

State Neutrality and Freedom of Conscience and Religion

Bruce Ryder

Osgoode Hall Law School of York University, bryder@osgoode.yorku.ca

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/sclr>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

Citation Information

Ryder, Bruce. "State Neutrality and Freedom of Conscience and Religion." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 29. (2005).

<https://digitalcommons.osgoode.yorku.ca/sclr/vol29/iss1/10>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

State Neutrality and Freedom of Conscience and Religion

Bruce Ryder*

While religion has always been a significant force in Canadian public life, the relationship between religious and state authority has changed profoundly. An explicit or implicit alliance between state norms and the teachings of the dominant Christian religions, long taken for granted, has been steadily challenged, especially in the last half century. The state is now conceived, in popular and constitutional discourses, as officially secular yet supportive of religious pluralism and multiculturalism. The path from a *de facto* Christian state to a secular pluralist state is not easily travelled — witness the tortured public debates about replacing the legal definition of marriage derived from Christendom with one that better reflects the contemporary objectives of state regulation of family relationships. We are still in the early stages of trying to work out what it means for the Canadian state to be both officially secular and supportive of religious pluralism. In this period of uneasy transition, the respective roles of secular and religious norms in shaping public policy are matters of considerable political debate and scholarly attention.¹

The Supreme Court has had a few opportunities to contribute to these debates in recent years.² However, its engagement with the *Canadian*

* Associate Professor, Osgoode Hall Law School, York University.

¹ See, e.g., John McLaren and Harold Coward, eds., *Religious Conscience, the State, and the Law: Historical Contexts and Contemporary Significance* (Albany: State University of New York Press, 1999); Douglas Farrow, ed., *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion and Public Policy* (Kingston & Montreal: McGill-Queen's University Press, 2004); Marguerite Van Die, ed., *Religion and Public Life in Canada* (Toronto: University of Toronto Press, 2001); David Lyon & Marguerite Van Die, eds., *Rethinking Church, State and Modernity: Canada Between Europe and the United States* (Toronto: University of Toronto Press, 2000); Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (December 2004).

² Most notably in *Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87, [2002] 4 S.C.R. 710 (school board's refusal to approve the use of books depicting same-sex parents violated legislative requirements of secularism and non-discrimination) and *Trinity Western University v. British Columbia College of Teachers*, [2001] S.C.J. No. 32, [2001] 1 S.C.R. 772 (teachers' college

Charter of Rights and Freedoms (“Charter”) guarantee of freedom of conscience and religion has been limited. In 2004, religious freedom issues came to the fore on the Court’s docket, as they have in public debates generally. The Court issued three significant rulings on religious freedom:³ in *Syndicat Northcrest v. Amselem*,⁴ it grappled with the very nature of religion and religious belief and issued a ruling requiring accommodation of practices grounded in an individual’s subjectively held sincere religious beliefs; in the *Same-Sex Marriage Reference*,⁵ it concluded that the federal government’s proposed legislative redefinition of civil marriage to include same-sex couples posed no threat to freedom of religion; and in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*,⁶ it considered whether a municipality was under an obligation to amend its zoning by-laws to facilitate the purchase of land suitable for a place of worship by a congregation of Jehovah’s Witnesses.

I. STATE NEUTRALITY

Before turning to a discussion of the Court’s three 2004 rulings on religious freedom, we will begin by exploring the theme of religious neutrality introduced by LeBel J. in *Lafontaine*. Justice LeBel described freedom of religion as imposing “a duty of state neutrality.” The role of the state, he wrote, is to act “as an essentially neutral intermediary in relations between the various denominations and between those denominations and civil society.”⁷

Using conceptions of state neutrality to characterize the obligations imposed on governments by constitutional guarantees of freedom of religion is commonplace in the United States, although less so in Canada. Neutrality has played a central role in the rich and complex case law

erred in concluding that a private Christian university’s requirement that students ascribe to religious beliefs condemning homosexuality was inherently discriminatory).

³ Another decision is pending on an appeal from a Quebec ruling holding that freedom of religion does not entitle a Sikh student to wear a kirpan in his public school: *Multani (tuteur de) c. Commission scolaire Marguerite-Bourgeoys*, [2004] J.Q. no. 1904 (Que. C.A.), appeal heard and reserved by the Supreme Court of Canada [2004] S.C.C.A. No. 198.

⁴ [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551.

⁵ [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698.

⁶ [2004] S.C.J. No. 45, [2004] 2 S.C.R. 650.

⁷ *Id.*, at para. 67.

interpreting the First Amendment's protection of the free exercise of religion and its prohibition on the establishment of religion. In American jurisprudence, judges tend to agree on the existence of a state duty of religious neutrality, but often disagree about what it means in theory and practice. Neutrality, as Harlan J. famously remarked, "is a coat of many colors."⁸

While exploring the concept of state neutrality helps capture the essence of legal understandings of religious freedom, it is also an elusive concept. Neutrality has no fixed meaning.⁹ Its content is heavily influenced by historical factors and changing cultural contexts. We should not expect neutrality to have the same meanings across time or across jurisdictions. Because of the breadth and depth of First Amendment jurisprudence, American understandings of neutrality loom large in the literature. Yet Canadian political traditions, our constitutional text, and our jurisprudence differ from the American experience regarding church and state. As a result, our understandings of the state's duty of religious neutrality are also different.

Two different kinds of neutrality dominate discussions in the area of religious freedom. One is *neutrality between religions*, a kind of neutrality required by both the Canadian and American constitutions, although Canadian constitutional jurisprudence imposes more expansive positive obligations on the state to ensure that its laws or policies do not unduly burden the exercise of religious freedoms. The second kind of neutrality is *neutrality about religion*, a kind of neutrality required by the American constitution but not by the Canadian. I will discuss each in turn.

1. Neutrality Between Religions

It is well established in Canadian jurisprudence that the state is subject to a duty of neutrality between religions. As Dickson C.J. wrote in the *Big M* case, "[t]he protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity."¹⁰ Freedom of religion prohibits

⁸ *Board of Education v. Allen*, 392 U.S. 236, at 249 (1968).

⁹ For a thorough critique of neutrality, see Frank Ravitch, "A Funny Thing Happened on the Road to Neutrality: Broad Principles, Formalism and the Establishment Clause" (2004) 38 *Georgia L. Rev.* 489.

¹⁰ *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, at para. 98, [1985] 1 S.C.R. 295, at 337. See also José Woehrling, "L'obligation d'accommodement raisonnable et l'adaptation de

laws or policies that have the purpose or effect of favouring or burdening some religious beliefs or practices over others. The state may not require a course of action for the purpose of compelling religious compliance or attempting religious indoctrination.¹¹ Rather, respect for freedom of religion requires that governments avoid laws or policies that seek to enforce the practices of a particular religion or indoctrinate citizens in particular religious beliefs. Thus, for example, the courts have held that public institutions cannot engage in religious indoctrination by compelling participation in prayers or religious instruction dominated by the perspective of a single denomination.¹² Furthermore, governments have a constitutional obligation to adjust laws or policies to remove any state-imposed burdens on religious freedom that cannot be reasonably and demonstrably justified pursuant to section 1 of the Charter.¹³

The concept of state neutrality between religions does not exhaustively account for the meanings of freedom of religion. Any law or government policy that imposes a non-trivial burden on the exercise of religious or conscientious freedoms will violate section 2(a) of the Charter, whether or not the impact is on the adherents of one belief system or many. In other words, section 2(a) can be violated by a law that is neutral in the sense that is equally oppressive of all religions. Nevertheless, the state duty of neutrality between religions has been the concern of many of the leading cases on section 2(a): *Big M*,¹⁴ *Zylberberg*¹⁵ and *Canadian Civil Liberties Association*¹⁶ all involved laws that had the

la société à la diversité religieuse” (1998) 43 McGill L.J. 325, at para 96: “... la liberté de religion impose une obligation de neutralité à l’État en matière religieuse qui l’empêche de privilégier ou de défavoriser une religion par rapport aux autres.” As Woehrling explains, the obligation of neutrality is supported by s. 2(a), s. 15 and s. 27 of the Charter: “... l’obligation de neutralité de l’État en matière religieuse découle également, outre les articles 2(a) et 15 de la Charte, de l’article 27 sur le multiculturalisme. En effet, dans la mesure où la religion fait partie de la culture, le respect du multiculturalisme est incompatible avec le fait de favoriser certaines religions par rapport à d’autres.” *Id.*, at note 178.

