
by

Howard Kislowicz

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Freedom of Religion and Canada’s Commitment to Multiculturalism: A Critical Analysis of the Rights-based Approach

Howard Kislowicz
Master of Laws
Faculty of Law
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Abstract

This thesis argues that the current Canadian approach to freedom of religion is inconsistent with Canada’s approach to multiculturalism. It begins by placing Canada’s multiculturalism legislation into the broader intellectual context of the leading political theories on the governance of diverse populations. It then examines the Canadian case law regarding freedom of religion, arguing that the prevailing rights-based approach produces consequences inconsistent with Canada’s legislated commitments to multiculturalism. It posits that the individualism of rights-based analysis, the pressure to frame religion in pre-defined ways, and the tendency of courts to speak in the language of tolerance are all troublesome. Further, it argues that when disputes are framed in terms of rights, meaningful dialogue is less likely and compromises are difficult to achieve. It then proposes an alternative, “difference-based” approach to disputes involving religion, which provides a framework more consistent with Canada’s multicultural ideals.
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Chapter 1
Canadian Multiculturalism and Freedom of Religion

1 Canadian Multiculturalism and Freedom of Religion

1.1 Introduction

Canada’s population is increasingly diverse. Its citizens and residents come from a multitude of backgrounds; they bear different national heritages, speak different languages, assert multiple cultural identities and adhere to many religions.1 In response to these social facts, the Canadian state has chosen to celebrate diversity in its Constitution and in other legislation. The Canadian Charter of Rights and Freedoms states that it “shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”2 What’s more, unlike many other countries with diverse populations, Canada has enacted legislation that specifically sets out a policy aimed at promoting multiculturalism.3

A significant test of Canada’s adherence to these commitments and aspirations is its treatment of religious minorities. In the chapters that follow, I will inquire into whether Canadian legal doctrine in matters of freedom of religion is consistent with its stated policies of

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1 For example, in Toronto, Canada’s largest city, recent census data show 2.3 million people as being born outside Canada, with over 1 million of those immigrants coming from Asia and the Middle East: Statistics Canada, “Immigrant population by place of birth, by census metropolitan area (2006 Census)” online: <http://www40.statcan.gc.ca/l01/cst01/demo35c-eng.htm>; see also Lorne Sossin, “God at Work Religion in the Workplace and the Limits of Pluralism in Canada”(2008), unpublished manuscript on file with author, at 16. Further, 2001 census figures show that, among its a population of 29.6 million, Canada counted nearly 600,000 Muslims, over 300,000 Jews, approximately 300,000 each of Buddhists, Hindus, and Sikhs; about 4.9 million respondents indicated no religious affiliation (Statistics Canada, “Population by religion, by province and territory (2001 Census)” online: <http://www40.statcan.gc.ca/l01/cst01/demo30a-eng.htm?ssi=religion>.


multiculturalism. I will argue that the rights-based approach to freedom of religion, an inheritance of the liberal philosophical tradition, gives cause for concern with respect to the realization of Canada’s multicultural ideals.

Of course, Canada’s diversity is not only religious. The Charter recognizes that Canadians can be grouped with reference to “race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” The Charter also takes prominent notice of Canada’s aboriginal and official linguistic communities. Arguably, each of these groupings represents a level on which Canada is culturally diverse, and other cultural differences may be noted. I do not mean to suggest that religion is a more important form of cultural identification. My focus on freedom of religion is motivated by three considerations.

First, there is a legal reason to look specifically at Canada’s legal treatment of multiculturalism from the perspective of religion. Freedom of religion is given explicit constitutional protection; indeed, it is the first freedom listed in the Charter. As such, a sizable body of case law exists in which the jurisprudential ideas of freedom of religion have been developed. While some scholars have made extended arguments on the basis of a right to culture, and there is some international legal basis for such an argument, there is no explicit

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4 Canadian Charter of Rights and Freedoms, supra note 2, s. 15.

5 Of course, the meaning of the word “culture” is contested, and many alternate definitions have been offered. Bhiku Parekh, for example, writes: “Culture is a historically created system of meaning and significance or, what comes to the same thing, a system of beliefs and practices in terms of which a group of human beings understand, regulate and structure their individual and collective lives. It is a way of both understanding and organizing human life (Bhiku Parekh, Rethinking Multiculturalism: Cultural Diversity and Political Theory (Houndmills: Macmillan Press Ltd., 2000) at 143).


7 Article 27 of the International Covenant on Civil and Political Rights provides: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in
constitutional protection in Canada of the right to culture, or freedom of culture. Freedom of religion is also qualitatively and legally different from the constitutional protections afforded to Canada’s aboriginal peoples and minority official language populations. Aboriginal groups have a unique relationship to both the government of Canada and its territory, and the protection for minority language groups was a key organizing principle in Canadian confederation. Freedom of religion, by contrast, is available to all Canadians.

Second, guarantees of freedom of religion have historically been an important mechanism for mediating inter-communal conflicts. While a detailed historical account of this notion is beyond the scope of this project, it suffices to note that the protection of freedom of religion and conscience was adopted in England as a response to the Wars of Religion, and is guaranteed by documents as old as the US Constitution and the “French law of 1905 on secularism.” Further, in the Canadian context, some measure of religious freedom has been critical since the pre-Confederation era. As Gérard Bouchard and Charles Taylor note, the “Treaty of Paris of 1763 and the Quebec Act of 1774 recognized Catholics’ freedom of religion.” The long history of the protection of freedom of religion distinguishes it from other policies aimed at addressing social diversity.


9 Ibid. at 140.
Third, and connected to the historical protection of freedom of religion, is a conceptual
distinction between matters of religion and other kinds of disputes. Avihay Dorfman has argued
that there is an irreducible core in matters of religion that cannot be explained through rational
discourse or argument. Rather, religious obligations, or religiously-based responses to social
situations, are persuasive to the faithful precisely because they appeal to principles of
transcendence and faith. I do not go as far as Dorfman to claim that religious principles cannot
be explained or put into words, but rather take the view that religiously based arguments exist on
a different plane than other political arguments. Because of religion’s special qualities, questions
of its appropriateness in matters of public discussion persist, and raise related debates over the
class of state institutions. Accordingly, a specific focus on religion is warranted in the
examination of multiculturalism in Canada.

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11 Dorfman, for example, argues that religious perspectives may necessarily be excluded from public debate, with
the protection of freedom of religion serving as a kind of *quid pro quo* for this arrangement (*ibid.*) There is some
empirical support for Dorfman’s claim, as governments continue to be preoccupied with the “secular” nature of
public institutions. For example, in Québec, recent concerns over the secular character of public institutions were
explored in the report of the *Commission de consultation sur les pratiques d’accommodement reliées aux différences
culturelles* (also known as the Bouchard-Taylor Commission, *supra* note 8). Raising similar themes, British
Columbia’s *School Act* provides that “All schools and Provincial schools must be conducted on strictly secular and
non-sectarian principles (*School Act*, R.S.B.C. 1996, c. 412, s. 76(1)).” This provision was at the heart of the
controversy in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, in which a dispute arose over the
inclusion of books featuring same-sex parents in a kindergarten family life education curriculum. This case will be
analyzed in Chapter 3. Much has been written on the issue of religion’s place in public debate in the field of
political theory: see e.g. John Rawls, “The Idea of Public Reason Revisited” in *The Law of Peoples* (Cambridge,
Massachusetts: Harvard University Press, 1999) 131; Jürgen Habermas, “Religion in the Public Sphere” (2006) 14
European Journal of Philosophy 1; Jennifer Nedelsky, “Legislative Judgment and the Enlarged Mentality: Taking
Religious Perspectives” in Richard Bauman & Tsvi Kahana, eds., *The Least Examined Branch: The Role of
Legislatures in the Constitutional State* (Cambridge University Press, 2006) 93; Robert Audi & Nicholas
Wolterstorff, *Religion in the Public Square* (Lanham: Rowman & Littlefield, 1997). Legal academics have also
debated the issue: see 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; Iain T. Benson, “Notes Towards a (Re)Definition of the
Queen’s University Press, 2004).
The three above reasons justify a focus on freedom of religion in particular as an important aspect of multiculturalism policy. But there is another plane on which the study of freedom of religion must be justified. Brian Barry has argued that, when it comes to public policy, religious beliefs should be treated in the same way as other preferences:

One natural recourse is to suggest that what I have said so far may be all very well for costs arising from preferences, but that costs arising from beliefs are a different kettle of fish. It is very hard to see why this proposition should be accepted… Consider, for example, the way in which people’s beliefs may make some job opportunities unattractive to them… Committed vegetarians are likely to feel [closed out from] jobs in slaughterhouses or butchers’ shops. Similarly, if legislation requires that animals should be stunned before being killed, those who cannot as a result of their religious beliefs eat such meat will have to give up eating meat altogether.

Faced with a meatless future, some Jews and Muslims may well decide that their faith needs to be reinterpreted so as to permit the consumption of humanely slaughtered animals. And indeed this has already happened.\textsuperscript{12}

There are two ways to respond to this view. The first is to assert that Barry gives far too short shrift to the constitutive role that religion plays with respect to people’s identities. But Barry’s argument is more complex than that. By comparing religious dietary laws with vegetarianism, Barry pits a matter of religion against a matter of conscience. The better way to respond to Barry’s argument is to hold that matters of religion and conscience are actually best analyzed together, rather than pitted against each other. Both can be influential forces in shaping individuals’ identity, and in grounding a sense of community belonging. The lessons learned from the study of freedom of religion can therefore likely be applied to other matters of conscience. The existence of a body of case law regarding freedom of religion therefore marks a convenient starting point for this analysis.

1.2 Overview of this Work

In this work, I will examine Canadian case law dealing with the right of freedom of religion. In particular, I will analyze those cases in which there is a conflict over a shared resource or space. Decisions made with respect to spaces shared by members of a plural society are a telling example of multicultural policies and practices. When an individual or group wishes to carry out a religious practice in a space that is shared by people of various faiths, other individuals or groups who have an interest in the space may object. Resolving disputes about the character of these spaces, and the appropriate uses that can be made of them, can test a polity’s commitment to multiculturalism. As Patricia K. Wood and Liette Gilbert argue, “public space is not only the ‘public’ site of multicultural practices but, as suggested by [Don] Mitchell… ‘Public space is always and inescapably a product of social negotiation and contest.”¹³

By analyzing the judicial decisions that address these issues, I will show how Canadian courts use the language of rights to resolve this type of conflict. Though I believe these decisions are generally earnest attempts to deal with difficult questions, they can often have unintended negative side-effects on the individuals or communities involved in the disputes. I will argue that these side-effects are inconsistent with the goals of multiculturalism, as embodied in Canadian legislation and explained by leading theorists. I will conclude by suggesting a potential alternative to the rights-based approach to freedom of religion that I call a “difference-based” approach. I will contend that this approach could help avoid the negative side-effects of

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the current jurisprudence, and harmonize Canadian judicial approaches to freedom of religion with Canada’s multicultural commitments.

The first step in developing this argument is to understand the nature of Canada’s multicultural commitments. In Chapter 2, I will survey some of the various political theories of multiculturalism. I will show that three themes discussed by leading authors emerge as dominant elements of multiculturalism legislation in Canada. First, the Canadian official position is committed to the ideal of cultural “recognition,” most famously explained out by Charles Taylor. Second, Canadian legislation is underpinned by the notion that cultural diversity is valuable *per se*. Third, the value of inter-cultural dialogue also animates the Canadian legislation. The second and third themes are most clearly articulated by Bhiku Parekh.

The second step in the argument is to examine the recurring ideas in the Canadian case law. In Chapter 3, I will conduct a review of leading Canadian cases, dividing them into two broad categories of dispute: shared spaces and shared institutions. I will argue that there are commonalities in courts’ approaches to these disputes that stem from a rights-based approach to freedom of religion. In particular, I will argue that judicial approaches to freedom of religion are (1) individualist, (2) concerned with preventing coercion, (3) infused with the rhetoric of tolerance, and (4) marked by a tendency to create an *ad hoc* hierarchy of fundamental rights.

In Chapter 4, building on this analysis, I will delve into the negative side-effects of the rights-based approach to freedom of religion. I will argue that, when viewed through the lens of

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15 *Supra* note 5.
Canada’s multicultural commitments, the rights-based approach raises serious concerns with respect to the ideal of recognition of all religious communities in three principal respects. First, an individualistic treatment of religion is discordant with the way that many Canadians experience religion. Second, by pressuring litigants to speak in a language that is not their own about their deeply held beliefs, the current approach to freedom of religion risks coercing people into adopting positions that are inconsistent with their religious views and identities. Third, the persistent reliance on the rhetoric of tolerance by Canadian courts may actually reinforce the marginalized position of religious minorities. Finally, I will argue that the high stakes of litigation and confrontational nature of rights-based modes of analysis make the prospects of inter-cultural dialogue bleak and tend to make creative settlements harder to achieve.

In Chapter 5, in response to the critique developed in Chapter 4, I will propose an alternative to the rights-based approach that I call a “difference-based” approach. Inspired by the work of Martha Minow,16 I will lay out the benefits of an approach that treats religious difference as a feature of Canadian society rather than a feature of the individuals before the court or their particular communities. This analytical framework insists that the differences between individuals and communities are something that the whole polity is responsible for managing, and that the costs of those differences should be fairly distributed. I argue that this approach offers a workable alternative to the current rights-based framework; it can arrive at just results while avoiding inconsistencies with Canada’s multicultural commitments.

Chapter 2
The (Contested) Objectives of Multiculturalism

2 The (Contested) Objectives of Multiculturalism

2.1 Introduction

As will be seen in more detail below in Chapter 3, Canadian courts frequently make allusions to the value of tolerance when confronting questions of freedom of religion. Often, and especially in cases revolving around public schools, this value is associated with Canada’s tradition of multiculturalism. Political theorists have been thinking seriously about the implications of multiculturalism for some time. Rarely, though, do judges refer to these theories. In my view, this is unfortunate for two reasons. First, the writings in the field have much to offer in terms of analyzing the implications of various policy choices. Second, and perhaps more importantly, I will argue that many of the ideas expressed in a detailed way by theorists are reflected in Canada’s legislation.¹ In particular, the idea of state recognition for minority groups,² the notion that social diversity has an inherent value, and the perception that cross-cultural dialogue is beneficial to all³ emerge as dominant themes in the country’s multiculturalism legislation. A more profound engagement with the theorists who have explored these ideas deeply would provide for more nuanced approaches and reasons. In Chapter 4, for example, I will argue that the rights-based approach that Canadian courts take towards freedom

¹ I do not claim that the theoretical writings discussed in this Chapter informed the text of legislation. Indeed, all the writings discussed here were written after the 1988 passage of the Canadian Multiculturalism Act, R.S.C., 1985, c. 24 (4th Supp.), which itself drew from a policy of the federal government that dated back to 1971. Instead, I suggest that the ideas that underlie the legislation have been explored and expressed more fully by the theorists discussed in this Chapter, and that an engagement with the writings of these theorists is therefore fruitful.
² The notion of recognition is associated most strongly below with the writings of Charles Taylor.
³ The inherent value of social diversity and the importance of cross-cultural dialogue are associated most directly below with the work of Bhiku Parekh.
of religion produces unintended side-effects that are inconsistent with the dominant themes of
Canada’s multiculturalism commitments. More direct engagement with these theorists may have
provided guidance for the judicial approach to freedom of religion. ⁴

In this chapter, I will explore five dominant strands in the political theory literature in
order to flesh out the intellectual *habitus* of multiculturalism. I will then explore in detail
Canada’s legislated commitments in the field, and argue that many of the ideas developed by
theorists are present in less developed forms in federal and provincial statutes.

### 2.2 Political Theories of Multiculturalism

Many political theorists argue that state actors must take the facts of social diversity
seriously. ⁵ In his book *The Multiculturalism of Fear*, Jacob Levy posits:

> We need to take seriously the enduring power of group loyalty and attachment,
> the durability of ethnic and cultural groups. Ethnocultural identities are strongly
> felt by many people at many, perhaps most, times to be permanent and
> immutable. ⁶

However, these theorists have supplied many different justifications for state policies in response
to a multicultural citizenry. These justifications all provide a different framework for evaluating
particular policies. This section will explore five different (if sometimes overlapping)
justifications for state action in socially diverse societies: (1) grounding state policies in the ethic

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⁴ Before developing this argument, however, it will be necessary to unpack the ideas that undergird Canada’s
multiculturalism commitments (the current Chapter), and then explore the major themes in Canada’s freedom of
religion jurisprudence (Chapter 3).

⁵ There is often a terminological slippage in the use of the term “multiculturalism.” It is sometimes used to refer to
the facts of a socially diverse polity, and other times used to refer to the kinds of policies that are adopted in
response to these facts. I have endeavoured to be explicit in this work about how I am using the term at different
points in the discussion.

of equal recognition for all cultures; (2) a *modus vivendi* approach; (3) viewing culture as providing a context for choice and autonomy; (4) viewing the state as a facilitator of inter-cultural dialogue; (5) grounding state policies in the notion of the rule of law. For each of these alternative viewpoints, I will refer to one author whom I take to be representative of the particular perspective.

2.2.1 Recognition, Identity and Dignity: Taylor

In an early essay on the political theory of multiculturalism, *Multiculturalism and the Politics of Recognition*, philosopher Charles Taylor articulated some ideas that have been foundational for other theorists.\(^7\) Taylor approaches the challenges of multiculturalism through the politics of personal and cultural identity, and concludes that giving due recognition to the cultural identities of all persons is fundamental to treating all people with equal dignity. Thus, for Taylor, recognition ought to be the basic aim for state policies of multicultural governance.

Taylor begins by identifying a thesis common to a number of strands of contemporary politics, which posits that

> our identity is partly shaped by recognition or its absence, often by the *mis*recognition of others, and so a person or group of people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.\(^8\)

Taylor distinguishes contemporary understandings of identity from older ideas of identity. Whereas, in a previous era, a person understood his or her identity as being ascribed by virtue of


\(^8\) *Ibid.* at 25 (emphasis in original).
his or her place in society (whether through social class, profession, etc.), the contemporary
person understands his or her identity as unique to him- or herself. Thus, Taylor writes, “[w]e
might speak of an individualized identity, one that is particular to me, and that I discover in
myself. This notion arises along with an ideal, that of being true to myself and my own
particular way of being.”9 This new understanding of identity raises the stakes for the politics of
recognition. If a person’s identity, which may be rooted in a particular culture, is not recognized,
then a very serious kind of harm can be sustained; the person’s worth as an individual may be
demeaned by the non- or misrecognition of his or her cultural heritage.10

Taylor further explains the connection between identity and recognition by arguing that
identity, indeed all human life, is “fundamentally dialogical.”11 Taylor asserts that “[w]e
become full human agents, capable of understanding ourselves, and hence of defining our
identity, through our acquisition of rich human languages of expression… But we learn these
modes of expression through exchanges with others.”12 In so arguing, Taylor eschews what he
calls “the overwhelmingly monological bent of mainstream modern philosophy.”13 Put
otherwise, Taylor subscribes to the view that people develop and construct their identities
through their relationships with others, rather than in isolation from them. Because the
construction of one’s identity occurs in conjunction with others, when these others (or worse, the

9  Ibid. at 28.
10  Ibid. at 34-35.
11  Ibid. at 32.
12  Ibid. at 32.
13  Ibid. at 32.
state as the representative of all others) fail to recognize a person’s identity, the harm is acutely felt.

