GOD AT WORK: RELIGION IN THE WORKPLACE AND THE LIMITS OF PLURALISM IN CANADA

Lorne Sossin†

INTRODUCTION

Religious freedom includes both the freedom to express religious beliefs and the freedom from having the beliefs of others imposed. The workplace has become the testing ground for religious freedom in Canada. The protection of religious freedom in the workplace, however, also sheds light on a broader struggle for political norms. In Canada, two normative aspirations are reflected in the protection of religious freedom: the narrative of pluralism and the narrative of exceptionalism.

There are two competing narratives that have come to define Canada, both to itself and the world. The first narrative is of a vibrant, pluralist, immigrant society. This narrative begins with the founding of the Canadian state in 1867 as a compromise federation between the English Protestant and French Catholic communities that resided in what was then British North America. From the outset, the Canadian Constitution was a vehicle for the expression and protection of minority rights. Postwar civil liberties in Canada in the 1950s were forged not on the crucible of racial equality, but on religious equality, and specifically the protection of the Jehovah Witness community in Quebec.[1] With the advent of the Canadian Charter of Rights and Freedoms in 1982, the protection of religious freedom once again drove the rights discourse—this time protecting employees and customers from having a "Sabbath" imposed on them through the Lords Day Act.

† Faculty of Law, University of Toronto. This paper was first presented at the Conference on Religious Expression in the Workplace, sponsored by the University of Illinois College of Law and the Nantes Institute for Advanced Studie, held in Nantes, France, in May, 2008. A later version was presented as part of the Religion in the Public Sphere series at the University of Toronto's Jackman Institute for the Humanities, on February 5, 2009. I am grateful to the participants of both events for the constructive comments and suggestions I received. I am also grateful to Anver Emon, Fay Faraday, and Kerry Rittich for reading and commenting on earlier versions of this paper.

1. *See* Saumur v. City of Quebec, [1953] 2 S.C.R. 299 (Can.).

In *R.* v. *Big M. Drug Mart Ltd.*,[2] the first significant case to be decided by the Supreme Court of Canada, the Lords Day Act was struck down. In the course of the majority's reasons, Dickson C.J. observed,

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the employment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. 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 belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. 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. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in any way contrary to his beliefs or his conscience.[3]

This narrative has culminated in the celebration of religious, ethnic, and cultural pluralism in Canada. As Michael Adams argues in his 2007 study, *Unlikely Utopia: The Surprising Triumph of Canadian Pluralism*, Canada is an experiment in pluralism that has flourished.[4]

The second narrative is that of exceptionalism. According to this narrative, Canada began as and has remained a conservative English Protestant society that tolerated, but never considered as equal, all other minority religious communities. This narrative highlights the fact that the French Catholic community was given second class status in Quebec (until the Quiet Revolution of the 1960s and the rise of Quebec separatism in the 1970s), and that aboriginal communities were systematically

2. [1985] 1 S.C.R. 295 (Can.).

3. The Queen v. Big M Drug Mart Ltd., [1984] 2 S.C.R. 145, ¶¶ 94–95 (Can.).

4. MICHAEL ADAMS, UNLIKELY UTOPIA: THE SURPRISING TRIUMPH OF CANADIAN PLURALISM (2007). *See also* Michael Adams, *Surprise, Canadian Pluralism is Working*, TORONTO STAR, Nov. 10, 2007, *available at* http://www.thestar.com/article/274900.

disenfranchised. As religious communities become established, the Jewish, Muslim, Hindu, Buddhist, and other "outsider" communities are accommodated, but only within a paradigm that accepts English Prostestants (or, post-1970s, French Catholics in Quebec) as the "norm" and other religious communities as "minorities." For example, Christmas Day and Easter remain publicly enforced "statutory holidays" in Canada despite the obvious religious connotation of both holidays, and the large (and growing) segment of the population that does not observe these holidays. Under this narrative, it goes without saying that no other religious community's holy days are accorded state recognition.

These narratives collide in workplace settings in a variety of ways. Should all exployees receive a secular day off from work each week, or should employees who observe several different Sabbath days have their preferences accommodated? Should employers be able to select the day that corresponds with the preference of the majority? What if the issue of religious preference is not a day off but relates to workplace safety, such as where religious head coverings preclude wearing a helmet?

These narratives also shape the intersection of three related but distinct legal regimes governing the Canadian workplace. The first is the Constitutional regime, under which "freedom of religion" is expressly protected. The second is the anti-discrimination regime, which is the jurisdiction of Canada's ten provinces and three territories, and varies somewhat according to the particular language of those jurisdictions' human rights legislation. The third is the labor law regime, also a matter of provincial and territorial jurisdiction, which sets out the procedural and substantive relationship between employers and employees.

Ultimately, I conclude these narratives each capture an important and legitimate aspect of religion in the workplace in Canada. The challenge, going forward, is how these narratives may be reconciled, both as a matter of political and social discourse, and as a matter of legal doctrine.

This study is divided into two sections. The first section examines the present approach to religious accommodation in the workplace under Canadian constitutional law, human rights law, and labor law. The second section links the ambivalence of the Canadian legal system's response to religion in the workplace to broader social and political narratives of reasonable accommodation.

