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Religious Freedom in Canada: A Crucible for Constitutionalism

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Modelli atlantici di libertà religiosa

Religious Freedom in Canada

A Crucible for Constitutionalism

by Benjamin L. Berger[*]

This article examines three axes around which contemporary Canadian debates on freedom of religion are turning: the status and protection of group and collective religious interests; the emergence – and instability – of state neutrality as the governing ideal in the management of religious difference; and the treatment of Indigenous religion. Each is discussed as a key thematic and doctrinal development emerging from recent activity in the freedom of religion jurisprudence in Canada. Each is also an instance, the article suggests, of religion doing its particularly effective work of exposing the fundamental tensions and dynamics in Canadian constitutionalism more generally.

Keywords: religious freedom, Canada, collective, neutrality, Indigenous peoples

1. *Introduction*

To reflect on the status, treatment, and role of religion has always been an avenue into understanding the deeper tensions, ideologies, and politics at work in the Canadian state, and the history, logic, and politics of its constitutional order. Religion was imbricated in the origins of the country in a way that means that Canadian constitutionalism has never embraced the strict separationist or non-establishment tradition of its neighbor to the south. Canada's earliest constitutional documents, including the *Treaty of Paris* (France, Britain, and Spain, 10 February 1763) and the *Quebec Act, 1774* ((UK), 14 Geo III, c 83) acknowledged the political and practical realities of British rule over a substantial French Catholic

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population with specific protections and rights extended to Roman Catholics and the Roman Catholic Church in Canada (Berger 2015; Epp Buckingham 2014). These protections would find expression in the form of denominational education rights in Canada's first written constitution, the *British North America Act, 1867* (UK, 30 & 31 Vict, c 3), rights that persist to this day. The formative relationship between French and English communities was refracted through their constitutive religious identities and interests, and the legacy of those origins is a political and legal space in Canada that resists easy claims about an «Atlantic Divide» (Whitman 2008) in approaches to the separation of church and state.

There have, of course, been profound constitutional and societal changes since these early days in the history of the country. Over this period of Canadian history there has been a diminishment in the overt role of religion in the structures of state authority. Nowhere is this more evident than in Quebec, where the Quiet Revolution of the 1960s has led to a fundamental repositioning of the Catholic Church in the province's politics and culture. Today, Canadian political and legal space is also famously characterized by profound religious and cultural diversity that has been met with a stance of official multiculturalism that counsels toleration and accommodation as the appropriate posture towards religious difference (Jedwab 2003; Kymlicka 2003). And with the introduction of the *Charter of Rights and Freedoms* in 1982, the frame of constitutional regard for individual and community rights and interests in Canada was radically expanded. Religion and religious freedom would now be but one constitutionally recognized interest amongst many.

Yet a central role for religion in Canadian constitutionalism persists. After early years under the *Charter* in which the jurisprudence under section 2(a) – the right to freedom of conscience and religion – was formative but relatively sparse, the last 10-15 years have seen an explosion of freedom of religion cases. Canadian religious freedom jurisprudence has shifted and evolved in response, with the Supreme Court of Canada seeking to navigate many of the core problematics that bedevil the adjudication of religious freedom wherever it takes place. One purpose of this brief article is to canvass some of the key developments and debates that have emerged from this frenetic activity in freedom of religion in Canada.

But there is another story told here: what we see when we look at these developments is that in Canada, as elsewhere in the world, freedom of religion is still serving as a singularly valuable site for the disclosure of the deeper challenges, politics, and paradoxes of constitutionalism at large. Freedom of religion turns out to be a crucible for constitutionalism more generally. The themes that are discussed in the following sections are, thus, not only key axes in the doctrinal and jurisprudential debate around freedom of religion in Canada; they are also instances of religion doing its peculiarly effective work of drawing our attention to the tensions

that affect and afflict contemporary Canadian constitutional law more generally (for more extensive treatment of this idea see Berger 2017).