With the increased importance of recognition to individual identity has come “a politics of difference;” this has come in the form of demands for the recognition of each person’s identity. Taylor writes that, in addition to being based on the notion of difference, “[t]here is… a universality basis to this as well, making for the overlap and confusion between the two.” He explains the distinction between the difference-based demand and the universality-based demand as follows:

Everyone should be recognized for his or her unique identity. But recognition here means something else. With the politics of equal dignity, what is established is meant to be universally the same, an identical basket of rights and immunities; with the politics of difference, what we are asked to recognize is the unique identity of this individual or group, their distinctness from everyone else… The universal demand powers an acknowledgement of specificity.

Though difference-based claims are powered by a kind of universalism, Taylor argues that some instantiations of universalism are not receptive to difference-based claims:

There is a form of politics of equal respect, as enshrined in a liberalism of rights, that is inhospitable to difference, because (a) it insists on uniform application of the rules defining these rights, without exception, and (b) it is suspicious of collective goals. Of course, this doesn’t mean that this model seeks to abolish cultural differences… But I call it inhospitable to difference because it can’t accommodate what the members of distinct societies really aspire to, which is survival.

14 Ibid. at 38.
15 Ibid. at 38-39.
16 Ibid. at 60-61. In Chapter 4, I will advance a related critique of rights-based approaches to social problems. In part, the same individualism that makes a “liberalism of rights” inhospitable to collective goals creates difficulties for the recognition and equal acceptance of religious perspectives that do not understand the world in individualistic terms.
As an alternative, Taylor suggests that difference ought to be respected, even when difference-based claims call for exceptions to the general rules defining rights, or when a polity espouses collective goals. Taking the example of Quebec, Taylor notes that “[i]t is axiomatic for Quebec governments that the survival and flourishing of French culture in Quebec is a good.”17 This is problematic for those who adhere strictly to a liberalism that focuses on the rights of the individual. “[T]his view understands human dignity to consist largely in autonomy, that is, in the ability of each person to determine for himself or herself a view of the good life,”18 and thus sits uncomfortably with an official state adoption of any particular conception of the good. But Taylor argues that

Quebeckers… tend to opt for a rather different model of a liberal society. On their view, a society can be organized around a definition of the good life, without this being seen as a depreciation of those who do not personally share this definition. Where the nature of the good requires that it be sought in common, this is the reason for its being a matter of public policy. According to this conception, a liberal society singles itself out as such by the way in which it treats minorities, including those who do not share public definitions of the good, and above all by the rights it accords to all of its members.19

Thus, in Taylor’s view, there is a version of liberalism that can be hospitable to difference-based claims for exceptions or to collective adoptions of a particular view of the good life. This form of liberalism is more consistent with Taylor’s inclination to accord equal respect to all cultures, and take more seriously people’s attachments to their sense of collective identity.

17 Ibid. at 58.
18 Ibid. at 57.
19 Ibid. at 59.
Taylor acknowledges that the reasoning behind some difference-based demands “seems to depend upon a premise that we owe equal respect to all cultures,” and that this “presumption is by no means unproblematic.” One of the central problems that Taylor sees with the claim that all cultures should be judged favourably is the impossibility of making such a judgment impartially. Taylor writes:

The peremptory demand for favourable judgments of worth is paradoxically – perhaps one should say tragically – homogenizing. For it implies that we already have the standards to make such judgments. The standards we have, however, are those of North Atlantic civilization… By implicitly invoking our standards to judge all civilizations and cultures, the politics of difference can end up making everyone the same. In this form, the demand for equal recognition is unacceptable.

Here, Taylor identifies one aspect of the problem of subjectivity, and the impossibility of neutrality.

Nonetheless, Taylor maintains that there is validity to the presumption, and that it can be seen as a “claim is that all human cultures that have animated whole societies over some considerable stretch of time have something important to say to all human beings.” Further,
Taylor argues that this presumption “help[s] explain why the demands of multiculturalism build on the already established principles of the politics of equal respect.”²⁵ If it is accepted that there is genuine harm to a withholding of recognition, “then a case can be made for insisting on the universalization of the presumption as a logical extension of the politics of dignity.”²⁶ Though this fits uneasily with the version of liberalism that is committed to “difference-blindness,” Taylor argues that the presumption seems to flow from liberalism’s commitment to equal dignity of all persons, “albeit uneasily.”²⁷

In sum, Taylor views the central aim of multiculturalism policy as the recognition of all cultures, such that people do not experience the harm to their identities prompted by non- or misrecognition. Taylor suggests adopting a presumption that all cultures have something valuable to offer, and should thus be treated, at least initially, with respect. Because he frames this as a presumption rather than an imperative, Taylor implies that the presumption of equality can be defeated in some circumstances. But multicultural policies, for Taylor, should in principle be aimed at the recognition of difference; this emerges, if uneasily, from the principle of the equal dignity of all persons.

2.2.2 Modus Vivendi: Jacob Levy’s Multiculturalism of Fear

Jacob Levy begins his discussion in The Multiculturalism of Fear by positioning his views between the poles of communitarianism (a view sometimes associated with Taylor) on the one hand and anti-accommodation rhetoric on the other. For Levy, the view that all cultures should

²⁵ Ibid. at 68.
²⁶ Ibid.
²⁷ Ibid.
be celebrated without critical examination lacks a moral centre. On the other hand, those who propose that no accommodations should be made in the name of cultural difference neglect the strength of ethnic and cultural identities.28

On the basis of this view, Levy “argue[s] for a political theory of multiculturalism which is centrally concerned neither with preserving and celebrating ethnic identities nor with overcoming them.” Instead, he “focuses on mitigating recurrent dangers such as state violence toward cultural minorities, inter-ethnic warfare, and intra-communal attacks on those who try to alter or leave their cultural communities.”29 In accordance with his focus on these issues of “cruelty,” Levy’s book takes its title from an essay by Judith Shklar, who advocated a “liberalism of fear,” which also centred its concerns on cruelty and violence.30 It is a multiculturalism of fear because it sees danger in people’s seemingly intractable connection to their ethnic identities, and the sad history of inter-ethnic conflict:

The multiculturalism of fear, by contrast [to Kymlicka and Kukathas], does see ethnic communities as morally important and distinctive, not because of what they provide for individuals, but because of what they risk doing to common social and political life.31

Levy argues that the concept of cruelty is helpful in providing a moral base from which to evaluate practices that affect different communities in different ways:

The liberalism of fear is helpful in a way that the analysis of rights and justice is not. The Bulgarian restrictions on Turkish names, the American use of the word

28 Levy, supra note 6 at 8-9.
29 Ibid. at 12-13.
31 Levy, supra note 6 at 33.
‘nigger,’ and the name Mumbai are historically and intentionally linked with violence and cruelty toward excluded communities in a way that disallowing Prince’s name change, the unavailability of a ‘biracial’ category [on US census forms], and the name San Francisco are not.\textsuperscript{32}

From one perspective, Levy’s concern with cruelty posits a relatively modest set of objectives for policies of multiculturalism and accommodation. They should, in Levy’s view, be aimed at preventing the worst sorts of actions associated with inter-communal tensions and “making it possible for members of potentially antagonistic groups to live together peacefully.”\textsuperscript{33} More aspirational goals of fostering common bonds between communities are not part of this program. Indeed, “[t]he multiculturalism of fear counsels against spending our time trying to define what it is in cultures that we respect or recognize.”\textsuperscript{34} Later in his work, Levy puts a finer point on the central concerns of his multiculturalism of fear:

Whether or not minority cultures ought to be helped in sustaining themselves, whether assimilation or diversity is desirable, whether and how to forge common identities - the multiculturalism of fear insists that these are secondary questions… Rather, the danger of bloody ethnic violence, the reality that states treat members of minority cultures in humiliating ways, the intentional cruelty of language restrictions and police beatings and subtler measures which remind members of a minority that they are not full citizens or whole persons, these are the focus of attention.\textsuperscript{35}

However, Levy’s concern with cruelty also leads him to suggest that the state does have a role in passing judgment, after careful consideration, on practices internal to communities, and potentially interfering with them:

\textsuperscript{32} Ibid. at 29.
\textsuperscript{33} Ibid. at 31.
\textsuperscript{34} Ibid. at 32.
\textsuperscript{35} Ibid. at 39.
Cultural diversity should make us especially wary of politically imposing certain kinds of moral judgments on other cultural communities. It should not, however, prevent us from making or acting on such judgments when a cultural community’s practices are violent or cruel. And it argues for caution in treating cultural communities as public goods.36

Put otherwise, while the state’s role in terms of facilitating or regulating inter-communal relations is limited under Levy’s view, he maintains that the state does have a role in monitoring and regulating intra-communal relations. The limits of the state’s legitimate sphere of action in both cases are defined by the concept of cruelty.

While Levy sees a role for the state in passing judgment on and regulating the internal practices of communities through the lens of cruelty, he is also convinced that people’s connections to their ethnic and communal identities are too strong to be undone through state policy. In this regard, he notes that “[t]he violence, cruelty, and humiliation which routinely accompany ethnic politics are not avoided by attacking ethnicity, any more than the violence, cruelty and humiliation of the wars of religion were ended by convincing people not to be religious.”37 Instead, Levy holds out the historical approach to freedom of religion pursued by liberal states as the exemplary model:

The institutional accommodations which make up the separation of church and state and the protection of freedom of religious exercise are the model to be followed (in spirit if not in all the particulars). The liberal of fear does not say that the proper way to handle religious pluralism is to govern as if everyone were an atheist, and ought not say that the proper way to handle cultural pluralism is to govern as though everyone were a worldly cosmopolitan.38

36 Ibid. at 17.
37 Ibid. at 27.
38 Ibid.
Thus, starting from a position that posits the prevention of cruelty at all levels and the maintenance of peaceful relations between ethnic communities as the central goals of multiculturalism, Levy arrives at the position that the liberal institutions for dealing with religious conflict and pluralism are the model to follow. Though these institutions may not answer questions about whether the state has an obligation to sustain and support ethnic communities, these questions are less pressing in Levy’s view than finding a *modus vivendi*, a way that all communities can live together peacefully.

2.2.3 Culture as context for freedom and choice: Kymlicka

Like Levy, Will Kymlicka takes as given the social facts of diversity, and maintains that people tend to have deep attachments to their own ethnic culture:

> [W]e should treat access to one’s culture as something that people can be expected to want… Leaving one’s culture, while possible, is best seen as renouncing something to which one is reasonably entitled. This is a claim, not about the limits of human possibility, but about reasonable expectations.\(^3^9\)

However, whereas Levy’s guiding principle in responding to the challenges of multicultural governance is the avoidance of cruelty, Kymlicka’s foremost concern is the enhancement and preservation of individual freedom. He identifies individual freedom as liberalism’s most basic value. Indeed, Kymlicka asserts that notions of freedom are even deeply ingrained in liberalism’s tradition of religious tolerance:

But if liberalism can indeed be seen as an extension of the principle of religious tolerance, it is important to recognize that religious tolerance in the West has taken a very specific form – namely, the idea of individual freedom of conscience… Historically, liberals have believed in a very specific notion of tolerance – one which involves freedom of individual conscience, not just

collective worship… What distinguishes liberal tolerance is precisely its commitment to autonomy – that is, the idea that individuals should be free to assess and potentially revise their existing ends.40

Having established the primacy of individual freedom and autonomy within his framework, Kymlicka argues that this freedom is best actualized through preserving the autonomy of national groups and safeguarding minority rights.41 The basis for this claim is that “freedom is intimately linked with and dependent on culture.”42 Kymlicka explains the link between culture and freedom by first limiting his argument to what he calls “societal cultures,” which he defines as

a culture which provides its members with meaningful ways of life across the full range of human activities, including, social, educational, religious, recreational, and economic life, encompassing both public and private spheres. These cultures tend to be territorially concentrated, and based on a shared language.43

These societal cultures are valuable, according to Kymlicka, because they provide meaning and context for human choices:

Put simply, freedom involves making choices amongst various options, and our societal culture not only provides these options, but also makes them meaningful to us… Whether or not a course of action has any significance for us depends on whether, and how, our language renders vivid to us the point of that activity. And the way in which language renders vivid these activities is shaped by our history, our ‘traditions and conventions’.44

Because Kymlicka attaches a high value to societal cultures, which are crucial to enhancing individual freedom and autonomy, it is legitimate, in his view, to protect group-

40 Ibid. at 156-158.
41 Ibid. at 75.
42 Ibid. at 76.
43 Ibid.
44 Ibid. at 83.
differentiated rights on this basis. Consequently, Kymlicka’s views ground a relatively robust role for the state in the preservation of societal cultures, as the state can be expected to expend funds protecting and promoting these rights.

Kymlicka buttresses this view by emphasizing the impossibility of total state neutrality with respect to culture. Kymlicka points to the issues surrounding the setting of public holidays and the adoption of uniforms for state actors as examples of the unfeasibility of state neutrality:

Some people object to legislation that exempts Jews and Muslims from Sunday closing legislation on the ground that this violates the separation state and ethnicity. But almost any decision on public holidays will do so. In the major immigration countries, public holidays currently reflect the needs of Christians...

Similar issues arise regarding government uniforms. Some people object to the idea that Sikhs or Orthodox Jews should be exempted from requirements regarding headgear in the police or military. But here again it is important to recognize how the existing rules about government uniforms have been adopted to suit Christians.

Kymlicka’s concern with individual liberty, however, can also militate against the autonomy of groups when their practices limit the freedom of individual group members; “some ethnic and national groups are deeply illiberal, and seek to suppress rather than support the

45 Ibid. at 84.
46 Ibid. at 108. Interestingly, Kymlicka further argues that while a state can be neutral with respect to religion, the same is not true with respect to culture:

[T]he analogy between religion and culture is mistaken…[M]any liberals say that just as the state should not recognize, endorse, or support any particular church, so it should not recognize, endorse, or support any particular cultural groups or identity. But the analogy does not work. It is quite possible for a state not to have an established church. But the state cannot help but give at least partial establishment to a culture when it decides which language is to be used in public schooling, or in the provision of services (at 111).

47 Ibid. at 114-115.
liberty of their members. Under these circumstances, acceding to the demands of minority
groups may result in gross violations of the most basic liberties of individuals.”48

In sum, Kymlicka’s views, like Levy’s, cut in two directions; his concern with individual
liberty can justify state action in both preserving minority cultures and in intervening to alter
those cultures when the individual liberties of group members are threatened. However, Levy
and Kymlicka’s views differ most fundamentally in that Kymlicka sees a more active role for the
state in the preservation of minority cultures. As discussed in the preceding section, Levy sees
the separation of church and state as the best kind of multicultural governance, suggesting that
the state should grant a sphere of autonomy for cultural groups but not take positive steps in
support of their activities. Because Kymlicka’s aspirations are relatively more ambitious and
framed in more positive terms than Levy’s (i.e. the enhancement of individual freedom as
opposed to the prevention of cruelty), Kymlicka’s views can more easily support robust state
action.

2.2.4 Universal values through cross-cultural dialogue: Parekh

Bhiku Parekh, like Levy and Kymlicka, takes the facts of social diversity as having a basis
in the real, lived experiences of people.49 Also like Kymlicka, Parekh responds to these social
facts with a theory of multicultural governance that has positive objectives. For Parekh, these
policies should be aimed at fostering cross-cultural dialogue. This dialogue, in turn, should be
grounded towards the articulation of universal values that are shared across cultures, which can help
strengthen social ties among different cultural communities.

48 Ibid. at 76.
49 Bhiku Parekh, Rethinking Multiculturalism : Cultural Diversity And Political Theory, 2nd ed., (New York :
In contrast to Kymlicka, Parekh sees culture as linked not only to individual freedom and autonomy, but to all of morality. He defines culture in similar terms to Kymlicka’s “societal culture” definition, but adds a nuanced distinction between cultural beliefs and practices. He writes that a culture is

a historically created system of meaning and significance or, what comes to the same thing, a system of beliefs and practices in terms of which a group of human beings understand, regulate and structure their individual and collective lives. It is a way of both understanding and organizing human life.\(^\text{50}\)

Morality, for Parekh, “is concerned with what kind of life is worth living, what activities are worth pursuing, and what forms of human relations worth cultivating.”\(^\text{51}\) The capacity to make these kinds of evaluations is dependent upon having a cultural context. Morality “presupposes criteria of worth or significance, which in turn presuppose a system of meaning or culture.” In short, “[e]very system of morality is embedded in and nurtured by the wider culture and can only be changed by changing the latter. Culture shapes and structures moral life.”\(^\text{52}\)

Further, in addition to being tied to morality, Parekh posits that “[a] society’s culture is closely tied up with its economic, political and other institutions. No society first develops culture and then these institutions, or vice versa.”\(^\text{53}\) It is unsurprising that a group would attempt to mould its institutions consistently with its conception of the good. Given that the group’s morality is culturally based and culturally specific, it follows that the group’s institutions will bear the markings of the culture. The observation that societal institutions are always culturally

\(^{50}\) Ibid. at 143.
\(^{51}\) Ibid. at 144.
\(^{52}\) Ibid.
\(^{53}\) Ibid. at 151.
situated leads Parekh to underscore the same neutrality problem identified by Kymlicka, though in slightly different terms:

A morally and culturally neutral state which makes no moral demands on its citizens and is equally hospitable to all cultures and conceptions of the good is logically impossible.\textsuperscript{54}

In addition to echoing Kymlicka, Parekh here challenges Taylor’s view that equal recognition of all cultures by the state is possible. As discussed above, Taylor argues that the imperative of recognition stems from principles of equality, implying that states are capable of extending equal recognition to all cultures. Distinguishing himself from Taylor on this point, Parekh suggests that, because every state is culturally situated, true equality of recognition is not attainable.

While their approaches bear similarities, Parekh argues that Kymlicka’s version of multiculturalism leaves important questions unanswered. In particular, while Kymlicka explains why culture is important to individual autonomy, Parekh finds Kymlicka’s argument lacking in terms of its justification for the preservation of multiple cultures. Though a culture is necessary for providing context for choices, it does not necessarily follow, according to Parekh, that each person is entitled to maintain his or her own culture. Parekh writes:

Kymlicka gives a coherent account of the value of culture but not of cultural diversity. He shows why human beings need a stable culture but not why they also need access to other cultures. His main argument for cultural diversity is that it increases our range of options… He says that we are deeply shaped, though of course not determined, by our culture, and that our primary concern should be not to explore and experiment with other cultures but to evaluate our own cultural beliefs and practices and in general to move around within them. This means that other cultures can have little real meaning for us as options or even as dialogical interlocutors.\textsuperscript{55}

\textsuperscript{54} \textit{Ibid.} at 201-202.

\textsuperscript{55} \textit{Ibid.} at 108.
In response to this perceived limitation in Kymlicka’s argument, Parekh gives an account of why cultural diversity is valuable in itself. He argues that cultures complement each other by filling in each other’s gaps. While Kymlicka’s understanding arguably views each culture as providing a complete range of meanings, Parekh says that no culture can possibly encompass everything that is valuable. Further, by having the opportunity to engage with a variety of cultures, individuals can widen their experiences of the good.

Furthermore, Parekh ties cultural diversity to human freedom in a way that Kymlicka that does not. While Kymlicka maintains that a cultural context is necessary in order to give meaning to human choices, Parekh claims that the existence of a multiplicity of worldviews contributes to human freedom by providing a means for people to assess their own cultures critically:

Cultural diversity is also an important constituent and condition of human freedom. Unless human beings are able to step out of their culture, they remain imprisoned within it and tend to absolutize it, imagining it to be the only natural and self-evident way to understand and organize human life.