I. THE DILEMMA OF RELIGIOUS ACCOMMODATION IN A MULTICULTURAL SOCIETY

Canadian Constitutional law, anti-discrimination law, and labor and employment law each suggest a commitment to religious pluralism and yet

also appear to reinforce the paradigm of a religious majority that is the norm and minority communities that must be accommodated. I refer above to this approach as exceptionalism. Below, I explore the tension between pluralism and exceptionalism within each of these legal regimes.

A. The Charter

The Canadian Constitution, known as the Canadian Charter of Rights and Freedoms, or simply the Charter, was introduced in 1982 and represented a limitation upon the principle of parliamentary sovereignty previously unknown to Canadian constitutional law.

The Charter applies to all laws and to all government action in Canada, and empowers the courts to strike down laws or invalidate any government decision that is inconsistent with the Charter's protections. The Charter, unlike the U.S. Constitution, does not expressly protect "free exercise,"[5] however, sections 2(a) and 15(1) provide for religious freedom. Section 2(a) provides:

> 2. Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion
>
> Section 15(1) states that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination . . . based on . . . religion.[6]

Both sections 2(a) and 15(1), however, are subject to section 1 of the Charter under which infringements of Charter rights may be justified by Government. That section provides:

> 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.

Finally, section 33 of the Constitution Act, 1982, provides a mechanism for Parliament to override certain sections of the Charter, including both the guarantee of freedom of religion and the guarantee of equality, for renewable, five year periods. On paper, at least, the

5. For a comparative perspective on freedom of religion in the United States and Canada, see Andrew M. Zeitlin, *A Test of Faith: Accommodating Religious Employees' "Work-Related Misconduct" in the United States and Canada*, 15 COMP. LAB. L.J. 250 (1994). *See also* Iain T. Benson, *The Freedom of Conscience and Religion in Canada: Challenges and Opportunities*, 21 EMORY INT'L L. REV. 111 (2007).

6. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.), 1982, c.11, *available at* http://www.canlii.org/en/ca/const/const1982.html.

constitutional guarantees of religious freedom in Canada appear contingent and potentially fragile. In practice, however, the Charter has proven more robust in the area of religious freedom.

In Canada**,** the separation of religion and state has historically not constituted governmental or legislative policy. On the contrary, section 93 of the Constitution Act, 1867, which guarantees religious education rights, suggests an institutionalized (and constitutionalized) accommodation of majority religions.[7] For example, the Preamble to the Charter refers explicitly to the "supremacy of God," alongside the rule of law. While I have argued elsewhere that this reference to the "supremacy of God" does not necessarily imply the predominance of particular religious denomination,[8] it is certainly widely cited as a statement of fidelity to Judeo-Christian ideals.

The religious references in the Canadian Constitution have led some to assert that Canada has a constitutional guarantee of free exercise of religion, without a corresponding guarantee against establishment.[9] Notwithstanding the absence of an express provision, however, the Canadian Supreme Court has interpreted the freedom of religion in Canada under the Charter to include both the freedom to express religious belief *and* the freedom from having religious observance imposed through state action.[10]

The freedom of religion has been the subject of relatively frequent litigation in the Supreme Court of Canada. In *Syndicat Northcrest v. Amselem*,[11] the Supreme Court held that, in order to establish that his or her freedom of religion has been infringed, a claimant must demonstrate (1) that he or she sincerely believes in a practice or belief that has a nexus with religion, and (2) that the impugned conduct of the state interferes, in a manner that is non-trivial or not insubstantial, with his or her ability to act in accordance with that practice or belief.

To be protected under the Charter, the religious belief must be asserted in good faith and must not be "fictitious, capricious or an artifice"[12] As the Court explained in *Amselem*, freedom of religion consists:

7. For discussion, see RELIGION AND PUBLIC LIFE IN CANADA: HISTORICAL AND COMPARATIVE PERSPECTIVES (Marguerite Van Die ed., 2001).

8. Lorne Sossin, *The "Supremacy of God", Human Dignity and the* Charter of Rights and Freedoms, 52 U. NEW BRUNSWICK L.J. 227 (2003); see also Jonathon W. Penney & Robert Danay, *The Embarrassing Preamble? Understanding the "Supremacy of God" and the Charter*, 39 U.B.C. L. REV. 287 (2006).

9. Zeitlin, *supra* note 5.

10. In The Queen v. Big M Drug Mart Ltd., [1984] 2 S.C.R. 145 (Can.), the Canadian Supreme Court agreed, interpreting section 2(a) of the *Charter* to include the notion of the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation.

11. [2004] 2 S.C.R. 551 (Can.).

12. *Id.* ¶ 52.

> of 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 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.[13]

So, for example, if a Sikh public servant argues that religious freedom should entitle him to wear a kirpan (ceremonial dagger) to the workplace, he must prove that the kirpan is central to observing Sikh traditions and that it is necessary that the kirpan be worn in the particular way adopted by the employee. As the Court observed in *Multani*, a case dealing with the right of a student to wear a kirpan in a school, the threshold to establish a breach of the freedom of religion under the Charter is a low one: "In order to demonstrate an infringement of his freedom of religion, Gurbaj Singh does not have to establish that the kirpan is not a weapon. He need only show that his personal and subjective belief in the religious significance of the kirpan is sincere."[14]

The constitutional regulation of religion in the workplace involves not simply interpreting the scope of the freedom of religion and conscience under section 2(a) and the equality guarantee under section 15(1) of the Charter but also the interaction between those sections and the "reasonable limits" saving provision under section 1, as noted above. Given the broad reading the Court has given to the freedom of religion under the Charter, the important balancing work of the Court takes place under section 1 of the Charter.