2. *Key Developments in Religious Freedom in Canada*

2.1. *Individualism and the Re-emergence of the Collective*

One such fundamental tension is the dynamic between the individual and the group. The tendency of liberal constitutionalism is to «pixelate» human experience, focusing on the individual as the primary unit of constitutional regard and analysis. This tendency has shaped Canadian freedom of religion jurisprudence and the effects on the area have been the subject of substantial scholarly and jurisprudential critique (Kislowicz 2013; Muñiz-Fraticelli 2014; Berger 2015; Newman 2016). But in recent years the Supreme Court has made tentative moves to open more space for the collective and group interests involved in religious freedom; we have witnessed something of a re-emergence of the collective.

To be sure, notes of regard for the collective dimensions of religious life have long been present in Canadian thinking about freedom of religion. Pre-*Charter* jurisprudence referred to religious liberty as «at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order» (*Saumur v City of Quebec*, [1953] 2 SCR 299 at 329), and, as discussed above, there are group protections for religion in the form of certain education rights for denominational schooling. But in the post-*Charter* section 2(a) jurisprudence, the overwhelming tendency has been to prioritize the individual and his or her personal religious freedom, rather than – and sometimes at the expense of – understanding religion as inherently tied to communities and collectivities.

The path was laid out in the touchstone post-*Charter* case on section 2(a), *R v Big M Drug Mart*, [1985] 1 SCR 295, in which Justice Dickson explained that «[w]ith the *Charter*, it [had] become the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be» (351). But the individualist rendering of religious freedom was doctrinally solidified in *Syndicat Northcrest v Amselem*, 2004 SCC 47, in which the Court adopted its subjective sincerity test for section 2(a). Focusing on religion as being, in essence, «about freely and deeply held personal convictions or beliefs» (para 39), the Court held that to gain access to the protection of section 2(a), a claimant need only «demonstrate that he or she sincerely believes in a practice or belief that has a nexus with religion» (para 65). The practice or belief need not accord with the dogma or positions of religious officials or communities;

if this subjective sincerity exists, section 2(a) protects against non-trivial interferences with those practices and beliefs.

A series of cases bear the imprint of this atomism, but the high-water mark came with the Court's decision in *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, in which a small Hutterite community objected that the requirement for a photograph on their drivers' licenses unjustifiably offended their right to religious freedom. Though she accepted that religion has a «collective aspect», Chief Justice McLachlin explained that the «broader impact of the photo requirement on the Wilson Colony community» did not «transform the essential claim […] into an assertion of a group right» (para 31). Despite a forceful dissent that would have laid substantial weight on the collective dimensions of the claim, in the majority's hands the group religious interests at play in the case became simply «costs» associated with the limitation on the right, to be weighed against the benefits of the universal photo requirement to society at large (Berger 2010; Moon 2010; Weinrib 2011).

The solicitousness for the individual's beliefs and choices that we have seen in the Charter protection of religion is to be expected: liberal constitutionalism sees the individual far more clearly than it does the group, treating the individual as the primary unit of constitutional analysis (Berger 2015, 66-78; Bakan 1997). But an insistent individualism in the legal understanding of religion effaces significant dimensions of religion as experienced and lived outside the courtroom. Religion troubles the law's individualism; phenomenologically, much of what gets categorized as religion has an irrepressibly collective dimension and is anchored in the lives of communities. Even when framed by a priority on the individual, religion cannot really be analyzed or understood without regard for the communities in which it is lived and that sustain it over time.