¹¹ *Big M*, *id.*

¹² *Freitag v. Penetanguishene (Town)*, [1999] O.J. No. 3524, 179 D.L.R. (4th) 150 (C.A.); *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)*, [1990] O.J. No. 104, 65 D.L.R. (4th) 1 (C.A.); *Russow v. British Columbia (Attorney-General)*, [1989] B.C.J. No. 611, 62 D.L.R. (4th) 98 (B.C.); *Manitoba Assn. for Rights and Liberties Inc. v. Manitoba*, [1992] M.J. No. 391, 94 D.L.R. (4th) 678 (Q.B.); *Zylberberg v. Sudbury Board of Education (Director)*, [1988] O.J. No. 1488, 52 D.L.R. (4th) 577 (C.A.).

¹³ *R. v. Edwards Books and Art Ltd.*, [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713.

¹⁴ *Supra*, note 10.

¹⁵ *Supra*, note 12.

¹⁶ *Supra*, note 12.

purpose or effect of compelling observance of Christian teachings or practices, and thus violated state neutrality by preferring one religious tradition over others.

The duty of neutrality between religions is firmly established in American jurisprudence as well. However, in *Smith* (1990),¹⁷ the U.S. Supreme Court held that generally applicable laws that are neutral on their face do not violate the First Amendment solely because they have the incidental effect of burdening religious belief or practice. The *Smith* ruling departed from earlier decisions holding that the First Amendment required governments to provide exemptions to laws burdening religious beliefs or practices, unless such exemptions would compromise compelling state objectives.¹⁸ The Canadian courts have held that section 2(a) of the Charter can be violated by the indirect effects of facially neutral laws. Governments have an obligation to adjust their laws and policies to eliminate any unnecessary interference with religious freedom. When special measures are put in place by government to accommodate religious freedoms — for example, providing employees with time for religious prayer and observance — the state is giving effect to neutrality because without such accommodations facially neutral rules would manifestly not be neutral in their impact. The Canadian conception of neutrality between religions is thus more expansive and robust compared to its American constitutional counterpart.

Several common misconceptions about the state's duty of neutrality between religions need to be addressed. Religious neutrality does not mean that the state must refuse to take positions on policy disputes that have a religious dimension. Many if not most legislative policies will accord with some religious beliefs and violate others. Critics who say that the state cannot act in a religiously neutral manner in this sense have a compelling point.¹⁹ Secularism, for example, is not neutral. There

¹⁷ *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

¹⁸ See *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Frazee v. Illinois*, 489 U.S. 829 (1989). Legislation enacted by Congress in response to *Smith* has restored the legal principles set out in this line of cases. See the *Religious Freedom Restoration Act*, 42 U.S.C. s. 2000bb (Supp. V 1993).

¹⁹ See Richard Moon, "Liberty, Neutrality, and Inclusion: Religious Freedom under the Canadian Charter of Rights and Freedoms" (2003) 41 *Brandeis L.J.* 563; David M. Brown, "Freedom From or Freedom For? Religion as a Case Study in Defining the Content of Charter Rights" (2000) 33 *U.B.C. L. Rev.* 551; Douglas Farrow, ed., *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion and Public Policy* (McGill-Queen's University Press, 2004); Rex

is no such thing as a view from nowhere. Secular constitutional documents like the Charter are political expressions of a particular philosophy about religion and life.²⁰ But even if we acknowledge that it is not coherent to speak of any position as being philosophically or religiously neutral, the state remains subject to a duty to avoid laws or policies that have the purpose or effect of interfering with the exercise of religious freedoms.

Furthermore, the state's duty of religious neutrality does not require that arguments grounded in religious beliefs must be ignored when formulating policy. Religious perspectives have played and should continue to play an important role in public debates. Ultimately, though, the validity of state laws and policies must be determined by reference to constitutional norms rather than religious doctrine.²¹

2. Neutrality About Religion

Must the state remain neutral about religion generally, that is, neutral as between adherents of religious and conscientious belief systems and non-adherents? Or can the state pursue policies that aid religion generally, so long as it does so in an even-handed manner that respects the duty of neutrality between religions? While there is less case law and commentary on this point, Canadian jurisprudence does not impose on the state a duty of neutrality about religion. Rather, the Canadian position appears to be that the state can aid religion so long as it does so

Ahdar & Ian Leigh, "Is Establishment Consistent with Religious Freedom?" (2004) 49 McGill L.J. 635, at para. 102; R. Clouser, *The Myth of Religious Neutrality* (University of Notre Dame Press, 1991); Iain T. Benson, "Notes Towards a (Re)definition of the 'Secular'" (2000) 33 U.B.C. L. Rev. 519; David N. Cinotti, "The Incoherence of Neutrality: A Case for Eliminating Neutrality from Religion Clause Jurisprudence" (2003) 45 J. Church & St. 499.

²⁰ Tariq Modood, "Introduction: Establishment, Reform and Multiculturalism" in Tariq Modood, ed., *Church, State and Religious Minorities* (London: Policy Studies Institute, 1997), 3 at 13.

²¹ See *Chamberlain*, *supra*, note 2, *per* McLachlin C.J.C. at para. 59, commenting on whether a school board's curricular decisions can be influenced by religious views:

The requirement of secularism ... does not preclude decisions motivated in whole or in part by religious considerations, provided they are otherwise within the Board's powers. It simply signals the need for educational decisions and policies, whatever their motivation, to respect the multiplicity of religious and moral views that are held by families in the school community. It follows that the fact that some parents and Board members may have been motivated by religious views is of no moment. What matters is whether the Board's decision was unreasonable in the context of the educational scheme mandated by the legislature.

in a manner that respects the principle of neutrality or even-handedness between religions.

The relationship between religion and state has never been a simple one in Canada. The metaphor of an impregnable wall between church and state,²² so often invoked in the United States, is not a plausible description of Canadian constitutional traditions. In the introduction to his collection of historical documents on the topic, John Moir commented: “Canada has rejected the European tradition of church establishment without adopting the American ideal of complete separation. Here no established church exists, yet neither is there an unscalable wall between religion and politics.”²³ Writing in 1967, he noted that “Canadians in fact assume the presence of an unwritten separation of church and state, without denying an essential connection between religious principles and national life or the right of the churches to speak out on matters of public importance.”²⁴ He characterized this difficult to define relationship as “peculiarly Canadian” and called it “legally disestablished religiosity”: “The tradition of church and state in Canada has grown into a peculiar paradox — anti-establishmentarian, but not secularist. Our history and our constitution require that the state be neither indifferent to nor involved in the church, and vice-versa.”²⁵

Moir’s account needs to be updated, since Canadians’ attitudes to church and state have evolved a great deal since 1967. The state is more resolutely secularist now, and the place of explicit reliance on religion in public debates is much more contested. The paradox Moir described has been reshaped in the Charter era, in part by the increasing multiculturalism and religious pluralism that characterizes Canadian society, and in part by the impact of the Charter itself. The Charter is, in many important ways, the nation’s new secular religion, establishing the fundamental norms with which all laws and public policies must comply.

The Charter may appear to embody a paradox similar to the one Moir described. Moir spoke of a “legally disestablished religiosity” characterizing Canadian political culture, one that has evolved, in

²² E.g., *Everson v. Board of Education*, 330 U.S. 1 (1947).

²³ John S. Moir, *Church and State in Canada, 1627-1867* (Toronto: McClelland and Stewart, 1967), at xiii.

²⁴ *Id.*

²⁵ *Id.*, at xix.