For example, in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*,[15] the claimants, who were Jehovah's Witnesses, contested an order that authorized the administration of a blood transfusion to their daughter. While acknowledging that freedom of religion could be limited in the best interests of the child, La Forest J., writing for the majority of the Court, stated the following:

> This Court has consistently refrained from formulating internal limits to the scope of freedom of religion in cases where the constitutionality of a legislative scheme was raised; it rather opted to balance the competing rights under s. 1 of the *Charter* . . .
>
> In my view, it appears sounder to leave to the state the burden of justifying the restrictions it has chosen. Any ambiguity or hesitation should be resolved in favour of individual rights. Not only is this consistent with the broad and liberal interpretation of rights favoured by

13. *Id.* ¶ 46 (emphasis in original).
14. Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256 ¶ 37 (Can.).
15. [1995] 1 S.C.R. 315 (Can.).

> this Court, but s. 1 is a much more flexible tool with which to balance competing rights than s. 2(*a*).[16]

The Court has developed a proportionality framework for its section 1 analysis. This framework consists of two parts. The onus is on the person challenging state action to prove that, on a balance of probabilities, the infringement is reasonable and can be demonstrably justified in a free and democratic society. To this end, two requirements must be met. First, the legislative objective being pursued must be sufficiently important to warrant limiting a constitutional right. Next, the means chosen by the state authority must be proportional to the objective in question, including that the means be rationally connected to the objective, that the right in question be infringed no more than necessary, and that the effects are not disproportionate.[17]

The heart of the section 1 proportionality analysis is the requirement that the law or state activity infringe the right of the claimant no more than necessary. The Supreme Court has referred to this standard, at least in the context of justifying an infringement of the freedom of religion, as one of reasonable accommodation to the point of undue hardship.[18] In other words, to impair the freedom of religion no more than necessary amounts to a requirement on the state to accommodate religious differences to the point of undue hardship. To return to the example of the kirpan, it would be difficult to say that an outright ban on kirpans could meet the burden of demonstrating that an employee had been provided with a reasonable accommodation. However, where the workplace setting involves some legitimate safety issues (say, in the context of an airport where all weapons are banned), accommodating a traveler who wishes to wear a ceremonial dagger may well constitute an undue hardship. In such circumstances, the Court would look to see if a reasonable accommodation was possible, and if so, whether it was pursued. For example, could the employee be asked to wear a kirpan made out of fabric or plastic, rather than metal, so that it would not pose a safety risk, or could the employee perform his duties outside secure areas of the airport where the risk would be reduced.

As discussed below, the Court has adopted as part of its section 1 Charter analysis a framework first developed in the context of statutory human rights protections against discrimination on the basis of religion in the workplace.

16. *Id.* ¶¶ 109–10.

17. *See* R. v. Oakes, [1986] 1 S.C.R. 103 (Can.).

18. *See* J. Woehrling, *L'obligation d'accommodement raisonnable et l'adaptation de la société à la diversité religieuse,*, 43 MCGILL L.J. 325 (1998); see also *Multani*, *supra* note 14, ¶ 53.

B. Human Rights Law

In addition to the Constitutional regime discussed above, human rights statutes have been enacted at the federal, provincial, and territorial jurisdictions. These statutes protect human rights, including freedom from discrimination in the workplace on grounds of religious identity or expression. While the Charter applies solely to state action, these human rights statutes protect against discrimination in both public and private settings, including the workplace. These human rights statutes also provide for specialized administrative mechanisms for investigating and prosecuting cases of discrimination (human rights commissions) and for adjudicating complaints of discrimination (human rights tribunals, etc).

In terms of how the protection against discrimination is framed, each human rights statute may define the scope of protection differently, but the Ontario Human Rights Code provides a representative example:

> Employment
>
> 5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.
>
> Harassment in employment
>
> (2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or disability.
>
> Vocational associations
>
> 6. Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.[19]

This provision is qualified by the following general provision dealing with discrimination:

> Constructive discrimination
>
> 11. (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

19. R.S.O. ch. H.19 (1990).

> (a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or
>
> (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.
>
> Idem
>
> (2) *The Commission, the Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.*[20] (Emphasis added.)

The effect of these human rights provisions is to establish a duty to accommodate on employers, which means taking steps to eliminate disadvantages to employees (and prospective employees) resulting from a rule, practice, or barrier that has an adverse impact on an individual or group protected under the statute. These accommodations will be required unless and to the extent they give rise to "undue hardship" on the point of the employer.

The duty to accommodate in the workplace in contexts of religious belief has arisen in at least three distinct settings: Sabbath observance, dress codes, and religious observance during working hours. These are each discussed below.

1. Sabbath Observance

One setting of frequent human rights litigation in workplace settings is where an employee wishes to observe a holiday or Sabbath of their religion on a day that the employer otherwise would expect the person to be at work.[21] Variations on this setting will be where employees require certain break times for prayer or have flexible scheduling needs to accommodate religious practice or observance.[22] Another setting is where a workplace dress code conflicts with religious dress or custom.[23] Finally, decorations in an office or other conditions of work may conflict with religious practice or religious values.[24]

20. *Id.*
21. *See O'Malley*, discussed below.
22. *See Dairy Pool*, discussed below.
23. *See Bhinder*, discussed below.
24. In Jones v. C.H.E. Pharmacy Inc. et al., [2001] B.C.H.R.T. 1 (Can.), for example, the practice of requiring employees to participate in hanging Christmas decorations was held to be discriminatory where an employee belonged to the Jehovah's Witness community. A human rights tribunal found that the employee was constructively dismissed for refusing to participate in the seasonal practice.