Thus, by providing space for more critical self-reflection, cultural diversity can be seen as expanding people’s notion of their own agency in making their life decisions.

56 Brian Barry, for one, is a strong critic of this view. He writes: “the only ways of life that need to appeal to the value of cultural diversity are those that necessarily involve unjust inequalities or require powers of indoctrination and control incompatible with liberalism in order to maintain themselves. Since such cultures are unfair and oppressive to at least some of their members, it is hard to see why they should be kept alive artificially” (Brian Barry, Culture and Equality: An Egalitarian Critique of Multiculturalism (Cambridge, Mass.: Harvard University Press, 2001) at 135).

57 Parekh, supra note 49 at 167. Similarly, Martha Minow argues that “the preservation of multiple communities promotes the correction of errors in one community, permits challenges to the ideology of the dominant elite, and provides space against oppression (Martha Minow, “Rights and Cultural Difference” in Austin Sarat & Thomas R. Kears eds. Identities, Politics and Rights (Ann Arbor: U. Mich. Press, 1995) 347 at 351).” Minow’s work is discussed in more detail in Chapter 5.

58 Parekh, ibid.
Cultural diversity is also central in what Parekh takes to be the most important project of multicultural societies: cross-cultural dialogue. Institutionalized respect for cultural diversity creates “a climate in which different cultures can engage in a mutually beneficial dialogue.”

For Parekh, cross-cultural dialogue provides the most compelling alternative to philosophies that embrace either relativism or monism. Parekh explains and critiques these views in turn:

[R]elativism and monism are incoherent doctrines. Relativism ignores the cross-culturally shared human properties and is mistaken in its beliefs that a culture is a tightly integrated and self-contained whole, can be neatly individuated, and determines its members. Monism rests on an untenably substantive view of human nature, ignores the impossibility of deriving moral values from human nature alone, fails to appreciate its cultural mediation and reconstitution, and so on. There is much to be said for minimum universalism… However, it suffers from several limitations. It naively assumes that the minimum universal values do not come into conflict, and that they are univocal and self-explanatory and mean the same thing in different cultures.

Parekh believes that a set of universal values can indeed be arrived at, but not through deduction. Rather,

the more satisfactory way to arrive at [universal values] is through a universal or cross-cultural dialogue. Since we are culturally embedded and prone to universalizing our own values, we need the dialogue to counter this tendency and help us rise to the required level of intellectual abstraction. The dialogue also brings together different historical experiences and cultural sensibilities, and ensures that we appreciate human beings in all their richness and that the values we arrive at are as genuinely universal as is humanly possible.

Parekh states that the values that will emerge as universal are “those that are within the reach of all, central to any form of good life, and for which we can give compelling reasons.”

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59 Ibid. at 168.
60 Ibid. at 127.
61 Ibid. at 128.
62 Ibid. at 133.
The articulation of universal values allows a state to act as a “united community” that can legitimately “take and enforce collectively-binding decisions and regulate and resolve conflicts.”

Accomplishing this through cross-cultural dialogue extends respect to all people by acknowledging their respective cultural backgrounds; thus, while the Taylorian ideal of equal recognition for all cultures by the state may be impossible in Parekh’s view, dialogic practices provide a more realistic way for the state to achieve a form of recognition of multiple perspectives. Indeed, Parekh treats the extension of respect to a person’s cultural background as a moral requirement:

We can hardly be said to respect a person if we treat with contempt or abstract away all that gives meaning to his life and makes him the kind of person he is. Respect for a person therefore involves locating him against his cultural background, sympathetically entering into his world of thought, and interpreting his conduct in terms of its system of meaning.

In Parekh’s view, the practice of dialogue also has the benefit of earning the loyalty of citizens, and giving citizens of minority cultures “the confidence and courage to interact with other cultures, and facilitating their integration into wider society.”

Though Parekh is a strong advocate of dialogue, he is careful to distinguish his views from the claims that all cultures should be immune from critique and comparison. Indeed, Parekh argues that cross-cultural dialogue can provide legitimate means for cross-cultural critique:

63 Ibid. at 196.
64 Ibid. at 240-241.
65 Ibid. at 196. Parekh contrasts his support for dialogic practices with the programs of assimilation sometimes proposed for immigrant and minority cultures. Parekh argues that such programs are unlikely to succeed, because of the deep and real attachment that people have to their cultures. Further, in Parekh’s view, these programs can potentially achieve the opposite of their intended effect, causing members of minority communities to further isolate themselves (at 198). Ayelet Shachar expresses a similar idea, calling it “reactive culturalism,” see Ayelet Shachar, Multicultural Jurisdictions: Cultural Differences and Women’s Rights (Cambridge: Cambridge University Press, 2001) at 36-37.
We can take it for granted that we have a duty to respect other persons… However, it does not prevent us from judging and criticizing their choices and ways of life. Obviously our judgment should be based on a sympathetic understanding of their world of thought from within… However, if after careful consideration and listening to their defence we find their choices perverse, outrageous or unacceptable, we have no duty to respect and even a duty not to respect these choices.66

In sum then, Parekh sees cultural diversity as valuable in itself; multiple cultures help fill in each other’s gaps and provide a means for critical self-reflection. Further, he views the appropriate state response to the social facts of multiculturalism as the fostering of cross-cultural dialogue. The aim of this dialogue is to produce an ongoing articulation of universal values, which in turn can strengthen the cohesiveness of a diverse society. While the commitment to dialogue requires a basic respect for all cultural beliefs and practices, it does not imply, for Parekh, that all cultural practices are immune from critique. Indeed, Parekh sees the role of the citizen as one of critical engagement with all beliefs and practices, whether their own, their fellow citizens’, or the official values espoused by the state.

2.2.5 Space for religious expression within the rule of law: McLachlin C.J.

In the context of these various political theories of multiculturalism, it is interesting to see how judges understand their role in balancing competing cultural claims. In her essay “Freedom of Religion and the Rule of Law: A Canadian Perspective,” current Chief Justice of the Supreme Court of Canada Beverley McLachlin provides a sense of how she approaches issues of religious diversity. From her perspective, a central challenge for the Canadian legal system is determining how one comprehensive system of understandings, which she calls the “rule of law,” can make space for religions, which are themselves comprehensive systems. With the term “rule of law,” McLachlin C.J. refers to a system of state law that “exerts an authoritative claim upon all aspects

66 Ibid. at 176-177.
of selfhood and experience in a liberal democratic society; the rule of law, in this view, “makes total claims upon the self and leaves little of human experience untouched.” This claim stems from the fact that all individuals are subject to the jurisdiction and of state law and courts.

Without going as far as the theorists discussed above, who understand their own cultural perspectives as distinctly North Atlantic or Western and influenced by their Christian heritage, McLachlin C.J. does view the rule of law itself as a kind of culture, as noted in her consideration of freedom of religion:

by examining freedom of religion, we are asking how an authoritative and ubiquitous system of cultural understanding - the rule of law - accommodates another similarly comprehensive system of belief. The law faces the seemingly paradoxical task of asserting its own ultimate authority while carving out a space within itself in which individuals and communities can manifest alternate, and often competing, sets of ultimate commitments.

For McLachlin C.J., however paradoxical the task may seem in theory, Canadian judges have in practice been able to carve out a zone of free religious practice within the rule of law. Citing a 1970 decision of the Supreme Court of Canada involving a Hutterite community in Manitoba, McLachlin C.J. writes

There can be little doubt that the tenets of the Hutterite faith, including communal living and ownership of property, conflicted with the prevailing legal norms of the time. Indeed, autonomy of decision making and free property holding remain

68 Ibid. at 16.
69 Ibid.
important aspects of the rule of law. But Chief Justice Cartwright was able to find space for these religious practices within the rule of law. In this space, the colony would be able to manifest its religious conscience without impinging unduly on either the core values of society or the rights and freedoms of others.  

The image evoked here is one of concentric circles. Religious communities exist as comprehensive cultures within the framework of the rule of law. The challenge for the judiciary, in this view, is determining the extent to which religious communities can remain autonomous. As McLachlin C.J. notes:

The challenge faced by the courts when attempting to find space within the rule of law for diverse expressions of religious conscience is... one of balancing competing cultural values. Due recognition must be given to the dignity of individuals and communities bound by a religious worldview and ethos, but this must be done without compromising the integrity of the rule of law and the values for which it stands.  

There is no question here that state law is and ought to be the final authority. The question is rather the degree to which cultural communities can be left room to manoeuvre within the confines of this authority. The answer seems to lie in a case-by-case analysis that ensures that basic legal principles are respected when assessing the validity of a given community’s practices or demands for accommodation. The main focus of this view is to preserve a unified system while allowing some space for individual and communal liberties. The details of the balance to be struck are determined on an ad hoc basis, as cases arise. Thus, few general principles emerge beyond the concern for state law’s primacy.

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71 McLachlin C.J., supra note 67 at 24.
72 Ibid. at 28.
2.3 Strands of Multiculturalism Theories in Canadian Law

Having explored some of the dominant threads in the political theories of multiculturalism, I turn now to discuss the extent to which elements of those theories are reflected in Canadian law. With legislation, the full rationale behind a particular policy statement is often left out of the final text. By connecting the legislative texts to the writings discussed above, we can get a better sense of the import and implications of the legislation. Where the legislation may be vague, the writings of theorists can provide guidance as to the kinds of commitments that Canada’s federal and provincial governments have made with respect to multiculturalism policy. As stated above, I do not mean to suggest here that Parliament intentionally borrowed the ideas expressed by the authors discussed above. Rather, I argue that some ideas are common to both the authors and the legislation. Further, the authors’ writings generally provide deeper and more sophisticated explanations for why the ideas are important and what the implications of the ideas might be.

2.3.1 Federal Legislation

As noted in Chapter 1, the Canadian Charter contains an interpretive provision at section 27 stating that the entire Charter is to be “interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”\(^{73}\) From the perspective of legislative interpretation, this provision could be read as one of the most powerful provisions in Canadian law. The Charter is part of the Constitution of Canada, and as such is part of the “supreme law of Canada.”\(^{74}\) Any legislation, federal or provincial, that is inconsistent

\(^{73}\) Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 27. This provision is significant in some of the case law discussed below in Chapter 3, particularly in cases involving religious exercises and curricula in public schools.

\(^{74}\) The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 52(1).
with the *Charter* is, “to the extent of the inconsistency, of no force or effect.”75 If every provision of the *Charter* must be interpreted in accordance with section 27, and every law in Canada must be consistent with the *Charter*, this means that all Canadian laws must be faithful to the “preservation and enhancement of Canada’s multicultural heritage.”

This language, of course, is quite broad, and does not prescribe in any detail a particular approach to the challenges of multiculturalism. Section 27 of the *Charter* does, however, display at least two fundamental commitments. First, Parliament’s understanding of “multiculturalism” is not limited to an observation of the facts of social diversity. Rather, the *Charter* affirms that this diversity is something worthy of preservation. Second, this provision states that the policies that governments generate should be aimed at the “enhancement” of Canada’s multicultural heritage. The aspiration here is not limited, like Levy’s approach, to the preservation of peaceful relations between cultural groups. Rather, the provision shares in common with Kymlicka and Parekh’s theories a prescription for positive state action. Admittedly, though, the justificatory basis action and the contours for legitimate state action are not spelled out in the *Charter*. Perhaps because of this, the provision has largely been relied upon by judges as a broad statement in favour of tolerance, as will be discussed below in Chapter 3.

The *Canadian Multiculturalism Act* spells out in much more detail the federal government’s commitments to multicultural policy, and, arguably, more clearly incorporates the thoughts expressed by the theorists discussed above. For example, many aspects of the Act can be linked to the thought of Charles Taylor. In its preamble, the Act invokes the principles of equality enshrined in the *Charter* and other federal legislation, thereby linking the notion of equality to the preservation and enhancement of multiculturalism. This is highly reminiscent of Taylor’s view that the imperatives of multiculturalism flow, albeit uneasily, from the principles of equality. Further, the Act declares as part of Canada’s official policy the recognition of “the existence of communities whose members share a common origin and their historic contribution to Canadian society.” This recognition is given further definition through the commitment to “ensure that all individuals receive equal treatment and equal protection under the law, while respecting and valuing their diversity.” To this end, the Act pledges that the government will “promote policies, programs and practices that enhance the understanding of

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76 R.S.C. 1985, c. 24 (4th Supp.). The Act was passed in 1988 by the Conservative government of Prime Minister Brian Mulroney. The preceding Liberal government of Prime Minister John Turner had intended to pass legislation of this nature, but was defeated in the 1984 federal election before the legislation was enacted (see *House of Commons Debates*, 11 (15 March 1988) at 13752-53, 13766-81.) For an account of the political history of Canada’s multiculturalism policy, which was adopted in 1971 and was the antecedent to the *Canadian Multiculturalism Act*, see Patricia K. Wood & Liette Gilbert, “Multiculturalism in Canada: Accidental Discourse, Alternative Vision, Urban Practice” (2005) 29.3 International Journal of Urban and Regional Research 679 at 679-682. Most notably, the authors argue that the policy was introduced by the Liberal government of Prime Minister Pierre E. Trudeau, “so that bilingualism would not create extra problems. It was coincidentally fortunate that it fit nicely into a Liberal tradition of immigration and citizenship programs. Nevertheless, as a consequence, a fragile vision of a diverse Canada continued to hold sway, and funds continued to flow towards ‘other ethnic groups’ (at 682).”

77 Employing the language of s. 27 of the *Charter*, the full title of the *Canadian Multiculturalism Act* is *An Act for the preservation and enhancement of multiculturalism in Canada*.


79 *Canadian Multiculturalism Act*, supra note 76, s. 3(1)(e).
and respect for the diversity of the members of Canadian society,” engaging Taylor’s view that policies of recognition are enmeshed with the equal respect due to all individuals.

The concern with recognition is prevalent not only in the text of the Act, but also in the language of the Parliamentarians who spoke in favour of its adoption. In the Parliamentary debates surrounding Bill C-93, which would become the *Canadian Multiculturalism Act*, Secretary of State David Crombie said:

> Indeed, most recently in a long line of Prime Ministers who have tried to define what Canadian diversity means, the present Prime Minister (Mr. Mulroney) said a year ago in Toronto:

> Multiculturalism is an affirmation of our commitment that Canadians of all ethnic and racial backgrounds have the right to equal recognition and equal opportunity in this country. Thus multiculturalism lies at the very heart of the idea of Canada, of our sense of country.  

Similarly, speaking to the Legislative Committee for the Act, Secretary of State Gerry Weiner said:

> For the first time in law… we recognize the existence of communities whose members share a common origin and commit the government to the enhancement

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80. *Ibid.* s. 3(2)(c).

81. *House of Commons Debates*, 11 (15 March 1988) at 13744 (Hon. David Crombie). Interestingly, Crombie also said: “These are not ideas about Canada which come from an academic pen. They are ideas about Canada which come from the experience of this country, the experience of the people who live and have lived in this country (at 13743).” Because Charles Taylor’s writings were subsequent to the passage of the *Canadian Multiculturalism Act*, there is arguably some empirical truth to this claim. Nonetheless, the notion of recognition that is central to Taylor’s writings also animates the legislation.

82. Between the second reading of the Act in the House of Commons and the time that it became law, Gerry Weiner replaced David Crombie as the Minister responsible for multiculturalism (see Canada, Parliament, “Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-93: An Act for the preservation and enhancement of multiculturalism in Canada” (12 April 1988) at 1:31 (Mr. Epp) [“Legislative Committee Minutes”]).
of their development. This bill gives these communities the recognition they have sought.  

The ideas associated above with Bhiku Parekh are also present in the federal Act. In particular, Parekh’s notion that cultural diversity is valuable *per se* can be seen as underpinning many provisions of the Act. For example, the Act promises to preserve Canada’s cultural and racial diversity, and “promote the understanding that multiculturalism… provides an invaluable resource in the shaping of Canada’s future.” Further, like Parekh, the Act views cross-cultural dialogue as a beneficial practice. For instance, the Act commits to promoting the “sharing” of cultural heritages, and “the understanding and creativity that arise from the interaction between individuals and communities of different origins.” It also spells out some of the preconditions to successful dialogue, in its promise to “encourage and assist the social, cultural, economic and political institutions of Canada to be both respectful and inclusive.” To a limited extent, even Parekh’s view that the ultimate purpose of cross-cultural dialogue is the articulation of universal values is captured in the legislation, which promises to “promote the full

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83 Ibid. at 1:18 (Hon. Gerry Weiner). Likewise, Gus Mitges, the Chairman of the Standing Committee on Multiculturalism said: “I believe the Act will recognize all Canadians as full and equal participants in Canadian society (House of Commons Debates, 11 (15 March 1988) at 13779).”

84 Canadian Multiculturalism Act, supra note 76, s. 3(1)(a).

85 Ibid. s. 3(1)(b). See also s. 3(2)(b).

86 Ibid. s. 3(1)(a).

87 Ibid. s. 3(1)(g). A government publication about the Act states: “Clause 3(1)(g) recognizes that the social, economic and cultural life of the country is strengthened by bringing together Canadians of different backgrounds.” Similarly, the publication also states: “Clause 3(1)(h) recognizes that the expression of our multicultural heritage contributes to the richness of our cultural experience… In applying the policy, the government assists Canadians to understand and share the many cultural influences across Canada, and encourages Canadians to participate in a variety of cultural activities (The Canadian Multiculturalism Act: A Guide for Canadians, supra note 78 at 14).”

88 Ibid. s. 3(1)(f).
and equitable participation of individuals and communities of all origins in the continuing evolution and shaping of all aspects of Canadian society.”

Parekh’s ideas about the value of cultural diversity and cross-cultural dialogue resonate even more powerfully with the speeches of the parliamentarians who supported the Act. For example, Secretary of State David Crombie showed a commitment to the idea that cultural diversity is valuable in itself when he said:

It drives me nuts, Madam Speaker, when I hear people ask why [people of Chinese background] cannot just be Canadian. That shows two things. First, they are really saying, “Why can’t they be like me?” Second, they would cut this country off from some of the richest cultural, linguistic and philosophical ore that we can mine.

Member of Parliament Jim Edwards put the value of cultural diversity in more concrete terms:

Canada’s distinctive character as a multicultural nation has made it a country that is enjoying healthy and dynamic growth both [sic] socially, culturally and economically. By putting to good use the knowledge, experience and talents of all these people who have come to this country from the four corners of the earth, we can greatly enhance Canada’s potential in the areas of international trade and diplomacy and in the field of cultural and scientific exchange.