And so a case would eventually emerge in the section 2(a) jurisprudence in which the Court would seek to find space for constitutional regard for the collective dimensions of religion. The central question in *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, was how the provincially mandated «ethics and religious culture» program applied in the context of a private Catholic high school. The program prescribed a curriculum that exposed students to the beliefs and ethics of different world religions and required that the instruction on these topics be conducted from a «neutral and objective perspective». Loyola objected that requiring a Catholic school to teach about Catholicism and the ethics of other traditions in a «neutral way» impaired religious freedom. In finding that Loyola could not be compelled by the state to teach about Catholicism in particular ways, Justice Abella, writing for the majority, explained that «[r]eligious freedom under the *Charter* must […] account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through

communal institutions and traditions» (para 60). She acknowledged that «these collective aspects of religious freedom – in this case, the collective manifestation and transmission of Catholic beliefs through a private denominational school – [were] a crucial part of Loyola's claim» (para 61).

Loyola is the strongest statement from the Court recognizing the collective and group aspects of religious freedom[1]. And yet there remains substantial uncertainty about what the nature and scope of this recognition and what it will mean for religious freedom claims on the part of groups and institutions (Chan 2017). How truly independent of the *Charter*'s traditional focus on the individual is the protection of these «collective aspects»? Justice Abella's account of the collective aspects of religion is that they are «manifestations» of individual religious belief and she frames the liberty interests involved as those of the «members of the community», not the group itself. The collective dimension is indexed to the individual: she explains the need to give weight to the collective on the grounds that «individuals may sometimes require a legal entity in order to give effect to the constitutionally protected communal aspects of their religious beliefs and practices» (para 33). And how robust is this regard for the collective? Diagnostically, the key test will come when the collective religious interests are at odds with the individual's religious freedom.

We are in an interesting moment in the development of Canadian religious freedom jurisprudence, wrestling with and wondering what it means to give regard to the collective, communal, and institutional aspects of religious freedom. And we watch as other countries explore the implications of the granting of collective and corporate religious rights[2] – a so-called «corporate turn» in religious freedom jurisprudence (Schwartzman, Flanders, and Robinson 2016, xiii). Some have found it useful to think about the individual, private, and choice-based understanding of religion evidenced in religious freedom jurisprudence as a «protestant» approach to the kind of religion that attracts constitutional protection (Berger 2015, 100–101; Sullivan 2005, 7–8). If that is an edifying framing, one wonders whether the renaissance of the group marks a tentative «catholic turn» in religious freedom in Canada.

[1] Indeed, the minority decision in *Loyola* would have gone even further, holding that religious organizations themselves could enjoy religious freedom under section 2(a).

[2] See, e.g., the US experience discussed in *Hosanna-Tabor v EEOC*, 132 S. Ct. 694 (2012); *Burwell v Hobby Lobby Stores, Inc*, 134 S. Ct. 2751 (2014).

2.2. *The Rise – and Instability – of State Neutrality*

Recent years have seen an intriguing shift in the concepts that anchor the Canadian approach to religious freedom: the ascendancy of a governing principle of state neutrality, arguably dethroning notions of toleration (Berger 2014). The seeds of this ideal of state neutrality in Canada were planted in the Court's first discussion of section 2(a) in *Big M*, but the first two decades of freedom of religion jurisprudence tended to focus heavily on notions of toleration as grounding the constitutional posture towards religion. This development in fact tracks a transnational phenomenon in freedom of religion: across varied legal orders, the concept of state neutrality has settled in as the regulative ideal in the constitutional management of religion[3]. But – in Canada, as elsewhere – as the legal emphasis on state neutrality emerges, so too does an increased awareness of its instability and, with this, of the deeper problematics that characterize the interaction of religious difference and the liberal constitutional state.

The case that most clearly and forcefully announced the ascendancy of this principle of state neutrality was *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16. In *Saguenay*, an organization seeking the «complete secularization of the state in Quebec» (para 9) challenged a local practice of opening municipal council meetings with a discernibly Christian prayer. The Court found that the practice breached the state's duty of neutrality in religious matters, which, though not explicitly imposed by the *Charter*, «has become a necessary consequence of enshrining the freedom of conscience and religion» (para 76). Justice Gascon explained that «the state is required to act in a manner that is respectful of every person's freedom of conscience and religion» and that the «corollary is that the state must remain neutral in matters involving this freedom» (para 1). The Court described this duty of state neutrality as requiring «that the state neither favour nor hinder any particular belief, and the same holds true for non-belief […]. It requires that the state abstain from taking any position and thus avoid adhering to a particular belief» (para 72). Because the prayer in question «resulted in a distinction, exclusion and preference based on religion» (para 120), it breached the duty of state neutrality.

