FAITH IN THE PUBLIC SCHOOL SYSTEM: PRINCIPLES FOR RECONCILIATION

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ABSTRACT

Freedom of religion includes both the right to manifest beliefs and practices and the right to be free from state coercion or constraint in matters of religion. This paper looks at the scope and interaction of these two aspects of freedom of religion in the context of religious accommodation issues in public schools. It considers the factors that may be relevant in addressing requests for accommodation in schools and how to address the difficult challenges of ensuring that accommodation of practices does not become and is not perceived as state endorsement or sanctioning of religion.

INTRODUCTION

Well before the ratification of the Canadian *Charter of Rights and Freedoms*,[1] freedom of religion was an important part of Canadian society. The Supreme Court of Canada acknowledged early on that freedom of religion has two core components. First, it encompasses the right to manifest beliefs and practices, and is therefore also closely related to freedom of opinion and belief. This means that freedom of religion requires that religious beliefs and practices be respected and accommodated. Second, freedom of religion includes the right to be free from state coercion or constraint in matters of religion. Thus, freedom of religion includes freedom from religion.

This paper will explore the scope of these two aspects of freedom of religion, and their intersection and interaction with one another. It will become clear that it is almost impossible to talk about freedom of religion without also considering concerns around equality and discrimination. While these issues arise in many contexts in our modern society, this paper will examine them through the lens of the school system and consider how to reconcile often competing concerns in this highly charged forum.

LEGAL FRAMEWORK

Section 2(a) of the *Charter* provides that: "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion". As mentioned above, the Supreme Court recognized the key components of freedom of religion early on. In R. v. Big M Drug Mart Ltd.,[2] the majority of the Court held:

> *The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious beliefs by worship and practice or by teaching and dissemination. But the concept means more than that.*
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> *Freedom can primarily be characterized by the absence of coercion or constraint… Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others.*[3]

The Court recognizes, therefore, the dual aspect of freedom of religion. In addition, section 15 of the *Charter* provides protection from discrimination on the basis of religion (among other grounds). As is true of all *Charter* rights, neither freedom of religion nor the right to equality

are absolute. Rather, these rights are subject to reasonable limits. In many cases the real difficulty or struggle comes in considering what constitutes a reasonable limit on a right and, conversely, when rights are limited in an unreasonable way.

In addition to the *Charter*, Canadians also benefit from human rights statutes that guard against discrimination on the basis of religion.[4] While the *Charter* constrains government action, human rights codes protect individuals from discrimination that may be perpetrated by other actors as well, often in the realms of the provision of housing or accommodation, goods or services.

In a public school context, both the *Charter* and human rights statutes are relevant in developing principles that should guide religious accommodation and respect for religious freedom. School boards are creatures of statute with powers delegated by government. Since a legislature cannot pass a law that violates the *Charter*, it similarly cannot violate the *Charter* simply by delegating a power to an administrative decision maker.[5] At the same time, schools provide a publicly available service and are therefore also subject to human rights codes in place across Canada. Finally, each province and territory has legislation that addresses the education system generally. There are often detailed regulations passed in relation to education as well as a significant number of policies, procedures and guidelines in place at the level of local school boards and even individual schools. Where an issue of religious freedom or accommodation is raised, these various instruments will need to be considered.[6]

A MATTER OF PRINCIPLE

It can sometimes seem as though questions of religion in the schools are ubiquitous, with issues and challenges constantly arising. In fact, although we may often read and hear about concerns regarding religion in the media, there are few legal cases that have proceeded to human rights tribunals or courts dealing specifically with religious accommodation in a school environment. Perhaps the best known case is one that required the Supreme Court of Canada to consider whether a Sikh student could wear his kirpan (ceremonial dagger) to school despite the school's zero tolerance weapons policy. This case, Multani v. Commission scolaire Marguerite-Bourgeoys,[7] demonstrates three important ideas that should be considered in any case concerning religious accommodation in a school environment. First, it recognizes that freedom of religion is not about what religious leaders or texts say is required of adherents, but rather that individual sincerity of belief is the appropriate test.[8]

Second, although the concept of "reasonable accommodation" is usually associated with discrimination claims under human rights statues, the Court in Multani recognizes the role that this concept can play when a violation of freedom of religion under the *Charter* is asserted. The majority held that reasonable accommodation provides a helpful analogy in assessing whether a limit placed on freedom of religion impairs the freedom as little as possible.[9] Thus, if an accommodation can be found that respects freedom of religion and still achieves whatever goal or purpose the school or board is trying to achieve, the limit on freedom of religion may not be reasonable.