George Egerton's expression, into a "religiously-positive pluralism."²⁶ The preamble of the Charter announces that Canada is a nation "founded upon principles that recognize the supremacy of God and the rule of law." Sections 2(a) and 15 guarantee religious freedom and religious equality, respectively. Section 27 directs that the Charter be interpreted so as to preserve and enhance Canada's multicultural heritage, and section 29 protects existing denominational school rights. How are we to make sense of this jumble of apparently paradoxical provisions?²⁷ Is it possible to simultaneously affirm both sacred and secular sources of authority? To integrate the nation's historical roots and its future aspirations?

Given the surprisingly strong interpretive weight the Supreme Court has given to the preamble to the *Constitution Act, 1867*,²⁸ and to the reference to the rule of law in the Charter's preamble,²⁹ it may be only a matter of time before the courts cease to view the preamble as "an embarrassment to be ignored,"³⁰ and embrace it as an interpretive opportunity thus far missed.³¹ The supremacy of God clause is perhaps best understood as a reminder of the state's role in not just respecting the autonomy of faith communities, but also in nurturing and supporting them, as long as it does so in an even-handed manner.³²

²⁶ George Egerton, "Writing the *Canadian Bill of Rights*: Religion, Politics and the Challenge of Pluralism 1957-1960" (2004) 19 C.J.L.S. 1, at 19.

²⁷ William Klassen sees the preamble and the Charter's guarantee of religious freedom as "a contradiction which even a theologian, to say nothing of all the lawyers, must surely recognize": "Religion and the Nation: An Ambiguous Alliance" (1991) 40 U.N.B.L.J. 87 at 95.

²⁸ See *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3 per Lamer C.J.C., describing the preamble to the 1867 Act as the "grand entrance hall to the castle of the Constitution" (at para. 109).

²⁹ See *Reference re: Manitoba Language Rights (Man)*, [1985] S.C.J. No. 36, [1985] 1 S.C.R. 721; *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217.

³⁰ Brown, *supra*, note 19, at para. 20.

³¹ In this regard, see Lorne Sossin's ambitious attempt to vitalize the preamble as "a repository of the tenets of our moral system and commitments to social justice": "The 'Supremacy of God', Human Dignity and the *Charter of Rights and Freedoms*" (2003) 52 U.N.B.L.J. 227, at 237. See also George Egerton, "Trudeau, God, and the Canadian Constitution: Religion, Human Rights and Government Authority in the Making of the 1982 Constitution," in Lyon & Van Die, eds., *supra*, note 1.

³² For example, regarding the public funding of private religious schools, José Woehrling writes that "le principe de neutralité religieuse découlant de la liberté de conscience et de religion n'interdirait pas à l'État de les aider financièrement, à condition qu'il le fasse sans privilégier ni défavoriser aucune religion par rapport aux autres." *Supra*, note 10, at para. 104.

The preamble represents a kind of secular humility, a recognition that there are other truths, other sources of competing world-views, of normative and authoritative communities that are profound sources of meaning in people's lives that ought to be nurtured as counter-balances to state authority.

The preamble's references to the "supremacy of God" and the "rule of law" express a form of reconciliation between the secular nature of the state and the importance of protecting religious belief and practice. They underline the fact that the state is secular and must be neutral between religions, but that it should also nurture and protect religious expression. In this way, there is a complementarity, not a conflict, in the preamble's reference to the "supremacy of God," the Charter's guarantees of religious freedom and equality, and the promotion of multiculturalism. The text of the Charter as a whole suggests that the Canadian state should aim to secure a religiously positive pluralism in an even-handed manner.³³ This is best accomplished by a secular state that is neutral between religions but not neutral about religion.³⁴

In contrast, in the United States a much stricter wall separates secular and religious authorities. The Canadian Constitution lacks an equivalent of the First Amendment's anti-establishment clause. The American Constitution has no equivalent of the Canadian Charter's "supremacy of God" preamble. A majority of the U.S. Supreme Court is committed to

³³ For example, if public schools choose to be involved in religious education, or if public institutions observe religious practices, they must do so in an even-handed manner that avoids indoctrination and respects a plurality of religious and conscientious beliefs. See *Zylberberg, supra*, note 12.

³⁴ The content of the Canadian state's obligations of religious neutrality presented here shares much common ground, if not the eloquence, of Justice Albie Sachs description of the South African position:

South Africa is an open and democratic society with a non-sectarian state that guarantees freedom of worship; is respectful of and accommodatory towards, rather than hostile to or walled-off from, religion; acknowledges the multi-faith and multi-belief nature of the country; does not favour one religious creed or doctrinal truth above another; accepts the intensely personal nature of individual conscience and affirms the intrinsically voluntary and non-coerced character of belief; respects the rights of non-believers; and does not impose orthodoxies of thought or require conformity of conduct in terms of any particular world-view. The Constitution, then, is very much about the acknowledgement by the state of different belief systems and their accommodation within a non-hierarchical framework of equality and non-discrimination. It follows that the state does not take sides on questions of religion. It does not impose belief, grant privileges to or impose disadvantages on adherents of any particular belief, require conformity in matters simply of belief, involve itself in purely religious controversies, or marginalise people who have different beliefs.

S. v. Lawrence, 1997 (4) SA 1176, at para. 148.

the view that the First Amendment mandates both kinds of governmental neutrality — “between religion and religion, and between religion and non-religion.”³⁵ Canadian law is even more strongly committed to the first kind of state neutrality, neutrality between religions. But on the second type of neutrality, ours is a different tradition, one that supports and encourages even-handed state support of religious and conscientious freedoms.

The difference between Canadian and American approaches to the issue of state neutrality about religion is perhaps most evident in controversies regarding public funding of religious schools. In the United States, government programs providing direct financial aid to religious schools — even if made available in an even-handed manner to all denominations — are prohibited as a violation of the principle of neutrality flowing from the establishment clause of the First Amendment.³⁶ In Canada, on the other hand, the issue has not been whether governments are *permitted* to provide direct financial aid to religious schools; the question has been whether the Charter *requires* further government funding of religious schools beyond those already enjoying constitutionally entrenched denominational school rights. In the *Adler* case, a majority of the Supreme Court of Canada held that the Charter creates no constitutional obligation to fund religious schools. None of the judgments in the case suggested there was any constitutional impediment to the extension of state funding to religious schools. To the contrary, in the principal majority opinion, Iacobucci J. wrote that the provinces are free to extend funding to religious schools if they so choose.³⁷ Similarly, in her dissenting opinion, L’Heureux-Dubé J. wrote that public funding would “promote the value of religious tolerance in this context where

³⁵ *Epperson v. Arkansas*, 393 U.S. 97, at 104 (1968). See also *Everson*, *supra*, note 22, *per* Black J. (“Neither a state nor the Federal Government ... can pass laws which aid one religion, aid all religions, or prefer one religion over another.”); *McCreary County v. American Civil Liberties Union*, 2005 U.S. Lexis 5211, *per* Souter J. for the majority.

³⁶ *E.g.*, *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (tuition tax credits for parents of children in private religious schools declared unconstitutional). The Court has upheld forms of aid that are made available neutrally to parents of children at any school, religious or not: *Mueller v. Allen*, 421 U.S. 349 (1983); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). For excellent discussions of the complexity of the American jurisprudence on religious neutrality, see Douglas Laycock, “The Underlying Unity of Separation and Neutrality” (1997) 46 *Emory L.J.* 43; Douglas Laycock, “Formal, Substantive, and Disaggregated Neutrality Toward Religion” (1990) 39 *DePaul L. Rev.* 993.

