giving up the self-sufficiency of their communities. The deeper motivation of the majority decision seems to lie in a reluctance to recognize the existence of an obligation of the state to allow for religious exemptions to rules of general application like statutes and regulations. In a passage reminiscent of the majority decision of the United States Supreme Court in *Employment Division* v. *Smith* (494 U.S. 872 [1990]), the majority in the *Hutterian Brethren* case asserted: "Freedom of religion presents a particular challenge […] because of the broad scope of the *Charter* guarantee. Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs, including the attempt to reduce abuse of driver's licences at issue here, to the overall detriment of the community."[79]

VI. State Financial Support for Religion

State financial support for religion is an issue that concerns both direct and indirect forms of support. For the most part, indirect forms of support take the form of tax exemptions and these will be dealt with briefly in the first part of this section. The following part will address the availability of financial support for religious private schools in Canada.

A. Indirect Financial Support for Religion

There are several basic forms of indirect financial support for religious institutions in Canada. One relates to an exemption from the payment of property taxes for land

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Accommodements: Actes des Conférences 2010 de la Section Droit Constitutionnel et de Droits de la Personne de l'ABC-Québec, (Cowansville: Éditions Yvon Blais/L'association du Barreau Canadien, 2010), 83-121.

78. *Hutterian Brethren of Wilson Colony v. Alberta*, 2007 ABCA 160, 417 A.R. 68, 283 D.L.R. (4th) 136, confirming 2006 ABQB 338, 398 A.R. 5, 269 D.L.R. (4th) 757.

79. Id., par. 36 (McLachlin, C.J.).

owned or leased by a church or religious organization and used as a "place of worship."[80] Another entitles religious institutions to a partial recovery of the federally-imposed Goods and Services Tax (GST) and the various Provincial Sales Taxes (PST) paid on goods and services acquired by the religious institution.[81]

The other forms of indirect support for religion are related to the special tax treatment Canada's income tax system provides to registered charities, a category into which most religious institutions fall. First, income earned by such charities is exempt under Canada's *Income Tax Act*.[82] As is the case with the exemption from property taxes, this is the functional equivalent of a government subsidy because instead of the government providing religious institutions with direct financial support for their activities, they essentially waive any taxes owing.

Furthermore, if individuals or corporations donate to charities, they will receive a tax credit or tax deduction for their contribution.[83] This provides a strong incentive for people to support religious institutions and enables these institutions to secure funding for their activities, with indirect support from the government. Generally speaking, these subsidies for religious-based institutions are justified on the basis that, like other charities, they provide socially desirable benefits that would otherwise have to be provided by governments directly.[84]

Undoubtedly, religious institutions stand to benefit significantly from these indirect forms of state support, but these forms of taxation relief only apply if the religious institution in question successfully registers as charity.[85] The general legal test for charitable status remains the one laid out in a 19th century English House of Lords decision.[86] According to this case, charitable activities include "the relief of poverty, the advancement of education, the advancement of religion, and other purposes beneficial to the community."[87] While "churches, synagogues, mosques, and temples, and closely related institutions such as schools, colleges, and eleemosynary organizations normally qualify for registration,"[88] the issue of charitable status for religious institutions has not

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80. See e.g. *Assessment Act*, R.S.O. 1990, c. A.31, ss. 3(1)(3), 4; *An Act respecting Municipal taxation*, R.S.Q. c. F-2.1, ss. 204(8),(12); *Vancouver Charter*, S.B.C. 1953, c. 55 s. 396(1)(c)(iv); *Municipal Government Act*, R.S.A. 2000, c. M-26, s. 326(1)(k). Eligible charities are also entitled to rebatesfor municipal taxes: see e.g: *Municipal Act*, S.O. 2001, c. 25, s. 361(1)–(13).

81. See Canada Revenue Agency, *GST/HST Information for Charities*, Guide no. RC4082 (Ottawa: Canada Revenue Agency, 2008), online: Canada Revenue Agency, http://www.cra-arc.gc.ca/E/pub/gp/ rc4082/rc4082-08e.pdf; Revenu Québec, *The QST and the GST/HST: How They Apply to Charities*, Brochure no. IN-228-V (N.p: Revenu Québec, 2004), online: Revenu Québec, http://www.revenu.gouv.qc.ca/documents/en/publications/in/in-228-v(2004-10).pdf

82. *Income Tax Act*, R.S.C. 1985 (5th Su), c. 1, s. 149(1)(f) [hereinafter Canadian *ITA*]. The same exception applies for Provincial Income Taxes: see e.g. *Income Tax Act*, R.S.O. 1990, c. I.2, s. 6 [hereinafter Ont. *ITA*]; *Income Tax Act*, R.S.B.C. 1996, c. 215, s. 27(1)(a) [hereinafter B.C. *ITA*]; *Alberta Income Tax Act*, R.S.A. 2000, c. A-26, s. 7(a); *The Income Tax Act*, R.S.M. 1988, c. I10, C.C.S.M. c. I10, s. 3(3)(a) [hereinafter Man. *ITA*]; *Income Tax Act*, R.S.S. 1978, c. I-2, s. 9(a).

83. Individuals receive a tax credit pursuant to Canadian *ITA*, id., s. 118.1(3) and corporations receive a deduction pursuant to Canadian *ITA*, id., s. 110.1. Similar tax benefits exist under provincial legislation: see e.g. Ont. *ITA*, id., s. 3.1(18); B.C. *ITA*, id., s. 4.4; *Alberta Personal Income Tax Act*, R.S.A. 2000, c. A-30, s. 11; *Income Tax Act, 2000*, S.S. 2000, c. I-2.01, s. 21; Man. *ITA*, id., s. 4.6(18).

84. But see Bruce Chapman, Jim Phillips, and David Stevens, eds., *Between State and Market: Essay on Charities Law and Policy in Canada* (Montreal: McGill-Queen's University Press, 2001) for a critique of these tax subsidies.

85. Canadian *ITA*, supra n. 82, ss. 149.1, 248.

86. *Commissioners of Income Tax v. Pemsel* [1891] A.C. 531 (H.L.), 3 TC 53 [hereinafter *Pemsel* cited to A.C.].

87. Id. at 583

88. M.H. Ogilvie, *Religious Institutions and the Law in Canada*, 2d ed. (Toronto: Irwin Law, 2003) at 268 [hereinafter Ogilvie, *Religious Institutions*].

been free from controversy in Canada. For example, there is ongoing debate over the recognition of charitable status for the Church of Scientology which, as it currently stands, has not been extended charitable status by the Canada Revenue Agency.[89]

B. Financial Support for Religious Private Schools

As has been seen in a previous section,[90] the principle of religious neutrality of the state, which the Supreme Court of Canada considers to be an implicit consequence of freedom of religion, does not appear to mean that the state should be forbidden from aiding the free exercise of religion, provided that all religions are treated equally. According to this reasoning, public funding of private religious schools would be seen as constitutionally permissible.[91]The courts have not yet been asked to decide on this issue[92] and in actual practice, five of the ten Canadian provinces fund private religious schools at varying levels.[93]

On the other hand, the Ontario policy of denying public funding for private schools, including religious schools, has been the subject of challenges based first on the *Canadian Charter of Rights and Freedoms*, and later on the *International Covenant on Civil and Political Rights*.[94] It must be remembered that under Article 93 of the *Constitution Act, 1867* (for information on this provision, see the historical development section above), Ontario is constitutionally obliged to fund Roman Catholic "separate" schools, which are legally regarded as public schools. Moreover, the province of Ontario funds public schools, which are secular. Thus, while refusing to fund private religious schools, Ontario does fund the public secular schools as well as public "separate" Catholic schools.

In *Adler*,[95] the applicant challenged the refusal of public funding of Jewish and independent Christian schools as being contrary to freedom of religion and the prohibition against discrimination based on religion. In the Supreme Court, the majority relied on Section 93 of the *Constitution Act, 1867* to dismiss the appeal, considering that

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89. As of January, 2010, according to the Canada Revenue Agency's Charities Directorate accessible online at http://www.cra-arc.gc.ca/charities/. With respect to the ongoing debate see e.g. John Saunders and Timothy Appleby, "Scientology Seeks Tax-Receipt Status: Fresh From U.S. Victory, Organization Looks to Canada for Charity Ruling," *The Globe and Mail* (19 January 1998) A1, A6 (QL). It is interesting to note that while the Church of Scientology has not obtained charitable status in Canada for the purpose of issuing tax receipts to donors, the Church itself does not pay income tax given its not-for-profit status and its ministers are authorized to solemnized marriages which will be recognized by the state. Further discussion on the solemnization of civil marriage by religious officials can be found in Section VII of this Report, below, Civil Legal Effects of Religious Acts, in particular, Part A: Marriage and Divorce.

90. See the section on Freedom of Religion and State Law – Reasonable Accommodation (Part V.B.), above.

91. To the same effect, see, among others: Peter W. Hogg, supra, n. 39 at 810-811; Robert A. Sedler, "The Constitutional Protection of Freedom of Religion, Expression and Association in Canada and the United States: A Comparative Analysis," 20 *Case Western Reserve Journal of International Law* 577 (1988), 584 ("In any event, because of the absence of a non-establishment component in section 2a), the government is not required to be neutral toward religion. Governmental practices that favor religion over non-religion or that favor one religion over another religion, are not as such violative of section 2a). It is only where the governmental action has the action of imposing "coercive burdens on the exercise of religious beliefs" that it may be found violative of section 2a)").