Parliamentarians in the government and in the official opposition also extolled the value of dialogue. Opposition MP Alfonso Gagliano said: “Once we have perceived and acknowledged [the fact that cultural development leads to prosperity], it is much easier to create a cultural

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89 Ibid., s. 3(1)(c), 3(2)(b).
90 House of Commons Debates, 11 (15 March 1988) at 13746 (Hon. David Crombie) (emphasis added).
dialogue and to acknowledge that we are all genuine parties to this dialogue."\(^92\) In a similar vein, Chairman of the Standing Committee on Multiculturalism Gus Mitges said:

\[\text{[The new multiculturalism] will promote the understanding and creativity that arise from the interaction between individuals and communities of different origins. It will foster the recognition and appreciation of diverse cultures of Canadian society and promote the reflection and the evolving expressions of those cultures.}\(^93\)\]

While Taylor and Parekh’s ideas are discernible in the Act’s text and in the speeches of legislators, Will Kymlicka’s views are arguably not present in the Act itself. Though Kymlicka is perhaps Canada’s most well known theorist of multiculturalism, the connection he draws between the preservation of culture and the enhancement of freedom does not surface in any detectable way in the Act, aside from a loose link between freedom and culture in the Act’s pledge to “promote the understanding that multiculturalism… acknowledges the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage.”\(^94\) It is unlikely, however, that Parliament consciously sought to distance the text of the Act from the ideas now associated with Kymlicka. Indeed, in the parliamentary debates surrounding the Act, Secretary of State David Crombie echoed Kymlicka’s concern with freedom: “Multiculturalism in this country, historically, and multiculturalism in this Act, is not the language of command control. It is the language of choice and opportunity.”\(^95\) Likewise, Gus Mitges, Chairman of the Standing Committee on Multiculturalism said: “I have no hesitation in stating that a policy of

\(^92\) House of Commons Debates, 11 (23 March 1988) at 14048 (Hon. Alfonso Gagliano).
\(^93\) House of Commons Debates, 11 (15 March 1988) at 13780 (Hon. Gus Mitges).
\(^94\) Canadian Multiculturalism Act, supra note 76, s. 3(1)(a).
\(^95\) House of Commons Debates, 11 (15 March 1988) at 13745 (Hon. David Crombie). See also “Legislative Committee Minutes”, supra note 82 at 1:21, where Secretary of State Gerry Weiner stated: “[This bill] is based on opportunity, not coercion. It is written in the language of choice for Canadians everywhere.”
multiculturalism is the most suitable way of assuring and guaranteeing cultural freedom and cultural diversity in our country.”96 As such, this is likely a case where the complexities of Kymlicka’s reasons for supporting a particular kind of multiculturalism policies are simply beyond the scope of an Act of this nature.

Similarly, the Act’s text does not make any overt commitments to upholding the rule of law, an idea attributed above to McLachlin C.J. Arguably, however, the very notion that multicultural policy is best regulated by an Act of Parliament embodies, to some extent, the presumption that state law is (and should be) a comprehensive system that touches every aspect of human existence. While the Act seeks to “promote” multiculturalism, its passage reinforces the assumptions that the state will be the most important player in questions of cultural diversity, that state laws are all-encompassing, and that the best way for the state to address these questions will be through laws and official policies.97 There is also some support in the legislative debates for rule of law notions of multiculturalism. Speaking in support of the Act, the Parliamentary Secretary to Secretary of State and Minister Responsible for Multiculturalism, Vincent Della Noce said: “Everytime [sic] I meet a new Canadian, I remind him that he is not here to claim the rights of his native country, he is here to accept the laws of this country, to enjoy all those privileges – stability and opportunity.”98

96 House of Commons Debates, 11 (15 March 1988) at 13780 (Gus Mitges) (emphasis added).

97 Arguably, perhaps, when the Act states at s. 3(1)(j) that the official policy of Canada is to “advance multiculturalism throughout Canada in harmony with the national commitment to the official languages of Canada,” this also reflects a kind of commitment to the rule of law. The concern articulated in this provision is that the Canadian Multiculturalism Act might be taken as inconsistent with the constitutional privileging of English and French over other languages by treating them as official languages. Thus, Parliament included s. 3(1)(j) to provide guidance to future multicultural policies, which would need to respect the official status of English and French in order to be consistent with the constitution, Canada’s supreme law.

98 House of Commons Debates, 11 (15 March 1988) at 13771 (Vincent Della Noce) (emphasis added).
Finally, though this notion was not explored in reference to the theorists discussed above, it must be noted that the Parliamentarians who sponsored the *Canadian Multiculturalism Act* believed that it would help foster greater participation by members of minority groups in public life and institutions. Indeed, s. 5(1)(d) of the Act requires the responsible minister to encourage and assist the business community, labour organizations, voluntary and other private organizations, as well as public institutions, in ensuring full participation in Canadian society, including the social and economic aspects, of individuals of all origins and their communities, and in promoting respect and appreciation for the multicultural reality of Canada.99 Similarly, speaking in favour of the Act, Minister of State (Multiculturalism) Gerry Weiner said: “Equality of participation is our objective throughout federal jurisdiction… This Government has opened up to cultural and racial minorities as never before, and we shall continue to do so.”100

In sum, the themes of recognition, cultural diversity, and cross-cultural dialogue exist in the federal Act alongside a particular commitment to equality. This latter is aimed at ensuring broader participation by members of minority groups. Further, notions of cultural freedom and the rule of law animated the speeches of the legislators who sponsored the Act. I turn now to consider similar legislation in several of Canada’s provinces.

2.3.2 Provincial Legislation

Saskatchewan, Nova Scotia, British Columbia and Manitoba all have legislation that is similar in nature to the *Canadian Multiculturalism Act*; each of the provincial acts lays out a general policy statement with respect to multiculturalism. As with the federal legislation, the goals articulated in the provincial statutes may be understood as reflecting elements of the

99 *Canadian Multiculturalism Act*, supra note 76, s. 3(1)(d).
100 *House of Commons Debates*, 14 (11 July 1988) at 17428 (Hon. Gerry Weiner).
various the policy stances adopted by leading theorists. For example, Nova Scotia’s
*Multiculturalism Act*, British Columbia’s *Multiculturalism Act*, and the *Manitoba
Multiculturalism Act* cite the promotion of harmonious inter-group relations as a goal of
multiculturalism policy. 101 This emphasis arguably reflects the *modus vivendi* approach to
multiculturalism articulated by Jacob Levy. There is an implicit recognition that individuals will
continue to identify with and remain committed to their ethnic or cultural communities, and that
an appropriate state response is to ensure that relations between these groups remain peaceful.
However, while these Acts may adopt the goal of maintaining peaceful relations, they do not
limit the goals of multiculturalism to the prevention of inter-communal tensions. All three Acts,
as well as the Saskatchewan Act, adopt more far-reaching goals that can be connected with the
views of the other theorists discussed above.

The importance of the Taylorian concept of recognition is underscored in all the provincial
statutes. One of the stated purposes of Saskatchewan’s *Multiculturalism Act*, for example, is “to
recognize that the diversity of Saskatchewan people with respect to race, cultural heritage,
religion, ethnicity, ancestry and place of origin is a fundamental characteristic of Saskatchewan
society that enriches the lives of all Saskatchewan people.”102 Further, the Saskatchewan
legislation shares Taylor’s view that there is a link between multiculturalism policy and the “the
full, free and equal participation of all individuals in Saskatchewan society.”103 Similarly,

101 *Multiculturalism Act*, R.S.N.S. 1989, c. 294, s. 3(b); *Manitoba Multiculturalism Act*, C.C.S.M. c. M223,
preamble; *Multiculturalism Act*, R.S.B.C. 1996 c. 321, s. 2(c), 3(b). Notably, Manitoba’s act uses the language of
“racial harmony,” while the Nova Scotia Act seeks to establish “a climate for harmonious relations among people of
diverse cultural and ethnic backgrounds without sacrificing their distinctive cultural and ethnic identities” and the
British Columbia Act declares its purpose as “promot[ing] racial harmony, cross cultural understanding and respect
and the development of a community that is united and at peace with itself.”

102 *Multiculturalism Act*, S.S. 1997, c. M-23.01, s. 3(a); see also s. 4(c).

103 *Ibid.*, s. 4(d).
Manitoba’s statute commits to “recognize and promote the right of all Manitobans…to… respect for their cultural values.”\(^{104}\) In the same breath, the statute incorporates the concept of equality, by committing to the promotion of “equal access to opportunities,” and “participat[ion] in all aspects of society” for all cultural groups.\(^{105}\)

In a similar vein, British Columbia’s Act commits “to recognize that the diversity of British Columbians as regards race, cultural heritage, religion, ethnicity, ancestry and place of origin is a fundamental characteristic of the society of British Columbia.”\(^{106}\) Likewise, Nova Scotia’s Act promises to encourage the “recognition and acceptance of multiculturalism as an inherent feature of a pluralistic society,” and “the continuation of a multicultural society as a mosaic of different ethnic groups and cultures.”\(^{107}\) Admittedly, there may be some terminological confusion in the Nova Scotia and British Columbia legislation. It is not necessarily clear that the recognition of “multiculturalism” or “diversity” means the same thing as the recognition of a particular cultural community. However, in the case of the Nova Scotia at least, when read together with the Act’s commitment to the concept of a “mosaic,”\(^{108}\) the idea that each cultural community should be recognized as worthy of preservation comes through the text. In the case of British Columbia’s Act, the fact that the Act states that social diversity “enriches the lives of all British

\(^{104}\) Manitoba Multiculturalism Act, C.C.S.M. c. M223, s. 2(b)(iii).

\(^{105}\) Ibid. s. 2(b)(i), (ii).

\(^{106}\) Multiculturalism Act, R.S.B.C. 1996 c. 321, s. 2(a), (b).

\(^{107}\) Multiculturalism Act, R.S.N.S. 1989, c. 294, s. 2(a), (c).

\(^{108}\) Ibid. s. 3(c).
Columbians”\textsuperscript{109} lends support to the view that each community’s contributions should be recognized as contributing to the lives of all.

Bhiku Parekh’s ideas of cross-cultural dialogue and the inherent value of cultural diversity also play heavily in the provincial statutes. In perhaps the clearest example, British Columbia’s Act promises to “promote cross cultural understanding” and, as already noted, officially recognizes that “the diversity of British Columbians… enriches the lives of all British Columbians.”\textsuperscript{110} Similarly, Saskatchewan’s Act emphasizes that diversity “enriches the lives of all Saskatchewan people,”\textsuperscript{111} and commits to “act in partnership with community groups and organizations to encourage and enhance co-operation and understanding among cultures.”\textsuperscript{112} Manitoba’s Act likewise identifies cultural diversity as “a strength of and a source of pride to Manitobans,”\textsuperscript{113} and adopts a policy of enhancing “the opportunities of Manitoba's multicultural society by acting in partnership with all cultural communities and by encouraging cooperation and partnerships between cultural communities.”\textsuperscript{114} Nova Scotia’s shorter Act does not explicitly adopt a policy of promoting dialogue, but still arguably views diversity \textit{per se} as valuable through its promotion of the idea a cultural mosaic.\textsuperscript{115}

\textsuperscript{109} Multiculturalism Act, R.S.B.C. 1996 c. 321, s. 2(a).

\textsuperscript{110} Ibid. s. 3(b), 2(a).

\textsuperscript{111} Multiculturalism Act, S.S. 1997, c. M-23.01, s. 3(a).

\textsuperscript{112} Ibid. s. 4(e).

\textsuperscript{113} Manitoba Multiculturalism Act, C.C.S.M. c. M223, s. 2(a).

\textsuperscript{114} Ibid. s. 2(c).

\textsuperscript{115} Multiculturalism Act, R.S.N.S. 1989, c. 294, s. 2(c).
Will Kymlicka’s idea that freedom and autonomy are closely related to cultural preservation is apparent, to some extent, in the Manitoba legislation. In its preamble, the Act displays a commitment not only to “the freedom and opportunity [for all persons] to express and foster their cultural heritage,” but also to “the freedom and opportunity to participate in the broader life of society.”\textsuperscript{116} Though these aspirations are not identical to Kymlicka’s view of culture as a necessary context for the maximization of personal autonomy, the legislation evinces the understanding that the concepts of multiculturalism and freedom are linked in important ways.

Finally, both the Manitoba and Saskatchewan Acts display a commitment to the idea of the rule of law, expressed above by McLachlin C.J. The Manitoba Act attaches a respect for the rule of law as a condition for participation in public life; in its preamble, the Act states that the opportunity to participate in the “broader life of society” comes with “the responsibility to abide by and contribute to the laws and aspirations that unite society.”\textsuperscript{117} In similar fashion, the Saskatchewan Act commits to “support the continued development and expression of all cultures within the framework of democratic principles and the laws of Canada.”\textsuperscript{118}

In sum, to varying degrees, the various provincial statutes reflect some of the same ideas developed by the theorists discussed in the first part of this Chapter. As with the federal Act, the provincial Acts share the most in common with Taylor and Parekh, though the ideas expressed by Levy, Kymlicka, and McLachlin C.J. also appear to some extent.

\textsuperscript{116} \textit{Manitoba Multiculturalism Act}, C.C.S.M. c. M223, preamble.
\textsuperscript{117} \textit{Ibid.}
\textsuperscript{118} \textit{Multiculturalism Act}, S.S. 1997, c. M-23.01, s. 4(a) (emphasis added).
2.4 Conclusion

Canada’s laws on multiculturalism share many underlying ideas with the political theorists of multiculturalism. The Taylorian concept of recognition, and Parekh’s insistence on the inherent value of cultural diversity and the importance of cross-cultural dialogue emerge as dominant themes in Canada’s federal and provincial multiculturalism legislation. To the extent that these ideas are vague in the statutes, the works of the theorists described in this chapter are helpful in providing clarification as to the import and implications of the legislated commitments. Armed with this understanding, we can more justifiably invoke the work of the leading theorists to critique the ways in which Canadian courts handle questions of freedom of religion. In Chapter 4, I will set out to do just this. First, though, it is necessary to explore in detail the Canadian legal doctrine of freedom of religion, which is the subject of Chapter 3. Once some common themes can be culled from judicial decisions, they can be examined through the lens of Canada’s multicultural commitments.
Chapter 3
Canadian Approaches through the Case Law

3  Canadian Approaches through the Case Law

3.1  Introduction

In order to determine whether Canadian jurisprudence on freedom of religion is faithful to Canada’s legislated commitments and aspirations of multiculturalism, it is necessary to first examine Canada’s case law in detail. In this chapter, I will analyze Canadian decisions raising matters of religion with respect to shared spaces and resources.¹ Broadly speaking, these disputes can be seen as falling into two categories: conflicts over shared physical spaces, and conflicts over shared institutions. I will provide an overview of the leading Canadian cases in each of these categories. I will focus on the judicial treatment of these issues, rather than the practical implications of the judgments.

I will argue that there are at least four common threads to the prevailing jurisprudence in Canada.² First, courts have taken an individualist approach to matters of religion; religious beliefs and practices are treated as private and particular to the individual litigants before the court. Second, a major concern of Canadian courts is the prevention of state coercion in

¹ I explain my reasons for focusing on these cases in Chapter 1.

religious matters. Courts treat this as the most basic aspect of freedom of religion, to the point that if legislation or state action is viewed as having a religious purpose, it cannot possibly pass constitutional muster. Third, the judicial decisions are infused with the discourse of tolerance. Appeals to tolerance can be used to trump competing claims for the use of a particular resource or the character of a state institution. Fourth, despite the legal principle that all constitutional rights have equal value,\(^3\) and none is seen as intrinsically more important than any other, courts’ resolutions of disputes involving competing constitutional rights typically involve a determination as to which right is more important. While this analysis is contextual and thus highly dependent on the facts of each case, courts more often determine which right is more important than they do truly reconcile the competing claims. Not all four of these strains are present in every decision discussed below. However, they are repeated with enough frequency to offer precedential sources of justification for other courts dealing with matters of religion.

3.2 Shared Physical Spaces

3.2.1 Shared Ownership

People of various religious faiths have different practices with respect to the way that they use their homes and private property. In condominium-type properties, people who have had no relation to each other, or no prior knowledge of each other, become co-owners in a building. Typically, the common portions of condominium projects are co-owned by all of the unit owners in the building. Condominium agreements may spell out the expectations of how common space is to be used. This may include those spaces that are used by individual co-owners but are

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publicly visible, like balconies. Quite literally, these spaces are shared by the co-owners of the condominium.

When co-owners disagree about how these spaces may be used, litigation can ensue, as was the case in Syndicat Northcrest v. Amselem.⁴ There, the arguments focused on whether the majority of co-owners had to accommodate the religiously-based needs and requests of a small number of co-owners, and whether a condominium agreement was subject to exceptions on the basis of freedom of religion.

The Supreme Court of Canada’s ruling in Amselem is perhaps the most significant decision dealing with freedom of religion in the last decade.⁵ The appellants in Amselem were Orthodox Jews who wished to install succoth on the balconies of their condominiums. A succah (plural: succoth) is a temporary structure that some Jews erect during the annual 9-day holiday of Succoth. At issue was whether the syndicate of co-ownership⁶ could prevent Mr. Amselem and his co-litigants from erecting succoth on their balconies on the basis of the by-laws in the building’s declaration of co-ownership.

The syndicate argued that these by-laws prohibited decorations, alterations and constructions on the balconies of the condominium. It claimed that these prohibitions were aimed at preserving the aesthetic unity of the building and the safety of all occupants. Mr.

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⁵ Shauna Van Praagh analyzes Amselem through the lens of the private law of nuisance and the similar Québec civil law concept of voisinage (neighbourhood), and provides a new way of thinking through the sharing of spaces by people of various faiths: see Shauna Van Praagh, “View from the Sukkah – Religion and Neighbourly Relations” in Richard Moon, ed., Law and Religious Pluralism in Canada (Vancouver: UBC Press, 2008) 21.
⁶ In Québec, the co-owners in condominium-type building constitute a “syndicate of co-owners,” which operates as a legal person analogous to a corporation (Art. 1038 C.C.Q.). For present purposes, it suffices to note that the syndicate of co-owners is analogous to a condominium’s board of directors.
Amselem and his co-appellants had all signed the declaration of co-ownership, and, according to the syndicate, should be held to this agreement. Mr. Amselem and his co-appellants claimed that the interpretation of the declaration of co-ownership advanced by the syndicate infringed their religious freedom.

Both the Superior Court of Québec and the Québec Court of Appeal found in favour of the syndicate. However, the majority of the Supreme Court of Canada concurred in the reasons by Iacobucci J. and found in favour of Mr. Amselem and his co-appellants. Iacobucci J.’s analysis is remarkable for several reasons. First, Iacobucci J. frames his analysis with reference to a few organizing principles. On one hand, Iacobucci J. notes that “respect for and tolerance of the rights and practices of religious minorities is one of the hallmarks of an enlightened democracy.” On the other hand, Iacobucci J. writes that “[r]espect for minority rights must also coexist alongside societal values that are central to the make-up and functioning of a free and democratic society.” Thus, at the outset, the prevailing orientation of the Court is clear: matters of controversy concerning the exercise of religious practices will be approached in a spirit of “respect” and “tolerance,” but always with an understanding that the right to freedom of religion is not absolute. This latter principle sets up a hierarchical organization of rights in any given case; freedom of religion is important, but not absolute. It therefore may need to give way to other rights.

7 The legislative guarantee of freedom of religion at issue in Amselem was Québec’s Charter of Human Rights and Freedoms, R.S.Q., c. C-12, s. 3, because the case involved a dispute between private parties as opposed to a dispute between a private party and a government actor. In the latter case, the Canadian Charter of Rights and Freedoms would apply. However, the majority of the Court made clear that the principles it set out with respect to freedom of religion apply equally to cases brought under the Canadian Charter (Amselem, supra note 4 at para. 37).
8 Amselem, supra note 4 at para. 1.
9 Ibid.
Second, in order to proceed with his analysis of freedom of religion, Iacobucci J. found it necessary to set out a working definition of religion. He held:

In order to define religious freedom, we must first ask ourselves what we mean by “religion”. While it is perhaps not possible to define religion precisely, some outer definition is useful since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom 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.\(^\text{10}\)

Iacobucci J.’s definition focuses on religion’s significance to the individual. Its emphasis is on personal convictions, individual self-definition and spiritual fulfilment, and the spiritual practices of individuals. Further, Iacobucci J.’s understanding that religious convictions are “freely” held implies the view that religious convictions are matters of individual choice. Indeed, Iacobucci J. notes the Supreme Court of Canada’s articulation of “an expansive definition of freedom of religion, which revolves around the notion of personal choice and individual autonomy and freedom.”\(^\text{11}\)

For Iacobucci J., a consequence of this individualized view of religion is that “claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same

\(^{10}\) \textit{Ibid.} at para. 39.