³⁷ *Adler v. Ontario*, [1996] S.C.J. No. 110, [1996] 3 S.C.R. 609, at para. 48.

some religious communities cannot be accommodated in the secular system.”³⁸

(a) *Religious Neutrality and Positive State Obligations: Lafontaine*

The discussion of religious neutrality above led to the conclusion that Canadian governments must remain neutral between religions but need not be neutral about religion. They may extend support to religion so long as they do so in an even-handed manner. What about positive obligations? To what extent must the state take positive steps to facilitate the exercise of religious freedom? In *Big M*³⁹ and *Edwards Books*⁴⁰ the Court understood freedom of religion, like the other fundamental freedoms, as imposing primarily negative obligations on the state to avoid adopting policies that would impose coercive pressure on individuals. However, the Court recognized that a purely negative conception of freedom of religion would be incomplete. Section 2(a) imposes a mix of positive and negative obligations on the state. The state has positive obligations to adjust laws or policies that have the effect of imposing burdens on religious belief and practice. Ostensibly neutral rules are not necessarily neutral in their impact on religion. Thus, to cite a few well-known examples, if they can do so without undue hardship, employers must adjust workplace rules to permit employees to engage in religious observance⁴¹ and governments must design and implement sabbatarian exemptions to Sunday closing laws to alleviate the financial burden placed on retailers who observe a Sabbath other than Sunday.⁴²

In the absence of state-imposed burdens on religious freedom, the courts have not interpreted section 2(a) as imposing positive obligations on governments to facilitate the exercise of religious freedoms. “Never,” wrote McLachlin J. (as she then was) in the *Adler* case, “has it been suggested that freedom of religion entitles one to state support for one’s religion.”⁴³ Thus, for example, the existing jurisprudence would likely

³⁸ *Id.*, at para. 106.

³⁹ *Supra*, note 10.

⁴⁰ *Supra*, note 13.

⁴¹ *E.g.*, *Ontario (Human Rights Commission) v. Simpsons-Sears*, [1985] S.C.J. No. 74, [1985] 2 S.C.R. 536.

⁴² *E.g.*, *Edwards Books*, *supra*, note 13.

⁴³ *Adler*, *supra*, note 37, at para. 200.

require governments to adjust their employment policies to accommodate, up to the point of undue hardship, the religious needs of public sector employees by making time and space available for prayer or meditation; it does not require governments to pass laws requiring private sector employers to do the same.

While the Charter does not impose obligations on governments to support religion, it permits and arguably encourages such support. Provincial governments may make public funding available to private religious schools, so long as they do so in an even-handed manner.⁴⁴ The Ontario Court of Appeal has held that pluralist religious instruction is permissible in public schools so long as it falls short of religious indoctrination.⁴⁵ The state must avoid imposing burdens on religious freedoms, and it may choose to be supportive and facilitative of all religious observance, so long as it can do so, as a practical matter, in an even-handed manner.

The nature of governments' positive obligations, and their relationship to duties of religious neutrality, were raised before the Supreme Court of Canada in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*.⁴⁶ A congregation of Jehovah's Witnesses felt they were unable to locate a suitable piece of land on which to build a place of worship, a Kingdom Hall, within the area zoned for this purpose by the village of Lafontaine's by-laws. Whether suitable land was truly unavailable was a crucial and disputed issue throughout the litigation that ensued. The Congregation had been looking for land on which to build a Kingdom Hall since 1989 and had been seeking permission from the municipality to build such a facility since 1992. Each time the Congregation located suitable parcels of land elsewhere, the Congregation was unsuccessful in its attempts to persuade the village to amend its zoning by-laws. On the third occasion the municipality refused to amend its by-laws, it stated, in a 1993 letter, that it need not explain why:

⁴⁴ *Id.*

⁴⁵ *Canadian Civil Liberties Association, supra*, note 12. See also *Zylberberg, supra*, note 12.

⁴⁶ *Supra*, note 6.

The municipal council of Lafontaine is not required to provide you with a justification and we therefore have no intention of giving reasons for the council's decision.⁴⁷

As McLachlin C.J. later noted, this letter “effectively foreclosed any possibility that the Municipality would assist the Congregation in its quest for land upon which to build its place of worship.”⁴⁸ The Congregation then initiated an action alleging that the municipality's refusal to amend its zoning by-law violated its freedom of religion.

At the Quebec Superior Court, the trial judge, Dubois J., found that suitable land was still available for purchase within the area where the zoning by-law permitted the construction of places of worship. He found that the by-law did not infringe freedom of religion.

On appeal, the Quebec Court of Appeal was unanimous in finding that the trial judge had made an unreasonable error in his assessment of the facts. The Court of Appeal was of the view that, practically speaking, no suitable land was available in the area zoned for places of worship. The Court of Appeal divided on the significance of this fact.

The majority, Gendreau and Pelletier J.J.A., held that the Municipality was not responsible for the unavailability of land and had no positive obligation to facilitate freedom of religion. The source of the problem was the unwillingness of private landowners to sell their property. The Municipality was under no duty to ensure that every religious community could have a place of worship located within its boundaries.

Chief Justice Robert dissenting, held that the zoning by-law infringed freedom of religion as it made it impossible for the appellants to build a place of worship. The Municipality was therefore under a duty to make a reasonable effort to accommodate the appellants by amending its zoning by-law to permit the construction of a place of worship in another area.

The Supreme Court of Canada, in a 5-4 ruling, allowed the appeal. The majority opinion, written by McLachlin C.J.,⁴⁹ was based exclusively on administrative law grounds. Unlike the Quebec Court of Appeal, the majority accepted the trial judge's finding that land was available

⁴⁷ *Id.*, at para. 27.

⁴⁸ *Id.*, at para. 29.

⁴⁹ Justices Iacobucci, Binnie, Arbour and Fish concurring.

where a Kingdom Hall could be built.⁵⁰ This finding undercut the factual basis of the religious freedom argument. The majority, in declining to address whether the zoning by-law or actions of the Municipality violated religious freedom, likely believed that a useful discussion of the constitutional obligations of municipalities in this area should await a more favourable factual foundation. Nevertheless, given that the Congregation and a number of interveners had focused their arguments on the religious freedom issues, the majority's refusal to even consider them is somewhat surprising.

Instead of engaging the constitutional issues, the majority held that the Municipality violated its duty of procedural fairness owed to the Congregation by refusing to provide reasons to justify its decisions to deny two of the applications for rezoning. In considering the scope of the duty of procedural fairness owed to the Congregation, McLachlin C.J.C. noted that the Municipality needed to consider that its "decision affects the Congregation's practice of its religion. The right to freely adhere to a faith and to congregate with others in doing so is of primary importance."⁵¹ In the result, the majority remitted the rezoning application to the Municipality for reconsideration.

The majority judges were apparently not troubled by the weakness of the remedy they ordered. The Chief Justice acknowledged that the result could be that the Municipality would simply refuse further applications for rezoning, accompanying its refusal this time with proper reasons.⁵² If this was to occur, and the Congregation was unable to purchase land in the zone permitted for places of worship — a possible result given the futility of their search prior to the litigation — would religious freedom then be violated? The majority opinion is silent on this question, compelling the Congregation to re-litigate the issue if this sequence of events were to unfold. The majority thus chose a path that offered the Congregation little support in its struggle with a municipality that was apparently indifferent to its religious needs. The majority's failure to offer reasons for not addressing the religious freedom argument, apart from noting that it was "unnecessary" to do so,⁵³ must have

⁵⁰ *Supra*, note 6, at para. 15.

⁵¹ *Id.*, at para. 9. See also paras. 29-30.

⁵² *Id.*, at para. 32.

⁵³ *Id.*, at para. 34.

struck the Congregation as no more sympathetic to its plight than the Municipality had been.

Justice LeBel's dissent,⁵⁴ even though it offered the Congregation no immediate remedy, was more supportive of the Congregation's religious freedom than the majority. In a lengthy *obiter dicta*, LeBel J. indicated that the Municipality would be under a constitutional obligation to amend its zoning by-law if it turns out that no land is available to the Congregation in the zone where places of worship are currently permitted. Justice LeBel's opinion is notable for his scholarly discussion of the duty of religious neutrality and its impact on the question of when governments can take, or must take, positive steps to support religious freedom. His opinion provides useful future guidance to the village of Lafontaine, and to other governments facing similar circumstances, on the nature of their constitutional obligations to facilitate religious worship.

