RE-UNDERSTANDING THE PUBLIC SPHERE AND THE FAIR TREATMENT OF BELIEFS IN CANADA

Iain T. Benson is Senior Associate Counsel, Miller Thomson LLP, Canada and Professor Extraordinary in the Faculty of Law, University of the Free State, Bloemfontein, South Africa; Mr. Benson serves on the Drafting Committee of the South African Charter of Religious Rights and Liberties. His "Living Together with Disagreement: Pluralism, the Secular, and the Fair Treatment of Beliefs in Canada Today" was recently published by Chester Ronning Centre for the Study of Religion and Public Life.

ABSTRACT

How we understand the public sphere is key to whether we treat different groups fairly in relation to it. This article suggests that many of the central terms currently in use hide the anti-religious aspect of a so-called "neutral" state that only bleaches out religious beliefs and projects while leaving untouched and unexamined those framed by atheistic and agnostic presuppositions.

From its earliest decisions touching upon the freedom of conscience and religion in Section 2(a) of the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada has recognized that religion has a public as well as a private dimension. In the famous decision striking down the *Lord's Day Act* in *R.v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 at 336, then Chief Justice Dickson wrote of the essence of the right to the freedom of religion as being not just the right to hold a belief privately but the right to the public aspects involved in relation to "teaching" "disseminating" and "manifesting" those beliefs. The question then is how these public dimensions of religious belief fit both with the right of citizens to be free *from* religion and the right of other citizens to have their religion expressed and lived in a public way.

The more recent decision of *Chamberlain v. Surrey Sch. Dist.* No. 36, [2002] 4 S.C.R. 710, ("Chamberlain") had to wrestle further with the nature of the public sphere and the meaning of the term "strictly secular" in the British Columbia *Schools Act*, given this public dimension of religious belief. The unanimous Supreme Court of Canada upheld a unanimous British Columbia Court of Appeal on the point that "secular" must include religious believers and their perspectives not exclude them. This decision is often overlooked but it remains a very important indication that fair treatment requires a public sphere that is inclusive not exclusive of religious believers and their groups (the right to freedom of religion not being simply an individual right).

The idea of a public sphere that includes religious beliefs and believers is not how most of us are used to considering the public sphere (a sphere containing, amongst other things, law, politics, medical ethics and public education). In fact, many of our key terms – such as "secular" – seem to be taken as meaning that the sphere is free from religion. Yet the conclusions of the Supreme Court of Canada decision in *Chamberlain* leads us to consider that "secular" in Canada should now be understood to be religiously *inclusive* rather than religiously *exclusive*. Another way of putting this is that a concept of a State that does not have an established religion (such

as Canada) does not mean that religious beliefs, believers and communities have no relevance for the public realm or are, in some particular way, outside it more than other citizens and their groups. Atheism and agnosticism are not established belief systems in Canada in the same way that no particular religion is established.

Many of the key terms and concepts in the discussion about the fair treatment of beliefs in relation to religion and public policy are so confused that they inhibit rather than assist clarity of analysis. Thus, terms such as "pluralism", "believer", "faith", "secular" and "secularism" must all be reconsidered in order to move to the fresh and more just consideration of the religiously inclusive public sphere (called for in *Chamberlain*) and principles of justice and fairness more generally.

The relationship best characterizing an appropriate way forward for Canada is "the co-operation of church and state." Co-operation, rather than separation, suggests *both* a necessary jurisdictional *distinction* (the "church" and state have different roles and Canada is not a theocracy) and a *functional relationship* rather than strict separation. Separation fails to recognize the public dimension of religion and beliefs as well as the cultural benefits that accrue from involving religious communities and believers in the work of the state – and one need only think of charities, health care and education to see areas in which Canadian society is able to co-operate with denominational organizations, including extending public funding or tax benefits to them.

There are strong arguments that the fair treatment of denominational rights involves extending that recognition beyond simply those denominations recognized historically (in such things as denominational education) rather than limiting extension or removing recognition all together in the name of "efficiency" or a mis-understanding of "fairness." Because denominations and all belief communities, religious or non-religious, operate within the nation state, there is also a corresponding need to develop a core curriculum of civics, including civil virtues that further a meaningful understanding of tolerance, pluralism and so on. This, however, could and should be done within expanded denominational and state-funded schooling.

Obviously, how the relationship between church and state is to be developed will build on what has already taken place in Canadian history, yet will be responsive to the identification of a new basis for co-operation.

In addition to a re-understanding of what we mean by the public sphere, the Supreme Court has made it clear in the case of *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 S.C.R. 835, that when the protected rights of two individuals (or, by extension, groups) come into conflict, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights. This is so because there is, in theory, no "rank-ordering" of rights in Canada with some taking a higher place than others. Here, the implication is that no particular claim, for example, one notion of equality or the rights of any one group in relation to, say, religion or sexual orientation, should take precedence over any other. Again, this calls for a more nuanced approach to potential rights conflicts and "sphere-sharing" than some sorts of claims allow when they seek to force everyone to support one side (their own) of contested beliefs.