\(^{11}\) \textit{Ibid.} at para. 40 (emphasis added). A critique of this individualized treatment of religion, motivating by the writings of Benjamin Berger, follows in Chapter 4.
religion, nor is such an inquiry appropriate for courts to make.”12 It follows from this view that it is not appropriate for courts to require corroboration of a particular religious practice from expert witnesses, such as clergy members. While such evidence may serve to bolster a claimant’s credibility, “[r]equiring proof of the established practices of a religion to gauge the sincerity of belief diminishes the very freedom we seek to protect.”13 Therefore, a court’s role is to determine the sincerity and credibility of the claimant. But even in so doing, courts must tread carefully: “it is inappropriate for courts rigorously to study and focus on the past practices of claimants in order to determine whether their current beliefs are sincerely held. Over the course of a lifetime, individuals change and so can their beliefs. Religious beliefs, by their very nature, are fluid and rarely static.”14

Third, Iacobucci J. probed somewhat deeper into the kinds of limits that the law will impose on freedom of religion. Citing John Stuart Mill, Iacobucci J. held that a person’s exercise of freedom of religion will be limited by the rights of others.15 In Amselem, however, Iacobucci J. found little of substance in the syndicate’s arguments as compared to the rights of religious freedom asserted by Mr. Amselem and his co-appellants. An annual period of nine

12 Ibid. at para. 43.
13 Ibid. at para. 54.
14 Ibid. at para. 53. In addition, Iacobucci J. held that another facet of this view is the inappropriateness of distinguishing between mandatory and voluntary religious practices. Thus, “[i]t is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection. An inquiry into the mandatory nature of an alleged religious practice is not only inappropriate, it is plagued with difficulties (at paras. 47, 67-68).” Interestingly, at paragraph 68 of the decision, Iacobucci J. appeals to the value of sexual equality as support for the proposition that religious customs should be granted the same protection as religious obligations: “Jewish women, for example, strictly speaking, do not have a biblically mandated “obligation” to dwell in a succah during the Succot holiday. If a woman, however, nonetheless sincerely believes that sitting and eating in a succah brings her closer to her Maker, is that somehow less deserving of recognition simply because she has no strict “obligation” to do so?”
15 Ibid. at paras. 61-62.
days during which the latter would install their succoth could not, in Iacobucci J.’s view, be said to significantly affect the rights of the other co-owners.\textsuperscript{16}

Iacobucci J. concluded his analysis by referring to the multicultural nature of Québec, and again appealed to the value of tolerance:

In a multiethnic and multicultural country such as ours, which accentuates and advertises its modern record of respecting cultural diversity and human rights and of promoting tolerance of religious and ethnic minorities — and is in many ways an example thereof for other societies —, the argument of the respondent that nominal, minimally intruded-upon aesthetic interests should outweigh the exercise of the appellants’ religious freedom is unacceptable. Indeed, mutual tolerance is one of the cornerstones of all democratic societies.\textsuperscript{17}

Thus, the value of tolerance bookends Iacobucci J.’s analysis, confirming its elevated status among the principles that guide judicial decisions in disputes involving religious matters. This is one instance in which the social facts of multiculturalism are associated with the value of tolerance. A critical analysis of the discourse of tolerance, inspired by the work of social theorist Wendy Brown, is developed below in Chapter 4. Before pursuing this, however, I will continue exploring the Canadian case law in order to expand upon the themes and patterns of thought in the jurisprudence.

3.2.2 The Character of Public Spaces

The character of a public space can become a source of tension between communities of different cultural or faith backgrounds. For example, in the United States, citizens have called into question the appropriateness of a municipality including a crèche in its holiday display.\textsuperscript{18} In

\textsuperscript{16} Ibid. at para. 85.
\textsuperscript{17} Ibid. at para. 87.
the constitutional context of the United States, where the first amendment to the Constitution provides that “Congress shall make no law respecting an establishment of religion,” (the Establishment Clause), the legal argument advanced those opposed to the municipality’s display is that the municipality infringed the constitution by advancing a particular religion. In holding that the installation of the crèche did not violate the Establishment Clause, the U.S. Supreme Court reasoned that Christmas had long been observed as a national holiday, and this gave the crèche a valid secular purpose.

In Canada, the question of how a public space can remain neutral as between religious faiths and those who are committed to secularism arose in a different context in the case of *Rosenberg v. Outremont (City)*. The city of Outremont neighbours Montreal’s downtown core and is home to a sizable Orthodox Jewish population. The dispute in *Rosenberg* centred on the installation and dismantling of an eruv (plural: eruvin) in Outremont. Hilton J. (as he then was) summarized the evidence of the Orthodox Jewish litigants on the practice of erecting eruv in as follows:

Essentially, an eruv is a notional concept by which an otherwise open area is closed by the attachment of barely visible wires or strings to freestanding structures. The purpose of an eruv is to avoid the prohibition in Jewish Law of

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19 U.S. Const. amend. I.

20 *Lynch, supra* note 18 at 680-681. Martha Minow views this decision as an instance where “[t]he impact of the observer’s unacknowledged perspective may be cruelly oppressive.” In Minow’s view, because the judges did not adopt the perspective of the complainants, they could not appreciate the exclusionary or oppressive aspects of the presence of the crèche in a municipal display (Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca: Cornell University Press, 1990) at 62).


removing things from one domain to another on the Sabbath and on Holidays. From a practical point of view, without an eruv, an Orthodox Jew is effectively housebound on the Sabbath and religious holidays if he or she wishes to or is required to take anything out of the house and bring it on to other property. This prevents, for example, such common-place activity as pushing a stroller with young children, carrying medication, or bringing food to a neighbour's home.23

The Orthodox Jewish community had installed several *eruv* (in this case using barely visible wires) within Outremont in order to facilitate the celebration of the Sabbath and other Jewish holidays. The wires were attached to private buildings, with the consent of the owners, approximately fifteen feet above ground.24 After receiving complaints from some residents, the city sent its workers to dismantle the *eruv*.25 The Orthodox Jewish petitioners in *Rosenberg* sought a declaration from the court stating that they were entitled to install *eruv*, and that the city had no right to dismantle them.26

The city made three main arguments in defence of its actions. First, it argued that the dismantling of the *eruv* did not “constitute an interference with the freedom of religion of the Petitioners, since the restriction they seek to alleviate by the erection of *eruv* is imposed by Jewish Law and not by Outremont.”27 In other words, because Jewish Law (and not municipal law) is the source of the prohibition on carrying objects between public and private zones on the Sabbath, the city maintained that its actions should not be seen as imposing any additional restriction. Second, the city argued that the guarantee of freedom of religion is not related to a particular place, and that the city was under no obligation to allow the space over public streets

23 *Rosenberg*, supra note 21 at para. 7.
to be used by members of religious communities. Third, the city argued that its conduct was “justifiable in light of its duty to maintain the public domain accessible to all residents of Outremont on the same basis and without distinction.”

The city’s third argument, which raised the issue of the city’s obligation to remain neutral as between religions, was echoed in the submission of a secularist organization, the Mouvement Laïque Québécois (M.L.Q.), that intervened in the case. Among other things, the M.L.Q. argued “that the erection of eruvin involuntarily place[s] non-members of the Orthodox Jewish faith within what amounts to a religious enclave with which they do not wish to be associated” and that a “judgment maintaining the relief being sought would inevitably create what amounts to an officially recognized religious territory.”

Hilton J. began his analysis by assessing the inconveniences imposed by the eruvin on non-members of the Orthodox Jewish community, and concluded that there were none. Hilton J. then noted that the right to freedom of religion “includes the right to practice the religion and to openly demonstrate or manifest that practice, while all the while insuring that no injury is caused to one’s neighbours or their right to hold and display different beliefs.” In applying this

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28 Ibid.
29 Ibid.
30 Ibid. at para. 18.
31 In a memorable passage, Hilton J. remarked: “The only physical limitation [an Outremont resident] identified when she was examined on her affidavit was that the presence of an eruv on the apartment building in which she lives would prevent her from flying a kite. In response to a direct question, however, she declined to say whether she has ever tried to fly a kite in front of her residence or whether she ever otherwise engages in flying kites (ibid. at para. 22).” In Chapter 5, I will outline an alternative approach to freedom of religion that, among other things, centres on an analysis of who bears the costs of religious differences. This shares much in common with Hilton J.’s approach of, as a first step, measuring the inconveniences suffered by the parties before the court.
32 Ibid. at para. 24.
principle, Hilton J. held that while “the restrictions that an eruv is meant to alleviate are not imposed by the City of Outremont but rather by Orthodox Judaism… [t]hat does not make the understandable desire of the Petitioners to erect eruvin to be any less a matter of their religious beliefs that they are entitled to have recognized as such.”33 In other words, because the eruv was related to the ability of Orthodox Jews to participate in religious services and was an aspect of their religious practice, it fell under the ambit of freedom of religion.34

On the issue of the city’s obligation of neutrality, Hilton J. held that the petitioners were not seeking an official recognition of their religion by the city, but rather an accommodation by the city of their religious requirements. This did not burden the municipality’s other residents because “the area within an eruv is only a religious zone for those who believe it to be one.”35 Though the city’s obligation to accommodate the petitioners raised “the potential for conflict between the duty to accommodate and the obligation of neutrality,”36 Hilton J. reasoned that the mere presence of religious symbols in public spaces did not imply that the state was less than neutral. He cited other examples of the city’s tolerance of religious symbols in public spaces such as “Christmas decorations displayed on City property” and “the ringing of church bells on Sunday morning to summon Christians to worship”37 in an effort to show that the presence of

33 Ibid. at para. 37.
34 Ibid. at para. 36.
35 Ibid. at para. 44. I find this to be a troubling assertion; a similar argument could be made to justify the presence of religious symbols in state institutions, such as the crosses that used to be present in Québec courtrooms. A distinction should be made, I believe, between a state actor’s allowance of a religious group to use a public space for religious purposes on the one hand, and the state itself displaying religious symbols on the other. I return to this point below in Chapter 4.
36 Ibid. at para. 29.
37 Ibid. at para. 25.
religion in public spaces is already an accepted feature of life in and around Outremont. Accordingly, the Court ruled that the petitioners were entitled to establish *eruv*, and that the city could not dismantle them.38

The decision in *Rosenberg* can be seen as emerging principally from the values of tolerance.39 Hilton J. used the language of “accommodation” to describe the city’s obligations to its religious inhabitants. Accommodation and tolerance are related ideas; indeed, the values of tolerance often require accommodation for divergent beliefs and practices. Further, Hilton J.’s focus on the burdens borne by the city’s non-Jewish residents reflects the view that people are expected to tolerate others’ religious practices unless they can show how the practices negatively affect them in a manner that outweighs the importance of freedom of religion. This view is also consistent with a hierarchical approach to rights claims in that it sets up a contest between litigants on the basis of whose interests are more compelling.

### 3.2.3 Organizing Spaces: Zoning Disputes

Not all the spaces in a municipality are shared; some spaces are deliberately set aside for private use, such as residential areas. However, the decisions as to how the space within a municipality will be organized, namely what kinds of uses will be permitted in which spaces, are public decisions. Zoning decisions are about shared spaces in the sense that municipalities are expected to make zoning decisions in the public interest, on behalf of all their inhabitants. Typically, when religious concerns are implicated in zoning decisions, it is because a community wants to install a place of worship and has problems locating a property that is zoned properly


39 As noted above, in Chapter 4 I will engage in a critical analysis of the discourse of tolerance. For now, the central point is that tolerance is a recurring theme in the jurisprudence.
for this purpose. Arguments tend to focus on whether the municipality must accommodate the community’s demands for zoning variances.

In Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village), a dispute arose between a congregation of Jehovah’s Witnesses and the village of Lafontaine, Québec. The congregation set out to purchase land for a new Kingdom Hall, and searched for property in the area designated as Zone P-3 of the village, which was properly zoned for a place of worship. Having concluded that there was no available property in Zone P-3, the congregation entered into a purchase agreement of a property that was in a residential zone, conditional on the congregation obtaining rezoning approval from the municipality, which the congregation then sought.

The municipality referred the matter to its Comité consultatif d’urbanisme, which commissioned a study “on the financial impact upon city taxpayers of granting the Congregation’s request.” Because places of worship are generally exempt from property taxes, the study concluded that if the municipality granted the congregation’s rezoning request, this would “result in increased property taxes for neighbouring residents.” On this basis, the municipality denied the congregation’s rezoning request at a public meeting, and gave detailed

41 Kingdom Hall is the term adopted by Jehovah’s Witnesses for their communal places of worship: see Jehovah’s Witnesses, Authorized Site of Office of Public Information of Jehovah’s Witnesses, “Worship and Conventions” online: <http://www.jw-media.org/people/worship.htm>.
42 Témoins de Jéhovah, supra note 40 at para. 18.
43 The name of the committee can be translated as the Consultative Committee for Urban Planning.
44 Témoins de Jéhovah, supra note 40 at para. 19.
45 Ibid.
reasons in support of its action. The mayor of the municipality then urged the congregation to meet with the municipal building inspector, who illustrated on a map all of the areas that were properly zoned for a place of worship. The building inspector told the congregation that “if no land were available for purchase in Zone P-3, the Congregation would have to reapply for a zoning variance.”

The congregation renewed its search for land in Zone P-3. Again concluding that no land was available, the congregation entered into another conditional purchase agreement, this time in a commercial area, for a parcel of land located 400 meters from another place of worship. It submitted another rezoning request to the municipality, accompanied by a letter detailing its four-year effort to find a suitable property, and inability to find land for purchase in Zone P-3. Three days later, the municipality refused the congregation’s second rezoning request, and advised the congregation that there were lots available in Zone P-3. The trial judge in the case held that, in fact, there was at least one parcel of land available for sale in Zone P-3. However, the municipality did not advise the congregation as to which parcel this was.

The congregation once again set out to find land in Zone P-3, and again was unsuccessful. The congregation presented another zoning variance request to the municipality, for the same property as the previous request, but accompanied by a series of letters which

46 Ibid. at para. 20.
47 Ibid. at para. 21.
48 Ibid. at para. 22.
49 Ibid. at para. 23.
50 Ibid. at paras. 24, 26.
provided evidence of the congregation’s fruitless searches. The municipality again rejected the congregation’s request. This time, it did not advise the congregation that there was land available in Zone P-3, and instead sent a letter to the congregation stating:

You have made a number of applications to amend the zoning by-law. The Legislature has given the municipal council the responsibility for exercising this power, which is discretionary. Upon careful consideration, the municipality of Lafontaine has decided not to take action in respect of your applications. 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.

The congregation then instituted litigation, arguing that municipality’s actions infringed their freedom of religion.

A narrow majority of the Supreme Court of Canada disposed of the case on the basis of administrative law principles of procedural fairness. McLachlin C.J., for the majority, reasoned that in failing to provide reasons for its denials of the congregation’s second and third requests for zoning variances, the municipality did not meet its duty to “exercise the powers conferred upon it fairly, in good faith and with a view to the public interest.” Accordingly, the Court remitted the matter back to the municipality for reconsideration.

Within the context of an analysis of the duty of fairness, the majority of the court took into account that the congregation was seeking to exercise its religious beliefs. In framing its analysis, the Court noted:

51 Ibid. at para. 26.
52 Ibid. at para. 27.
53 Ibid. at para. 2.
54 Ibid. at para. 31.
The content of the duty of fairness on a public body varies according to five factors: (1) the nature of the decision and the decision-making process employed by the public organ; (2) the nature of the statutory scheme and the precise statutory provisions pursuant to which the public body operates; (3) the importance of the decision to the individuals affected; (4) the legitimate expectations of the party challenging the decision; and (5) the nature of the deference accorded to the body.\textsuperscript{55}

In relation to the third factor, the importance of the decision to the individuals affected, the majority of the Court considered the religious motivations of the congregation. In this regard, the Court held:

Here, it becomes important that the municipal 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, as attested to by its protection in the Canadian Charter of Rights and Freedoms and the Quebec Charter of human rights and freedoms.\textsuperscript{56}

Because the majority of the Court took this approach, there is little to be drawn from its reasons about the way that freedom of religion is protected. While the religious commitments of the congregation served to elevate the duty of fairness owed to it by the municipality, it is difficult to imagine that the municipality would not owe a similar (if perhaps somewhat diminished) duty to a person applying for a zoning variance for other reasons, for example in order to open a business in a residential zone.

However, the four dissenting judges, in a decision written by LeBel J., treated the matter as a question of freedom of religion. Though his opinion did not carry the day, other courts have

\textsuperscript{55} Ibid. at para. 5; see also Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.

\textsuperscript{56} Ibid. at para. 9.
drawn on it in their analyses of similar problems.\textsuperscript{57} Thus, the underpinnings of LeBel J.’s reasoning have worked their way into Canadian case law, despite the fact that LeBel J.’s opinion was given in dissent and is thus not formally binding on lower courts. It is therefore worthwhile to examine Lebel J.’s reasoning.

The first significant issue for LeBel J. was the factual matter of whether there was actually land available in Zone P-3 on which the congregation could construct its Kingdom Hall. While the trial judge had found that there was such land available, the Québec Court of Appeal overturned this finding, finding a palpable and overriding error in the trial judge’s acceptance of the testimony of a witness who claimed that her lot was for sale in Zone P-3 throughout the relevant time.\textsuperscript{58} At the Supreme Court of Canada, the majority and dissenting opinions restored the factual finding of the trial judge. This finding was not significant for the majority of the judges, who focused on the procedural fairness issue.\textsuperscript{59} However, it was effectively determinative for the dissenting judges.\textsuperscript{60}

LeBel J. held that, because there was a lot available where the congregation could have built a place of worship, the congregation could not successfully argue that the zoning by-law infringed its members’ freedom of religion. Simply put, the zoning by-law did not make it impossible for them to build a Kingdom Hall. The obligations of the municipality in this case

\begin{itemize}
\item[59] Témoins de Jéhovah, supra note 40 at para. 15.
\item[60] Ibid. at para. 62.
\end{itemize}
were to refrain from placing “unnecessary obstacles” in the way of the congregation’s exercise of its religious practices. Had the municipality provided assistance to the congregation in gaining access to a lot that matched the congregation’s selection criteria, the municipality would have violated its duty to act neutrally with respect to religion.\footnote{Ibid. at para. 71.}

LeBel J. went on to consider the hypothetical situation in which no land was available that was properly zoned for a place of worship. He held that if there had been no land available, the municipality’s failure to adapt its zoning by-law to “evolving community needs” would have constituted an infringement of the congregation’s right to freedom of religion, which included, in his view, the right to have a place of worship.\footnote{Ibid. at paras. 73-75.} Though, “[a]s a general rule, the Charter does not require the state to take positive steps in support of the exercise of the fundamental freedoms provided for in s. 2(a) of the Charter;”,\footnote{Ibid. at para. 76.} a case where a congregation cannot find a suitably zoned piece of land for its house of worship is an “exceptional situation in which a posture of restraint on the municipality’s part would interfere with the appellants’ freedom of religion.”\footnote{Ibid. at para. 79.}

The themes in LeBel J.’s judgment are familiar. He began by invoking the concept of tolerance, noting that freedom of religion “imposes on the state and public authorities, in relation to all religions and citizens, a duty of religious neutrality that assures individual or collective tolerance.”\footnote{Ibid. at para. 65.} Similar to the line of thought articulated by Iacobucci J. in Amselem, LeBel J. concluded later in his reasons that the edicts of tolerance limit the scope of the right to freedom

\footnotetext[61]{Ibid. at para. 71.}
\footnotetext[62]{Ibid. at paras. 73-75.}
\footnotetext[63]{Ibid. at para. 76.}
\footnotetext[64]{Ibid. at para. 79.}
\footnotetext[65]{Ibid. at para. 65.}
of religion: “[freedom of religion] is limited by the rights and freedoms of others. The diversity of opinions and convictions requires mutual tolerance and respect for others.”66

Next, LeBel J. went on to separate the “positive” and “negative” aspects of freedom of religion. The positive aspect involves “the right to believe or not believe what one chooses, to declare one’s beliefs openly, and to practice one’s religion in accordance with its tenets,” as well as “the right to proselytize, that is, to teach and disseminate one’s beliefs.” The negative aspect, in LeBel J.’s view, is “the right not to be compelled to belong to a particular religion or to act in a manner contrary to one’s religious beliefs.”67 It is this “negative” aspect of freedom of religion that is most important, for LeBel J., in defining the state’s proper sphere of action:

The guarantee of freedom of religion set out in s. 2(a) of the Charter prohibits the state from compelling an individual to adopt or renounce a particular belief or to practice a particular religion. This obligation remains essentially a negative one. As a general rule, the state refrains from acting in matters relating to religion. It is limited to setting up a social and legal framework in which beliefs are respected and members of the various denominations are able to associate freely in order to exercise their freedom of worship, which is a fundamental, collective aspect of freedom of religion, and to organize their churches or communities.68

Here, LeBel J.’s analysis picks up the anti-coercion theme that plays heavily in some prior decisions,69 and, as will be seen below, is significant in courts’ analyses of public institutions.