92. In the *Big M* case, supra n. 24 at par. 107-09, Dickson J. expressly left open the question of whether the *Charter permits* the state to support financially private religious institutions. Nor has the question been decided in *Adler* v. *Ontario*, [1996] 3 S.C.R. 609, where the Supreme Court however decided that the *Charter* did not *require* the state to provide such a financial support.

93. British Columbia, Alberta, Saskatchewan, Manitoba, and Quebec.

94. *Adler*, supra n. 92; *Waldman* c. *Canada*, CCPR/C/67/D/694/1996, 4 November 1999 [*Waldman*].

95. *Adler*, id.

it was not possible to invoke the rights guaranteed in the *Charter* to contradict or neutralize another provision of the Canadian Constitution. In dissent, McLachlin and L'Heureux-Dubé J.J. were of the opinion that there existed an indirect discrimination (or "adverse effect" discrimination) based on religion, insofar as the Ontario policy had the effect of denying a benefit to people whose religion did not allow them to send their children to secular public schools. Madam Justice McLachlin, however, concluded that the discrimination was justifiable in light of the limitation provision contained in section 1 of the *Charter*, and took the view that encouraging the establishment of a more tolerant multicultural society was a pressing and substantial objective, and that the public school system offered the best means to achieve this goal. Moreover, in her opinion, McLachlin J. stated that it was impossible to say whether a less intrusive means, like the partial funding of private religious schools, would achieve the goal with the same efficacy.[96] Conversely, Madam Justice L'Heureux-Dubé held that even if the Ontario policy had the valid purpose of promoting the greatest possible attendance in secular public schools, the refusal of any financing of private religious schools went beyond what was required to achieve this goal and was therefore not a "minimum impairment". For her, the allocation of partial funding would have given some aid and recognition to religious minorities without compromising the secular and universal character of public schools.[97]

As such, the position adopted by the Supreme Court in the *Adler* case allowed for the continued discrimination between the treatment of Catholic schools on the one hand, and other religious schools on the other. The fact that such discrimination was shielded by section 93 of the *Constitution Act, 1867* did not, however, protect it against a challenge based on section 26 of the United Nations *Covenant*. In the *Waldman* case[98] (the complainant was Jewish and had to pay nearly $15,000 per year to send his children to a private non-subsidized Jewish school), the United Nations Committee on Human Rights had little difficulty concluding that the financing by Ontario of Catholic schools, but not schools of other religions, amounted to discrimination based on religion, and that the concerns that led to the protection of the rights of Catholics in section 93 of the *Constitution Act, 1867* could no longer justify such discrimination today.[99] The Committee observed that the *Covenant* does not oblige states to fund private religious schools; however, if they choose to do so they must proceed in a non-discriminatory manner.[100]

The Ontario government's initial position was that it would refuse to correct the discrimination by either accepting to fund religious schools other than Catholic schools or by stopping the funding of Catholic schools. It is true that Ontario is constitutionally

96. Id. at par. 193and ff.

97. Id. at par. 56 and ff.

98. *Waldman*, supra n. 94.

99 Given this conclusion, the Committee found it unnecessary to consider the two other arguments of the applicant, respectively based on Article 18 (freedom of religion) and Article 27 (rights of ethnic, religious, and linguistic minorities) of the *Covenant*.

100 "[…] the Committee observes that the Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria. In the instant case, the Committee concludes that the material before it does not show that the differential treatment between the Roman Catholic faith and the author's religious denomination is based on such criteria. Consequently, there has been a violation of the author's rights under article 26 of the Covenant to equal and effective protection against discrimination." (par. 10.6)

obliged to fund Catholic schools under section 93 of the *Constitution Act, 1867*, but, as emphasized by the complainant in the *Waldman* case, two other provinces, Newfoundland and Quebec, have obtained exemptions from the obligations arising from the same article (or, in the case of Newfoundland, under similar constitutional provisions) by constitutional amendments adopted in 1997 and 1998. Nevertheless, shortly after the pronouncement by the U.N. Committee, Ontario adopted changes to its tax law to allow parents who pay tuition to send their children to private schools (and who are also required to pay public school taxes) to include this expense as a deduction in their tax return.

VII. Civil Legal Effects of Religious Acts

This section will discuss the extent to which, in Canada, secular law recognizes and enforces acts performed, and decisions made, according to religious law. These issues will be examined in the context of Marriage and Divorce, where they frequently arise, as well as more broadly, within the realm of the internal autonomy of religious communities.

A. Marriage and Divorce

Pursuant to the *Canadian Constitution*, while marriage falls under the competence of the federal government, the solemnization of marriage falls under provincial competence,[101]and it is mainly to provincial legislation to which we must turn to discern the civil legal effects of religious marriages. Today, in every province, there is explicit recognition by secular law of religiously performed marriages by every minister of religion authorized to solemnize marriages.[102] As such, everywhere in Canada, in respect of marriage, "the civil contract and the religious sacrament can be performed simultaneously."[103]

There are, however, two main issues concerning marriage that involve the delicate intersection between secular law and religion. The first arises in the context of Canada's recognition of same-sex marriages. Following a reference by the federal government to the Supreme Court of Canada,[104] Parliament enacted the *Civil Marriage Act*[105] in 2005 which defines marriage as "the lawful union of two persons to the exclusion of all others." This Act made Canada only the fourth country in the world to legislate same-sex marriage.[106]

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101. *Constitution Act, 1867*, supra n. 33, ss. 91(26), 92(12).

102. Arts. 366, 367 C.C.Q.; *Marriage Act*, R.S.O. 1990, c. M.3, s. 20 [hereinafter Ontario *Marriage Act*]; *Marriage Act* R.S.B.C. 1996, c. 282, ss. 2-3; *Marriage Act*, R.S.A. 2000, c. M-5, ss. 3-4; *Marriage Act*, S.S. 1995, c. M-4.1, as am. by S.S. 2004, c. 66 and S.S. 2009, c.4, ss. 3, 5, 6; *Marriage Act*, R.S.E.I. 1988, c. M-3, ss. 3-8 [hereinafter PEI *Marriage Act*]; *Solemnization of Marriage Act*, R.S.N.S. 1989, c. 436, ss. 4-6; *Marriage Act*, R.S.N.B. 1973, c. M-3, s.2 ; *Solemnization of Marriage Act*, R.S.N.L. 1990, c. S-19, ss. 3-5; *Marriage Act*, R.S.M. 1987, c-M50, C.C.S.M. c. M50, ss. 2-3; *Marriage Act*, R.S.Y. 2002, c. 146, ss. 2-3; *Marriage Act*, R.S.N.W.T. 1988, c. M-4, ss. 2-3; *Marriage Act*, R.S.N.W.T. 1988, c. M-4, ss. 2-3, as duplicated for Nunavut by s. 29 of the *Nunavut Act*, S.C. 1993, c. 28.

103. Robert Leckey, "Profane Matrimony" 21:2 *Canadian Journal of Law and Society* 1 (2006) at 13 (providing an interesting overview of the historical regulation of civil marriages and the evolution of civil marriage in its intersection with religion in Canada).

104. *Reference Re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, 246 D.L.R. (4th) 193.

105. S.C. 2005, c. 33 (formerly Bill C-38).

106. The other countries were the Netherlands (2001), Belgium (2003) and Spain (2005). For an overview of this historical evolution and description of this legislation as well as court decisions in the area of same-sex marriage see Mary C. Hurley, "Bill C-38: The Civil Marriage Act" Legislative Summaries, online: Library of

Because same-sex marriage may be repugnant to the religious beliefs of certain faith communities, this new legislation had the potential to interfere within the religious domain, and provision needed to be made to protect religious officials from state compulsion to perform same-sex marriages against their religious beliefs.[107] As such, the *Civil Marriage Act*[108] contains, both in its Preamble and in section 3, specific recognition that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs. This is echoed in some provincial legislation.[109]

While Canadians may marry pursuant to a civilly-recognized religious ceremony, they may also choose to marry civilly with no religious sanction. The interesting question that arises in this context is whether a marriage commissioner may conscientiously object to performing a civil same-sex marriage due to his own religiously-held beliefs. As solemnization of marriage is within provincial competence, the answer is not uniform across the country. Prince Edward Island is thus far the only province to have enacted specific protection allowing anyone authorized to solemnize a marriage to refuse to do so if it conflicts with that person's religious beliefs.[110] It has been said that this issue "sets the stage for (yet another) conflict between religious freedom and sexual orientation, between religion-based constitutional claims and (sexual orientation) equality claims."[111]

In Canada, this was recently tested before the courts with the result that civil officials will not be able to claim conscientious objection, based on religious grounds, to refuse to perform a same-sex marriage. In *Nichols v. Saskatchewan (Human Rights Commission)*, Justice McMurtry upheld a decision of the provincial Human Rights Commission to fine a Saskatchewan civil marriage commissioner $2,500 for refusing to perform his public service for a same-sex couple, holding that as a government actor, he was "not entitled to discriminate, regardless of his private beliefs."[112] As Professor MacDougall asserts, to do otherwise would be to allow a "religious 'veto' over the availability of a public service."[113] The Saskatchewan Court of Appeal[114] recently affirmed this position in a reference from the provincial government asking the Court's opinion on the constitutional validity of proposed legislation that would allow a commissioner to decline to solemnize a same-sex marriage if performing it would be contrary to his or her religious beliefs. The Court held that this legislation would, if

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Parliament – Parliamentary Information and Research Service, http://www2.parl.gc.ca/Sites/LOP/LegislativeSummaries/Bills_ls.asp?Parl=38&Ses=1&ls=c38.