The wide variety of circumstances in which freedom of religion claims have been asserted in the employment context in Canada has been well documented. Conflicts have arisen when religious employees request days off to observe their Sabbaths, when they wear religious headgear or other apparel, or when they request permission to attend religious assemblies. Additional cases concern employment rules governing facial hair and leaves of absence. Freedom of religion cases in the employment context have reached the Canadian Supreme Court in three significant cases: *Ontario Human Rights Commission v. Simpsons-Sears Ltd. (O'Malley)*;[25] *Bhinder v. Canadian National Railway Co. (Bhinder)*;[26] and *Alberta Human Rights Commission v. Central Alberta Dairy Pool (Dairy Pool)*.[27]

O'Malley, decided in 1985, involved a plaintiff who became a member of the Seventh-Day Adventist Church during her employment with a department store. Her religion required her to miss work on Friday evenings and Saturdays in order to observe her Sabbath. O'Malley alleged discrimination when her employer refused to accommodate these needs. The Canadian Supreme Court found the employer guilty of violating the Ontario Human Rights Code, which prohibits discrimination against employees with regard to any term or condition of employment, because of "creed." In reviewing the Ontario Human Rights Code, the Court noted that legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary—and it is for the courts to seek out its purpose and give it effect. Writing for a unanimous Court, Justice McIntyre held that intent is not a necessary prerequisite to establish a violation of the Ontario Human Rights Code; absent undue hardship, the employer has a duty to accommodate observant employees and bears the burden of showing that undue hardship will result by accommodating the employee.

2. Dress Codes

A second, frequent setting for human rights conflict has been where an employer has a dress code or uniform that conflicts with an employee's religious observance. For example, *Bhinder*, handed down on the same day as *O'Malley*, involved a Sikh maintenance electrician employed by Canadian National Railways (CN). During Bhinder's employment, CN initiated a policy requiring employees to wear hard hats, a rule directly contrary to the Sikh religious policy mandating the wearing of turbans. Bhinder's employment ended when he refused to wear the hard hat, and he subsequently filed a complaint against CN alleging a violation of the

25. [1985] 2 S.C.R. 536 (Can.).
26. [1985] 2 S.C.R. 561 (Can.).
27. [1990] 2 S.C.R. 489 (Can.).

Canadian Human Rights Act. The Federal Court of Appeal reversed a ruling in favor of Bhinder by a human rights tribunal on the basis that CN's policy constituted a "bona fide occupational requirement" (BFOR) and thus complied with the Canadian Human Rights Act.

In a 5-2 decision—and over a strong dissent by Chief Justice Dickson—the Supreme Court affirmed. The Court recognized that the risk borne by Bhinder by wearing a turban instead of a hard hat was only increased by a small amount. Consequently, providing an exception to Bhinder would be unlikely to impose a hardship on CN. Again writing for the majority, Justice McIntyre held that the Canadian Human Rights Act, unlike the Ontario Human Rights Code, does not require an employer to accommodate a religious employee when the employee's religious practice conflicts with a BFOR. The majority held that, in considering the validity of a BFOR, courts are required to examine the employer's reasons for adopting the work rule. If the employer did so for genuine business reasons, with no malicious intent, the employer is not guilty of discrimination. According to the majority, the BFOR could not be considered on an individual basis. The words of the statute speak of an "occupational requirement." This must refer to a requirement for the occupation, not a requirement limited to an individual. It is, by its nature, not susceptible to individual application. As one commentator has noted, the effect of the *Bhinder* decision was that a law with a BFOR allowance would permit employers to prevail over the religious requirements of an individual employee.

An illustration of how the approach in *Bhinder* has had ripple effects throughout workplaces in Canada is provided by the case study of the Royal Canadian Mounted Police (RCMP).[28] In 1987, the RCMP adopted affirmative action policies within the force to remove barriers to minority groups, including religious and visible minorities. In particular, the RCMP clarified that Sikh Muslims could wear beards and turbans instead of the traditional felt hat required of RCMP officers. However, in situations where the officer is performing duties that require special headdress or safety equipment, the officer would have to remove the turban. The RCMP, in part, was simply reacting to the evolving jurisprudence from Canadian courts interpreting religious accommodation requirements in the workplace. Canadian courts have required a "beard exemption" policy to extend equally to religious and non-religious employees.

28. For a more detailed consideration of this setting, see L. Grunloh, *Religious Accommodations for Police Officers: A Comparative Analysis of Religious Accommodation Law in the United States, Canada and the United Kingdom*, 16 IND. INT'L & COMP. L. REV. 183 (2005).

The Waterloo Regional Police Services (WRPS) implemented a policy allowing officers to only wear beards for religious, medical, or investigative purposes.[29] Once the beard policy was challenged, the court found it to be an irrational rule because WRPS lacked a legitimate reason for such a broad prohibition. The court found that a beard policy taking into account health and safety or a policy merely regulating appearance and maintenance of a beard would be legitimate. Therefore, the accommodation of appearances cannot unduly affect other police officers in the force.