Justice LeBel would have denied any relief to the Congregation for two reasons. First, even though he agreed with the majority's finding that the municipality had denied procedural fairness to the Congregation by failing to provide sufficient reasons for its refusal to amend its zoning by-laws,⁵⁵ he held that the Court could not base its decision on this ground since the Congregation declined to rely on it at the hearing before the Court.⁵⁶ Second, he accepted the trial judge's finding that land was available for purchase in the zone where places of worship could be located and that, as a result, the Congregation's freedom of religion had not been violated by the by-laws or the Municipality's failure to amend them.⁵⁷ The Congregation had failed to demonstrate that the purpose or effect of the by-laws was to prevent it from building a place of worship in the Municipality.⁵⁸

Before reaching his conclusion on the religious freedom issue, LeBel J. undertook a discussion of the duty of religious neutrality imposed on governments by section 2(a) of the Charter. Drawing on Pro-

⁵⁴ Justices Bastarache and Deschamps concurring. Justice Major wrote a short separate dissenting opinion, agreeing with the result reached by LeBel J. but restricting his reasons to the absence of any violation of religious freedom based on the trial judge's findings of fact.

⁵⁵ *Supra*, note 6, at paras. 89-92.

⁵⁶ *Id.*, at paras. 85-86.

⁵⁷ *Id.*, at paras. 61-62.

⁵⁸ *Id.*, at para. 71.

fessor Woehrling's leading article on religious freedom,⁵⁹ LeBel J.'s discussion was in part a restatement of the well-established principle of neutrality between religions. As he wrote,

... the state acts as an essentially neutral intermediary in relations between the various denominations and between those denominations and civil society ... it is no longer the state's place to give active support to any one particular religion, if only to avoid interfering in the religious practices of the religion's members. The state must respect a variety of faiths whose values are not easily reconciled.⁶⁰

The more innovative and controversial aspects of LeBel J.'s opinion suggest that the duty of religious neutrality goes beyond a duty of even-handedness as between religions. He argued that the state must also remain neutral about the value of religion generally. He linked this idea to the evolving "dissociation of the functions of church and state."⁶¹ The resulting "clear distinction between churches and public authorities,"⁶² in his view, requires the state to "be neutral in matters of religion."⁶³

Conceiving the Municipality's duty of religious neutrality as embracing a duty of neutrality regarding the value of religious worship itself, LeBel J. reached the following conclusion about the Municipality's obligations:

As the municipality is required to be neutral in matters of religion, its by-laws must be structured in such a way as to avoid placing unnecessary obstacles in the way of the exercise of religious freedoms. However, it does not have to provide assistance of any kind to religious groups or actively help them resolve any difficulties they might encounter in their negotiations with third parties in relation to plans to establish a place of worship. In the case at bar, the municipality did not have to provide the appellants with access to a lot that corresponded better to their selection criteria. Such assistance would be incompatible with the municipality's duty of neutrality in

⁵⁹ *Supra*, note 10.

⁶⁰ *Supra*, note 6, at paras. 67-68. See also para. 76: "The principle of state neutrality discussed above means that the state must even refrain from implementing measures that could favour one religion over another or that might simply have the effect of imposing one particular religion."

⁶¹ *Id.*, at para. 67.

⁶² *Id.*

⁶³ *Id.*, at para. 71. See also para. 68: "As a general rule, the state refrains from acting in matters of religion."

that the municipality would be manipulating its regulatory standards in favour of a particular religion. Such support for a religious group could jeopardize the neutrality the municipality must adopt toward all such groups.⁶⁴

Justice LeBel's comments appear to be taking the conception of religious neutrality in a direction more consonant with American constitutional traditions. Canadian jurisprudence has not insisted on a "wall of separation" between church and state, nor on a principle of state non-involvement in matters religious. To the contrary, our jurisprudence places a positive value on the protection and promotion of religious pluralism. As discussed above, the preamble to the Charter, by affirming that Canada "is founded upon principles that recognize the supremacy of God" — when read in conjunction with the Charter's commitments to religious freedom, religious equality and multiculturalism — suggests that the Charter should be interpreted in a manner that permits the state to foster a religiously-positive pluralism. The state may nourish religious expression and foster the vitality of religious communities, so long as it does so in an even-handed manner. Freedom of religion should not be interpreted as imposing a duty on the state to refrain from even-handed religious support.

From this perspective, while LeBel J. was right to insist that the Municipality was under no obligation to assist the Congregation in finding better lots than the ones already available for sale, he was on less solid ground in suggesting that the Municipality could not choose to offer such assistance. So long as the Municipality could offer such assistance on an even-handed basis to any denomination seeking to construct a place of worship, no duty of religious neutrality would be violated.

Justice LeBel went on to consider, in *obiter dicta*, whether freedom of religion would be violated if the Congregation had demonstrated an absence of suitable land available in the area zoned for places of worship. He found that a violation would have occurred. "The construction of a place of worship," he noted, "is an integral part of the freedom of religion protected by s. 2(a) of the *Charter*."⁶⁵ Contrary to the conclusions of the majority of the Quebec Court of Appeal, the unavailability of a location where a place of worship could be constructed would not

⁶⁴ *Id.*, at para. 71.

⁶⁵ *Id.*, at para. 73.

be the sole responsibility of private landowners. The Municipality would bear responsibility as well for its refusal to adapt the zoning by-law to evolving community needs. Thus, wrote LeBel J., the hypothetical situation where no property is available

... involves one such exceptional situation in which a posture of restraint on the municipality's part would interfere with the appellants' freedom of religion. It would be utterly impossible for the appellants to establish their place of worship within the boundaries of the municipality if no land were available in the only zone where this type of use is authorized. As it would then be impossible to practise their religion, this would constitute direct interference with their freedom of religion. This is a clear example of a case in which freedom of religion can have no real meaning unless the public authorities take positive action. Since such positive action would be required, it would constitute a reasonable limit on the principle of state neutrality.⁶⁶

Justice LeBel's conclusion that, in these circumstances, the Municipality would be under a positive constitutional obligation to amend its zoning by-laws is compelling. However, his suggestion that the result would be in conflict with ("a reasonable limit on") the principle of state neutrality is puzzling. In a passage quoted by LeBel J., Professor Woehrling takes the same view:

... les deux principes constitutifs de la liberté de religion — libre exercice et neutralité de l'État — doivent être considérés comme mutuellement limitatifs, puisque le fait de donner une amplitude maximale à l'un entraînerait fatalement la négation de l'autre. L'obligation de neutralité de l'État en matière religieuse doit être limitée par l'obligation d'accommodement, laquelle justifie certaines formes d'assistance étatique aux religions.⁶⁷

The potential conflict posited by LeBel J. and Professor Woehrling arises only if one conceives of religious neutrality as requiring a strict separation between church and state. Yet, as discussed above, the Canadian constitutional position differs from the American in two crucial respects. First, Canadian jurisprudence imposes an obligation on governments to adjust facially-neutral laws and policies to remove unnecessary

⁶⁶ *Id.*, at para. 79.

⁶⁷ Woehrling, *supra*, note 10, at para. 113.

burdens on religious freedom. Second, Canadian jurisprudence conceives of neutrality as permitting even-handed state promotion of religion. The state's duty of neutrality between religions, in Canadian law, does not require state neutrality about religion. It permits the state to promote, in an even-handed manner, a religiously-positive pluralism.

In contrast to American constitutional law, then, no conflict arises in Canadian constitutional law between state neutrality and positive duties of accommodation. Rather, in order to remove burdens on religious freedom resulting from state policies, and to give effect to the principle of state neutrality between religions, positive state action is required. As Dickson C.J. put it in *Big M*, “[t]he equality necessary to support religious freedom does not require identical treatment of all religions. In fact the interests of true equality may well require differentiation in treatment.”⁶⁸

(b) *Separating “Christendom” and State: The Same-Sex Marriage Reference*

If zoning laws seem an unlikely context in which issues related to state duties of religious neutrality might arise, the same cannot be said of marriage law, which for centuries has been the site of struggles over the boundaries of religious and state authority. The *Same-Sex Marriage Reference*⁶⁹ raised the issue of whether freedom of religion hinders the ability of Parliament to redefine civil marriage to include same-sex couples.

