EDITOR'S INTRODUCTION: HUMAN RIGHTS, CREED & FREEDOM OF RELIGION

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EDITOR'S INTRODUCTION

Since the 1996 publication of the Ontario Human Rights Commission's *Policy on Creed and the Accommodation of Religious Observances,* there have been many important legal and social developments in Canada and internationally. These developments have changed the way creed and religion are understood, and shaped the experiences of individuals and communities identified by creed. There has been much public debate on the appropriate limits and protections of rights relating to religion and creed.

The Ontario Human Rights Commission (OHRC) has embarked on a revision of its 1996 *Policy*. The update aims to clarify the Commission's interpretation of human rights on the basis of creed under the *Code,* and advance human rights understanding and good practice in this area more generally. The policy update will require extensive research and consultation and will take two to three years to complete (work began in 2011).

In January 2012, the OHRC brought together community partners, academics, legal professionals and human rights and diversity practitioners from diverse backgrounds to a *Policy Dialogue on Human Rights, Creed, and Freedom of Religion*. This event was organized in partnership with the University of Toronto's Religion in the Public Sphere Initiative and the University of Toronto Law School and was hosted at the University of Toronto's Multi-Faith Centre.

The *Policy Dialogue on Human Rights, Creed and Freedom of Religion* provided an opportunity to hear from interested and affected stakeholders on such key themes as:

- the definition, interpretation and scope of 'creed' and freedom of religion in law;
- social and historical contexts shaping creed-based human rights and freedom of religion issues and experiences on the ground;
- kinds of discrimination and harassment experienced by various communities in Ontario on the basis of creed or religion;
- significant trends, gaps, challenges, and best practices relating to the accommodation of, and inclusive design for, religious/creed beliefs and practices in Ontario society and its institutions;
- intersections of creed human rights and other human rights grounds such as gender, sexual orientation, disability, race, and ethnicity.

The essays in this special issue of *Canadian Diversity* were initially selected through a public Call for Papers. They were presented at the January 2012 Policy Dialogue. The contributors include some of Canada's leading and emerging scholars and legal practitioners working in this area of human rights law, as well as a range of community voices and experts.

The papers range in order and content from historical, conceptual and legal background to concrete and specific experiences from Canadian history and society. The journal begins with an article by **David Seljak** that highlights social and historical contexts and trends shaping creed-based human rights issues and contemporary efforts to protect religious freedom. Seljak argues that Canada has become at once more secular and more religiously diverse in ways challenging to both Canada's "residual Christian" legacy and its efforts to become institutionally multicultural.

Janet Buckingham, Lori Beaman, Iain Benson and Benjamin Berger's papers that follow lay out some of the norms and assumptions underlying law and contemporary policy debate on religious rights. **Janet Buckingham's** paper examines diverging interpretations of the meaning of 'secular', as reflected in Canadian jurisprudence and in high profile conflicts between religion and the secular state. Highlighting the positive societal contributions of religion, Buckingham argues for a religiously inclusive understanding of 'secular', citing supporting Canadian legal decisions. **Lori Beaman's** paper explores different frameworks for thinking about religious diversity and inclusion. She highlights the implicit hierarchies of belonging that a discourse of

"tolerance" and "accommodation" can create (where majorities confer benefits on minorities). She argues for a 'deep equality' approach, and offers alternative language consistent with Canada's multicultural commitments. Beaman calls on policy and law makers to incorporate and learn from not only conflict scenarios but also the day to day success stories of negotiating religious difference in Canadian society.

Critiquing the reduction (or 'reading down') of religion as private and individual, **Iain Benson's** paper argues that "creed" and religion should be understood as something that informs what a person takes into the public and that necessarily includes beliefs that often influence "morals and ethics" and even "politics." Benson also calls for a re-interpretation of the "special employer exemption" found in section 24 of the *Code* as applied to religious employers, which he critiques for focusing too narrowly on *the kinds of job duties* performed by employees rather than the *kinds of religious projects or associations* involved.

Benjamin Berger's paper looks at how constitutional law governing religion both *reflects* dominant liberal cultural norms and ideals and *shapes* how religious adherents present and understand themselves before the law. He points out that this contradicts the conventional self-image of the law as being neutral and as standing above the cultural fray. Berger raises particular concerns with the way in which the law may be encouraging religious adherents, through various legal incentives, to adopt increasingly static and rigid stances.

The papers by **Howard Kislowicz, Gail McCabe, Mary Beaty and Peter Moller and Richard Landau** focus on the definition of religion and creed from different perspectives. **Howard Kislowicz's** paper examines contending critiques of Canada's legal definition of religion, primarily as defined by the Supreme Court of Canada decision in *Syndicat Northcrest v. Amselem* ("*Amselem*")[1], which some critics argue is either too narrow or too broad to be meaningful and useful. Kislowicz cautions against efforts to comprehensively define 'religion' in policy or law, arguing for a more flexible, adaptive, and evolving 'analogical' approach (if it looks like a duck…), which, he argues, has been the dominant approach taken by the Human Rights Tribunal of Ontario.

Collaboratively produced by the *Ontario Humanist Society's* (OHS) 'Ethical Action Committee', **Gail McCabe, Mary Beaty and Peter Moller's** paper argues for an expanded and more inclusive OHRC policy definition of 'creed'. The exclusion of moral, ethical, and political beliefs of a secular nature in the current definition, McCabe et al. argue has led to the failure of the *Code* to fully protect the individual and collective rights of Humanists and other such ethical communities of choice.