The appeal of a duty or principle of state neutrality as the governing ideal for the management of religious difference is clear: «It rhetorically positions law outside the 'us' and 'them' of political conflict; it casts law in the role of disinterested conciliator rather than boundary-setter; and its invocation relieves the legal system of the burden of its own cultural and historical contingency» (Berger 2014, 119). Of course, the duty

[3] See, e.g. *Leyla Sahin v Turkey* ECHR 2005-XI 819, 44 EHRR 5; *Lautsi and Others v Italy* ECHR 2011-III 2412, 54 EHRR 3; *Dahlab v Switzerland* ECHR 2001-V 449.

of state neutrality reflects some important principles and aspirations regarding even-handedness and equality as between individuals and groups irrespective of religious belief (Ryder 2005; Moon 2014, 19-24). Yet the ambition for depoliticization through adherence to this standard of state neutrality – that it will extract law from history and politics in matters of religion – is consistently and necessarily frustrated, collapsing in ways that gesture evocatively to the character of the constitutional project more generally.

Cases about prayer and historical symbols show one way in which this frustration occurs. The political institutions and constitutions of the modern state are thick with the deposits of their religious histories. However, in *Saguenay*, Justice Gascon made clear that «the state's duty of neutrality does not require it to abstain from celebrating and preserving its religious heritage» (para 116). Translating these artefacts of the state's relationship with particular religions into matters of heritage and culture legally insulates them from the demands of state neutrality, but their presence and preservation is a reminder that the liberal state and its constitution are more religiously particular and historically conditioned than the language of «state neutrality» seeks to communicate.

But a clear-eyed reflection on the character of religion itself unsettles and frustrates the ideal of state neutrality in matters of religion in a more foundational way. For all its virtues, the cogency of a duty of state neutrality floats on a naïve confidence in the divisibility of «matters involving» religion and those of a civic nature (Berger and Moon 2016, 6). However, no such neat distinction can be drawn. If one understands religion as a normative and cultural system that produces claims about ethics, has implications for conduct, and advances a vision of a good society, religion will have much to say about matters of broad public policy import. The state's inescapable adoption of positions on such matters will thus involve position-taking on matters of deep religious interest. We have seen this in Canada as it relates to questions of abortion, same-sex marriage, medically-assisted dying, and civic education to name just a few, matters on which the necessity of adopting a constitutional position is experienced by some communities as position-taking on matters of religion. This is not the result of not yet getting the approach to and definition of state neutrality «right». It is a reflection of the reality that state neutrality, understood as abstention on position-taking, is dependent on a legal view of the nature of religion that fails; and in failing, it consigns the legal demand for state neutrality to inconsistency and paradox. Faced with this, the Court has conceded what it must: that «the state always has a legitimate interest in promoting and protecting» values like equality, human rights and democracy (*Loyola*, para 47). But each of these values and controversies is a ground for interpretation, debate, and contestation about which religion might have much to say. Whatever state neutrality

may mean, it does not mean that the state must be neutral about the nature of a good society.

What begins, then, as troubling the ideal of state neutrality as an adequate response to the deeper dynamics involved in the relationship between law and religion becomes a way into something of broader, more general, constitutional import. The conundrums of pursuing state neutrality in matters of religion end up disclosing the particular and normative character of liberal constitutionalism and the state that it constitutes. The protection of freedom of religion becomes an important site of reflection for the larger critical enterprise of challenging the conceit of law's neutrality and autonomy from culture. Religion is not alone in being able to show this truth – from their own distinctive perspective, scholars of Indigenous law and Aboriginal justice have pointed to this fact about the Canadian constitutional project (Borrows 2016, 2010; Asch 2014; Boisselle 2010) – but it is a resource well fitted to exposing ways in which, as Charles Taylor put it years ago, «liberalism is also a fighting creed» (Taylor 1995, 249).