References to the Supreme Court ought to be initiated by the federal government where advice is needed to clarify uncertain legal issues. In practice, however, references are often used for political purposes. The *Same-Sex Marriage Reference* was a classic example of a politically motivated use of the reference procedure. The government presented to the Court a *Proposed Act* that would define civil marriage as the union of two persons to the exclusion of all others, thus confirming the legality of same-sex marriage across the country. At the time the reference was initiated, court rulings in British Columbia, Ontario and Quebec had left little doubt that the federal government could pass such legislation and

⁶⁸ *Supra*, note 10, at 347, at para. 124.

⁶⁹ *Supra*, note 5.

that, indeed, such a change in the law was required to give effect to the equality rights of same-sex couples.⁷⁰ The federal government's decision to refer the *Proposed Act* to the Supreme Court appeared to be motivated by a desire to buy further time to enable the public to get used to the idea of same-sex marriage and to enlist the Supreme Court's moral authority in supporting the legislation.

The public debate about same-sex marriage has been characterized by confusion regarding the respective roles of church and state. This is perhaps not surprising since the legal definition of marriage has long been aligned with dominant religious understandings, and since most marriages in Canada are performed in a religious context. No doubt the federal government hoped that the Supreme Court's opinion in the reference would help educate the public on the differences between religious and civil marriage and appease concerns that legalizing same-sex marriage threatened religious freedom.

From the point of view of civic education on the respective roles of church and state, the opinion issued by the Court in the *Same-Sex Marriage Reference* both succeeds and disappoints. The Court's answers were clear, yet terse. The Court seemed to adopt a minimalist approach: say as little as possible and send the issues back to the politicians where they belong. This was in sharp contrast to the Court's approach in another recent reference, the *Secession Reference*,⁷¹ which also raised questions on which there was little legal doubt yet a great deal of political confusion. In the *Secession Reference*, the Court crafted a lengthy opinion that reads like a civics lesson, situating its answers in a careful historical review of fundamental constitutional principles. The Court clearly saw itself performing an important role in statecraft. Not so in the *Same-Sex Marriage Reference*. The Court's opinion is uncluttered by historical embellishments, normative discursions or detailed analysis of any kind.

Nevertheless, the Court did make clear that the *Proposed Act* was within the constitutional competence of Parliament, and that it would be consistent with the *Canadian Charter of Rights and Freedoms*. In

⁷⁰ *EGALE Canada Inc. v. Canada (Attorney General)*, [2003] B.C.J. No. 994, 225 D.L.R. (4th) 472 (C.A.); *Halpern v. Canada (Attorney General)*, [2003] O.J. No. 2268, 65 O.R. (3d) 161 (C.A.); and *Hendricks v. Québec (Procureur général)*, [2002] J.Q. no 3816, [2002] R.J.Q. 2506 (Sup. Ct.). The latter decision was later affirmed by the Quebec Court of Appeal: *Hendricks v. Canada (Attorney General)*, [2004] J.Q. no 2593, 238 D.L.R. (4th) 577 (C.A.).

⁷¹ *Supra*, note 29.

particular, the Court decisively rejected arguments that the *Proposed Act* would violate freedom of religion.

The common law, according to the leading 1866 English ruling in *Hyde v. Hyde*, defines marriage, “as understood in Christendom,” “as the voluntary union for life of one man and one woman to the exclusion of all others.”⁷² After quoting this definition, the Court remarked pointedly:

The reference to “Christendom” is telling. *Hyde* spoke to a society of shared social values where marriage and religion were thought to be inseparable. This is no longer the case. Canada is a pluralistic society. Marriage, from the perspective of the state, is a civil institution.⁷³

If the common law definition flows from a Christian conception of marriage, the definition of marriage in the *Proposed Act*, the Court pointed out, has a different kind of source. “Far from violating the *Charter*,” the Court wrote, the *Proposed Act* “flows from it.”⁷⁴ The historical shift from religious to secular constitutional norms as a source of political authority could not be more poignantly demonstrated.

State obligations of religious neutrality, while not explicitly discussed by the Court, cast doubt on the constitutional validity of the common law definition of marriage, rather than on the definition in the *Proposed Act*. Religious neutrality does not mean that the state must avoid taking sides on matters of religious disagreement. Neutrality in this sense is not possible unless the state refrains from regulating marriage, divorce and a host of other matters. Rather, religious neutrality, as understood in *Charter* jurisprudence, requires the state to not take a position for the purpose of favouring one religious view over another and to avoid adopting laws or policies that have the effect of burdening religious freedom. Since the common law definition was explicitly fashioned to implement Christian views, it is the common law definition that is problematic from the point of view of state duties of religious neutrality. Since the definition in the *Proposed Act* was designed to achieve *Charter* compliance, it is not problematic from the point of view of state

⁷² (1866), L.R. 1 P. & D. 130, at 133.

⁷³ *Supra*, note 5, at para. 22.

⁷⁴ *Id.*, at para. 43.

neutrality unless it would have the effect of interfering with religious freedom.

The Court went on to summarily dispense with the arguments that the *Proposed Act* would have the effect of violating religious freedom. First, the Court considered the argument that the *Proposed Act* would impose a dominant social ethos that would limit the freedom to hold religious beliefs to the contrary. To this the Court responded with a single proposition: “the mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another.”⁷⁵ This was not a satisfying response. Rights can conflict. More to the point here is that the *Proposed Act* does not interfere with the freedom to hold contrary beliefs. Freedom of religion does not entail a right to have legal norms aligned with one’s religious beliefs. The argument misconstrues religious freedom with religious imposition.

Second, the Court rejected the argument that the passage of the *Proposed Act* would violate the Charter because it would lead to a collision between the rights of same-sex couples and the religious freedom of those opposed to same-sex marriage. The Court responded by acknowledging the possibility of such collisions occurring in the future, and by saying, in essence, that the Court would balance competing rights, as it has in other cases.⁷⁶

Finally, the Court stated that section 2(a) would protect religious officials in the unlikely event that the state at some future date might seek to compel them to perform same-sex marriages contrary to their religious beliefs. Freedom of religion protects religious practice, and “[t]he performance of religious rites is a fundamental aspect of religious practice.”⁷⁷ State interference with religious rites would constitute a severe violation of religious freedom. But the Court went beyond this obvious conclusion. It also stated that section 2(a) would protect religious officials from being compelled by the state to perform *civil* same-sex marriages

⁷⁵ *Id.*, at para. 46.

⁷⁶ *Id.*, at paras. 50-54.

⁷⁷ *Id.* at para. 57. It might be helpful for the Court’s obvious conclusion on this point to be written into legislation for even greater certainty, as the Ontario legislature recently did with the passage of *An Act to amend various statutes in respect of spousal relationships*, S.O. 2005, c. 5, s. 32(11) and s. 39(3) (adding s. 18.1 to the *Human Rights Code*, R.S.O. 1990, c. H. 19 and s. 20(6) to the *Marriage Act*, R.S.O. 1990, c. M.3 making clear that religious officials are not required to solemnize or assist in the solemnization of a marriage that runs counter to their religious beliefs).

that are contrary to their religious beliefs.⁷⁸ The Court offered no reasoning in support of this more controversial conclusion.

A civil marriage is not a religious rite. If a religious official is licensed to perform civil marriages, he or she is delivering a public service in a secular context on behalf of the state. He or she is acting as a public official, not a religious official, and thus is bound to comply with Charter equality rights. Same-sex couples have no right of access to a marriage ceremony in a religious context, but they do have a right of equal access to all public services, including civil marriage. The appropriate balance between a public official's religious or conscientious objection to performing civil same-sex marriages and a same-sex couple's equal right to a civil marriage ought not to tilt automatically in one direction or the other.