The RCMP created an application for Sikhs that were exempted from the traditional uniform policy. It required them to agree to the following language: "Notwithstanding that I may be granted the exemption requested . . . I hereby undertake to perform all duties assigned to me by the RCMP and to wear any special headdress or safety equipment that is necessary for bona fide operational reasons or is required by law."[30] As Lynn Grunloh has observed of this requirement, "Therefore, although religious employees are allowed exemptions for appearance when appearance is not a BFOQ, they appear to be mostly excluded from accommodations regarding work schedules and job reassignment by signing the application form."[31] Once again, there is an ambivalence detectable in such compromises. Employers may be willing to accommodate and remove barriers, but only to a point, and this point falls far short of genuine pluralism.

It is also worth emphasizing that the RCMP's acceptance of religious minorities was met with a fair degree of societal resistance. In *Grant v. Canada*,[32] concerned members of society brought suit against the RCMP challenging the enacted policy of allowing turbans and beards. The plaintiffs claimed pride and attachment in the traditional appearance of the RCMP, and that the religious neutrality of the uniform, in particular, had significant value to society generally and to them specifically. The court held that there was no evidence that officers wearing turbans deprived any person of liberty or security as a matter of Constitutional law, and furthermore, the plaintiffs assertion that a "visible manifestation of a Sikh officer's religious faith, as part of his uniform, will create a reasonable apprehension of bias"[33] was not based upon any concrete evidence.

29. *Id.* at 204.
30. *Id.* at 205.
31. *Id.* at 205.
32. [1995] 1 F.C. 598 (T.D.), appeal dismissed at [1995] 125 D.L.R. (4th) 556 (F.C.A.).
33. *Id.* ¶ 93.

3. Religious Observance during Working Hours

The third area of human rights scrutiny in the context of religion in the workplace is where religious holidays occur during working hours. The most important dispute in this area was the *Dairy Pool* case.

Dairy Pool involved Jim Christie ("Christie"), an observer of the Worldwide Church of God. Christie's religion required him to refrain from working from Friday evening until Saturday evening and on ten religious holidays. His employer, the Central Alberta Dairy Pool, denied Christie's request to be excused from work on a religious holiday which fell on a Monday, since that day of the week was particularly busy. The Dairy Pool subsequently fired Christie. Pursuant to Alberta's Individual's Rights Protection Act, Christie brought a discrimination complaint. His claim was initially upheld by an Alberta Board of Inquiry, but was later denied on appeal by both the Alberta Court of Queen's Bench and the Alberta Court of Appeal on the basis of the Supreme Court's decision in *Bhinder*.

On appeal, however, the Canadian Supreme Court reversed its decision in *Bhinder*, concluding that the Court should have considered whether the employer could have accommodated the individual religious employee without experiencing undue hardship.[34] The Court held that, once again, even under jurisdictions permitting a bona fide occupational qualification (BFOQ) exception, an employer has a duty to accommodate individual religious employees unless such accommodation would impose an undue hardship on the employer.

Thus, in the wake of the *Dairy Pool* approach, the duty to accommodate in Canadian human rights jurisprudence appears to hover somewhere between the narrative of pluralism and the narrative of exceptionalism. As discussed below, this standard has also come to permeate the adjudication of disputes between employers and employees before labor boards and arbitrators.

C. Labor and Employment Law

In addition to the Constitutional protection of freedom of religion and the protection contained within provincial human rights statutes against discrimination on religious grounds, a third important legal regime governing religion in the workplace is labor and employment law. Like human rights law, labor and employment law differs in the various provinces and territories (in addition to a federal labor scheme for employees in national enterprises), but these various statutes share a

34. *See supra* note 26.

number of common features. Employment statutes set out minimum standards that all workplaces must met. Labor legislation governs rights of collective bargaining, establishing unions, grievance procedures, and the forum in which disputes between employers and employees will be resolved—usually an arm's length labor board.

Protections relevant to religion in the workplace may arise expressly in collective agreements or contracts of employment or may be incorporated by reference, such as where a collective agreement incorporates provisions of the human rights code.[35]

An example of how labor law interacts with issues of religion in the workplace in Canada is the *Commission scolaire régionale de Chambly v. Bergevin* case.[36] The case involved three Jewish teachers employed by the a Quebec School Board, who took a day off to celebrate Yom Kippur. The School Board had granted them leave of absence but without pay and the teachers' union brought a grievance seeking reimbursement for the day's pay. The school calendar, which is part of the collective agreement, fixed the teachers' work schedule. The majority of the arbitration board found that the school calendar requiring Jewish teachers to work on Yom Kippur had the effect of being discriminatory and that the School Board had failed to take reasonable steps to accommodate the Jewish teachers in the observance of their religious holy day. The case reached the Supreme Court of Canada, which unanimously upheld the arbitration board's interpretation of the collective agreement.

One preliminary issue for the Court in *Bergevin* is that of deference to the arbitration board. The provincial labor statutes, including the Quebec Labour Code at issue in *Bergevin*, contain privative clauses that attempt to insulate the determinations of labor boards and arbitrators from judicial review. As a result, Courts generally will show deference to those determinations, and only interfere where they find the board or arbitration decision "unreasonable"; this stands in contrast to the Court's approach to human rights tribunals, which is to review their decisions on a standard of correctness.[37] The result is that where religion in the workplace issues arise as human rights issues interpreting a human rights statute, courts are more likely to intervene than where those same issues arise as interpretations of a collective agreement by a labor board or arbitration panel.