2.3. *Indigenous Peoples, Religion, and Sovereignty*

Perhaps the most intriguing and challenging recent development in the Canadian conversation surrounding religious freedom has been the opening up of the question of how general principles of religious freedom under the *Charter* interact with the particularities surrounding Indigenous rights, Indigenous religion, and the fundamental constitutional problem of unsettled sovereignty in Canada.

The defining issue of the political and legal moment in Canada is that of «reconciliation» between the Canadian state and Indigenous peoples. Although questions of Indigenous rights, treaties, and sovereignty had long been before the Court and were an important dimension of Canadian politics for some time, the conversation around Indigenous justice issues sharpened and intensified significantly following the report of the Truth and Reconciliation Commission of Canada (Truth and Reconciliation Canada 2015). The Commission's work, and the report that it issued, marked an historic reckoning not only with the dark history of the use of residential schools in an effort to extinguish Indigenous culture (Miller 1996), but also with the broader injustices and effects of colonialism in Canada. This history and its ongoing effects are the subject of increasing understanding and study amongst scholars of Indigenous law and politics in Canada (Macklem and Sanderson 2016; Borrows and Coyle 2017), but are rarely analyzed as a meaningful part of the story of religious difference and religious freedom in Canada (see Epp Buckingham 2014; Moon 2014).

And yet religion was central in shaping the foundational relationship between the Canadian state and Indigenous peoples. The early colonial project was one in which religious missionaries played a crucial role, sometimes extending state power and sometimes aligning with Indigenous communities in advocating for the recognition of Aboriginal rights and sovereignty (Foster and Berger 2008). With the expansion westward of the Canadian state and its claims for sovereignty, the Federal government banned Indigenous religious rituals and practices, such as the potlatch, as part of its effort to consolidate political and economic control over Indigenous people and their territories. There is a dialectic here between denials of religion and denials of sovereignty, and thus between denials of religious freedom and aspirations to turn a desire for colonial sovereignty into political and constitutional fact. And one sees these links between the suppression and use of religion and the striving for political sovereignty very clearly, though tragically, in the history of the residential school system in Canada. In a devastating project aimed at cultural extinguishment, the Canadian state worked with the churches in administering this system. Indigenous communities are still, inspirationally, overcoming its ruinous effects, which continue to condition the political and legal relationship between the Canadian state and Indigenous peoples. The story of religion, state, and Indigenous people must be excavated and studied as a central part of the distinctive history – the «emotional inheritances», in Asad's felicitous phrase (Asad 2003, 102) – of law and religion in Canada.

There is a robust constitutional jurisprudence in Canada dealing with Aboriginal and treaty rights that has arisen through section 35 of the *Constitution Act*, 1982, by which Aboriginal and treaty rights are «recognized and affirmed». That jurisprudence has, with a few notable exceptions, been disappointing for Indigenous peoples, largely because of the formidable evidentiary and legal burdens that s 35 has imposed on claimants. Given those burdens, the history that I outlined above, and the close tethering between Indigenous religion and the land, it was perhaps unsurprising that a case would emerge that, instead, involved a claim for the protection of Indigenous rights and land interests through the general guarantee of freedom of religion pursuant to section 2(a) of the *Charter*.