107. In *Reference Re Same-Sex Marriage*, supra n. 104 at para. 58, the Supreme Court held that s. 2(a) of the *Charter*, supra n. 25 was sufficiently broad to offer such protection to religious officials from performing same-sex marriage contrary to their religious beliefs.

108. Supra, n. 105.

109. As the solemnization of marriage falls under provincial jurisdiction, provincial legislation is needed to protect religious officials in a similar way. See Ontario *Marriage Act*, supra n. 102, s. 20(6); Art. 367 C.C.Q.; PEI *Marriage Act*, supra n. 102, s. 11(1).

110. PEI *Marriage Act*, supra n. 102, s. 11(1) as am. by R.S.E.I. 2005, c.12, s. 7. Although there was a Bill proposed in New Brunswick to the same effect, it never came into effect.

111. Bruce MacDougall, "Refusing to Officiate at Same-Sex Civil Marriages," 69 *Sask. L. Rev.* 351 (2006) at 355.

112. 2009 SKQB 299, [2009] 10 W.W.R. 513, 71 R.F.L. (6th) 114 at para 73.

113. Supra n. 111 at 353. But see Ryder, supra n. 36 at 191. Ryder is less categorical on this issue and points out that "human rights jurisprudence supports the rights of employees, whether in the public or the private sector, whether or not they are religious officials, to object to the performance of job duties on religious grounds and employers have an obligation to accommodate them if they can do so without undue hardship." Id.

114. Marriage Commissioners Reference, 2011 SKCA 3.

enacted, be unconstitutional because it would violate equality rights entrenched in s. 15 of the *Canadian Charter*, which prohibits discrimination on the basis of sexual orientation. Moreover, the Court held that accommodating the religious beliefs of marriage commissioners could not justify discrimination against gay and lesbian couples. Emphasizing that marriage commissioners act as government officials as opposed to private individuals, the Court stated that the obligation to solemnize same-sex marriages would not interfere with the commissioners' religious freedom as they could still hold beliefs and exercise the freedom to worship.

The second issue involving the intersection between religion and the secular state in the area of marriage concerns polygamous marriage. While Canada has made polygamy a criminal offence pursuant to s. 293(1) of the *Criminal Code*,[115] at least one Canadian community continues to adhere openly to plural marriage.[116] Although the practice is not widespread in Canada, it has brought to the forefront the potential clash between Canada's criminalization of polygamy and the constitutional protection of religious freedom.[117] In 2011, the British Columbia Supreme Court ruled on this very issue pursuant to a reference by both the federal and provincial governments on the question as to whether the polygamy section of the Criminal Code was consistent with the *Canadian Charter of Rights and Freedoms*.[118] Chief Justice Bauman found that while the criminalization of polygamy did in fact compromise religious liberty for members of certain faiths (such as fundamentalist Mormons, some Muslims and Wiccans) where plural marriage is a sincerely held religious belief, such interference was justified pursuant to section 1 of the *Canadian Charter*. The primary reason for such justification lay in the prevention of the harms to children, women and society the Court found associated with polygamy.

The legal repercussions of polygamous marriages go beyond their potential criminality and extend to matters of immigration[119] as well as to issues surrounding

115. R.S.C. 1985, c. C-46. Further, the definition of marriage in the *Civil Marriage Act*, supra n. 105, as "the lawful union of two persons to the exclusion of all others" excludes polygamy from the Canadian conception of marriage. Bigamy is also indictable offence pursuant to s. 290(1) of the *Criminal Code.*

116. This community is Bountiful, British Columbia where according to Professor Angela Campbell, who has done empirical research about this community, until two male community leaders were arrested on polygamy charges in January, 2009 (such charges being subsequently dropped), Bountiful's residents, who belong to the Fundamentalist Church of Jesus Christ of Latter Day Saints, have been practicing polygamy for decades without state interference. See Angela Campbell, "Bountiful Voices," 47 *Osgoode Hall Law Journal* 183 (2009); Angela Campbell, "Wives' Tales: Reflecting on Research in Bountiful," 23 *Canadian Journal of Law and Society* 121 (2008); Robert Matas and Wendy Stueck, "Polygamy Charges in Bountiful," *The Globe and Mail* (7 January 2009), at http://www.theglobeandmail.com/news/national/article963758.ece. One of Bountiful's religious leaders who was charged with polygamy in 2009 even filed a lawsuit against the provincial government for damages due to "unlawful" prosecution. See Keith Fraser, "Polygamist Sect Leader Sues B.C. Government," *The National Post*, 13 January 2010, at http://www.nationalpost.com/story.html?id=2438556.

117. See generally, Angela Campbell, "Representations of Women in Polygamy in Reference re: Section 293 of the Criminal Code of Canada," *Annuaire Droit et Religion* (forthcoming 2014); Nicholas Bala et al., "An International Review of Polygamy: Legal and Policy Implications for Canada," in *Polygamy in Canada: Legal and Social Implications for Women and Children* (Ottawa: Status of Women Canada, 2005), 1; Susan G. Drummond, "Polygamy's Inscrutable Criminal Mischief," 47 *Osgoode Hall Law Journal* 317 (2009); and Lisa Kelly, "Bringing International Human Rights Law Home: An Evaluation of Canada's Family Law Treatment of Polygamy," 65 *University of Toronto Facult of Law Revew* 1 (2007).

118. *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588.

119. See e.g. the cases of *Ali v. Canada (Minister of Citizenship & Immigration*) (1998), 154 F.T.R. 285 and *Awwad v. Canada (Minister of Citizenship & Immigration*) (1999), 162 F.T.R. 209 at para. 17, [1999] F.C.J. No. 103 (confirming that immigration officers may take the fact of being in a bigamous or polygamous marriage into account in denying admission to Canada).

spousal support and matrimonial property division.[120] And while contrary to the law in Canada, for certain limited purposes, a polygamous marriage entered into validly in a jurisdiction that recognizes such marriages, by persons domiciled in that jurisdiction at the time of the marriage, may be given some effect in Canada.[121]

As is the case with marriage, divorce is also within the federal government's jurisdiction.[122] With respect to the interface between religion and divorce, it is worth noting that the *Canada Divorce Act*[123] contains, in section 21.1, a provision which prevents a spouse from exercising his civil rights in a divorce for so long as he refuses to remove a religious barrier to divorce, such as the granting of a religious divorce. This provision was enacted after consultation with, and through the urging of, the Jewish community since in the Jewish religion, despite a civil divorce, a marriage remains in effect until a *get* (or religious divorce supervised by the rabbinic tribunal called the *Beit Din*) is given by the husband and accepted by the wife.[124] This section of the *Divorce Act* may be seen as palliating a potentially unfair withholding of such a divorce by the husband, without which the wife cannot remarry within her faith.

B. Religious Arbitration in Family Matters

The issue of the legitimacy of religious arbitration in family matters attracted a great deal of attention in Canada when the Islamic Institute of Civil Justice sought to create a "Shari'a Court" in Ontario in 2003. The purpose behind this proposed religious arbitral body was the settlement of personal disputes involving Muslims related to inheritance and family matters. Key to this proposal was that such decisions would be legally binding and judicially enforceable by Ontario courts.[125] This recommendation resulted in intense controversy[126] "triggering heightened concern for the well-being of vulnerable members of society"[127] such as women and children, as well as "concerns about individual autonomy and community compulsion."[128]

As a result, the Ontario government mandated a study, commonly known as the "Boyd Report,"[129] which concluded that Ontario should allow individuals to choose

120. Kelly, supra n. 118 at 30-37.

121. See *Tse v. Minister of Employment & Immigration* [1983] 2 F.C. 308, 144 D.L.R. (3d) 155 (upholding a polygamous marriage entered into in Hong Kong as valid for purposes of establishing the legal status of a child).

122. *Consitution Act, 1867*, supra n. 33, s. 91(26).

123. R.S.C. 1985 (2nd Su), c. 3.

124. This issue was at the forefront of the recent Supreme Court of Canada decision in *Bruker*, supra n. 47, discussed in Section IV of this Report, The State and Religious Autonomy, above. See generally Jukier and Van Praagh supra n. 47.

125. For a summary of the debate concerning the Shari'a Court proposal in Ontario see Jean-François Gaudreault-DesBiens, "On Private Choices and Public Justice: Some Microscopic and Macroscopic Reflections on the State's Role in Addressing Faith-Based Arbitration," in *Doing Justice: Dispute Resolution in the Courts and Beyond*, eds. Ronalda Murphy and Patrick A. Molinari (Montreal: Canadian Institute for the Administration of Justice, 2009), 247 at 249-255 [Gaudreault-DesBiens, "Faith-Based Arbitration"].

126. In June 2005, a "No Religious Arbitration Coalition" was formed which included most Canadian feminist organizations and some Muslim organizations. See Natasha Bakht, "Were Muslim Barbarians Really Knocking on the Gates of Ontario?: The Religious Arbitration Controversy – Another Perspective," in *Doing Justice: Dispute Resolution In the Courts and Beyond-2007*, eds. Ronalda Murphy and Partrick A. Molinari (Montréal: Canadian Institute for the Administration of Justice, 2009), 229 at 237-38.

127. Lorraine E. Weinrib, "Ontario's Sharia Law Debate: Law and Politics under the Charter," in Moon, supra n. 18, 239 at 260.