In *Bergevin*, beyond affirming deference to the arbitration board's interpretation of the collective agreement, the Supreme Court confirmed that the school calendar, although neutral on its face, had the effect of

35. For discussion, see Fay Faraday, *The Expanding Scope of Labour Arbitration: Mainstreaming Human Rights Values and Remedies*, 12 CAN. LAB. & EMP. L.J. 355 (2006).

36. Commission scolaire régionale de Chambly v. Bergevin, [1994] 2 S.C.R. 525 (Can.).

37. Canada (Attorney General) v. Mossop, [1993] 1 S.C.R. 554 (Can.).

adversely discriminating against Jewish teachers. As a result of their religious beliefs, they must take a day off work and, in the absence of some accommodation by their employer, must lose a day's pay to observe their holy day while the majority of their colleagues have their religious holy days recognized as holidays from work. It follows that the effect of the calendar is to discriminate against members of an identifiable group because of their religious beliefs and that the employer must take reasonable steps to accommodate the individual or group of employees adversely affected. The Court confirmed that a *de minimis* test should not apply to the evaluation of either the existence or the extent of the duty to accommodate.

Adopting the same approach to reasonable accommodation discussed above, the Court held that, in permitting the Jewish teachers to take a day off work without pay in order to celebrate Yom Kippur, the School Board did not, however, meet the burden resting upon it to demonstrate that it took reasonable steps to accommodate these teachers, short of undue hardship. The Court concluded that the provisions of the collective agreement could reasonably be interpreted to provide for such an accommodation. The agreement specifically provided for the payment of teachers who were absent for what the parties considered to be a good or valid reason and for a number of days for a variety of reasons. On a reasonable, indeed a correct, interpretation of the collective agreement, the observance of a holy day by teachers belonging to the Jewish faith should constitute a "good reason" for their absence and should qualify them for payment of a day's wages. Finally, by incorporating the provisions of the Quebec Charter of Human Rights and Freedoms, the collective agreement provided further support for this position by stressing that principles of equality and freedom from religious discrimination would guide the parties in their relations. Thus, while issues of religion in the workplace may arise as a matter of constitutional law, human rights law, or labor law, the approach of "reasonable accommodation" provides a unifying thread for the legal regulation of religion in the workplace.

Reasonable accommodation reflects the ambivalence of the Canadian legal system toward religious difference, especially in employment settings. This dynamic is discussed further in relation to the social and political debate surrounding reasonable accommodation in Canada below.

II. RECONCILING PLURALISM AND EXCEPTIONALISM IN THE WORKPLACE

The issue of religious accommodation in the workplace, and the place of multiculturalism in a constitutional democracy such as Canada's, has

spawned a vibrant and voluminous literature.[38] Canada and Canadian scholars (such as Charles Taylor,[39] Will Kymlicka,[40] and James Tully,[41] among others) have been at the forefront of these diversity/difference debates, in part because Canada was founded on a compromise federation to respect cultural autonomy, and in part because Canada today is an immigrant society with an increasingly high concentration of religious and visible minorities.

In Toronto, Canada's largest city, for example, over 2.3 million residents (of a total population of just over five million) were born outside Canada, with over a million of those immigrants coming from Asia and the Middle East.[42] For obvious reasons, disputes involving accommodation and difference have come to dominate constitutional jurisprudence and political debate in Canada.[43]

Since at least the late 1960s, it has been generally uncontested in Canada that accommodation of minority cultures is desirable (as opposed to policies of assimilation), and further that the state must actively pursue accommodation policies and not simply allow majority communities to marginalize minority communities in the marketplace for social goods (education, employment, etc.).

In passing the Canadian Multiculturalism Act,[44] Canada formally chose to recognize cultural difference and a model of differentiated citizenship. That *Act* provides:

> **3.** (1) It is hereby declared to be the policy of the Government of Canada to
>
> (*a*) recognize and promote the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society and acknowledges the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage;

38. Some of the more influential works include: JANICE GROSS STEIN ET AL., UNEASY PARTNERS: MULTICULTURALISM AND RIGHTS IN CANADA (2007); MULTICULTURAL QUESTIONS (Christian Joppke & Steven Lukes eds., 1999); JOSEPH H. CARENS, CULTURE, CITIZENSHIP, AND COMMUNITY: A CONTEXTUAL EXPLORATION OF JUSTICE AS EVENHANDEDNESS (2000); BHIKHU C. PAREKH, RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY (2000); AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS (2001).

39. Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM AND THE POLITICS OF RECOGNITION (Amy Gutman ed., 1992).

40. CITIZENSHIP IN DIVERSE SOCIETIES (Will Kymlicka & Wayne Norman eds., 2000).

41. JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY (1995).

42. *See* Statistics Canada, http://www40.statcan.ca/l01/cst01/demo35c.htm (last visited Apr. 10, 2008).

43. *See* C. Sheppard, *Constitutional Recognition of Diversity in Canada*, 30 VT. L. REV. 463 (2006).