In the wake of court rulings legalizing civil same-sex marriage, some provincial governments have reportedly directed their marriage commissioners to be prepared to perform civil same-sex marriages or resign. If governments do not provide an exemption from performing same-sex marriages to religious objectors, such a directive would constitute religious discrimination in employment contrary to the Charter and applicable provincial human rights legislation. Human rights jurisprudence supports the rights of employees, whether in the public or the private sector, whether or not they are religious officials, to object to the performance of job duties on religious grounds, and employers have an obligation to accommodate them if they can do so without undue hardship. Thus, for example, a tribunal has held that a public sector employee who objected to abortion on religious grounds could not be compelled to process a claim for abortion-related benefits, since the government failed to demonstrate efforts to accommodate her beliefs up to the point of undue hardship.⁷⁹

Thus, whether a public official is entitled to a religious or conscientious objection from being compelled to perform civil same-sex marriages depends on whether the official's beliefs could be accommodated without undue hardship — in particular, without compromising a same-sex

⁷⁸ *Id.*, at para. 60.

⁷⁹ *Moore v. British Columbia (Ministry of Social Services)*, [1992] B.C.C.H.R.D. No. 15. See also *Jones v. Eisler*, [2001] B.C.H.R.T.D. No. 1 (employee complainant objected to working on Christmas display at drug store; employer failed to demonstrate that it had attempted accommodation to the point of undue hardship).

couple's equal access to civil marriage. Most of the time, governments should have little difficulty respecting both religious freedom and equal access to civil marriage, since other public officials will be available and willing to marry same-sex couples. If this is not the case, however, it may be a reasonable limit on a public official's religious freedom to require him or her to perform a civil same-sex marriage ceremony. In the absence of a factual context, it is not possible to resolve the collision of rights that may arise when a public official licensed to perform marriages refuses to perform same-sex marriages on religious grounds.

(c) *Defining Conscientious and Religious Belief: Amselem*

Since the state has a duty to adjust laws or policies to eliminate state-imposed burdens on the exercise of religious freedoms, including practices grounded in religious beliefs, a series of questions with crucial legal significance arise about the nature of religious belief. How do we go about determining what practices qualify as grounded in religious beliefs? What is a religion? Who determines the scope of religious belief? These questions have bedevilled religious studies and legal theory for some time. Many scholars acknowledge that it is impossible to precisely define religion.⁸⁰

As if the question of defining religion was not hard enough, section 2(a) of the Charter protects "freedom of *conscience and religion*." Discussions of section 2(a) commonly omit reference to freedom of conscience, using "freedom of religion" as a shorthand way of describing what are in fact two closely related yet distinct fundamental freedoms. This tendency should not lead us to lose sight of the importance of freedom of conscience, or erase it from section 2(a), or collapse it into freedom of religion. The reference to conscience must add something to section 2(a); it must lead to constitutional protection of some non-religious belief systems.

An example of the recognition of the independent significance of freedom of conscience in protecting practices grounded in non-religious belief systems is the case of *Maurice v. Canada (Attorney General)*.⁸¹

⁸⁰ See, e.g., Winnifred Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005); Kent Greenawalt, "Religion as a Concept in Constitutional Law" (1984) 72 Calif. L. Rev. 753.

⁸¹ [2002] F.C.J. No. 72, 210 D.L.R. (4th) 186 (T.D.).

The claimant, a federal inmate, had received a vegetarian diet on religious grounds until he renounced his Hare Krishna faith. Thereafter, Correctional Services Canada (“CSC”) refused to provide him with a vegetarian diet even though he insisted on it as a matter of moral conscience. Justice Campbell found that his freedom of conscience had been violated:

... while the CSC has recognized its legal duty to facilitate the religious freedoms outlined in the *Charter*, freedom of conscience has been effectively ignored. Section 2(a) of the *Charter* affords the fundamental freedom of both religion and conscience, yet by the CSC’s policy, inmates with conscientiously held beliefs may be denied expression of their “conscience.” In my opinion the CSC’s approach is inconsistent. The CSC cannot incorporate s. 2(a) of the *Charter* in a piecemeal manner; both freedoms are to be recognized.⁸²

In other words, even if a practice is grounded in a belief that does not qualify as religious, it may still be protected by section 2(a) if the belief is a conscientious one. Justice Campbell in *Maurice* was satisfied that vegetarianism, as a dietary choice founded on the belief that the consumption of animals is morally wrong, is a belief system that qualified as conscientious in that case.⁸³

When do beliefs become matters of conscience for constitutional purposes? Not all beliefs or opinions can qualify as matters of conscience; otherwise, freedom of conscience would become the freedom to disregard all laws with which we disagree. As a Scottish court stated when a fox-hunter challenged a law prohibiting hunting animals with dogs, freedom of conscience cannot “give individuals a right to perform any acts in pursuance of whatever beliefs they may hold.”⁸⁴ Yet the spectre of anarchy should not be invoked to deny protection entirely to practices grounded in non-religious conscience. Freedom of conscience, for the purposes of section 2(a), ought to embrace comprehensive non-religious belief systems that have the kinds of significance in the lives of

⁸² *Id.*, at para. 9.

⁸³ *Id.*, at para. 10.

⁸⁴ *Whaley v. Lord Advocate*, [2003] Scot. J. No. 209, at para. 74 (Ct. Sess.).

believers analogous to the significance of religion in the lives of the devout.⁸⁵

Clearly, courts interpreting section 2(a) face significant challenges in defining the scope and nature of religious and non-religious conscientious belief systems. Until last year, the Supreme Court had managed to avoid the issue in its Charter rulings. In *Syndicat Northcrest v. Amselem*,⁸⁶ members of the Court engaged in a fascinating debate about the nature of religious belief. The issue was whether the religious freedom of the appellants, Orthodox Jewish residents of a co-operatively owned building, gave them a legal right to build succahs, or temporary shelters, on their balconies during the Jewish holiday of Succot. Construction on the balconies was prohibited by the terms of co-ownership. The evidence presented by two rabbis at trial did not establish that Jewish religious doctrine required each resident to build a personal succah. The trial judge, and a majority of the Quebec Court of Appeal, concluded that the claimants' freedom of religion had not been violated because they had failed to establish that the practice at issue was required by official religious teachings.

On appeal, Iacobucci J., writing for a 5-4 majority,⁸⁷ held that the appellants' religious freedom did entitle them to build succahs on their balconies, that they had not waived their rights, and that no sufficiently compelling competing interests existed that could justify limiting their rights. Because the dispute involved private parties, it fell to be resolved according to the requirements imposed by the guarantee of freedom of religion in the Quebec human rights legislation, the Quebec *Charter of Human Rights and Freedoms*.⁸⁸ The Canadian Charter did not apply. Nevertheless, Iacobucci J. stated that his analysis of the scope

⁸⁵ The reference to conscience in s. 2(a) encourages Canadian courts to adopt a definition of the term as broad as the interpretation given to the term "religion" by the U.S. Supreme Court in the conscientious objector cases of *United States v. Seeger*, 380 U.S. 163 (1965) (interpreting a statutory exemption from military service based on religious belief as including a purely ethical creed "which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption") and *Welsh v. United States*, 398 U.S. 333 (1970) (religious exemption can be claimed by persons with deeply held moral or ethical beliefs who would have "no rest or peace if they allowed themselves to become a part of an instrument of war.").

⁸⁶ *Supra*, note 4.

⁸⁷ McLachlin C.J.C., Major, Arbour and Fish JJ. concurring.

⁸⁸ R.S.Q., c. C-12.

of religious freedom was equally applicable to the Quebec and Canadian Charters.⁸⁹

Justice Bastarache dissented,⁹⁰ holding that religious freedom was not violated since it was not a requirement of the Jewish faith that the appellants build their own succahs. Even if the appellants were required by a precept of their religious faith to build succahs, Bastarache J. would have found the infringement of their religious freedom to be justified by the competing rights of other co-owners. Justice Binnie wrote a separate dissent finding that the appellants' freedom of religion was reasonably limited on the specific facts of the case.

The majority and dissenting judgments are remarkably different in their spirit and in their approach to defining the scope of religious freedom. The majority took an expansive view, emphasizing the public value of respect for and tolerance of the rights and practices of religious minorities. The dissenting judges took a much narrower view, portraying the appellants as inflexibly insisting on questionable religious practices to the detriment of the security and comfort of their co-residents.

