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What Does Freedom of Religion Really Mean?

(Powerpoint Presentation)

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“If religious freedom means nothing more than that religion should be free so long as it is irrelevant to the state, it does not mean very much”

Michael McConnell
Renowned U.S.
Constitutional Scholar

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INTRODUCTION

- What is freedom of religion and why should it be important to your religious organization?
 - Relevant Legislation – *Charter of Rights and Freedoms* and *Ontario Human Rights Code*
 - History of Interpretation in the Case Law
 - Human Rights Complaints Related to Same-Sex Marriage
 - Commentary: Religious Freedom v. The Rule of Law

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RELEVANT LEGISLATION

- S. 2(a) and (b) of *Charter of Rights and Freedoms* (“*Charter*”):

Everyone has :

- a) freedom of conscience and religion;
- b) freedom of thought, belief, opinion and conscience including freedom of the press and other media of communication.

- S.15 of the *Charter*:

Every individual is equal ... and has the right to the equal protection and equal benefit of the law without discrimination ...based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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• Relevant *Ontario Human Rights Code* (“Code”) provisions:

– General prohibition against discrimination;

1. Every person has a right to equal treatment..., without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.

– No discrimination in employment

5(1) Every person has a right to equal treatment with respect to employment without discrimination ...

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– Exemption

24.(1) The right under section 5 to equal treatment with respect to employment is not infringed where,

(a) a religious [or] philanthropic ... organization that is primarily engaged in serving the interests of persons identified by their race, [etc.] ... employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment;

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– Cannot be discriminated against because of association:

12. A right under Part I is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination.

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– Exemption provided for certain organizations

18. The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, [or] philanthropic organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.

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18.1(1) The rights under Part I to equal treatment with respect to services and facilities are not infringed where a person registered under section 20 of the *Marriage Act* refuses to solemnize a marriage, to allow a sacred place to be used for solemnizing a marriage or for an event related to the solemnization of a marriage, or to otherwise assist in the solemnization of a marriage, if to [do so].... would be contrary to,

- (a) the person's religious beliefs; or
- (b) the doctrines, rites, usages or customs of the religious body to which the person belongs.

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– Section 11(2) of the *Code* imposes the duty to accommodate in cases of constructive discrimination:

The Commission ... shall not find that a requirement, qualification or factor is reasonable and *bona fide* ... 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 ...

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- Creed not defined in the *Human Rights Code*, but OHRC defines it as:

Creed is interpreted to mean "religious creed" or "religion". It is defined as a professed system and confession of faith, including both beliefs and observances or worship. A belief in a God or gods, or a single supreme being or deity is not a requisite.

The existence of religious beliefs and practices are both necessary and sufficient to the meaning of creed, if the beliefs and practices are sincerely held and/or observed.

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HISTORY OF INTERPRETATION IN THE CASE LAW

- *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295:

Freedom [of religion] can primarily be characterized by 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 a way contrary to his beliefs or his conscience.

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- *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772:

The proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them.

- *Chamberlain v. Surrey District School Board*, [2002] 4 S.C.R. 710:

Parental views, however important, cannot override the imperative placed on the British Columbia public schools to mirror the diversity of the community and teach tolerance and understanding of difference.

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- **Gonthier (minority decision):**
 - The distinction between actions and beliefs is present in Canada's constitutional case law: persons are entitled to hold such beliefs as they choose, but their ability to act on them, whether in the private or public sphere, may be narrower. This approach reflects the fact that ss. 2(a) and 2(b) of the *Charter* coexist with s. 15, which extends protection against discrimination to both religious persons and homosexual persons.

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- ***Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551:**

In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.

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- **Reference Re Same-Sex Marriage, [2004] S.C.J. No. 75:**

The protection of freedom of religion afforded by s.2(a) of the *Charter* is broad and jealously guarded... [S]hould impermissible conflicts occur, the provision at issue will by definition fail the justification test under the s.1 of the *Charter* and will be of no force and effect under s.52 of the *Constitution Act*, 1982. In this case the conflict will cease to exist.

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- *Kempling v. B.C. College of Teachers* (2005), 255 D.L.R. (4th) 169:

Non-discrimination is a core value of the public education system; ... When a teacher makes public statements espousing discriminatory views, and when such views are linked to his or her professional position as a teacher, harm to the integrity of the schools system is a necessary result.

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HUMAN RIGHTS COMPLAINTS RELATED TO SAME-SEX MARRIAGE

- Outstanding complaint made against Knights of Columbus in B.C.
 - Same sex couple brought human rights complaint against Knights of Columbus in B.C. for their refusal to rent their hall to them for the purposes of a same sex wedding reception

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- Lawyer representing the same-sex couple in the Knights of Columbus case argued that:

“The religious freedom of the Roman Catholic Church to refuse to marry same-sex couples could not be equated to religious freedom of a lay organization of Catholics to refuse to rent premises for the celebration of a same-sex marriage—not if the premises were generally offered to the public.”