128. Id.

129. Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Toronto: Ontario Ministry of the Attorney General, 2004), online: Ontario Ministry of the Attorney General, http://www.attorneygeneral,jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf.

religious arbitration as a reflection of Canada's multicultural society as long as minimal safeguards, concerning such things as the legitimacy of consent and judicial review procedures, were put into place. The Ontario government did not follow these recommendations, choosing instead to reject all state-sanctioned religious arbitrations. Amendments to the province's *Arbitration Act* were passed requiring all family arbitrations to be conducted exclusively in accordance with Ontario or Canadian law.[130] It is important to point out that despite these amendments, parties are not prohibited from choosing to settle their family matters according to religious norms, or before a religious authority, as any such prohibition would constitute a violation of freedom of religion. The amendments merely assert that such religious arbitration will not be automatically legally binding or enforceable before a state court of law.[131] Given the public order nature of family decisions, the same would be true in the rest of Canada and as such, a secular court will not grant a divorce on terms arrived at by religious mediation or arbitration, or sanction a religious decision on any family matter, unless that court deems it consonant with Canadian law and policy.

C. Civil Effects of Religious Decisions outside the Family Context

The final question to address is what effect does the state give to religious decisions made by religious bodies or courts outside the family context. While it is tempting to assert categorically, as does Justice Deschamps in dissent in the Supreme Court decision of *Bruker v. Marcovitz*,[132] that civil courts and religious undertakings must operate in non-intersecting spheres, the reality is slightly more complicated.

In general, Canadian courts do decline to intervene in the internal matters of a religious body and in deciding questions pertaining to religious doctrine.[133] Religious organizations are viewed as voluntary associations over which courts are slow to exercise jurisdiction.[134] For example, it was held to be inappropriate for a secular court to interfere with a decision taken by a religious council responsible for supervising and certifying products and establishments complying with Jewish dietary laws.[135] Likewise, courts will generally enforce contractual stipulations pursuant to which parties agree to submit their disputes to religious arbitration.[136]

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130. See Prithi Yelaja and Robert Benzie, "McGuinty: No Sharia Law," *The Toronto Star*, 12 September 2005, A1 (QL) (the premier of Ontario, Dalton McGuinty, announced that "there will be no sharia law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians"). As a result, Bill 27, *Family Statute Law Amendment Act, 2006*, 2nd Sess., 38th Leg., Ontario, 2006 (assented to 23 February 2006), S.O. 2006 c-1, was passed amending the *Arbitration Act, 1991*, S.O. 1991, c. 17 and providing that all family law arbitrations must be conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction.

131. Gaudreault-DesBiens, "Faith-Based Arbitration," supra n. 125 at 254. As Bakht points out, supra n. 126 at 245, these amendments do not prohibit family arbitration with religious principles, as long as such principles do not conflict with Ontario or Canadian family law. This is similar to the situation in Quebec. See art. 2639 C.C.Q. which prohibits family matters from being submitted to binding arbitration.

132. Supra n. 47 at paras. 101-85.

133. See generally Ogilvie, *Religious Institutions*, supra n. 88 at 217-221; Anne Saris, "Les Tribunaux Religieux dans les Contextes Canadien et Québécois," 40 *Revue juridique Thémis* (2006) 353; *Levitts Kosher Foods Inc. v. Levin* (1999), 45 O.R. (3d) 147 at para. 31 (Su Ct. J.), 175 D.L.R. (4th) 471 [*Levitts Kosher Foods* cited to O.R. (3d)].

134. See Ogilvie, *Religious Institutions*, id. at 215; *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, 81 Man. R. (2d) 1.

135. *Levitts Kosher Foods*, supra n. 133 (the court stressed that the process of supervision and certification was a religious function, based on religious belief and conscience, into which it could not intervene).

136. See *Popack v. Lipszyc*, 2008 CarswellOnt 5184 (Su Ct. J.) (WLeC) aff'd 2009 ONCA 365, 2009 CarswellOnt 2288 (C.A.) (WLeC) (the Court enforced the parties agreement to submit any disputes that arose

There are instances, however, where it may be appropriate for Canadian judges to interfere with, or refuse to enforce, decisions taken by religious bodies where it is "necessary to prohibit practices that are harmful, that violate civil or property rights or that infringe a person's constitutional rights."[137] As such, intervention by secular courts occurs in instances where the court finds some procedural irregularity or breach of natural justice.[138] In *Lakeside Colony of Hutterian Brethren v. Hofer*,[139] the Supreme Court of Canada refused to enforce a decision by a religious community to expel one of its members and thereby deprive him of his property in the colony on the ground that such expulsion was invalid for lack of notice and procedural fairness.

The above examination demonstrates that while Canada is said to espouse a separation between secular courts and internal religious decision-making, this principle of non-intervention is somewhat more nuanced and dependent on public order principles related to family law, as well as procedural fairness guarantees for all Canadians.

VIII. RELIGIOUS EDUCATION OF THE YOUTH

Freedom of conscience and religion and religious education in public and private schools

A. Private Religious Schools

The right to create and operate private religious schools, and the right to send one's children to such schools, is not explicitly recognized in the *Canadian Charter of Rights and Freedoms*. It is, however, generally considered that in the *Jones*[140] and *Adler*[141] cases, the Supreme Court recognized that freedom of conscience and religion, as well as the right to liberty recognized in section 7 of the *Charter*, implicitly contain the right of parents not to send their children to public school, as well as the right to have them receive religious instruction in a private school or at home, provided such instruction is "appropriate". The right of parents to send their children to a private religious school implies the right to create and operate such schools. It should also be noted that some of the existing provincial human rights statutes (among them the Quebec *Charter of Human Rights and Freedoms*[142]) explicitly affirm the right to establish private schools,

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in the course of their commercial dealings to the *Beit Din*, a Jewish religious tribunal). See also *Grunbaum c. Grunbaum* (2002), AZ-50110109 (Qc. Su Ct.) (Azimut).

137. Bakht, supra n. 126 at 235-36. Accord Ogilvie, *Religious Institutions*, supra n. 88 at 218.

138. See e.g. *Cohen v. Hazen Avenue Synagogue* (1920), 47 N.B.R. 400 (S.C. (Ch.D)) (a resolution to suspend a member for life was not enforced because of procedural irregularities and lack of notice requirements in calling the meeting where such expulsion was decided by the religious body).

139. Supra n. 134.

140. *R.* v. *Jones*, [1986] 2 S.C.R. 284.

141. *Adler*, supra n. 92. In this decision, the four judges who gave reasons on article 2(a) of the Canadian *Charter* (freedom of conscience and religion), supra n. 25, have emphasized that the refusal by the province of Ontario to fund private religious education did not amount to a denial of the right to educate one's children in accordance with one's religious beliefs *insofar* as the Ontario legislation did not prohibit religious education in a private school or at home. *A contrario*, a legislation making it mandatory for parents to send their children to secular public schools would restrict such a right.

142. Quebec *Charter*, supra n. 42. Section 41 reads: "[Religious and moral education] Parents or the persons acting in their stead have the right to give their children a religious and moral education in keeping with their convictions and with proper regard for their children's rights and interests". Section 42 reads: "[Private educational establishments] Parents or the persons acting in their stead have a right to choose private educational establishments for their children, provided such establishments comply with the standards prescribed or approved by virtue of the law."

including religious private schools, and to send one's children to such schools. As explained earlier in this Report, the state is not required to offer financial assistance to such schools, but the Canadian Constitution does not prevent it from doing so, provided it is done in a non-discriminatory manner.

B. Religion in Public Schools

By invoking freedom of conscience and religion, and the principle of religious neutrality of the state that is considered an implicit component of this freedom, the Court of Appeal for Ontario ruled unconstitutional Christian religious exercises (prayer at the beginning of school activities)[143] and Christian religious instruction[144] in public schools, despite the possibility, in both cases, of an exemption upon parental request. The Court considered that pressure to conform and fear of peer stigmatization could deter some parents from requesting such an exemption for their children. Referring to these two decisions of the Court of Appeal for Ontario, Justice Sopinka of the Supreme Court of Canada observed in the *Adler* case that "[t]his secular nature [of the public school system] is itself mandated by s. 2(*a*) of the *Charter* as held by several courts in this country".[145] In other words, the *Charter* requires that public schools be "secular", that is to say that they respect the principle of religious neutrality.

The principle of religious neutrality of the state, however, does not seem to prohibit the existence, within the public school system, of schools having a religious orientation as long as such schools are voluntarily chosen by parents. Such an arrangement exists, for example, in the province of Alberta. In addition, the cultural teaching *about* religion (religious *education* or *instruction* as opposed to religious *indoctrination*) may be made mandatory in public schools, provided it is dispensed in a neutral and objective way. The Court of Appeal for Ontario has defined the criteria that such cultural education about religion should respect in order to avoid violating the freedom of conscience and religion of students and/or of their parents:

- The school may sponsor the *study* of religion, but may not sponsor the *practice* of religion.
- It may *expose* students to all religious views, but may not *impose* any particular view.
- The approach to religion is one of *instruction*, not one of *indoctrination*.
- The approach is *academic*, not *devotional*.
- The school should strive for student *awareness* of all religions, but should not press for student *acceptance* of any one religion.[146]

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143. *Zylberberg* v. *Sudbury Board of Education*, (1988) 65 O.R. (2d) 641 (Ont. C.A.), leave to appeal to the Supreme Court denied.

144. *Canadian Civil Liberties Association* v. *Ontario (Minister of Education)*, (1990) 71 O.R. (2d) 341; 65 D.L.R. (4th) 1 (Ont. C.A.), leave to appeal to the Supreme Court denied. It should be noted that the interpretation given by the Ontario Court of Appeal to freedom of religion is more restrictive than what follows from international standards. The existence of non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians is generally considered sufficient to ensure compliance with freedom of religion guaranteed in international law. To this effect, see *The Right to Freedom of Thought, Conscience and Religion (art. 18) 30/07/1993. CCPR/C/21/Rev.1/Add.4, General Comment No. 22*, paragraph 6.