44. R.S.C. C.24 (1985).

> (*b*) recognize and promote the understanding that multiculturalism is a fundamental characteristic of the Canadian heritage and identity and that it provides an invaluable resource in the shaping of Canada's future;
>
> (*c*) promote the full and equitable participation of individuals and communities of all origins in the continuing evolution and shaping of all aspects of Canadian society and assist them in the elimination of any barrier to that participation;
>
> (*d*) recognize the existence of communities whose members share a common origin and their historic contribution to Canadian society, and enhance their development;
>
> (*e*) ensure that all individuals receive equal treatment and equal protection under the law, while respecting and valuing their diversity;
>
> (*f*) encourage and assist the social, cultural, economic and political institutions of Canada to be both respectful and inclusive of Canada's multicultural character;
>
> (*g*) promote the understanding and creativity that arise from the interaction between individuals and communities of different origins;
>
> (*h*) foster the recognition and appreciation of the diverse cultures of Canadian society and promote the reflection and the evolving expressions of those cultures;
>
> (*i*) preserve and enhance the use of languages other than English and French, while strengthening the status and use of the official languages of Canada; and
>
> (*j*) advance multiculturalism throughout Canada in harmony with the national commitment to the official languages of Canada.

Canada's embrace of multiculturalism and the ideal of a national "mosaic" in contrast to the American "melting pot," however, are not the only dynamics influencing issues of religion in the workplace.

In Quebec, the embrace of multiculturalism is complicated and exacerbated by linguistic politics and the province's role in protection Francophone culture and society. The Taylor-Bouchard Commission was established by the Quebec Government in 2007 following a number of high-profile conflicts to investigate the Quebec experience with accommodating religious, cultural, ethnic and racial minorities.

A number of high profile incidents of religious tension in 2007, mostly arising in Quebec, prompted both the panel and intense public interest in the topic in Canada more generally.[45] These incidents included pressure by the Federal Government on Elections Canada, the independent regulator of elections, to require Muslim women to remove their veil for identification

45. These events are chronicled in the final report of the Taylor-Bouchard Commission, *Building the Future: A Time for Reconciliation*, *at* http://www.accommodements.qc.ca/documentation/rapports/rapport-final-integral-en.pdf, at 53–60.

purposes in order to vote,[46] a girl removed from a soccer team for refusing to remove her hijab;[47] the owner of a sugar shack in Quebec received threats of violence for removing pork from his pea soup in an attempt to attract Muslim customers;[48] the Quebec's Human Rights Commission awarded a man $10,000 after he was asked to leave a kosher dining hall at Montreal's Jewish General Hospital because he had been eating a lunch of spaghetti with non-kosher sauce;[49] and a downtown Montreal YMCA being asked to cover its windows by an orthodox Jewish school across the street so that students at the school would not see women exercising.[50]

Hearings were held across the province of Quebec in the Fall of 2007 exploring topics of Islamophobia, Anti-Semitism, and the limits of reasonable accommodation for religious minorities in a secular society. The Panel issued its final Report in May of 2008.[51] Most controversial among its findings was the Commission's recommendation (following the French Republican approach) that judges, police officers, and prison guards be prohibited from wearing religious symbols, although, permitting other employees of public systems, such as teachers in public schools, to wear such symbols.[52]

Another catalyst for the intense scrutiny of religious accommodation was the decision by the Ontario Government in 2005 not to allow Courts to recognize the decisions of a Shari'a tribunal in family law matters, after an outcry of protest, particularly from women's groups to the Government's initial acquiescence to the tribunal's decisions being recognized.

The notion of a public backlash against policies of promoting pluralism and accommodation in Canada is not without foundation, and is not isolated to formal state recognition of religious law, as in the Ontario Shari'a tribunal case.

---

46. *See Harper Slams Elections Canada Ruling on Veils*, http://www.cbc.ca/canada/story/2007/09/09/harper-veil.html.

47. *See Muslim Girl Ejected from Tournament for Wearing Hijab, at* http://www.cbc.ca/news/yourview/2007/02/muslim_girl_ejected_from_tourn.html.

48. Philip Authier, *Boisclair Talks Tough on Pea Soup*, MONTREAL GAZETTE, Mar. 20, 2007, *available at* http://www2.canada.com/montrealgazette/features/quebecvotes2007/story.html?id=c35d1e53-4b41-4c01-bdfe-7ce163b72f49&k=19677.

49. Martin Patriquan, *Canada's Renown for Tolerance is Breaking Down*, MACLEANS MAGAZINE Oct. 22, 2007, *available at* http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=M1ARTM0013162.

50. See the discussion of these events Linda Deibel, *Uneasy Mosiac: When Rights Collide with Freedoms*, TORONTO STAR, May 28, 2007, *available at* http://www.thestar.com/News/article/218355 (last visited Apr. 15, 2008).

51. The Commission's Report, *Building the Future: A Time for Reconciliation*, and its thirty-seven recommendations, are available at http://www.accommodements.qc.ca. These recommendations include that employers adopt policies of paid leave for employees to observe religious holidays and practices, and that government owned corporations take a leadership role in designing and implementing such policies (at p. 267).

52. *Id.*

The results of a poll conducted for the Institute for Research on Public Policy in the Fall of 2007 reflect the rising tensions in Canada.[53] When asked if they agreed with the following statement—"it is reasonable to accommodate religious and cultural minorities"—a mere 18% said yes. Over 50% thought immigrants should "adapt fully to culture in Canada." When it came to accommodating religious and cultural minorities in public places, such as schools, hospitals, and government buildings, 37% thought there should be no accommodation at all, with smaller portions accepting some accommodation but only 6% advocating full accommodation.