What this means for public policy formulation and the fair treatment of beliefs in Canada is the need to be attentive to religious inclusion in each area to ensure that citizens who have religious concerns or who might be influenced by particular policies (in areas such as charitable status, immigration, social security, child care policy, multiculturalism, health care, education, to name but a few) are considered and consulted in the course of policy formulation and involved on an ongoing basis with respect to the monitoring of such policies. Canada must become as "inclusive", "tolerant", and "diverse", in practice, as it purports to be in principle.

One definition of a "liberal" after all is a person who values liberty not only for himself or herself, nor only for his or her group, but for everyone. The key is living together with difference and disagreement, and not bleaching these out for some sort of forced consensus that involves an abandonment of what it is legal to believe, such as very different and irreconcilable notions of what legitimate "marriage" entails.

Only a richer conception of how citizens with differing belief systems can co-exist will solve the dilemma posed by erroneous uses of key terms in aid of universal consensus. What is clear is that claims for "neutrality" based upon the prior exclusion of religious beliefs rather the inclusion of other beliefs, under misuse of terms such as "believer/unbeliever", "secular" or "faith", fail to support a proper approach to accommodation of differing beliefs. Approaches to "pluralism", "equality" or "tolerance" that implicitly or expressly suggest a move towards eventual agreement on all matters, need to be rejected as inconsistent with both human freedom and a proper understanding of diversity and accommodation.

If we want to affirm that Canada does not have a sectarian government, then we should say so; this is different than using the concept of "separation of Church and State" which, in one reading of its American formulation, would preclude the "co-operation of "Church" and State", which is the better Canadian model for the relationship.

The State, through its primary public policy drivers of law and politics, should always keep in mind the need

to find ways in which people who do not believe the same things can, nonetheless, share the public realm and even work together in their joint task and privilege of citizenship.

All human beings are believers, the question is not one of belief or non-belief but of what is believed in. Yet how often we hear those who do not have religious belief described as "unbelievers." All citizens, as a matter of fact, as set out above, make their decisions in life based upon their beliefs. On one level, therefore, we are all "believers." The question is: "what do we believe in?" and "for what reasons?". Furthermore, we may ask 'does the origin of our beliefs mean that some people or some beliefs have less importance in a society that says it will respect the ability of citizens to have the fundamental right and freedom to "belief" and "expression" in addition to "conscience and religion?"

As with "belief", so it is with "faith." It has been observed that everyone who acts must take matters on faith of some sort, as we do not and cannot prove all of our assumptions empirically; for example, we trust the directions of a stranger. Everyone has "faith" of some sort, therefore, and not all faiths are religious. This, too, has implications for how we think about citizenship and public policy. Why then do we speak of "communities of faith" or "people of faith" when we mean only those who have religion or are religious, thereby implicitly suggesting that all the others do not have faith?

The separation of the world, therefore, into two sharp divisions – one side the religious, thought of as based on non-rational "belief" and "faith" and the other side, the non-religious, based upon facts and empirical reason, is erroneous. The implicit suggestion of the contemporary period is that those who are not in "communities of faith" are people of facts and/or that they do not operate out of "faith" but – and here is another false division – "reason" alone. This is not so and when "faith" and "belief" are understood to be aspects of all human existence, and public policy as based upon beliefs and faith, of some sort, we begin to see that the watertight compartments currently being used to insulate, divide and confuse our analysis need to be replaced by better conceptions.

It is somewhat surprising that it is often those who have much to gain in terms of public sphere access who often further this very erroneous language.

Similarly, there is, on all sides, a tendency to view "the State" as something that stands free and apart from the citizens and communities that make it up. I believe this is a misleading characterization. The State, as primarily composed of "law" and "politics" as the formal means of controlling the public realm, should be understood holistically. It skews analysis of the inter-relationship to view the State as entirely separate from those who constitute it. For the State or public realm to be "religiously inclusive" means that all aspects of it should be open to the influence of beliefs and conceptions of religious and non-religious citizens. It is this holistic understanding that has been lost through the uses of "secular" and similar terms over the last few centuries.

The reference point of this short paper, therefore, is holistic of State, Individual and Community but suggests that a plurality of viewpoints on such matters as the nature of equality, the relations between women and men, the dignity of the person, what sorts of moral views are tolerable etc., is both unavoidable and necessary in a free and democratic society. Such a society recognizes that diverse forms of life are part and parcel of contemporary existence and liberal constitutional government properly understood.

Any foundational terms used to describe the nature of the public sphere can serve to bracket out religious adherents from other citizens. I have referred, above, to "secular", "believer/unbeliever" and only religious understandings of "faith", and elsewhere in my writing, to misunderstanding or not defining "secularism" as key impediments in this regard. To move towards fair treatment of faiths in the public sphere requires overcoming these impediments. As the context usually shows, however, such anti-religious uses are, with the exception of "secularism", most often implicit and unintentional. I hope I have illustrated the need to overcome the general failure in understanding key terms so that the State, through the political and legal dimensions of public policy, can begin to better extend fair and inclusive treatment to all citizens whether religious or not.