145. *Adler*, supra n. 92 at para. 181 (Sopinka J.)

146. *Canadian Civil Liberties Association* v. *Ontario (Minister of Education)*, supra n. 144 at 367. These criteria are taken from *Religion in the Public Schools* (1986), a publication of the American Association of School Administrators, at p. 33, which in turn quoted from an earlier statement of the Public Education Religion Studies Center, Wright State University.

But compliance with these conditions may lead to a paradox. To avoid the reproach of inculcating religious values, schools will tend to present the various religions in the most neutral way possible and to emphasize the diversity of opinions about the subject. Some parents may then find that such teaching conveys a moral relativism incompatible with the religious beliefs they want to transmit to their children and that it therefore risks creating a conflict of loyalties in children, harming the relation of trust that exists with their parents. It is precisely such criticism that is directed by some parents against the *Ethics and Religious Culture Program* (ERC) introduced in 2008 in Quebec public schools and private schools that receive government subsidy. As discussed in more detail in the conclusion/addendum to this Report, the Supreme Court of Canada has rejected this contention in relation to *public* schools, but the same issue is still pending before that Court in relation to *private* religious schools. If the Court accepts the arguments of the complainants in this latter context, the question will then be raised as to whether an exemption should be granted to parents who require it. To convince the courts that no exemption should be allowed, the government will have to argue that maintaining the curriculum as mandatory is justified by the aim of developing students' ability to think critically about complex and controversial subjects in order to prepare them to exercise their civic responsibilities, or by the aim of educating tolerance in children from diverse backgrounds by socializing them together. Such goals could be compromised if schools had to excuse children from participating in the educational activities that their parents consider objectionable for religious reasons. In *Multani* (the case concerning the wearing of a *kirpan* by a Sikh student in school, which is presented later in this Report) the Supreme Court of Canada attached great importance to the mission of schools to educate students about tolerance and respect between persons of different cultural, religious, or ethnic backgrounds.[147]

IX. Religious Symbols in Public Places

A. Religious signs and symbols in public places

In Canada, the issue of religious symbols or signs in public space (understood as the sphere of public institutions) has been raised primarily with respect to the wearing of the Sikh *kirpan* and the Islamic headscarf and, as discussed in greater detail in the conclusion/addendum to this Report, has recently become the subject of great controversy. The view generally adopted differs depending on whether the wearers of such religious symbols are ordinary citizens or government agents. The Supreme Court of Canada has held that school authorities, who may legitimately prohibit the presence of weapons in schools, should nevertheless allow a Sikh student to come to school with his *kirpan* (a dagger with a curved blade considered to be religiously prescribed by orthodox Sikhs), provided it is worn under conditions which respect the safety of other persons attending the school (in particular, that it is maintained in a sleeve securely sewn and worn under the clothes).[148] Conversely, the *kirpan* has been prohibited in courthouses and on-board aircrafts, because it is considered that in these two contexts

147. *Multani* v. *Marguerite-Bourgeoys (Commission scolaire)*, [2006] 1 S.C.R. 256 at para. 76: "Religious tolerance is a very important value of Canadian society. If some students consider it unfair that Gurbaj Singh may wear his *kirpan* to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instil in their students this value that is […] at the very foundation of our democracy" (Charron J.).

148. *Multani*, id.

there exists a risk to the safety of others.[149] The issue of Islamic headscarves in schools has not yet been dealt with by the courts but in 1994 the Quebec Human Rights Commission (established under the *Quebec Human Rights Act*), issued an opinion to the effect that schools must allow the wearing of Islamic headscarves by students, unless it amounts to pressure on other students, provocation, or incitement to discrimination based on sex. The Commission mentioned a number of considerations that could justify the prohibition of religious symbols in schools: the fact that such symbols marginalize students (however, public schools must educate students to respect the rights and freedoms of others, precisely to avoid such marginalization), the existence of a threat to public order or gender equality and, finally, considerations of security (for example, the wearing of a *hijab* could be dangerous in the context of physical education or laboratory activity).[150]

The wearing of religious symbols by teachers in carrying out their educational functions renders the question more complex because one must take into account both the right of the teachers to the free exercise of their religion, as well as the requirement of religious neutrality imposed on them as part of their professional obligations. In countries where the principle of religious neutrality of the state is interpreted rigorously, such as France and the United States, its invocation would probably suffice to justify prohibiting the wearing or displaying of religious symbols by teachers. In Canada, however, since the principle of neutrality is not specifically proclaimed but merely follows from the free exercise of religion, it should be necessary, in order to justify the ban, to demonstrate that the wearing of religious signs by teachers is likely to subject students to religious pressure and thus, to infringe their religious freedom. Such a conclusion is not inevitable as it depends on the context: the age of the children (they are evidently more vulnerable the younger they are), the discretion or, conversely, the ostentation of the sign in question, the subject that is taught and, finally, the teacher's general behaviour.[151]

B. The "reasonable accommodation crisis" in Quebec (2007-2008)

The judicial pronouncements on religious accommodation seem to be generally well

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149. In *Hothi* v. *R.*, [1985] 3 W.W.R. 256 (Man. Q.B.) conf. [1986] 3 WWR 671 (Man. C.A.) the Court of Queen's Bench of Manitoba confirmed the order of a judge of the Provincial Court banning the *kirpan* in the courtroom. In *Nijjar* v. *Canada 3000 Airlines Ltd.*, (1999), 36 C.H.R.R. D/76), the Canadian Human Rights Tribunal, established under the *Canadian Human Rights Act*, rejected a complaint by a Sikh who was denied access to an airplane because of his *kirpan*. The tribunal took into consideration the unique environment of an aircraft, where it is impossible to have access to emergency medical or police assistance. In *Pritam Singh* v. *Wokmen's Compensation Board Hospital*, (1981) 2 C.H.R.R. D/459 (Bd. Inq. Ont.), Mr. Singh was told he could not pass tests at the hospital if he did not remove his *kirpan*; a Commission of Inquiry found that the hospital could have found a solution to accommodate the beliefs of Mr. Singh and ordered that future Sikh patients be allowed to keep their *kirpan*, provided it is of a reasonable length, while receiving hospital care. Note also that Sikh MPs are authorized to wear the *kirpan* in the Canadian House of Commons, as are visitors to the House present in the gallery reserved for the public.

150. Pierre Bosset, *Le Port du Foulard Islamique dans les Écoles Publiques. Aspects Juridiques* (Direction de la Recherche, Commission des Droits de la Personne du Québec). Document adopted on the 388th hearing of the Commission, held on 21 December 1994, by resolution COM-388-6.1.3. To the same effect, see also Ontario Human Rights Commission, *Policy on Creed & the Accommodation of Religious Observances*, 1996.

151. *Pandori* v. *Peel Bd of Education* (1990) 12 C.H.R.R. D/364 (Ont. Bd. Inq.): A board of inquiry established under the *Ontario Human Rights* concluded, given the evidence of absence of incidents of violence, that the kirpan must be allowed in the respondent school, both for students and for teachers and members of the school administration, but under the condition that it is of a reasonable size and is worn under the clothing so as to be invisible, as well as maintained firmly enough in its sheath to be difficult (but not impossible) to remove.

received in Canada's English-speaking provinces, but they raise serious reservations, and even opposition, in French-speaking Quebec. A portion of the Quebec population is concerned that after having "driven out" the Christian majority religion from public space and public schools (see the decisions analyzed above declaring unconstitutional Christian prayers and religious instruction in public schools), courts are now encouraging the expression of minority religions, particularly those of immigrants, in the same context (for example by authorizing the *hijab* or the *kirpan* in schools).

This view, however, ignores the fact that the obligation of religious neutrality is binding on public institutions, but not on private individuals who are the users of such institutions. In fact, the "reasonable accommodation crisis" that took place in Quebec in 2007-2008 (and which saw an outburst of popular opposition to the practice of religious accommodation) appears to reflect a feeling of "identity discomfort" amongst the francophone majority. Due to its minority status in Canada and throughout North America, the latter tends to consider the increasing cultural diversity of Quebec's society resulting from immigration as a threat to its majority status and to its traditional values. For similar reasons, the federal policy of multiculturalism is not well received in Quebec. Section 27 of the *Canadian Charter of Rights and Freedoms* proclaims that the interpretation thereof "shall be consistent with the preservation and enhancement of the multicultural heritage of Canadians". Although this section has yet to be given any significant legal consequence by the courts, opponents of multiculturalism in Quebec see it as encouraging "communalism".

Concerns such as these have led a significant segment of Quebecers to reject the religious accommodations imposed by the courts, and to ask for the establishment of a system of secularism modeled on the system existing in France, in the hope that it will justify the exclusion of all religious expression from "public spaces", understood not only as the sphere of state institutions, but in the broader sense of the space of social interaction (such as streets, businesses, parks, and associations in civil society). In the minds of its supporters, such secularism (that they call "republican") is assigned the double mission of fostering the emancipation of individuals in relation to religion and realizing civic integration (allegiance to a common civic identity) by neutralizing religion as an identity marker. This position has been advocated before a Commission created by the Quebec government in reaction to the reasonable accommodation crisis, the *Consultation Commission on Accommodation Practices Related to Cultural Differences*, chaired by philosopher Charles Taylor and sociologist Gérard Bouchard.