The polling results were even more striking for accommodation in the workplace, with 45% saying there should be none, and just 4% agreeing with full accommodation. The poll indicated that by significant majorities in Canada as a whole, and by overwhelming majorities in Quebec, the emphasis in the public discourse is on limiting accommodation, not extending it.

While some regional disparities were evident (with those areas of the country with the smallest multicultural populations supporting accommodation in the highest numbers), education, income, and age appear better predictors of support for accommodation. Those with less education, as well as older Canadians, tended to be less accommodating. For example, only 17% of Canadians aged 55 to 64 thought it was reasonable to accommodate, compared with 24% of those aged 25 to 34. And as for education, just 24% of those with a university education saw accommodation as reasonable as against 9.6% of those with just a high-school education. Another countrywide survey suggested Canadians believe conflict between Christians and Muslims will eventually overshadow the country's long-standing quarrel between the English and French.[54]

Yet, as Michael Adams work shows, there are also survey data showing that the Canadian approach to promoting pluralism has been successful, especially when compared with the violent encounters witnessed in recent years in France and elsewhere in Europe. Adams included in his study survey information from Canada's fast-growing Muslim population. While he noted that people generally express two fears about Muslims in Canada: they are unwilling to integrate into secular society and they are sympathetic to terrorism, Adams found Canadian Muslims to express views similar to other immigrant groups in Canada (Canada's Muslims are 90% foreign-born): 9 in 10 are proud to be Canadian, 8 in 10 think the country is headed in the right direction and reasons cited for national pride are the

53. See the discussion of these polling results in Patriquin, *supra* note 49.
54. *Id.*

same as in the population at large: freedom and democracy, peacefulness, and the friendliness they perceive among their fellow Canadians (although 3 in 10 Canadian Muslims say they have experienced discrimination). Muslim Canadians condemn acts of global terrorism in similar numbers to the rest of Canadian society.[55]

Recognition of Canada's aboriginal community as a founding people (or First Nations) is another dynamic that characterizes Canadian legal and political institutions. The aboriginal community is not viewed as simply a religious, cultural, or linguistic minority to be accommodated but as a people whose relationship with Canada must be reconciled. Some aboriginal communities entered into treaties with Canada governing land use and rights, while others were simply dispossessed.

Religious accommodation also cannot be disentangled from other social, economic, and political realities. Socioeconomic stratification in Canadian society, regionalism, the urban/rural divide, the impact of globalization, and the war on terror, all shape in different ways the Canadian response to issues of religious tensions in the workplace.

CONCLUSION

The Canadian approach, discussed above, of reasonable accommodation as a burden owed by employers to employees who express their religious beliefs or observances in workplace settings, is based on two premises.

The first premise is that Canada, as a matter of state policy, is a secular society. This is a rejection of the idea to true pluralism. As Premier Dalton McGuinty asserted when announcing that Ontario would abandon the recognition of Shari'a Tribunal decisions in family law, "There will be no Shariah law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians."[56]

The second premise is based on mutual recognition and the promotion of multiculturalism. The Canadian government and employers have embraced the view that they must accommodate a variety of religious expression, so long as this embrace is contingent, limited both by the first premise (that Canada as a matter of state policy is secular), and by the notion of "undue hardship," which allows employers to bracket accommodation within a set of commercial and cultural bounds.

55. *See* ADAMS, *supra* note 4; Adams, *supra* note 4.

56. *See McGuinty Rules out Use of Sharia Law in Ontario*, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1126472943217_26/?hub=TopStories (last visited Apr. 15, 2008).

The challenge for the future will be how to reconcile these competing narratives. To this end, Canadian labor boards, human rights commissions and tribunals, and the courts have advanced the discourse of reasonable accommodation as a reconciliatory approach. For example, as noted above, in *Multani v. Commission scolaire Marguerite-Bourgeoys*,[57] the Supreme Court found that a Sikh boy should be permitted to wear a ceremonial kirpan to school, so long as it was sewn into his clothes in a manner that would not allow him to access it. The Court was quick to point out, however, that such accommodation might not also be permitted if that same boy were flying in an airplane or attempting to enter the courtroom. As Abella J. notes in her concurring judgment in *Multani*, "The process required by the duty of reasonable accommodation takes into account the specific details of the circumstances of the parties and allows for dialogue between them. This dialogue enables them to reconcile their positions and find common ground tailored to their own needs."[58]

Ultimately, a deeper form of intercultural engagement may be needed before this project of reconciliation can be realized—an approach based on building bridges between cultural communities rather than the premise of multiculturalism, which is to recognize and provide rights to cultural communities within their boundaries.[59] The goal of this project, in my view, should be to move beyond the narrative of the "other" that permeates the discourse of multiculturalism, and at the same time to promote the dignity enhancing framework of protecting religious expression under the Charter, human rights, and labor/employment law.

While pluralism and exceptionalism may be mutually exclusive frameworks for governing the workplace, they have been pursued for the most part in an uneasy but stable balance in Canada. Reconciliation, in this sense, is a journey rather than a destination. Whether Canadians are prepared to undertake this journey together in the long run remains unclear. If there is one national trait that unifies Canada, however, it is the ability to sustain compromise, and if necessary, to live peaceably with contradiction.

57. Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256 (Can.).
58. *Id.* ¶ 133.
59. *See* STEIN ET AL., *supra* note 38, at 19.