That case was *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54. The Ktunaxa asserted that the government's approval of a large resort development project in a region of British Columbia called the Jumbo Valley or, for the Ktunaxa, Qat'muk, offended their religious freedom. The Ktunaxa believe that the valley is the home of the Grizzly Bear Spirit, a figure of spiritual significance, and that the construction of permanent accommodations would drive the Grizzly Bear Spirit from Qat'muk. Proceeding with the development would, thus, «irrevocably impair their religious beliefs and

practices» (para 6). The Court euphemistically characterizes this as «a novel claim» (para 70). It was, in fact, a claim with radically subversive potential. Given the connection between Indigenous religion and the land (Borrows 2010), and the capacious scope of section 2(a) to that point, this claim had profoundly disruptive potential for the Crown use and control of land and its resources. Wrestling with that potential led the Court to novel – and troubling – doctrinal outcomes.

The Supreme Court of Canada unanimously dismissed the Ktunaxa's claim. Chief Justice McLachlin and Justice Rowe, writing for the majority of the Court, concluded that the Ktunaxa's claim simply fell outside the scope of freedom of religion because they were seeking to protect not their beliefs and practices, but rather the Grizzly Bear Spirit itself. The majority explains that «the *Charter* protects the freedom to worship, but does not protect the spiritual focal point of worship» (para 71). Although infringements of religious freedom can be (and, in the Court's jurisprudence, most commonly are) justified as reasonable limitations under section 1 of the *Charter*, this holding in *Ktunaxa* represented the first clearly articulated *internal scope limitation* for freedom of religion in Canada.

But this particular scope limitation feels uncomfortably specific to Indigenous religion. For other religious traditions with which the Court is accustomed in its freedom of religion jurisprudence it is hard to imagine the government being able to adversely affect the metaphysical referent of their beliefs and practices (ie, God, for Jews and Christians, for example). By contrast, the «spiritual focal point of worship» for the Ktunaxa is vulnerable to state interference: the Grizzly Bear Spirit is tied to the land. Justice Moldaver, in separate reasons, rightly points to this distinguishing feature, explaining that «[f]or Indigenous religions, state action that impacts land can therefore sever the connection to the divine, rendering beliefs and practices devoid of their spiritual significance» (para 127). For the Ktunaxa, Moldaver J explains, the protection of religious practices without regard to the metaphysics that lend those practices their meaning «amounts to protecting empty gestures and hollow rituals, rather than guarding against state conduct that interferes with 'profoundly personal beliefs', the true purpose of s. 2(*a*)'s protection» (para 130). The majority's approach, therefore, «risks foreclosing the protections of s. 2(a) of the *Charter* to substantial elements of Indigenous religious traditions» (para 131). The majority's approach seems to exile important dimensions of Indigenous religion outside the shelter of freedom of religion.

And yet, whereas the distinctive and unruly features of this Indigenous claim under s. 2(a) led the majority to say something novel and troubling about the scope of the right, Justice Moldaver's ultimate position says something equally arresting about the reasonable limitation of religious freedom. Although he found that the impugned state action would render

the Ktunaxa's beliefs «entirely devoid of religious significance» and their prayers, ceremonies, and rituals would «become nothing more than empty words and hollow gestures» (para 133), Justice Moldaver nevertheless justified the government's decision as «reasonable in the circumstances» (para 155). This result would seem no less troubling to the Ktunaxa, given the broad justificatory scope that it grants to the state: actions that could *entirely evacuate* the right to freedom of religion for the Ktunaxa are nevertheless judged reasonable.

What was it about this novel claim for the protection of Indigenous religion that yielded these uncomfortable conclusions from both the majority and minority? Justice Moldaver's reasons suggest an answer, exposing the extent to which questions of sovereignty suffused the analysis of this freedom of religion claim in *Ktunaxa*. To accede to the Ktunaxa's claim would allow them «to veto development over the land» and «would effectively transfer the public's control of the use of over fifty square kilometres of land to the Ktunaxa» (para 150). Justice Moldaver explains: «This placed the Minister in a difficult, if not impossible, position. He determined that if he granted the power of exclusion to the Ktunaxa, this would significantly hamper, if not prevent, him from fulfilling his statutory objectives: to administer Crown land and to dispose of it in the public interest» (para 150).