C. The Bouchard-Taylor Commission Report

In its Report, published in 2008,[152] the Commission considered that a system of secularism (*laïcité*), which it describes as "open secularism", is already in operation in Quebec, even if it has been historically defined implicitly rather than formally. For the Commission, the four key principles of any model of secularism are freedom of conscience and religion, the right of individuals to religious and moral equality, the separation of church and state, and the principle of state neutrality towards religion. The first two principles define the final purposes that are sought by secularism, while the other two principles express themselves in the institutional structures that are essential to achieve these purposes. The latter principles can be defined and arranged in different ways and may prove to be more or less permissive or restrictive from the standpoint of

152. Bouchard & Taylor, supra n. 20. For a commentary, see José Woehrling, "The 'Open Secularism' Model of the Bouchard-Taylor Commission Report and the Decisions of the Supreme Court of Canada on Freedom of Religion and Religious Accommodation," supra n. 25.

religious practice. For example, advocates of "open secularism" would insist more on religious freedom and equality, even if this requires adopting a flexible conception of state neutrality. Conversely, proponents of "rigid secularism" would allow for greater restrictions of the free exercise of religion in the name of a rigorous interpretation of state neutrality and the separation of political and religious powers.

From these premises, the Commission concluded that as a general rule, government employees must be allowed to wear religious signs in the exercise of their functions, but that a limited ban is justified in the case of public officials "who occupy positions that embody at the highest level the necessary neutrality of the State," such as judges, Crown prosecutors, the president of the National Assembly of Quebec, police officers, and the like. This recommendation of the Commission has thus far not been put into practice and there does not presently exist, either in Quebec or anywhere else in Canada, any rule prohibiting the wearing of religious signs by public officials in the exercise of their functions (although one has been proposed before the Quebec legislature). On the contrary, the Royal Canadian Mounted Police (R.C.M.P.) specifically allows Sikhs serving in the force (which is under federal authority) to wear a turban instead of the traditional felt hat. While this decision of the R.C.M.P. was challenged as being contrary to the freedom of conscience and religion of members of the public who may come into contact with police officers wearing Sikh religious attributes, the courts rejected this claim.[153]

In its Report, the Commission also recommended that the crucifix hanging above the Speaker's chair in the National Assembly (or Legislature) of Quebec be removed because it suggests a special relationship between the Legislature and the religion of the Christian majority. The very day after the Report was published, however, provincial Premier Jean Charest presented a resolution, which was adopted by a unanimous vote, to reject this recommendation and affirm the continued presence of the crucifix in the National Assembly.

X. HATE SPEECH: FREEDOM OF EXPRESSION AND OFFENCES AGAINST RELIGION

This section will examine the extent to which there is, in Canada, particular protection of religion in the public arena against offensive expressions. While the criminal offence of blasphemous libel is still on the books,[154] it has proven to have little consequence in the important intersection between freedom of expression and offences against religion in this country. The true test of this intersection has come in the form of protections against hate speech[155] which, while not limited to speech inciting hate against members of religious groups,[156] certainly encompasses speech that vilifies groups on the basis of their religion.

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153. *Grant* v. *Canada (Attorney Général)*, [1995] 1 F.C. 158 (Federal Court – Trial division), aff'd (1995) 125 D.L.R. (4th) 556 (F.C.A.).

154. *Criminal Code*, supra n. 115. See Ogilvie, *Religious Institutions*, supra n. 88 at 165-66. There is also an offence of inciting genocide in s. 318 of the *Criminal Code*. See *Mugasera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 at paras. 85-89, 254 D.L.R. (4th) 200 [*Mugasera*] for a discussion of its elements.

155. For an excellent report on the status of hate speech in Canada see Richard Moon, *Report to the Canadian Human Rights Commission Concerning Section 13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet* (Ottawa: Minister of Public Works and Government Services, 2008), online: Canadian Human Rights Commission, http://www.chrc-ccdca/pdf/moon_report_en.pdf [Moon, *Report Concerning Section 13*]. See also Ogilvie, *Religious Institutions*, id. at 150–155.

156. Hate speech can be directed against any identifiable group such as those identified by religion, gender, race or sexual orientation.

A. Hate Speech

By way of overview, hate speech in Canada is regulated both at the federal level, through the Criminal Code and the Canadian Human Rights Act,[157] as well as at the provincial level, where several provinces have specific provisions aimed at hate speech in their respective Human Rights Codes.[158] Because regulation of hate speech often clashes with the constitutionally protected right of freedom of expression, this area of the law has been fraught with constitutional challenges, several of which have successfully impugned the relevant hate speech provisions,[159] and others which, while upholding such provisions, have divided the Canadian Supreme Court.[160]

In terms of federal criminal legislation, the focus is primarily on section 319(2)[161] of the *Criminal Code*, a provision that recognizes the "power of words to maim"[162] and one that is aimed at suppressing the wilful promotion of hatred against identifiable groups. In the 1990 landmark decision of *R v. Keegstra*,[163] the Supreme Court upheld, by a narrow majority of 4 to 3, the constitutionality of this provision. That case concerned a High School teacher who taught his students that the Holocaust never occurred and that the Jews created the myth in order to gain sympathy.

While the Court agreed that the provision under which Keegstra was charged infringed freedom of expression entrenched in s. 2(b) of the Canadian *Charter of Rights and Freedoms*,[164] the majority was able to save the provision through the use of s.1 of the *Charter*[165] which allows the state to set limits on rights to the extent that such limits "can be demonstrably justified in a free and democratic society." Section 319(2) was held to constitute a reasonable limit on freedom of expression given Parliament's objective of preventing harm caused by hate propaganda and given that the provision meets the "proportionality test" in that its narrow ambit ensures only the most minimal impairment of such freedom.[166]

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157. But see *Warman v. Lemire*, 2009 CHRT 26 [*Warman*] (S. 13 of the Canadian Human Rights Act, R.S.C 1985, c. H-6 [*CHRA*] was the subject of a court challenge and the Canadian Human Rights Tribunal has declared the section unconstitutional). For further discussion, see 37-38, below.

158. *Saskatchewan Human Rights Code*, R.S.S. 1979, c. S-24.1, s. 14; *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14, s. 3; *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 7; *Human Rights Act*, S.N.W.T. 2002, c. 18, s. 13; *Human Rights Act*, S.Nu. 2003, c. 12, s. 14.

159. See e.g. *R. v. Zundel*, [1992] 2 S.C.R. 731, 95 D.L.R. (4th) 202 [*Zundel*] (regarding s. 181 of the *Criminal Code*, supra n. 115); see most recently *Warman v. Lemire*, supra n. 157 (impugned the constitutional validity of s. 13 of the *CHRA*, supra n. 157).

160. See e.g. *R. v. Keegstra*, [1990] 3 S.C.R. 697, 114 A.R. 81 [*Keegstra* cited to S.C.R.] (the Supreme Court upheld the criminal hate provisions by a narrow 4 to 3 majority); *Taylor v. Canadian Human Rights Commission*, [1990] 3 S.C.R. 892, 75 D.L.R. (4th) 577 [*Taylor*] (had previously upheld the constitutionality of s.13 of the *CHRA*, supra n. 157, also by a 4 to 3 margin).

161. Supra n. 115, s. 319(2) (aimed at incitement that willfully promotes hatred against identifiable groups). See also s. 319(1) (covers the incitement of hatred where such incitement is likely to lead to a breach of the peace).

162. Maxwell Cohen (Chair), Preface in *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada* (Ottawa: Queen's Printer, 1966) at xiii. The report also continued to recognize that while freedom of expression must exist, society must "draw[] lines at the point where the intolerable and the impermissible coincide."

163. Supra n. 160.

164. *Charter*, supra n. 25, s.2(b) (section 2(b) reads: "Everyone has the following fundamental freedoms: …(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.")

165. Id., s. 1 ("The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.")

166. For an overview of the role of s. 1 analysis, see *R. v. Oakes*, supra n. 76. For a thorough analysis of the

It is to be noted that while s. 319(2) has withstood constitutional attack,[167] another provision in the *Criminal Code*,[168] one that had made it an offence to "spread false news" and which had also been considered a tool to suppress offensive expressions against religious groups, was held to be unconstitutional by a narrow majority in the Supreme Court decision of *R v. Zundel*.[169]

To make out the elements of the hate speech offence under s. 319(2), the Crown must prove, beyond a reasonable doubt, that the accused, by communicating statements other than in private conversation, wilfully promoted hatred against a group identifiable by colour, race, religion or ethnic origin. The promotion of hatred implies that individuals are to be "despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation"[170] and its wilful nature necessitates a stringent standard of *mens rea*, thereby limiting the offence to the intentional promotion of such hatred. In particular, it is not sufficient that the accused be negligent or reckless as to the result of their words but rather, that he or she desire the promotion of hatred or foresee such a consequence as certain or substantially certain to result.[171] While by the Supreme Court of Canada's own admission, this is a "difficult burden for the Crown to meet,"[172] the Crown need not prove an actual causal link, namely that actual hatred resulted, but merely that the hate-monger had the required intent.[173]

Furthermore, the section provides the accused with a variety of defences including the truth of the statements, as well as the ability to prove that the statements were made in good faith to advance an opinion of a religious subject. Although not a case on s. 319(2) of the Criminal Code, *Owens v. Saskatchewan (Human Rights Commission)*[174] demonstrates how this defence could arise. Owens had placed an ad in a newspaper containing Biblical passages condemning homosexuality, including a passage from Leviticus 20:13 to the effect that homosexuals "must be put to death." The Saskatchewan Court of Appeal did not find Owens to have contravened the relevant provincial hate speech provision and stated that "Mr. Owens published the advertisement pursuant to a sincere and *bona fide* conviction forming part of his religious beliefs."[175] This case demonstrates that while hate speech may at times protect religious groups, in appropriate cases, religious freedom can itself be a defence against hate speech.