It is worth noting that the Supreme Court has rejected the reasonable accommodation approach in a subsequent case, Alberta v. Hutterian Brethren of Wilson Colony.[10] In that case the majority found that a sharp distinction should be maintained between the reasonable accommodation approach under human rights statutes and a section 1 *Charter* analysis. This development is concerning because it suggests that there is no obligation on decision makers to engage in dialogue with minority groups, something which is crucial in negotiating issues of religion in a school setting. The silver lining may be the Court's recognition that, at least when government action or an administrative practice is alleged to violate freedom of religion, the duty to accommodate analysis may still be relevant in considering whether the means chosen to achieve a particular objective minimally impair freedom of religion.[11] Arguably then, this concept should still be engaged where an individual or group accommodation is sought in a school setting.

Finally, the Court in Multani recognizes that schools are a special venue and may present unique opportunities for teaching lessons about tolerance and respect. Claims of religious freedom and requests for accommodation may help open up an important dialogue on these issues. As the majority held:

> *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 instill in their students this value that is…at the very foundation of our democracy.*[12]

Other religious accommodation cases have considered whether a private school could preclude a Sikh student from attending because of a uniform policy that precluded the wearing of a turban,[13] and whether a daycare had a duty to provide meals adhering to a halal diet.[14] Generally, however, the body of law in this area is small and not well-developed.[15] Nevertheless, a number of general principles emerge from both religion and discrimination cases, both in and outside of the school context. These principles help in the development of factors to be considered when

decision-makers are faced with a claim of freedom of religion and/or a request for accommodation.

ACCOMMODATION: RELEVANT FACTORS

First, as a general rule, public institutions should be neutral with respect to religion and should not sanction or endorse (nor be seen as sanctioning or endorsing) one religion over another. Religious indoctrination in a school setting is not acceptable. While schools may teach about religion in general, and use curriculum designed to foster moral values, giving preference to one religion over another and proselytizing to students is over the line.[16] In cases where a claim for accommodation is made, decision-makers must consider whether granting the accommodation may end up endorsing a particular religious belief or practice. Although this won't often be an issue, an accommodation for a large group of students may lead to this concern and therefore should be undertaken with particular care.

Second, human rights statutes and, in some cases, the *Charter*, require reasonable accommodations for religious practices. In some ways, the duty to accommodate may be seen to run counter to the requirement of neutrality, so these ideas need to be reconciled. In achieving this reconciliation, schools must consider both the purpose and effects of a particular practice or exercise. If students feel that an accommodation amounts to the sanctioning of a particular practice or belief, these concerns will not be alleviated by the fact that individuals can opt not to participate without penalty. In the school setting, concerns about indirect coercion may be particularly acute, but also subtle and sometimes difficult to detect.[17] The manner in which an accommodation is sought or implemented can help to mitigate some of these issues. For example, are accommodations considered only for those who seek them out, or are they offered to the broader student population? Are accommodations equally available to all, so that there is no preference (or perceived preference) given to one group? Is the accommodation issue managed in a way so that parents and students are not required to speak up about their beliefs unless they so choose? The way in which a particular accommodation or practice is implemented may have a significant impact on where it is seen as lying on the spectrum between accommodation and endorsement.

Third, we must recognize the important role that schools play in our society. Public schools are intended to be institutions that foster tolerance and respect for diversity.[18] As a result, the personal views of individuals (students, administrators, etc.), whether animated by religion or otherwise, should not be used to undermine these goals. The Supreme Court has recognized this special role in a number of cases dealing with religious freedoms in a school context, including Multani and others.[19]

Finally, in any case where an accommodation is being sought or a claim of freedom of religion is being made, we must both recognize and listen to the affected stakeholders. For young children, accommodation requests will probably be made by parents or guardians, but we should still look for opportunities to discern what students themselves want or need. The rights of the child should lie at the centre of any issue around a claim for accommodation or religious freedom, and schools must work to ensure that parental religious beliefs and rights are not operating at cross-purposes to the rights of the child.[20] Even if we are willing to accept that parents can force their views on their children at home (or in their places of worship), we need to ensure that schools, as public institutions, are not complicit participants in this. This will obviously require walking a fine line in many cases, but such is the duty on an institution as central to our society as the school.[21]

CONCLUSION

Issues of religion are always difficult because they involve deep-seated beliefs. At stake are multiple interests and values, respect for parental roles, increasing respect for the rights of the child, gender and racial equality, protection of multiculturalism, and the central role that education plays in our society. Without undertaking a comprehensive look at all aspects of this issue, this paper has endeavoured to pose some important questions about how to address freedom of religion and discrimination and equality concerns in public schools.