The pivotal phrase here is «Crown land». Is Qat'muk Crown land to be disposed of in the public interest? That question – the status of the land and the sovereignty claim over it – is the irreducible political core of such disputes between the state and Indigenous peoples. Although this core is somewhat less obvious in the majority's decision, the way those reasons efface the link between land and religion suggests similar concerns and preoccupations. A tantalizing tell comes in the majority's initial description of the facts. The majority explains that the area in dispute «is located in a Canadian valley in the northwestern part of the larger Ktunaxa territory» (para 3). Is it a «Canadian valley» or is it part of «Ktunaxa territory»? The shearing forces within this facially anodyne statement are the forces exerted by the underlying sovereignty claims working themselves out – seeking and resisting reconciliation – beneath and through the debate about freedom of religion. Imaginatively, both decisions begin from an assertion of state sovereignty over the land; they proceed from, are shaped by, and ultimately return to that imaginative foundation.

With this, we may detect some resonance between this developing issue of the treatment of Indigenous religion and the institutional or corporate turn in religious freedom jurisprudence discussed earlier in this paper. There is an intrinsic claim about sovereignty at work in both cases, and freedom of religion seems to offer itself as something of a natural or hospitable vehicle for such claims. As against dominant contemporary

understandings of religious freedom that treat its essence as a matter of liberty and equality, there is another story about religious freedom that is about jurisdictional and political pluralism (Muñiz-Fraticelli 2014; Cohen 2017). Read against the backdrop of this story, the *Ktuanxa* decision is a provocative development in Canadian freedom of religion debates for two reasons: it marks out the issue of Indigenous religion and reconciliation as an important matter to track in the coming years, and it gestures more broadly to the role that religious freedom plays – perhaps genetically – in questioning and testing state sovereignty.

3. *Conclusion*

This article has examined three axes around which contemporary Canadian debates on freedom of religion are turning: the status and protection of group and collective religious interests; the emergence – and instability – of state neutrality as the governing ideal in the management of religious difference; and the treatment of Indigenous religions. There are others, to be sure, but these three represent not only key developments in this recently active field of freedom of religion in Canada, but also vectors of change (with all of the uncertainty and open questions that this involves) as we look ahead in the unfolding of jurisprudential and scholarly debates. But at the same time that each says something important about the evolution of freedom of religion in Canada, each also gestures to underlying currents and tensions in Canadian constitutionalism at large. The question of how to give regard to the collective and associational dimensions of social life within a constitutional logic focused on liberty and autonomy is a structural problem in liberal constitutionalism. The issue of state neutrality and its limits is one that touches on the fundamental question of the legitimacy and authority of constitutions. And studying the treatment of Indigenous religions reminds of the abiding uncertainty and contestation that surrounds sovereignty in Canada. In each instance, freedom of religion is serving as a window into the issues and dynamics that affect and afflict contemporary Canadian constitutional law at large.

What is it about the constitutional protection of freedom of religion that gives it this diagnostic function? The distinctive ability of religious freedom to reveal general trends and patterns in contemporary Canadian constitutionalism is not just a matter of a surge in cases on point or, in any straightforward way, a function of increased religious pluralism. The answer is more structural and intrinsic to the relationship of law and religion.

In its effort to judge claims of freedom of religion, the law must adopt a particular vision of religion and its relationship to the political – an approach to and conception of its subject that will make religion digestible

within the constitutional order (Berger 2015). And yet religion as experienced and lived by individuals and communities will always overflow the constitutional categories and assumptions used to attempt to manage it legally. Religion is never just what law imagines it to be, or wishes it were. In terms offered by Elizabeth Shakman Hurd, «lived religion» will always elude and exceed «governed religion» (2015). In resisting those categories, assumptions, and commitments drawn from the logic of Canadian constitutionalism, it makes them visible. The unruliness of religion within the conceits of liberal constitutionalism generates conceptual and doctrinal friction. And through this friction, religion displays the tensions, paradoxes, and instabilities that bedevil those conceits.

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