In point of fact, the high threshold in the hate speech provision has proven to be difficult to meet by the Crown, and there are very few cases where an actual conviction

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majority and minority opinions in *Keegstra*, supra n. 160, see Lorraine E. Weinrib, "Hate Promotion in a Free and Democratic Society: *R v. Keegsra*," 36 *McGill Law Journal* 1416 (1991).

167. Its constitutionality has been recently affirmed in *R. v. Sentana-Ries*, 2005 ABQB 260, [2005] A.W.L.D. 2930.

168. Supra n. 115, s. 181 formerly read: "Every one who willfully publishes a statement, tale or news, that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."

169.Supra n. 159 (the majority of the Supreme Court of Canada found that unlike in *Keegstra*, supra n. 160, the provision in question could not be justified under s. 1 of the *Charter*, supra n. 25, given its overly broad reach).

170. *Keegstra*, supra n. 160 at 777; *Mugasera*, supra n. 154 at para. 101. In addition, in *Mugasera*, the Court states at para. 103: "In determining whether the communication expressed hatred, the court looks at the understanding of a reasonable person in the context".

171. *Keegstra*, id. at 774-76 as affirmed most recently in *R. v. Ahenakew*, 2009 SKPC 10, 64 C.R. (6th) 389 at paras. 17-20, 329 Sask. R. 140 [*Ahenakew*].

172. *Keegstra*, id. at 775.

173. See *Mugasera*, supra n. 154 at paras. 102, 104 ("the offence does not require proof that the communication caused actual hatred," just that "the speaker must desire that the message stir up hatred").

174. 2006 SKCA 41, 267 D.L.R. (4th) 733, 279 Sask. R. 161.

175. Id. at para. 54.

has resulted. This may be illustrated by the recent and highly publicized case of *R. v. Ahenakew*,[176] in which Ahenakew, Chief of the Federation of Saskatchewan Indian Nations, alleged in a public speech that the Jews were responsible for starting World War II and later stated to a newspaper reporter that the Holocaust was a measure taken to "get rid of a disease" and an attempt to "clean up the world." Despite the fact that the Court characterized these remarks as "revolting, disgusting and untrue," they did not result in a conviction under the Criminal Code. The Court found the statements were not made with the required intent of inciting hatred, but rather as a response to questions by a reporter whom the accused considered rude and aggressive.

As previously mentioned, hate speech is not only regulated through the Criminal Code but through the Canadian *Human Rights Act* (hereinafter the "CHRA") as well.[177] Section 13 of the CHRA is aimed at speech, communicated telephonically or over the Internet, that is likely to expose members of an identifiable group to hatred or contempt. While initially held, by a narrow majority of the Supreme Court of Canada, to pass constitutional muster in the case of *Taylor v. Canadian Human Rights Commission*,[178] it has recently been held to be unconstitutional as an unwarranted restriction on freedom of expression in the recent Canadian Human Rights Tribunal decision of *Warman v. Lemire*.[179] The change in constitutional propriety is due to amendments to the CHRA in 1998. Previously the section carried with it merely the sanction of a cease and desist order whereas the amendments added financial sanctions by way of penalties that could be levied on offenders. That was held to turn the provision, whose main purpose was previously described as "remedial, preventative and conciliatory," into one with punitive and penal consequences, thereby no longer justifying the limit on freedom of expression on the basis of minimum impairment.[180] The result of this recent decision of September 2009 certainly places the regulation of hate speech through non-criminal federal legislation into uncertain territory.

Several provincial and territorial human rights codes[181] also regulate hate speech and one such provision, section 14 of the Saskatchewan Human Rights Code, has been the subject of recent constitutional challenge. In 2013, in a case concerning the publication of flyers with the potential to expose homosexuals to hatred and ridicule, the Supreme Court of Canada held that parts of section 14, namely those that prohibited "any representation that ridicules, belittles or otherwise affronts the dignity" of any person or class of persons on the basis of a prohibited ground, offended constitutional

176. Supra n. 171.

177. For a more detailed comparison of the two provisions see Jennifer Lynch, *Special Report to Parliament: Freedom of Expression and Freedom from Hate in the Internet Age* (Ottawa: Minister of Public Works and Government Services, 2009).

178. Supra n. 160 (the Supreme Court noted that despite not requiring proof of intention, s. 13 only minimally impairs freedom of expression because the Act's purpose is to prevent discrimination rather than punishing moral blameworthiness).

179. Supra n. 157.

180. See id. at paras. 248-290. See also Moon, *Report Concerning Section 13*, supra n. 155 (Moon argues that s. 13 of the *CHRA*, supra n. 157, as currently drafted constitutes an unjustified intrusion on the fundamental right of *freedom of expression and should either be repealed or reshaped*); Lynch, supra n. 177 (recommends repealing the penalty provision in s. 54(1)(c) of the *CHRA* and amending the *CHRA* to provide a statutory definition of hatred and contempt in accordance with *Taylor*, supra n. 160.)

181. See list of provisions supra n. 146. Note as well that even where hate speech is not specifically regulated in provincial human rights legislation, most provinces and territories make it unlawful to display notices, signs or symbols that discriminate or intend to discriminate against an identifiable group: see Luke McNamara, "Negotiating the Contours of Unlawful Hate Speech: Regulation under Provincial Human Rights Laws in Canada," 38 *U.B.C. L. Rev* (2005) 1 (providing an excellent overview of provincial regulation of hate speech).

protections of expression and religion and could not be justified as being a reasonable limit on such freedoms.[182] Other portions of this provision, however, namely those that prohibit any representation that "exposes or tends to expose to hatred" any such person or class of persons, were saved as being a reasonable limit on freedom of expression and freedom of religion, demonstrably justified in a free and democratic society. The upshot of the Court's decision is that while the protection of vulnerable groups from the harmful effects emanating from hate speech can justify the infringement of freedoms of expression and religious belief, such infringements must be as minimal as possible. This decision certainly underscores Luke McNamara's conclusion in his exhaustive study of hate speech at the provincial level in Canada. He found that "a lingering unease about the legitimacy of legislative restrictions on the communication of ideas … has been manifested in the preference … for a narrow construction of the scope of provincial hate speech prohibitions."[183]

B. Group Defamation

Another avenue through which one may potentially pursue offensive speech is through defamation. The major impediment to this approach as a way to redress offensive speech against identifiable groups is that traditionally, defamation is seen as a personal action based on injury to one's own reputation and not injury to the reputation of the group to which one belongs. As such, if the statements target the group and not specific members of a group, defamation will not, according to its established ambit, apply.[184] An interesting case recently decided by the Supreme Court of Canada is *Bou Malhab v. Diffusion Métromédia CMR Inc.*,[185] which upheld, with only a single dissenting voice, the conventional position that unless the group is very small such that personal prejudice can be shown, racist commentary about a group will not constitute defamation.[186] In refusing to nuance the traditional ambit of defamation in a group setting, the Court held that "the imputing of a single characteristic to all members of a group that is highly heterogeneous, has no specific organization or has flexible, broadly defined admission criteria would make an allegation of personal injury implausible."[187]

The few statutory group libel provisions that exist in Canada[188] have likewise not proven to be effective tools against hate speech directed at religious or other groups. According to McNamara, these statutes have been minimally used due either to the strict nature of the offence (in Manitoba, the publication must not only expose members of the target group to hatred but must also tend to raise unrest or disorder) and/or an underlying concern about constitutional validity.[189]

The result is that while Canada has sought to attack hate speech through a variety of federal and provincial provisions, "free speech sensitivity has exerted a powerful

182. *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11.

183. Supra n. 181 at para. 230. Accord Moon, *Report Concerning Section 13*, supra n. 155 at 16.

184. See *Bai v. Sing Tao Daily Ltd.* (2003), 226 D.L.R. (4th) 477 (Ont. C.A.), 171 O.A.C. 385.

185. 2011 SCC 9.

186. See e.g. *Ortenberg v. Plamondon* (1915), 24 B.R. 69 (Qc. C.A.). The plaintiff succeeded in an individual action for defamation based on racist comments against Jews in Québec City due to the small number of individuals forming the targeted group, the fact that he was specifically identified as the subject of the comments, and evidence that he suffered personal, distinct and foreseeable damages following the comments.

187. Supra n. 185 at para 66.

188. See *Defamation Act*, R.S.M. 1987, c. D20, s. 19; *Civil Rights Protection Act*, R.S.B.C. 1996, c. 49, s. 2.

189. McNamara, supra n. 181 at paras. 100, 108.

influence"[190] on the legitimacy and efficacy of such attempts.

XI. CONCLUSION/ADDENDUM

This Report has presented a multifaceted overview of the interaction between religion, the public and private spheres of Canadian law, and everyday life. Despite the myriad of court decisions, many at the Supreme Court level, that seem to settle a great variety of issues dealing with the intersection of religion and the secular state, Canada continues to grapple with difficult questions on this topic.

Indeed, since the initial drafting of this Report in 2010, there have been many key developments in the area of religion highlighting the potential clash between secularism and the accommodation of religious observance. We will concentrate on those that have occurred in the areas of religion and education, prayer recitation in governmental settings, and the right to wear religious symbols in public places.