In sum, for LeBel J., while tolerance is a fundamental Canadian value, this does not mean that religious communities can have a place of worship wherever they want. When a zoning

66 Ibid. at para. 69.
67 Ibid. at para. 65.
68 Ibid. at para. 68. Interestingly, LeBel J. steps somewhat out of the norm in these comments by referring to the collective aspects of religious worship, whereas the general trend is to treat religion as an individual matter.
69 See e.g. R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at paras. 94-96.
dispute arises between a religious community and a municipality, the religious freedom of the community can only ground a successful argument where there is no land available in a properly designated zone for the construction of a place of worship. While, generally, communities have the right to build a place of worship, they do not have the right to build it at the place of their choosing; they must yield to the interests of the other members of the municipality on this point, which are taken to be expressed in zoning regulations. This analysis, for LeBel J., emerges from the value of tolerance. It also provides a framework for establishing a hierarchy of the rights of religious communities vis-à-vis the rights of public bodies to govern in particular ways.

The Québec Court of Appeal relied on LeBel J.’s reasoning in Témoins de Jéhovah in another zoning dispute over a place of worship, showing how LeBel J.’s reasoning can play out in practice. In Congregation of the Followers of the Rabbis of Belz to Strengthen Torah c. Val-Morin (Municipalité de), a Hasidic Jewish congregation engaged in a dispute with a municipality over the zoning of two buildings. The buildings were located in a residential zone, but the congregation had used the buildings as a synagogue and a religious school for some 20 years. Though the congregation owned land in an area of the municipality that was properly zoned for these purposes, the congregation argued that the enforcement of the zoning regulation infringed its freedom of religion. It stated that the costs of building a new place of worship and school in the proper zone were prohibitive, and that the municipality was obligated, in the circumstances, to accommodate the congregation.

Following Témoins de Jéhovah, Dufresne J. held for a unanimous Court that the municipality was under no obligation to accommodate the congregation. Dufresne J. began his

70 Supra note 57.
analysis of the congregation’s argument with extended references to case-law standing for the proposition that freedom of religion is not absolute, and must yield to the rights of others in some circumstances.\textsuperscript{71} In the circumstances of the case, the fact that the congregation owned suitably zoned land situated close to the homes of the congregation’s members was determinative: there was no violation of the congregation’s freedom of religion. In the Court’s words: “freedom of religion does not entail the right to worship or to establish a religious school in the place of one’s choosing (author’s translation).”\textsuperscript{72} The Court recognized that the zoning regulation served as an obstruction (“\textit{entrave}”\textsuperscript{73}) to the congregation’s freedom of religion, but the obstruction was negligible in this case.\textsuperscript{73} It was also relevant to the Court that the congregation had continuously represented the disputed properties as residences in its previous communications with the municipality. This, to the Court, was a sign of the congregation’s bad faith, as the congregation stated in its pleadings that the buildings had always been used as a synagogue and school.\textsuperscript{74}

### 3.3 Shared Institutions

As a consequence of an increasingly diverse citizenry, the character of shared public institutions must sometimes be rethought. Practices that were once thought to be the inoffensive, even laudable norm have been challenged in this context on numerous occasions. The presence and/or exclusion of religious symbols from shared institutions have been recurring issues in

\textsuperscript{71} \textit{Ibid.} at paras. 28-35.

\textsuperscript{72} \textit{Ibid.} at para. 45; in the original: “\textit{La liberté de religion n'emporte pas le droit de célébrer le culte ou d'établir une école d'enseignement religieux à l'endroit de son choix.}”

\textsuperscript{73} \textit{Ibid.} at para. 46.

\textsuperscript{74} \textit{Ibid.} at paras. 50-51. According to congregation leader Charles (Yankel) Binet, there was a longstanding agreement between the congregation and the municipality: the congregation would continue to pay taxes on the properties as if they were residential, and the municipality would not seek to enforce its zoning by-law (Interview of Charles (Yankel) Binet, Belz Community Leader (25 October, 2004)). There was, however, no proof of such an agreement presented to the Court.
litigation. Public religious practices have also raised challenging questions for town councils, legislatures, courthouses, and schools.

3.3.1 Town Councils and Legislatures

Penetanguishene is a rural town on the tip of Ontario’s Georgian Bay, and presently has a population of about 10,000.75 Traditionally, the town council meetings commenced with a reading of the Lord’s Prayer.76 In Freitag v. Penetanguishene (Town),77 a non-Christian resident of the town applied to the court claiming that his freedom of religion was unjustifiably infringed by this practice. Ontario’s Court of Appeal described the crux of his allegation as follows:

He acknowledges that he is not forced to stand and say the Lord’s Prayer at the opening of the meetings. However, he says that there is great pressure to do so, and that as a non-Christian, he feels intimidated and uncomfortable with the practice adopted by the Town. He also says that although he has considered running for office, he has been deterred from doing so, as it would be contrary to his personal beliefs to be a member of a council that uses a denominational prayer as it does.78

The town provided evidence that the practice was not intended to indoctrinate people into the Christian faith, but rather to “have the Council take a moment’s pause to recognize the importance of our deliberations, the moral values that should be brought onto our deliberations

75 Town of Penetanguishene, online: <http://www.town.penetanguishene.on.ca/siteengine/activepage.asp>.
76 The Lord’s Prayer is Christian in origin, and versions of it appear in the Gospels of Matthew and Luke. The prayer reads: “Our Father, Who art in Heaven, hallowed be Thy name, Thy kingdom come, Thy will be done in earth as it is in Heaven; give us this day our daily bread; and forgive us our trespasses as we forgive them that trespass against us; and lead us not into temptation, but deliver us from evil: For thine is the kingdom, and the power, and the glory, for ever. Amen” (see Zylberberg, infra note 112 at 687).
77 (1999), 47 O.R. (3d) 301 (C.A.) [Freitag].
78 Ibid. at para. 5.
and the fact that we are serving the public when we deliberate.”79 It also provided evidence that another non-Christian resident of the town was a long-standing member of the town council who did “not feel compelled to stand when called upon by the Mayor, but [chose] to stand and take a moment for silent reflection.”80

In analyzing the freedom of religion claim, Feldman J.A. held for a unanimous Court that the purpose of the practice was to “to impose a Christian moral tone on the deliberations of council,”81 noting that the town had refused to adopt a practice that would set a moral tone without reciting a Christian prayer. The adoption of a religious purpose was problematic in that it raised the spectre of state coercion into a particular religious practice. The Court held that this religious purpose was enough on its own to invalidate the practice.82

Nonetheless, the Court went on to examine the effects of the recitation of the Lord’s Prayer on Mr. Freitag. At first instance, the application judge held that the effects of the practice were trivial and insubstantial, and thus did not warrant protection under the Charter. The Court of Appeal firmly rejected this view. The Court held that “everyone is entitled to attend public local council meetings” and “be free from coercion or pressure to conform to the religious practices of the majority.”83 While the recitation of the Lord’s Prayer did not cause the applicant to avoid public council meetings altogether, he was “singled out as being not part of the majority

83 *Ibid.* at para. 34.
recognized officially in the proceedings” and dissuaded from running for public office. The town had also argued that the recitation of the Lord’s Prayer was an historical practice in several municipalities and in the legislatures. The Court noted that, in 1994, Parliament had replaced the Lord’s Prayer with a “non-sectarian prayer.” Further, the Court held that the historical argument was inconsistent with s. 27 of the Charter, “which ensures the preservation and enhancement of the multicultural nature of current Canadian society as well as of our Canadian heritage.”

The issue of a prayer being recited at meetings of legislative or quasi-legislative bodies arose twice more in Canada, both times in Ontario. The case of Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission) began with a complaint to Ontario’s Human Rights Commission by Henry Freitag, the same man who had objected to the practice of the town council in Penetanguishene. At the time, Ontario’s legislature began every day with two prayers, a “non-denominational” prayer and the Lord’s Prayer. Freitag’s concern was with the latter, and he challenged the practice using the same arguments he had advanced against the town of Penetanguishene.

84 Ibid. at para. 36.
85 The “non-sectarian” prayer reads:

Almighty God: We give thanks for the great blessings which have been bestowed on Canada and its citizens, including the gifts of freedom, opportunity and peace that we enjoy. We pray for our Sovereign, Queen Elizabeth, and Governor General. Guide us in our deliberations as Members of Parliament, and strengthen us in our awareness of duties and responsibilities as Members. Grant us wisdom, knowledge, and understanding to preserve the blessings of country for the benefit of all and to make good laws and wise decisions. Amen.

We will now have a moment of silence for private reflection and meditation. Amen. (Ibid. at para. 45)

A similar prayer was assessed in Allen v. Renfrew (Corp. of the County) (2004), 69 O.R. (3d) 742 (S.C.J.) [Allen], discussed below.

86 Freitag, ibid. at para. 46.
87 (2001), 54 O.R. (3d) 595 (C.A.) [Ontario Legislative Assembly].
On this occasion, however, the Ontario Court of Appeal held that the Human Rights Commission did not have the jurisdiction to intervene. The requirement that the Ontario legislature begin every day with the recitation of prayers is embodied in the Standing Orders of Legislative Assembly. The Court took the view that the Standing Orders are immune from judicial scrutiny on the basis of parliamentary privilege, which protects matters essential to the internal functioning of legislative assemblies from judicial review. In explaining what he saw was at stake in the case, Finlayson J.A. held for the Court:

In the case under appeal, the privilege asserted by the Speaker on behalf of the Legislative Assembly is the right to establish and regulate the House’s own internal affairs without any interference from the other two branches of government, the executive and the judicial. In addressing the problem in this case, we are weighing the constitutional rights of a citizen of the state against the right of legislative assemblies, hard won over the centuries, to control their own affairs independent of the Crown.  

Interestingly, the Court referred to statements of the Supreme Court of Canada to the effect that the doctrine of parliamentary privilege has constitutional status, and cannot be overridden by other constitutional provisions such as the protection of freedom of religion. The Court distinguished the case from its previous holding in Freitag on the basis that a provincial legislative assembly enjoys constitutional status, while a town council does not. Accordingly, the complaint to the Human Rights Commission could not proceed. Ontario’s legislature still begins its days with a recitation of the Lord’s Prayer, as do several other provincial

88 Ibid. at para. 19.
89 Ibid. at paras. 31-32. Though this decision is based on the principle that all constitutional notions are equally authoritative, in practice, it could be argued that the result of the decision was to prioritize parliamentary privilege over freedom of religion.
90 Ibid. at para. 46
legislatures. Recently, Ontario Premier Dalton McGuinty has called for a review of this practice, and has met with some opposition.

In one other case, a recitation of a prayer at county council meetings was challenged by a resident. In *Allen v. Renfrew (Corp. of the County)*, Mr. Allen took issue with the County of Renfrew’s practice of reciting the following prayer:

> Almighty God, we give thanks for the great blessings which have been bestowed on Canada and its citizens, including the gifts of freedom, opportunity, and peace that we enjoy. Guide us in our deliberations as [County Councillors], and strengthen us in our awareness of our duties and responsibilities. Grant us wisdom, knowledge, and understanding to preserve the blessings of this country for the benefit of all and to make good laws and wise decisions. Amen.

The county council had traditionally recited the Lord’s Prayer at its meetings. Mr. Allen, a county resident, initiated a lawsuit while this was still the prevailing practice at Renfrew County Council meetings, basing his argument on the Ontario Court of Appeal’s holding in *Freitag*. In apparent response to the lawsuit, the council passed a resolution substituting the above “non-sectarian” prayer for the Lord’s Prayer.

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93 *Allen, supra* note 85.


96 Throughout the judgment, Hackland J. refers to the prayer as “non-secular;” it seems from the context that he intended this to mean “non-sectarian.”

97 According to the judgment in *Allen*, the County Council changed its prayer “the day prior to the service of [the] application” (*Allen, supra* note 85 at para. 2). The application, however, was commenced on November 28, 2000 --
Mr. Allen was unsatisfied, and claimed that the “non-sectarian” prayer adopted by the council violated his freedom of religion and conscience. He argued that, by making reference to God, the newly adopted prayer was only “non-sectarian” from a theistic point of view; it was exclusionary of those individuals who did not believe in God. As a Secular Humanist, Mr. Allen did not maintain a belief in God. He presented expert evidence from a professor of comparative religion who opined that the new prayer assumed

the existence of a supreme, personal being (“Almighty God”), who bestows boons (“great blessings…of freedom, opportunity and peace”), who responds to petitions (“guide us…and strengthen us”), and who intervenes within human history to assist lawmakers (by granting “wisdom, knowledge & understanding”).

In response to Allen’s claim, Hackland J. noted that, in Freitag, the Ontario Court of Appeal had indicated some approval for the practice of using a “non-denominational prayer and a moment of silence.” He held that the prayer at issue in Allen was significantly different from the Lord’s Prayer, and did not violate Mr. Allen’s constitutional rights:

I do not accept the proposition that the mere mention of God in a prayer in a governmental meeting, accompanied by the implication that God is the source of the values referred to in the prayer, can be seen as a coercive effort to compel religious observance… In a pluralistic society religious, moral or cultural values put forward in a public governmental context cannot always be expected to meet with universal acceptance. This is to be contrasted with the use of a specifically Christian prayer, such as the Lord’s Prayer or readings from the bible, when non-Christians are involved (i.e. as in Freitag and Zylberberg). In my view, it would be incongruous and contrary to the intent of the Charter to hold that the practice of offering a prayer to God per se, is a violation of the religious freedom of non-

the County Council passed its resolution on November 29. The application was served on November 30. The timing of these events suggests that the Council did not act independently of the application.

98 Ibid. at para. 13.
99 Ibid. at para. 8.
believers. This conclusion derives considerable support from the fact that the preamble to the Charter itself specifically refers to the supremacy of God.\textsuperscript{100}

Thus, Mr. Allen’s claim was unsuccessful in large measure because the Court did not view the new prayer as coercive in either intent or effect.

Overall, the avoidance of coercion has been the most important principle in guiding courts’ decisions on the appropriateness of prayers at legislative or quasi-legislative meetings. It is on the basis of this same principle that Mr. Freitag’s application was successful, and Mr. Allen’s was not. In Chapter 4, I will revisit the theme of the avoidance of coercion, using it to assess certain aspects of the overall approach to freedom of religion in Canadian courts. I will argue that there are structural features of the doctrine of freedom of religion that manifest a kind of coercion on litigants in a troubling way.

3.3.2 Courthouses

Courthouses are physical representations of the public justice system. They should, in principle, be equally accessible to all.\textsuperscript{101} There has been some public attention to the presence of religious symbols in courthouses in Canada in recent years. In 2006, a Toronto judge’s administrative decision to move a Christmas tree out of a courthouse lobby aroused some controversy.\textsuperscript{102} Ontario’s Premier said that the decision “reflect[ed] a mistaken understanding of what we’re trying to do here,” and that the judge had misunderstood the principles of pluralism.

\textsuperscript{100} Ibid. at para. 19.

\textsuperscript{101} Provincial human rights legislation, which is applicable to both governmental and private actors, generally provide that every person should have equal access to services without discrimination because of religion or creed, see e.g. Human Rights Code, R.S.O. 1990, c. H.19, s. 1.

and multiculturalism. The matter, however, was not litigated, and there has been no reasoned judicial decision on this particular issue in Canada.

On the other hand, the religious obligations of participants in the justice system have, in at least one circumstance, been the subject of judicial commentary. In R. v. Hothi et al., five men were charged with assault. When they appeared before a provincial court judge in Manitoba, after they pleaded not guilty to the charges against them, the men’s counsel raised the question of the possession of kirpans in the courtroom. A kirpan was described in that case as “an instrument consisting of a hilt and a 3 1/2 to 4 inch blade, carried by persons, who are baptized members of the Sikh religion as a religious symbol.” One of the accused, Joginder Singh, was a baptized Sikh man who argued that he was required by his religion to wear the kirpan at all times, and should therefore be entitled to have a kirpan in the courtroom. Further, he claimed that the exclusion of kirpans from the courtroom would deprive him of a fair and open trial. Some of the witnesses he intended to call would not wish to testify if they were prevented from carrying their kirpans, and members of the public might also refrain from entering the courtroom on this basis.

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105 Ibid. at para. 3. The presence of kirpans in public institutions was analyzed more fully in the more recent Supreme Court of Canada case, Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256. There, the question was whether a school board could institute an absolute prohibition on kirpans in its high schools. The Supreme Court of Canada concluded that such a prohibition was unconstitutional. The case is discussed in greater depth below.

106 Hothi, ibid. at para. 8.
The Manitoba Provincial Court judge decided to prohibit *kirpans* in the courtroom, reasoning that the men were charged with violent acts, and that the *kirpan* could be used as a weapon. On review at the Manitoba Court of Queen’s Bench, Dewar C.J. resolved the case under s. 1 of the *Charter*. He held that the exclusion of *kirpans* from the courtroom was a reasonable limit on freedom of religion, and that the provincial court judge was acting properly within his discretion to “to maintain order and security in the courtroom, in the light of prevailing circumstances.”107 The accused’s freedom of religion had to cede to the “transcending public interest that justice be administered in an environment free from any influence which may tend to thwart the process.”108 The Court held that “[p]ossession in the courtroom of weapons, or articles capable of use as such, by parties or others is one such influence. A weapon does not cease to be a weapon because it is a religious symbol subject to strictures of the faith regarding use.”109 The Manitoba Court of Appeal upheld the ruling.110

In this particular case, hierarchy of rights was clear: an orderly and secure court was more important than the religious obligations of an accused person, in particular where that person was accused of a violent act. While the accused had, of course, not been convicted of the offence at the time of the decision, the fact that charges were laid indicated that there were reasonable and probable grounds to believe that he had committed the offence. In a later decision, however, the Supreme Court of Canada went to some length to advance the view that a *kirpan* is not primarily

a weapon, but rather a religious symbol. While the subsequent decision distinguished *Hoithi* on its facts, there is a clear tension between the decisions in terms of their characterization of the *kirpan*.