Barbara Findlay

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- Whereas the lawyer for the Knights of Columbus submitted that,

“If it’s lawful to say no to a same-sex marriage, it’s lawful to say no to celebrating the event. To celebrate an event against your religious belief is the same as conducting the event yourself.”

Michael Valpy

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- Marriage Commissioners: are religious conscience exemptions available - duty to accommodate?

- Alberta, New Brunswick, Quebec and British Columbia: Yes
- Manitoba, Saskatchewan and Newfoundland: No
- Ontario: exemption provided in *Marriage Act* and OHRC (Bill 171) for religious officials

- More information to come in a presentation by Terrance S. Carter – re: The Legal Impact of Same-Sex Marriage on Religious Organizations

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- Human Rights Tribunals in B.C. will therefore have to decide:

- Whether the freedom of religion extends far enough to protect the religious freedom of members of a “lay organization”
- Whether it extends to religious groups who are offering a service to the public
- Whether the “celebration” of a marriage should be distinguished from the solemnization of a marriage

- No decision rendered as of this date

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- **Marriage commissioners who are opposed to same-sex marriage on religious grounds:**
 - Complaints have been filed in Manitoba, Saskatchewan and Newfoundland by marriage commissioners who have been told that they must perform same-sex marriages or resign
 - New legislation in Ontario *Spousal Relationships Statute Law Amendment Act, 2005* will provide some relief for religious marriage commissioners

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- **Camp Arnes in Manitoba**
 - Human rights complaint lodged by homosexual choir against Mennonite camp, Camp Arnes, for refusing to allow the use of its facilities
 - No decision has yet been made by Manitoba Human Rights Commission

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- **Human Rights Complaint Against Catholic Bishop Fred Henry in Calgary**
 - Two complainants alleging that letter written by Bishop Henry to parishioners urging them to oppose same-sex marriage legislation discriminates against homosexuals
 - Letter compared homosexuality to adultery, prostitution and pornography
 - Urged government to use its “coercive power” to proscribe or curtail such activities in the interests of the common good

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**COMMENTARY:
RELIGIOUS FREEDOM V. THE RULE OF LAW**

• Freedom of religion=

“freedom to manifest [one’s] religion or belief in teaching, practice, worship and observance.”
Universal Declaration of Human Rights
art.18

Religion=

“profoundly personal beliefs that govern one’s perception of oneself, humankind, nature, and, in some cases a higher order of being. These beliefs in turn govern one’s conduct and practices.”

Justice Dickson – R v. Edwards Books and Art Ltd., [1986]2 S.C.R.713

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• Rule of law =

“The rule of law shapes our experience of meaning everywhere and at all times. ... Voting, taxation, mobility, family organization, and public discourse: the rule of law leaves no aspect of human experience unaffected by its claim to authority.”

Kahn- The Cultural Study of Law

“The rule of law must incorporate within itself some space for the manifestation of religious conscience”

Justice Tachereau – Chaput v. Romaine et al., [1955] S.C.R. 834

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“The struggle faced by the courts is one of balancing. On the one hand stands society’s need for adherence to the rule of law...on the other hand in Canadian society there is the value that we place upon multiculturalism and diversity which brings with it a commitment to freedom of religion.”

*Justice Beverley McLachlin,
“Freedom of Religion and the Rule of Law: A Canadian Perspective”*

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• Examples in the case law

- *Hofer v. Interlake Colony of Hutterian Brethren*, [1970] S.C.R. 958: SCC ruled that Colony members who had been “properly expelled” had no right to a division of the Colony’s property.
- *Malette v. Shulman* (1990), 72 O.R. (2d) 417 court recognized right of adult Jehovah Witness to refuse blood transfusion and found doctor liable for battery for having given a blood transfusion despite clear evidence this went against her religious beliefs.
- *R.B. v. Children’s Aid Society of Metro Toronto*, [1995] 1 S.C.R. 315: court found that Jehovah Witness parents did not have right to refuse blood transfusion for child as state’s duty to protect children overrode parents’ religious belief.

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• Internal review of decisions made by religious authorities?

- Do religious leaders have to consider whether their church’s teaching conforms with “public policy”?
- Example: Is excluding women and/or homosexuals from clergy contrary to public policy?
- Could dissidents from within the religion bring human rights challenges against religious leaders for having been excluded on the basis that this is discrimination?

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• Conclusion:

“Freedom of conscience and religion has become a component of the Canadian experience of the Rule of Law.”

Justice Beverley McLachlin,
“*Freedom of Religion and the Rule of Law: A Canadian Perspective*”

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