Education: Issues in the context of education have arisen because of a recent program that has become a part of the school curriculum in Quebec. In 2008, the Ethics and Religious Culture ("ERC") Program became mandatory in Quebec schools, both in public as well as private schools subsidized by the government. The ERC Program has two components: instruction in ethics and instruction in religious culture. The latter is aimed at fostering an understanding of several religious traditions whose influence has been, and continues to be, felt in society. The goal is not to indoctrinate students in any specific religion or spiritual quest, nor to promote some new common religious doctrine aimed at replacing specific beliefs. Notwithstanding these objectives, the program ignited a debate as to whether it infringed on the religious rights of children and their parents and, as a result, Catholic parents of public school children requested that their school board exempt their children from the ERC course. They claimed that not only was the presentation of various religious facts confusing for children, but that the program infringed on their right to freedom of conscience and religion and interfered with their ability to pass on their faith to their children.

In the 2012 decision of *S.L.* v. *Commission scolaire des Chênes*,[191] the Supreme Court of Canada rejected the parents' claim. The Court found that exposing children to a comprehensive presentation of various religions, without forcing them to adopt them, does not constitute an indoctrination of students. Further, the Court held that early exposure of children to realities that differ from those in their immediate family environment is a fact of life in today's society. The suggestion that merely exposing children to a variety of religious facts infringes on their religious freedom, or that of their parents, would amount to a rejection of the multicultural reality of Canadian society and would ignore the Quebec government's obligations with regard to public education.

The Court's decision stressed the importance of neutrality in the *public school system*, recognizing that the very nature of a *public* education system implies the creation of opportunities for students of different origins and religions to learn about the diversity of opinions and cultures existing in Quebec society, even in religious matters. This insistence on the religious neutrality of state authorities in education could be interpreted as limiting the ambit of the *des Chênes* decision to public schools. Different principles may well apply in the case of *private* religious schools, even those subsidized by the state. That very issue will soon be argued before the Supreme Court. In 2010, the

190. Id. at para. 232.
191. [2012] 1 S.C.R. 235.

Quebec Superior Court had held that Loyola High School, a private Catholic educational institution, should be granted an exemption from the obligation to teach the ERC program, enabling it to continue to offer its own Catholic religious instruction program instead.[192] This decision was overturned by the Quebec Court of Appeal[193], which applied the same reasoning the Supreme Court used in *des Chênes* with respect to a public school to Loyola, notwithstanding that it was a private religious institution.

Prayer: Another issue on which the Supreme Court will have to pronounce itself in the near future concerns prayer recitation in governmental settings. In 1999, the Ontario Court of Appeal held that the recitation of the Lord's Prayer at the opening of town council meetings infringed on the religious freedom of non-Christians in that it pressured individuals to conform to a particular faith[194]. However, in *obiter*, the Court suggested that an ecumenical prayer, similar to the one used in the federal House of Commons, would not be objectionable.[195] Several years later, the Ontario Superior Court[196] and the Quebec Court of Appeal[197] had occasion to examine the validity of precisely such a prayer modeled on the practice of the House of Commons. Both courts were of the opinion that a broadly inclusive and non-denominational prayer could not be seen as coercing religious observance and did not, therefore, infringe on religious freedom[198]. Both courts were of the opinion that the mere mention of God is not sufficient to interfere in any material way with the beliefs of non-religious individuals – agnostics or atheists – or the adherents of polytheistic or non-theistic belief systems.

In its decision, the Quebec Court of Appeal examined the meaning of the concept of religious neutrality of the state. In its opinion, the kind of neutrality that underlies freedom of religion in Quebec is a form of "benevolent", rather than "integral", neutrality which is ensured when the state neither favours nor hinders any particular religious belief and shows respect for all postures toward religion.[199] Moreover, the principle of neutrality does not prohibit the government from acknowledging the sources of a society's historical heritage, even if they are religious.[200] It will be interesting to see how the Supreme Court of Canada tackles this issue.

Wearing Religious Symbols: In terms of the wearing of religious symbols in public places, Canada has seen recent developments on two fronts, one jurisprudential, the other legislative. In 2012, the Supreme Court of Canada rendered an important

192. *Loyola High School* c. *Courchesne*, 2010 QCCS 2631 (Dugré J.)

193. *Quebec (A.G.) v. Loyola High School*, 2012 QCCA 2139.

194. *Freitag* v. *Penetanguishene (Town)*, [1999] 47 O.R. (3d) 301.

195. Id. at para. 52 (Feldman J.). At the beginning of each sitting of the House of Commons, the Speaker reads the prayer before any business is considered. While the prayer is being read, the Speaker, the Members and the Officer all stand. The prayer is followed by a moment of silence for private reflection and meditation. The text of the prayer is as follows: "Almighty God, we give thanks for the great blessings which have been bestowed on Canada and its citizens, including the gifts of freedom, opportunity and peace that we enjoy. We pray for our Sovereign, Queen Elizabeth, and the Governor General. Guide us in our deliberations as Members of Parliament, and strengthen us in our awareness of our duties and responsibilities as Members. Grant us wisdom, knowledge, and understanding to preserve the blessings of this country for the benefit of all and to make good laws and wise decisions. Amen."

196. *Allen* v. *Renfrew County*, [2004] 69 O.R. (3d) 742.

197. *Saguenay (Ville de)* c. *Mouvement laïque québécois*, 2013 QCCA 936.

198. The Quebec Court of Appeal overturned a decision of the Quebec Human Rights Tribunal, which had held that the prayer recited by the Mayor before Saguenay municipal council meetings violated the freedom of conscience and religion of an atheist resident who had formally objected to it: *Simoneau* c. *Tremblay*, 2011 QCTDP 1.

199. Supra n. 197 at para. 76 (citing José Woehrling, "Quelle Place pour les Religions dans les Institutions Publiques?," in *Le Droit, la Religion et le Raisonnable*, ed. Jean-François Gaudreault Desbiens (Montréal: Éditions Thémis, 2009), 127.

200. Id. at para 106.

decision in *R. v. N.S.*,[201] a case in which the Court had to decide whether a witness in a criminal sexual assault trial, who was also the alleged victim, could be required to remove the full face-covering niqab she wore for religious reasons while testifying. As the Court acknowledged, this question raised the interaction between two sets of *Charter* protections, namely the witness's freedom of religion and the accused's right to a fair trial, including the right to make full answer and defence. The argument advanced by the accused centred on the importance of the witness's face and observation of facial expressions in effective cross-examination and credibility assessment, both asserted to be elements of a fair trial.

In a complex decision involving three sets of reasons by 7 justices, the majority of the Supreme Court held that there could be no hard and fast rule. Rather, "the answer lies in a just and proportionate balance between freedom of religion and trial fairness, based on the particular case before the Court."[202] As such, the Court outlined a four-step framework for assessing any particular case where the issue of testifying while wearing a niqab arises. The framework entails considering the following four questions: (1) Would requiring the witness to remove the niqab while testifying interfere with her religious freedom? (2) Would permitting the witness to wear the niqab while testifying create a serious risk to trial fairness? (3) Is there a way to accommodate both rights and avoid the conflict between them? (4) If no accommodation is possible, do the salutary effects of requiring the witness to remove the niqab outweigh the deleterious effects of doing so?

The framework outlined by the Court makes the context of the particular case of paramount importance. For instance, the contested or uncontested nature of the testimony, the central versus peripheral nature of such testimony, the type of trial and the potential for wrongful conviction, as well as the availability of measures to limit facial exposure are all relevant factors in the ultimate decision as to whether in a given case, a witness may be required to remove the niqab she wears for religious reasons.

Perhaps an even more controversial development related to religion and the secular state has taken the form of a proposed law in Quebec commonly known as the *Charter of Values.*[203] This Bill, introduced in 2013, is intended to assert the values of state secularism and religious neutrality as well as that of equality between women and men but, in so doing, has created great controversy in its proposed ban on the wearing of religious symbols by anyone affiliated with a public body (including hospital or school) in Quebec. While most see this Bill as a measure aimed primarily at restricting Islamic headwear in public institutions, the generality of its provisions would encompass a ban on *all* religious symbols in the public sector including the Jewish kippah, the Sikh turban, large crucifixes and other religious pendants, as well as the Islamic hijab and niqab.

The Quebec Human Rights Commission has already declared publicly that, in its opinion, this Bill would not survive legal challenge in that it offends both the Quebec and Canadian Charters of Rights and Freedoms.[204] Moreover, the Bill has resulted in

201. 2012 SCC 72.

202. Id. at para 31.

203. Bill 60, *Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests*, 1st Sess, 40th Leg, Quebec, 2013.

204. Commission des Droits de la Personne et des Droits de la Jeunesse, "Comments on the Government Policy Paper: Parce Que Nos Valeurs On Y Croit," in *Orientations Gouvernementales en Matière d'Encadrement des Demandes d'Accommodement Religieux, d'Affirmation des Valeurs de la Société Québécoise ainsi que du Caractère Laique des Institutions de l'État* [Commission on Human Rights and

public protests and heated public debate and will be a key issue in the next provincial election. While at this time, this Bill is only proposed law, it has certainly ignited the passion and debate intrinsic to the issues surrounding religion and religious freedom in an ostensibly secular state.

The foregoing discussion highlights just a few examples that have arisen recently and given the increasingly multicultural nature of Canadian society, the incidents in which religion will interact, or clash, with the secular state can only be expected to rise. As this Report has attempted to illustrate, the legal landscape in Canada is already rich with many examples of accommodating this delicate balance. The near future is sure to hold even more developments of this ongoing and interesting intersection between religion, law and life.

Youth Rights, "Comments on the Government Policy Paper: Because Our Values What We Believe," *in Governmental Guidelines for Supervision of Material Applications Accommodating Religious Affirmation of Values Company Quebec and the secular nature of the State Institutions]* (Montréal: CDPDJ, October 2013), Cat 2.113-2.12.1.