### 3.3.3 Schools

The extent to which religion should be present in public schools has long been a matter of controversy in Canada; as the Ontario Court of Appeal has noted: “The place of religion in the public schools of Ontario has been a matter of concern and, sometimes, dispute throughout their history.” Litigation of these matters has also ensued in other provinces. These debates are complicated as demographics within communities change and become more diverse with respect to the religious practices of residents.

Canadian courts have in part relied on s. 27 of the *Charter*, which mandates that the *Charter* be interpreted “in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians,” to resolve disputes in this area, and insisted that the pluralistic nature of Canada’s population requires a sensitive approach that does not depreciate the position of Canada’s religious minorities. Largely, however, courts have analyzed these issues through the lens of freedom of religion, and the courts’ comments in these cases shed much light on the way that the freedom is understood in Canadian jurisprudence.

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111 See the discussion of *Multani* below.


115 *Zylberberg*, supra note 112 at 656-657.
3.3.3.1 Religious Exercises

In one stream of cases, litigants have challenged the constitutionality of public schools incorporation of “religious exercises” into their daily educational program. In practice, this has typically meant that schools commenced their morning assembly with a biblical reading and/or a recitation of the Lord’s Prayer. Another feature of this practice was the availability of an exemption for students from present during the religious exercises.

The issue has never been decided definitively by the Supreme Court of Canada. However, *Zylberberg v. Sudbury Board of Education*, a decision of the Ontario Court of Appeal, has been followed by courts in other jurisdictions, and can be considered the prevailing statement of Canadian law on the question of religious exercises in public schools. In that case, a group of parents took issue with a practice within the jurisdiction of Sudbury Board of Education. In all schools in the jurisdiction, the school day commenced with the singing of O Canada and the recitation of the Lord’s Prayer. In some schools, this was supplemented by the reading of biblical passages. At the request of a parent, students could be exempted from attending or participating in the exercises. This practice was carried out in conformity with provincial regulations in force at the time, which provided:

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116 See note 76 for the text of the Lord’s Prayer.
118 The lawsuit was commenced by five parents. By the time the case reached the Ontario Court of Appeal, two of the parents had moved away from the jurisdiction. The parents’ position was supported by three intervenors: the League for Human Rights of B’nai Brith Canada, the Canadian Civil Liberties Association, and the Canadian Jewish Congress (*Zylberberg, supra* note 112 at 646).
119 *Zylberberg, supra* note 112 at 645.
28.- (1) A public school shall be opened or closed each school day with religious exercises consisting of the reading of the Scriptures or other suitable readings and the repeating of the Lord's Prayer or other suitable prayers.

(2) The readings and prayers that form part of the religious exercises referred to in subsection (1) shall be chosen from a list of selections approved for such purpose by the board that operates the school where the board approves such a list and, where the board does not approve such a list, the principal of the school shall select the readings and prayers after notifying the board of his intention to do so, but his selection is subject to revision by the board at any time.

(10) No pupil shall be required to take part in any religious exercises or be subject to any instruction in religious education where his parent or, where the pupil is an adult, the pupil applies to the principal of the school that the pupil attends for exemption of the pupil therefrom.120

Of the three parents who brought the case to the Court of Appeal, one was Jewish, one Muslim, and the third practiced no religion but attended church with his wife a few times per year. Despite the availability of the exemption, the parents had not sought to have their children excused from the exercises, “because they did not want [the children] singled out from their peers because of their religious beliefs.”121 The parents filed an expert affidavit from a psychologist, who stated that the religious exercises in the school placed pressure on students to conform, which, if resisted, could result in alienation from their peers.122

In response, the school board filed affidavits from psychologists who asserted that children of religious minorities were not harmed by the exercises. They “claimed that religious exercises resulted in minority children ‘confronting the fact of their difference from the majority,’” and

120 O.Reg. 262/80, s. 28. The regulations were made pursuant to s. 10(1) of the Education Act, R.S.O. 1980, c. 129.

121 Zylberberg, supra note 112 at 647.

122 Ibid.
saw this as “a normal and healthy part of growing up which would contribute to the development of religious tolerance and understanding.”  

In assessing whether the students’ freedom of religion was infringed by the religious exercises, the Zylberberg court began by referring to the Supreme Court of Canada’s general definition of the freedom, which is “characterized by the absence of coercion or restraint.” Further, freedom of religion also implies “freedom from conformity;” in the Court’s view, this means that “[t]he practices of a majoritarian religion cannot be imposed on religious minorities.” It also follows, on this view, that the rights of non-believers to refuse to participate in religious activities must be protected. At a general level, the Court viewed freedom of religion as a very broad freedom, limited only insofar as “its manifestation must not injure others or interfere with their right to manifest their own beliefs and opinions.”

The school board conceded that, on its face, the legislation which authorized the religious exercises infringed the freedom religion and conscience. However, it argued that the availability of the exemption removed “any suggestion of pressure or compulsion on non-Christian pupils to participate in those exercises.”

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123 Ibid.


125 Zylberberg, ibid.

126 Ibid. at 653.

127 Ibid.

128 Ibid. at 654.
The Court rejected the school board’s argument, holding that whether pressure or compulsion existed had to be assessed from the standpoint of members of religious minorities, and “in particular, from the standpoint of pupils in the sensitive setting of a public school.”129 The Court viewed the fact that the parents before the Court did not seek the exemption for their children as evidence that the children and their parents felt compelled to conform to the religious practices of the majority.130 Moreover, the exemption procedure required students to “make a religious statement” and publicly declare their faith. The Court found that the procedure infringed the students’ freedom of religion in this “broader sense.”131 Though the school board argued that the parents had failed to prove any actual harm to their children caused by the religious exercises, the Court determined that no such proof was required, given its findings that the exercises in themselves violated the students’ freedom of religion.132

Finally, on the freedom of religion issue, in response to the evidence submitted by the school board that the religious exercises were beneficial to members of religious minorities, the Court held:

The effect of religious exercises cannot be glossed over with the comment that the exercises may be "good" for minority pupils. This view was expressed, as we indicated above, by a psychologist in supporting the Board's case who said that it was salutary for minority pupils to confront "the fact of their difference from the majority". This insensitive approach, in our opinion, not only depreciates the position of religious minorities but also fails to take into account the feelings of

129 Ibid.
130 Ibid. at 655.
131 Ibid.
132 Ibid. at 656.
young children. It is also inconsistent with the multicultural nature of our society as recognized by s. 27 of the Charter.\textsuperscript{133}

The Court concluded by holding that the religious exercises could not be justified under s. 1 of the \textit{Charter}, as being within the “reasonable limits” on freedom of religion. The Court held that the purpose of the regulation authorizing the exercises was clearly religious, and legislation with religious purposes could not be justified under s. 1.\textsuperscript{134} Further, even if s. 1 were applicable, the Court held that the legislation failed to minimally impair the rights of students of religious minorities, and thus could not be saved.\textsuperscript{135}

3.3.3.2 Religious Instruction & Curriculum Design

Soon after its decision in \textit{Zylberberg}, the Ontario Court of Appeal released its decision in \textit{Canadian Civil Liberties Assn. v. Ontario (Minister of Education)} (the “\textit{Elgin County} case”).\textsuperscript{136} There, the issue was whether the curriculum of religious studies prescribed by the Elgin County Board of Education infringed the freedom of religion and equality rights of students.

At the time, Ontario’s \textit{Education Act} provided that, subject to its regulations, students were “allowed” to receive the religious instruction that their parents desired, but that no student could be required to “read or study in or from a religious book, or to join in an exercise of devotion or religion.”\textsuperscript{137} \textit{Regulation 262}, enacted pursuant to the \textit{Education Act}, detailed how religious instruction was to be implemented by Ontario’s schools. The Regulation provided for

\begin{itemize}
\item \textsuperscript{133} \textit{Ibid.} at 656-657.
\item \textsuperscript{134} \textit{Ibid} at 660-661.
\item \textsuperscript{135} \textit{Ibid.} at 659-662.
\item \textsuperscript{136} (1990), 71 O.R. (2d) 341 [\textit{Elgin County}] .
\item \textsuperscript{137} \textit{Education Act}, R.S.O. 1980, c. 129, s. 50.
\end{itemize}
two half-hour periods of religious education per week. The instruction was to be given by the teacher, who was to avoid “issues of [a] controversial or sectarian nature.” School boards were allowed to select a “clergyman” or lay person to give religious instruction in lieu of the teacher, and there was some flexibility in the regulation to allow for multiple clergy members or lay people of “different denominations” to provide religious education. Like the *Education Act*, the Regulation allowed for students (usually through their parents) to opt out of the religious education curriculum.

In Elgin County, where the school board operated 25 elementary schools with approximately 8,100 students, the religious education curriculum evolved through the 1980s. Up until the 1986-1987 school year, the course was exclusively Christian, and developed in participation with members of the Elgin Count Bible Club and the local ministerial association. The course was taught by members of the Bible Club recommended by clergymen. In April 1986, after the commencement of litigation, the school board invited submissions by interested individuals in the county, and began a revision of the curriculum. This resulted in an interim curriculum being taught in 1986-1987 academic year. The curriculum was no longer exclusively Christian; it included references to other faiths. A more substantially revised curriculum was introduced in the 1988-1989 academic year.

In rendering its decision, the Ontario Court of Appeal provided a good deal of historical context regarding the presence of religion in Ontario’s schools. Notably, the Court stated:

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138 Reg. 262, R.R.O. 1980, s. 28.
140 *Elgin County*, supra note 136 at 347.
Before 1944, then, a distinction was drawn between "religious exercises" and "religious instruction". While the former was for all pupils, subject to exemptions for those opting out, the latter was available on a specialized basis outside the class-room. Both activities were conducted from a normative, rather than descriptive perspective -- the pupils were to participate in manifestations of faith, not critical or objective study. In this sense, both can be said to have been aimed at indoctrination, although one might have argued that the real aim was teaching "morality" by means of teaching religion.  

Through this historical account, the Court set up what it saw as a critical distinction: indoctrination on the one hand, and education on the other. For the Court, religious instruction that amounts to indoctrination falls clearly afoul of the constitutional protection of freedom of religion, while education may not.

This framework was crucial in assessing the constitutionality of the applicable legislation. In explaining why religious indoctrination violated the protection of freedom of religion, the Court held:

State-authorized religious indoctrination amounts to the imposition of majoritarian religious beliefs on minorities. Although s. 2(a) of the Charter is not infringed merely because education may be consistent with the religious beliefs of the majority of Canadians… teaching students Christian doctrine as if it were the exclusive means through which to develop moral thinking and behaviour amounts to religious coercion in the class-room. It creates a direct burden on religious minorities and non-believers who do not adhere to majoritarian beliefs… this amounts to violation of s. 2(a) of the Charter, especially when viewed in the light of s. 27 of the Charter.  

Interestingly, the Court adopted the view of the Divisional Court that the availability of an exemption from religious instruction provided in the legislation “strongly suggests something other than pure education.” Thus, whereas with respect to religious exercises, exemption

142 Ibid. at 360.
143 Ibid. at 363.
144 Ibid. at 362.
provisions were seen as well-intentioned but ineffective because of the pressures to conform in elementary and high schools, with respect to religious education, they were seen as indicators of the indoctrinating intention of the curriculum. In any event, the Court followed Zylberberg in holding that the school environment, coupled with the nature of the curriculum, created “an appreciable degree of coercion.”

Further, the possibility of allowing clergy members to teach the curriculum was also viewed by the court as evidence that the intention of the legislation was to allow indoctrination. In the Court’s words,

(1) why else would a member of the clergy be invited to give instructions; (2) such "outsiders" were not authorized for any other part of the school programme, except possibly the heritage language programme; (3) in the absence of evidence that clergymen are better equipped to teach comparative religions than they are skilled at indoctrination, the conclusion has to be that the purpose was indoctrination.

Further, because the legislation used the language of “denominations” rather than “religions” or “faiths,” the Court viewed the legislation as promoting indoctrination within the Christian faith.

Accordingly, the Court held that the purpose of the Regulation at issue violated the Charter. It went on to hold that the implementation of the curricula in Elgin County produced similar effects. The Court pointed to the evidence of parents of the Baha’i faith living in Elgin County, who claimed that their child was taught that she would go to Hell if she were not Christian, and that efforts to have the religious education instructor change his lessons were

\[145\] Ibid. at 363.
\[146\] Ibid. at 362.
\[147\] Ibid.
unsuccessful. Further, there was expert evidence to the effect that the Christian curriculum would be particularly hard on students of other religions, who would feel pressure to conform and stress arising from being “caught between the opinions and wishes of two authority figures, their teachers and their parents.”

The Court acknowledged that the line between indoctrination and education can at times be difficult to draw with precision. It adopted an eight-part test from a publication of American Association of School Administrators, which could be used in future cases:

1. The school may sponsor the study of religion, but may not sponsor the practice of religion.
2. The school may expose students to all religious views, but may not impose any particular view.
3. The school's approach to religion is one of instruction, not one of indoctrination.
4. The function of the school is to educate about all religions, not to convert to any one religion.
5. The school's approach is academic, not devotional.
6. The school should study what all people believe, but should not teach a student what to believe.
7. The school should strive for student awareness of all religions, but should not press for student acceptance of any one religion.
8. The school should seek to inform the student about various beliefs, but should not seek to conform him or her to any one belief.

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148 Ibid. at 366.
149 Ibid. at 367.
In applying this test to the interim curriculum in place in Elgin County in 1986-1987, the Court concluded that there were elements of the curricula which amounted to indoctrination. In particular, the course used “memory verses” from the New Testament emphasizing the centrality of Jesus and teaching students that, like Moses, they each had a particular destiny and source of help (presumably referring to God). Further, some lessons provided time for silent prayer, which would have no place, in the Court’s view, in a program that is purely educational.

The Court also found that the 1988-1989 curriculum failed to pass constitutional muster. Despite noting some improvements, in particular in the stated goals of the curriculum, the Court held that Bible stories were included in the curriculum “for their own sake, rather than as general illustrations to enhance the teaching about values.” Further, some exercises treated biblical texts as authoritative sources of guidance for the children’s lives. Other exercises were even more clearly aimed at indoctrination:

At the intermediate level, there are included student worksheets which require the pupil to read passages in the Bible and then fill blanks in sentences such as ‘Jesus Christ is the ________ way to God.’ The word to be inserted is "only".

In contrast, the treatment of other religions in the curriculum was done from an educational, rather than indoctrinating, perspective. The course taught that “Buddhists believe…”, but there was no similar statement about what Christians believe.

\[150\] Ibid. at 371-372.
\[151\] Ibid. at 372.
\[152\] Ibid. at 376.
\[153\] Ibid.
Finally, the Court held that s. 1 of the *Charter* was not applicable because the very purpose of the legislation and curricula at issue infringed freedom of religion. It further held that curricula aimed at indoctrination in a particular religion can never be saved by s. 1, because they cannot be rationally connected to a valid legislative purpose, nor can they be said to meet a “minimal impairment” test:

Regardless of how beneficial an objective is ascribed to the regulation, such as, for example, the inculcation of proper moral standards in elementary schoolchildren, the measures adopted -- the indoctrination of children in the Christian religion -- are not rationally connected to that objective. In addition, they fail to impair the appellants' freedoms under s. 2(a) as little as possible.¹⁵⁴

One other decision bears mentioning on the issue of curriculum design. In *Chamberlain v. Surrey School District No. 36*,¹⁵⁵ the Supreme Court of Canada reviewed a British Columbia school board’s decision to exclude books about same-sex families from a kindergarten curriculum. The Court’s reversal of this decision was based on the legislation applicable to British Columbia schools, rather than on the notion of freedom of religion. However, in applying British Columbia’s *School Act*,¹⁵⁶ the Court relied heavily on a provision that required “[a]ll schools and Provincial schools must be conducted on strictly secular and non-sectarian principles.”¹⁵⁷ The Court’s interpretation of the term “secular” is relevant to the current discussion as it relates to the concept of tolerance, and the primary importance attached to this value.

¹⁵⁷ *School Act*, R.S.B.C. 1996, c. 412, s. 76.
McLachlin C.J. held for the majority of the Court:

The Act’s insistence on strict secularism does not mean that religious concerns have no place in the deliberations and decisions of the Board… Religion is an integral aspect of people’s lives, and cannot be left at the boardroom door. What secularism does rule out, however, is any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community. A requirement of secularism implies that, although the Board is indeed free to address the religious concerns of parents, it must be sure to do so in a manner that gives equal recognition and respect to other members of the community… This is fair to both groups, as it ensures that each group is given as much recognition as it can consistently demand while giving the same recognition to others.158

In this passage, the value of tolerance is so powerful that it effectively changes the meaning of the word “secular,” which is ordinarily defined as “not having any connection with religion.”159

The Court’s intention was to frame a rule by which school board members with religious views about homosexuality or same-sex couples were free to voice these views, but only to the extent that these views were not exclusive of other people.160

3.3.3.3 Students’ Religious Apparel

In addition to issues arising with respect to curricula and exercises carried out in public schools, policies of general application can raise problems for students who feel obliged to wear or carry particular religious items to school. There has been some controversy in Québec around

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158 Chamberlain, supra note 155 at para. 19.

159 Cambridge Advanced Learner’s Dictionary, s.v. “secular”, online: <http://dictionary.cambridge.org/define.asp?key=71094&dict=CALD>. See also Merriam-Webster Online Dictionary, s.v. “secular”, online: <http://www.merriam-webster.com/dictionary/secular>: “1 a: of or relating to the worldly or temporal… b: not overtly or specifically religious <secular music> c: not ecclesiastical or clerical… 2: not bound by monastic vows or rules; specifically : of, relating to, or forming clergy not belonging to a religious order or congregation.”

160 Notably, the books depicting same-sex parents were eventually excluded from the curriculum on the basis of problems with punctuation, spelling, and grammar. The board also found fault with the way the books depicted men, addressed the issue of sexual orientation for the age of the audience, and raised the subject of dieting, see “School board rejects books with gay parents for bad grammar” CBC News (13 June 2003), online: cbc.ca <http://www.cbc.ca/canada/story/2003/06/13/samesex_books030613.html>.
Muslim women and girls who wear a hijab\textsuperscript{161} to school or at other organized events. In the 1990s, following a similar discussion in France,\textsuperscript{162} there was public debate about whether students in Québec public schools should be allowed to wear a hijab. According to Bouchard and Taylor, however, “fairly broad agreement was reached then to allow students wearing headscarves to attend public schools rather than excluding them and thus steering them to private denominational schools.”\textsuperscript{163} Further, the Québec Human Rights Commission published a non-binding report in 1995 stating the view that “public schools were obliged to accept Muslim girls wearing headscarves, provided that this freedom of religious expression did not constitute a real risk to personal safety or security of property.”\textsuperscript{164}

More recently, a Muslim girl at a private school in Québec complained the Québec Human Rights Commission about the school’s prohibition on wearing a hijab; the student’s family negotiated an agreement with the school, and the Commission never issued a decision in the case.\textsuperscript{165} Some time later, however, the Québec Human Rights Commission issued an opinion to the effect that private denominational schools were “bound to accommodate students of other religious faiths, for example by allowing the wearing of a headscarf, unless they could show that

\textsuperscript{161} A hijab (sometimes spelled hidjab) is a headscarf worn by some Muslim women.