Justice Iacobucci began his discussion of religious freedom by offering the Court's first attempt to define the concept of religion:

Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. 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 fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.⁹¹

In his view, a claimant need not show that an asserted religious belief is "objectively recognized as valid by other members of the religion."⁹² While a claimant may more easily establish the religious nature of a belief or practice if there is evidence that it corresponds with official religious dogma, such evidence is not necessary.⁹³ Nor should freedom of

⁸⁹ *Supra*, note 4, at para. 37.

⁹⁰ Justices LeBel and Deschamps concurring.

⁹¹ *Supra*, note 4, at para. 39.

⁹² *Id.*, at para. 43.

⁹³ *Id.*, at para. 54.

religion be confined to religious obligations; the Charter also protects “voluntary expressions of faith.”⁹⁴ In sum, in the majority’s view,

... freedom of religion consists 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.⁹⁵

Inquiries into the sincerity of an individual’s asserted religious beliefs should be as limited as possible:

... the court’s role in assessing sincerity is intended only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice. Otherwise, nothing short of a religious inquisition would be required to decipher the innermost beliefs of human beings.⁹⁶

Justice Iacobucci offered two reasons in support of this broad conception of religious freedom. First, it was consistent with the emphasis on “personal choice of religious beliefs” in the jurisprudence.⁹⁷ Second, the courts should not restrict religious beliefs to officially supported dogma because they would then be dragged into adjudicating religious doctrine, a domain forbidden by the requirements of state neutrality:

... the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, “obligation,” precept, “commandment,” custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.⁹⁸

⁹⁴ *Id.*, at para. 47.

⁹⁵ *Id.*, at para. 46.

⁹⁶ *Id.*, at para. 52.

⁹⁷ *Id.*, at para. 43.

⁹⁸ *Id.*, at para. 50.

While it is certainly an advantage of this approach that it limits the need to entangle the courts in disputes about religious doctrine, it is doubtful that the problem can be entirely avoided. Without any demonstrated religious connection apart from the claimant's asserted sincere belief, is it possible to determine when personal opinions become "religious"? Do religious beliefs and practices not inevitably involve some connection with a religious history and community?⁹⁹ Even Iacobucci J.'s definition requires "a nexus with religion," an element he asserted but did not discuss in this case, presumably because, as Binnie J. noted, the appellants' claim so clearly related to their understanding of Jewish requirements during Succot.¹⁰⁰ In less clear cases, establishing "a nexus with religion" may inevitably involve the courts in at least some general assessment of the presence or absence of objectively verifiable religious doctrine.

In Bastarache J.'s dissenting opinion, the majority's approach did not adequately distinguish between "genuine religious beliefs and personal choices or practices that are unrelated to freedom of conscience."¹⁰¹ To take adequate account of the fact that religious freedom has "genuine social significance and involves a relationship with others,"¹⁰² religious beliefs must be connected to religious precepts, a body of objectively identifiable data.

While one can readily agree with Bastarache J. on the importance of recognizing the collective aspects of religious observance, it is not clear why this requires the exclusion of matters of purely individual conscience.¹⁰³ Justice Bastarache's opinion uses the language of religion and conscience interchangeably. This, coupled with his insistence on maintaining a clear boundary between the religious and the secular, leads one to wonder whether he would accord any independent significance to section 2(a)'s protection of freedom of conscience.

⁹⁹ This point was emphasized by Bastarache J. in dissent (*id.*, at para. 137), citing Timothy Macklem, "Faith as a Secular Value" (2000) 45 McGill L.J. 1 at 25.

¹⁰⁰ *Id.*, at para. 189.

¹⁰¹ *Id.*, at para. 135. Justice Bastarache's opinion treats the concepts of religion and conscience as interchangeable. This, coupled with his insistence on maintaining a clear boundary between the religious and the secular, leads one to wonder whether he would accord any independent significance to s. 2(a)'s protection of freedom of conscience.

¹⁰² *Id.*, at para. 137.

¹⁰³ See Woehrling, *supra*, note 10, at para. 132.

The second way in which Bastarache J.'s view differed from the majority is that he held that a claimant must demonstrate a sincere belief that the practice dependent on the religious precept is mandatory. In his view, religious practices that are voluntary in nature are not protected.¹⁰⁴

His insistence on limiting protection to objectively verifiable religious precepts sincerely thought to be mandatory led Bastarache J. to a different conclusion than the majority. Justice Iacobucci found that the appellants' freedom of religion had been violated because they held sincere beliefs that constructing and dwelling in their own succahs had religious significance to them. Justice Bastarache, on the other hand, was not persuaded that the appellants sincerely believed, based on an objectively established precept of their religion, that they were under an obligation to erect their own succahs.¹⁰⁵ In his dissenting view, their sincere religious preference was not a mandatory religious practice and therefore their religious freedom had not been violated.

III. CONCLUSION

The three 2004 Supreme Court rulings canvassed above made significant contributions to our understanding of the nature of religious freedom and the state's duty of religious neutrality.

While the majority in *Lafontaine* avoided the religious freedom issue, LeBel J.'s dissent introduced the language of religious neutrality into the Court's jurisprudence and his thoughtful discussion of its implications ought to contribute to future debates. Moreover, his opinion affirmed the existence of positive state duties to accommodate religious worship. On the other hand, some of his comments relied on a questionable understanding of religious neutrality that might deter governments from undertaking steps to facilitate the exercise of religious freedoms in the future. The notion that governments are entitled, indeed should be encouraged, to engage in even-handed support of religion, is not yet strongly rooted in the jurisprudence.

The Court's opinion in the *Same-Sex Marriage Reference* was commendable for so clearly stating that religious freedom is in no way threatened by the federal government's *Proposed Act* (subsequently introduced in Parliament in slightly altered form as Bill C-38). The

¹⁰⁴ *Supra*, note 4, at paras. 141, 144.

¹⁰⁵ *Id.*, at para. 162.

move from a definition of civil marriage rooted in Christendom to one aimed at fulfilling the secular ideals of the Charter is consistent with the state's duty of religious neutrality, and the Court's opinion played a valuable role in removing any legal objections to its attainment.

Justice Iacobucci's opinion for the majority in *Amselem* is the Court's most ambitious contribution to the jurisprudence on freedom of religion since the *Big M* ruling. The majority broadly defined freedom of religion as embracing sincerely held subjective beliefs having a nexus with religion, regardless of whether those beliefs are supported by objective evidence of corresponding religious dogma. His emphasis on personal choice may pave the way for the development of an equally broad conception of freedom of conscience in the future. His opinion contains a strong endorsement of the idea that the courts should avoid as much as possible becoming arbiters of religious doctrine, another positive development from the point of view of state religious neutrality.

Justice Iacobucci's ruling in *Amselem* may become a leading case on Canadian constitutional understandings of religious freedom. However, the Court in *Amselem* was sharply divided. Justice Iacobucci's broad conception of when beliefs and practices qualify as religious was strongly resisted in Bastarache J.'s dissent. In his separate dissent, Binnie J. noted that the majority's ruling results in a "right of immense potential scope" that, in his view, too easily prevailed over other competing rights and interests in the private context in which it arose.¹⁰⁶ A future majority of the Court may question Iacobucci J.'s contention that his broad definition of religious freedom should be equally applicable to the constitutional guarantee in the Charter, where it is subject only to reasonable limits that can be demonstrably justified by governments pursuant to section 1.

The Court was divided 5-4 in *Amselem* and *Lafontaine*, and the judges may have achieved unanimity in the *Same-Sex Marriage Reference* by deferring a number of difficult issues for future elucidation. No doubt in the years ahead we will continue to witness divisions on the appropriate scope of religious freedoms and state duties of religious neutrality. With two members of the *Amselem* majority (Arbour and Iacobucci JJ.) no longer on the Court, the Court may not adopt as generous an approach to religious freedom in forthcoming rulings as it did in 2004.

¹⁰⁶ *Id.*, at para. 191.