As a TV broadcaster faced with making difficult day-to-day choices regarding acceptable religious programming content, from both a moral and legal perspective, **Richard Landau** argues against leaving the definition and interpretation of religion and creed too open and undefined. He suggests various criteria by which one might distinguish legitimate faith communities ("authentic" religions) from those either promoting illegal or vexatious objectives, or which simply do not merit the same legal protection as centuries-old faith traditions.

Richard Moon, Andre Schutten, Cara Zwibel and Heather Shipley's papers consider the boundaries and limits of creed-based human rights and freedom of religion, in interaction with various competing legal claims.

Engaging Chief Justice McLachlin's legal reasoning in the Supreme Court of Canada decision in *Alberta v. Hutterian Brethren of Wilson Colony*[2], **Richard Moon's** paper argues that while 'reasonable accommodation' may be an appropriate analytical framework for imposing restrictions on an individual's freedom of religion under *Human Rights Codes*, it is not the appropriate analysis to take in *Charter* freedom of religion cases in which restrictions on religious freedom are imposed by statute. Moon, however, critiques Chief Justice McLachlin's alternative approach - the balancing of interests under s.1 of the *Charter* - as being 'either inappropriate or unworkable'.

Andre Schutten's paper takes issue with what he argues are overly narrow interpretations, as applied to religious employers, of the exemption from the prohibition of employment discrimination as provided for under section 24(1)(a) of the *Ontario Human Rights Code*. Schutten traces the history of such narrow readings of section 24 of the *Code* to disability case law, which he argues, has unjustifiably (for reasons of non-comparability) set the standard for section 24 analyses in religious employment contexts. He calls for a modification of the *Code* legislation under s.24 in order to fully protect the rights of citizens to freely associate with others in a religious community, consistent with *Supreme Court Charter* jurisprudence.

Cara Zwibel's paper examines two main dimensions of the freedom of religion: the *freedom to* manifest beliefs and practices, in private and public, un-coerced and unconstrained by state authority, on the one hand, and the right to be *free from the imposition of religion*, on the other hand. Zwibel looks at how these two inseparable aspects of religious freedom interact in the context of religious accommodation issues in public schools. She suggests various key factors to consider in what is necessarily a delicate balancing act to ensure that school religious accommodations do not veer over the line into state endorsement or sanctioning of religion.

Heather Shipley's paper completes the section of papers concerned with competing rights and the limits of religious freedom by cautioning against overly narrow and rigid constructions in law and policy that oppose the rights of religious believers against the rights of sexual minorities. Such constructions, she argues, caricaturize both religious believers and sexual minorities in the process, setting up an inescapably conflictual relationship that fails to acknowledge, allow for, or cultivate actual or possible intersecting interests and identities in between these two apparent solitudes.

The remaining five papers by **Alice Donald, Anita Bromberg, Uzma Jamil, Barry Bussey and Matthew King** provide a view of how various communities, past and present, have grappled with creed-based human rights issues on the ground.

Presenting select findings of research commissioned in 2011 by Britain's *Equality and Human Rights Commission*, **Alice Donand's** paper provides a view from England and Wales of the law and its relation to equality, human rights and 'religion or belief' (as British law protects both religion and belief under human rights legislation). Donald examines some of the prominent legal cases making waves in the UK, and identifies areas where the law is particularly unclear and contested.

Anita Bromberg's paper looks at Jewish efforts to integrate in Canada, with their religious identities and practices intact. Bromberg highlights some of the more recent stresses on contemporary efforts by Jews to seek religious accommodation in the context of increasing religious diversity, 'multicultural' backlash and general misunderstandings of accommodation as synonymous with unmerited 'special privilege'.

Based on a preliminary analysis of data from a community research study, **Uzma Jamil's** paper looks at everyday experiences of Muslims in the Greater Toronto Area, post-911, with Islamophobia – a concept she explores and defines. While most of the respondents in her study expressed positive views about their rights and freedoms to practice their religious beliefs in Canada, many felt that there were widespread negative stereotypical social attitudes and perceptions about Islam and Muslims in Canadian society which, for many, created feelings of not belonging irrespective of place of birth or length of residency in Canada.

Matthew King's paper examines how two diverse segments within the Canadian Buddhist community - western convert and Asian immigrant - variously negotiate religious needs and practices within two mainstream Canadian institutional spheres: end of life care and the penal system. King demonstrates how dominant liberal-individualist legal interpretations of creed and religion, in effect, disproportionately privilege and protect the religious practices of western converts, while marginalizing majority immigrant understandings and practices of Buddhism.

Closing out the publication is an article by **Barry Bussey** that looks at the history of Canadian Seventh-day Adventist conscripts who sought conscientious objector status during WWII, before an unyielding Mobilization Board. The refusal of many young Seventh-day Adventist men to bear arms in the regular forces was almost uniformly met with severe consequences. Some were compelled to serve in the army. Others faced ridicule, imprisonment, and/or hard labour in alternative service work camps.

We hope that this publication serves as one of several opportunities to broaden the creed policy conversation beyond those who were able to attend the January 2012 Dialogue.

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Finally, we would like to thank all of the Policy Dialogue presenters, participants and contributors who so generously offered their time, thoughts and energy to make the Policy Dialogue, and this publication, so engaging and insightful. It is our hope that your efforts, and this publication, will help set the stage for healthy, balanced and well reasoned public policy debate on human rights, creed and freedom of religion in the coming months and years.