Some relevant factors to be considered and addressed when these issues arise include:

1. The need to guard against religious indoctrination/coercion;
2. The need to accommodate religious practices/beliefs without endorsing or sanctioning any in particular or favoring some over others;
3. The role of schools as institutions that promote a variety of societal goals including tolerance and respect, the promotion of equality (including gender equality), and the prevention of discrimination against marginalized groups;
4. The educational opportunities that arise in different accommodation contexts; and
5. Respect for the rights of the child and the rights that students have to participate in their own education.

Although the list is not exhaustive, it is likely only in the application of these factors to a variety of unique situations that a more fulsome framework will emerge.

NOTES

[1] *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 (the "*Charter*").

[2] [1985] 1 S.C.R. 295.

[3] *Ibid*., at pp. 336-337.

[4] See e.g. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 3(1) and *Human Rights Code*, R.S.O. 1990, c. H. 19, s. 1.

[5] See *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para. 22.

[6] See e.g. *Education Act*, R.S.O 1990, c. E.2. Some Regulations under that Act will be relevant in considering requests for religious accommodation including, for example, the Regulation related to Opening or Closing Exercises, O. Reg. 435/00. Individual school boards within the province may also have pertinent policies or regulations.

[7] *Supra* note 5. See also *Pandori v. Peel (County) Board of Education* (1991), 80 D.L.R. (4th) 475 (Ont. Div. Ct.), leave to appeal ref'd.

[8] *Ibid*, at para. 35.

[9] *Ibid*., at paras. 52-55.

[10] 2009 SCC 37.

[11] *Ibid*., at paras. 65-71. In *Hutterian Brethren* a law of general application was being challenged.

[12] *Ibid*., at para. 76.

[13] *Sehdev v. Bayview Glen Junior Schools Ltd.* (1988), 9 CHRR D/4881, 1998 CarswellOnt 3315 (Ont. Bd. of Inquiry).

[14] *Québec (Commission des droits de la personne & droits de la jeunesse) c. Centre à la petite enfance Gros Bec,* [2008] R.J.Q. 1469.

[15] For a discussion of cases from outside of Canada, see Wendy J. Harris, Q.C. and Audrey Ackah, "Freedom of religion and Accommodating Religious Dress in Schools" (2011) 20 Educ. & L. J. 211.

[16] See e.g. *Zylberberg v. Sudbury Board of Education (Director)* (1988), 65 O.R. (2d) 641 (Ont. C.A.) and *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341 (Ont. C.A.).

[17] *Ibid*. See also *R. (on the application of Begum) v. Headteacher and Governors of Denbigh High School*, [2006] 2 All E.R. 487 (U.K. H.L.) and in particular Lady Hale's opinion.

[18] The special role of schools and the involvement of children make some of the religious accommodation cases found in other contexts (e.g. employment) difficult to apply.

[19] See e.g. *Ross v. New Brunswick School District No. 15* [1996] 1 S.C.R. 825 at para. 42. See also *Chamberlain v. Surrey School District No. 36,* 2002 SCC 86 at para. 66.

[20] See Cheryl Milne, "Religious Freedom: At What Age?" (2009) 25 Nat'l J. Const. L. 71. See also R. Brian Howe, "Schools and the Participation Rights of the Child" (2000) 10 Educ. & L.J. 107.

[21] See Paul Clarke, "Parental Rights, the Charter and Education in Canada: The Evolving Story" (2010) 19 Educ. & L. J. 203.

A BIT OF HISTORY...

Discrimination laundering

The Commission is encountering a growing number of incidents of discrimination committed on behalf of clients by such intermediaries as employment agencies and management consultants. This practice constitutes, in effect, a "laundering" of discrimination in the sense that the employers themselves have no direct contact with the victims and thus do not appear to be acting in contravention of the *Code*, though clearly they are as responsible for discrimination as the agent who accepts the assignment ... Indeed, acts of discrimination of this kind are frequently so covert that the victim may not even know that he or she is being discriminated against.

Source: *Life Together*, 1977