\textsuperscript{165} Bouchard-Taylor Report, supra note 165 at 51.
the confessional status of these establishments demands certain exclusions or preferences.”¹⁶⁶ In addition, Muslim girls in Québec have been confronted with prohibitions on wearing their *hijabs* in soccer matches and *tae kwon do* tournaments.¹⁶⁷

None of the controversies surrounding the *hijab*, however, has resulted in a decision from a Canadian court. In contrast, the Supreme Court of Canada has addressed the question of whether a Sikh student could carry a *kirpan*¹⁶⁸ in a public school setting, in apparent contravention of a no-weapons policy. In *Multani v. Commission scolaire Marguerite-Bourgeoys*,¹⁶⁹ the Supreme Court held that the institution of an absolute prohibition against wearing *kirpans* was an unjustifiable violation of a Sikh student’s freedom of religion.

The issue arose when a student, Gurbaj Singh Multani, accidentally dropped his *kirpan* while in the schoolyard. The Multani family initially reached a compromise arrangement with the local school board; Gurbaj Singh could wear his *kirpan* to school provided that it was sealed inside his clothing.¹⁷⁰ However, the school’s governing board refused to ratify this agreement, on the basis that it conflicted with the school’s prohibition on weapons and dangerous objects.¹⁷¹ The school board’s council of commissioners upheld the governing board’s decision, and


¹⁶⁷ See *Bouchard-Taylor Report*, *ibid.* at 57, 71, 73.

¹⁶⁸ A *kirpan* is a ceremonial dagger traditionally carried by male, Orthodox Sikhs who have been baptized.

¹⁶⁹ [2006] 1 S.C.R. 256 [*Multani*].


“notified the Multanis that a symbolic kirpan in the form of a pendant or one in another form made of a material rendering it harmless would be acceptable in the place of a real kirpan.”\textsuperscript{172}

The Multani family sought judicial review of the council of commissioners’ decision, and “asked the court to declare… that Gurbaj Singh had a right to wear his kirpan to school if it was sealed and sewn up inside his clothing.”\textsuperscript{173} The Québec Superior Court found in favour of Multani, declaring that the governing board’s decision was of no force and effect. The Québec Court of Appeal then reversed that decision, and the Multani family appealed to the Supreme Court of Canada. In a set of concurring opinions, the Supreme Court restored the decision of the Québec Superior Court, which effectively yielded the same result as the initial agreement between the Multanis and the local school board.

Charron J. wrote the majority decision for the Supreme Court of Canada. On the issue of freedom of religion, Charron J. began her analysis by referring to the core principles previously enunciated in Supreme Court jurisprudence. Revisiting at once the themes of anti-coercion and individualism, Charron J. held that freedom of religion is essentially “the right to entertain such religious beliefs as a person chooses” and the right to manifest those beliefs. Emphasizing the view that religion is a question of individual choice, she restated the Court’s position that “it is the right of every Canadian to work out for himself or herself what his or her religious obligations, if any, should be.”\textsuperscript{174} Further, on the individualist theme, Charron J. reemphasized that religious practices are protected where an individual sincerely believes that the practice has a

\begin{footnotes}
\footnote{172} Ib\textit{id.} at para. 5.
\footnote{173} Ib\textit{id.} at para. 6.
\footnote{174} Ib\textit{id.} at para. 32, citing \textit{R. v. Big M Drug Mart, supra} note 69 at 336-37 and 351.
\end{footnotes}
“nexus with religion;” the person’s credibility with respect to the religious practice is the proper focus of the inquiry, rather than the manner in which other people practice the same religion. The conduct of a third party interferes with the practice in a “non-trivial or not insubstantial” way will be said to infringe freedom of religion.\textsuperscript{175} As regards the hierarchy of rights, Charron J. noted that, subject to some necessary limitations for the protection of “public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.”

In applying these principles, the Court held that Gurbaj Singh had established the sincerity of his religious beliefs, and that the interference with his religious was not trivial. Indeed, by the time this decision was issued, Gurbaj Singh had left the public school system because, in the period between the Québec Court of Appeal’s decision and the Supreme Court of Canada’s decision, he was not allowed to wear his \textit{kirpan} to school.\textsuperscript{176} The interference with his religious practice had effectively deprived him of the right to attend a public school.

The Court then turned the balancing of this right against council of commissioners’ objective in banning \textit{kirpans} from schools. The council had argued that its objective was to create a safe environment in public schools, in order to foster an environment conducive to students’ learning and development. The Court held that though this is a laudable goal, the degree of safety actually pursued by the council was one of reasonable safety, rather than

\textsuperscript{175} \textit{Multani}, supra note 169 at paras. 33-34, citing \textit{Amselem}, supra note 4.

\textsuperscript{176} \textit{Multani}, ibid. at para. 40.
absolute safety. The council did not, for example, install metal detectors or prohibit all potentially dangerous objects such as scissors and compasses.  

It was in determining whether the method chosen by the council of commissioners satisfied the “minimal impairment” that Charron J. made perhaps the most noteworthy finding in Multani. Following the trial judge’s view in Multani, Charron J. linked the minimal impairment test to the notion of “reasonable accommodation.” This latter concept emerges from the field of labour and employment law, and requires employers to accommodate their employees’ religious practices to the point of undue hardship. Charron J. found the analogy compelling; a party arguing that it had “minimally impaired” the rights of an individual would have to show that any further action would constitute an undue hardship. Using this framework, Charron J. noted that the council of commissioners had not presented any evidence tending to support the view that Gurbaj Singh’s wearing a kirpan would present any real risk to the goal of ensuring a reasonable level of safety in the school.

Finally, the Court appealed to the values of multiculturalism and tolerance, as they have come to be associated in the jurisprudence, to support its view that a blanket prohibition on kirpans was unconstitutional:

The argument that the wearing of kirpans should be prohibited because the kirpan is a symbol of violence and because it sends the message that using force is necessary to assert rights and resolve conflict must fail. Not only is this assertion contradicted by the evidence regarding the symbolic nature of the kirpan, it is also

177 Ibid. at paras. 46-48.
178 Ibid. at paras. 52-53.
179 Ibid. at paras. 57-60, 67.
disrespectful to believers in the Sikh religion and does not take into account Canadian values based on multiculturalism.

…

Religious tolerance is a very important value of Canadian society. If some students consider it unfair that Gurbaj Singh may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instil in their students this value that is… at the very foundation of our democracy. 180

In the Court’s view, absolutely prohibiting kirpans is contraindicated by the special duty of schools to foster respect for the constitutional rights of others and teach “civic virtue and responsible citizenship.”181 There is a special connection, therefore, between the school’s duty to foster civic values and its obligation to accommodate its students. Thus, the link between accommodation and tolerance is drawn.

3.3.3.4 Teachers’ Religious Beliefs

In addition to the issues presented by an increasingly diverse student population, the diversity of teachers’ religious beliefs has also given rise to controversy. Given the particular environment of the public classroom, with its goals of promoting responsible citizenship and its impressionable and vulnerable population, the protection of teachers’ freedom of religion presents complicated issues.

Two decisions of the Supreme Court of Canada deal with questions of this nature. First, in Ross v. New Brunswick School District No. 15,182 a public school teacher in New Brunswick had, in a series of letters to newspapers, publications, and television appearances, expressed the

180 Ibid. at paras. 71, 76.
181 Ibid. at para. 78.
view that “Christian civilization was being undermined and destroyed by an international Jewish conspiracy.”

Though these activities occurred outside the classroom, a Jewish family complained to the New Brunswick Human Rights Commission. They argued that, in failing to take disciplinary action against the teacher, the school board had condoned his views and thereby discriminated against the Jewish and other minority students within the school board’s jurisdiction. The Supreme Court held that the most appropriate solution in such a case was to remove the teacher from the classroom, and provide him with the opportunity to hold a non-teaching position in the School Board.

Second, in *Trinity Western University v. British Columbia College of Teachers*, the question was whether the British Columbia College of Teachers had acted appropriately in refusing to approve a teacher training program provided by a private, religious university. The approval would have meant that graduates from the program would be qualified to teach in British Columbia’s public school system. The College of Teachers was concerned with the university’s policy of requiring students to sign a “community standards” document that condemned, among other things, “homosexual behaviour.” The College of Teachers took the view that it was against the public interest to approve a program at a university that adopted discriminatory practices. Instead, the College of Teachers preferred a program wherein aspiring teachers spent the last year of the program at a public university. The Supreme Court held that the College of Teachers had acted inappropriately, and that the Trinity Western training program should be approved.

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183 *Ibid.* at para. 3.

184 [2001] 1 S.C.R. 772 [*Trinity Western*.]
The Supreme Court of Canada’s responses to these two cases illuminate the legal boundaries of teachers’ freedom of religion. In both cases, the court held that public schools are meant to transmit civic values; this requires, in the court’s view “an environment free of bias, prejudice and intolerance”\(^{185}\) and that the school “be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate.”\(^{186}\)

Accordingly, in *Ross*, where there was evidence that the teacher’s off-duty activities contributed to a poisoned environment in the school, the teacher’s freedom of religion could not suffice to keep him in a teaching position; the students’ right to learn in an environment free from discrimination prevailed.\(^{187}\) In contrast, in *Trinity Western*, where there was no factual evidence presented to the effect that teachers’ professed religious beliefs create a discriminatory environment in schools, the teachers’ rights to hold their religious beliefs prevailed. The Court noted:

> the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that training teachers at [Trinity Western University] fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at [Trinity Western University] should be respected. The [British Columbia College of Teachers], rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society.\(^{188}\)

Thus, while the value of tolerance required the exclusion of a teacher in *Ross*, the same value required the inclusion of teachers who had trained exclusively at a religious university in *Trinity Western*.


\(^{186}\) *Ross*, supra note 182 at para. 42.

\(^{187}\) *Ibid.* at paras. 40, 45, 47.

\(^{188}\) *Trinity Western*, supra note 184 at para. 36.
Western. To put it in the terms employed by the Court in the Chamberlain decision discussed earlier in this chapter, there was no evidence that teachers who graduated from Trinity Western compromised the inclusive, “secular” school environment.189

3.4 Conclusion

This chapter has identified four major themes in the Canadian judicial approach to freedom of religion. First, in all cases, religion is treated as an individualistic phenomenon. This is particularly apparent in the requirement that litigants’ religious claims are evaluated on a standard of sincere subjective belief, rather than by any objective measure.190 The view that religion is something that each person must work out for him or herself, and that religion is in effect an individual choice, is also a recurring theme.

Second, particularly in the “shared institutions” cases, courts are concerned that no person should be coerced into adopting a particular religious view or practice, or effectively coerced away from observing their own religious beliefs and practices. Accordingly, town councils are prohibited from opening their meetings with the Lord’s Prayer,191 and public schools cannot carry out religious exercises192 or adopt indoctrinating curricula.193

189 There is a strong parallel between Trinity Western and the Chamberlain (supra note 155) decision discussed above. Both cases deal with a conflict arising out of religious beliefs that, at least on their surface, treat same-sex relationships as inferior to heterosexual relationships. Despite the fact that the Court in Chamberlain prevented the reliance on religious reasons for the exclusion of books with same-sex parents public school curricula, Trinity Western can be seen as consistent with Chamberlain. In Chamberlain, the Court held that all views were welcome in the discussion and development of public school curricula, provided that the view was not exclusionary towards another group. In Trinity Western, because there was no evidence that the teachers who graduated from the Trinity Western program acted in an exclusionary way towards any students, there was no valid reason to withhold the program’s accreditation.

190 Amselem, supra note 4 at paras. 39-54.

191 Freitag, supra note 77.

192 Zylberberg, supra note 112.
Third, in all cases, the value of tolerance is appealed to in order to resolve disputes, and usually in favour of the religious claimant. This leads to a policy of accommodation. The value is so strong that it can effectively change the definition of the word “secular” to mean “inclusive” rather than non-religious.  

However, this policy is conditioned by the idea of reasonableness, which relates to the fourth theme: a case-by-case construction of rights hierarchies. In order to construct these hierarchies, courts assess what is “reasonable” in any given case, by looking to the weight of the burdens borne by those seeking to limit a religious practice, and to the evidence presented to support their types of claims. Thus, condominium co-owners whose legitimate interests are in the aesthetics of a building and whose safety concerns are not substantiated by proper evidence cannot prevent the installation of succoth, students will be permitted to wear a kirpan to
public schools in the absence of evidence that *kirpans* specifically pose a safety risk,\(^{197}\) and teachers who have signed a code of conduct that prohibits homosexual practices will not be prevented from teaching in public schools in the absence of evidence of detrimental effects on the classroom environment.\(^{198}\) On the other hand, when a person is charged with assault, safety concerns legitimize a courtroom prohibition on *kirpans*,\(^{199}\) and a religious congregation will not be able to force a municipality to change its zoning regulations to accommodate a place of worship unless there are no properties available in the appropriate zone.\(^{200}\)

In the next chapter, I will undertake a critical analysis of the themes of individualism, the avoidance of coercion, tolerance, and the *ad hoc* creation of rights hierarchies that are apparent in the case law. I will examine these themes through the lens of the recurring ideas in Canada’s multiculturalism legislation and the relevant insights of the political theorists discussed in Chapter 2. Addressing each theme in turn, I will argue that each raises concerns with respect to Canada’s commitments to recognizing cultural communities, valuing social diversity, and encouraging cross-cultural dialogue.

\(^{197}\) *Multani*, *supra* note 169.

\(^{198}\) *Trinity Western*, *supra* note 184.

\(^{199}\) *Hothi*, *supra* note 104.

\(^{200}\) *Témoins de Jéhovah*, *supra* note 40; *Belz*, *supra* note 57.
Chapter 4
Legal Doctrine through the Multiculturalism Lens

4 Legal Doctrine through the Multiculturalism Lens

4.1 Introduction

In Chapter 3, I highlighted four common themes in the Canadian jurisprudence on freedom of religion. First, the analysis in the case law focuses on the individual. Second, courts are highly concerned with preventing coercion with respect to religious beliefs. Third, the judicial rhetoric is often infused with the value of tolerance. Finally, despite the legal principle that all constitutional rights are to be treated as equal in weight and importance, judgments end up creating an *ad hoc* hierarchy of rights and interests. In this chapter, I will interrogate each of these themes through the lens (or lenses) of multiculturalism discussed in Chapter 2. Drawing on the multiculturalism legislation and the political theory that underpins it, I will argue that the very doctrines that courts employ to resolve conflicts involving freedom of religion are in tension with Canada’s commitments to recognizing cultural communities, valuing social diversity, and encouraging cross-cultural dialogue.¹ These tensions are deeply related to an analysis that proceeds through the paradigm of individual rights. Further, I will argue that freedom of religion litigation, by its current nature, involves disputes of very high stakes. The current judicial discourse intensifies the personal, communal and national identity aspects of interpersonal conflict. This makes compromise solutions harder to achieve and increases the likelihood that cultural communities will adopt extreme positions in the event that decisions do not favour their interests.

¹ For the political theory perspectives that develop these notions, see the discussion in Chapter 2 on Charles Taylor and Bhiku Parekh’s writings.
4.2 The Individualism of Rights Analysis

As discussed in Chapter 3, a basic feature of the Canadian approach to freedom of religion is that the courts treat religion as an individual matter. This is perhaps most readily seen in *Amselem* (the *sukkah* dispute), where the Supreme Court of Canada held that the sincerity of belief of the individual litigant was the touchstone for deciding whether a matter of faith deserved protection under s. 2(a) of the *Charter*. There is no need for the litigant to show the communal aspect of his or her religious belief or practice. Indeed, the Court held that expert testimony regarding the practice would be illuminative only of the litigant’s credibility, rather than the validity of the practice itself. There are, of course, sound reasons for such a policy. Judges are not suited to making decisions regarding the validity of a religious practice within a religious tradition, or of accepting or rejecting a litigant’s interpretation of a religious edict or text. Not only is such a decision beyond the competence of the courts, it would also likely violate the litigant’s freedom of religion; if the courts decide which religious practices or interpretation are valid within a religious tradition, then freedom of religion is curtailed because the range of “valid” religious expression is narrowed.

Nonetheless, there are important (if unintended) consequences to treating religion as an individual matter. These consequences are particularly troubling in light of Canada’s commitment to recognizing the various cultural identities of its citizens. In this section, I will draw on the work of Benjamin Berger to discuss the multiple dimensions of individualism at work in Canadian freedom of religion jurisprudence. I will argue that this form of analysis is related to approaching freedom of religion claims through a rights-based framework, and at odds

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2 [2004] 2 S.C.R. 551 [*Amselem*].
with an approach to multiculturalism that, in keeping with the writing of Charles Taylor, places a high value on the recognition of multiple cultures, religious traditions, and perspectives.

Benjamin Berger explains that the individualist focus that characterizes freedom of religion jurisprudence is common across most constitutional protections, largely because the Charter is a piece of rights-protection legislation. According to Berger,

Once religion is embedded within a rights protecting instrument, as it is in the Charter, law's conception of religion quite naturally assumes certain characteristics of the philosophical idiom in which it is placed. The modern drive to universal human rights has been dominated by a focus on the rights of the individual. This is eminently true of the Charter... the Charter conceives of legally cognizable interests and redressable harms as being enjoyed by the individual.3

Berger adds that Canadian law understands religion as an individual matter in three respects. He writes:

Canadian constitutional law's image of religion is best understood as comprising three elements, each of which lead into and mutually support the others. The result is a cohesive and particular theory of religion. The elements of this conception are: (a) religion as essentially individual, (b) religion as centrally addressed to autonomy and choice, and (c) religion as private.4

Berger bases his view that law treats religion as essentially individual in part on the Amselem ruling discussed above, and also on the Court’s holding in Ross, another case discussed in Chapter 3. In Ross, the Court accepted the argument that a teacher’s extra-curricular anti-Semitic writings were an expression of his religious beliefs, and thus fell within the scope of s. 2(a). However, on the basis of s. 1 of the Charter, the Court held that the teacher should not be

3 Benjamin L. Berger, “Law's Religion: Rendering Culture” (2007) 45 Osgoode Hall L.J. 277 at 283-284. Berger further notes that “the structure of Canadian constitutionalism is really only the vehicle for the transmission of--or perhaps a symptom of--the more foundationally informing political culture of liberalism, which is itself deeply committed to the primacy of the individual (at 284).”

4 Ibid. at 283.
allowed to continue teaching in a public school. While the decision could be read as supporting the collective rights of students, Berger argues that the Ross holding was based on individualist notions as well:

Ross loses the protection of section 2(a) because his religious views deprive other individuals of their parallel right to believe whatever their consciences dictate, and to do so equally and with dignity. Amselem and Ross demonstrate that, for the law, what counts as religious is that which is meaningful to the individual; institutions and collective traditions are only of derivative importance to the law.5

With respect to the Supreme Court’s decision not to enter into an analysis of whether a particular religious practice is consistent with the religion’s principles, Berger notes that the “reticence to pronounce on the content of a particular religion's beliefs is understandable.” However, Berger also asks, “if this is the case, how then does the Court know which communications are of a religious nature and which are not?”6 Thus, Berger exposes an analytical problem that stems from treating religion as an individualized phenomenon: the difficulty in separating those claims that should receive constitutional protection from those that should not.

But the problems run deeper. Viewing religion exclusively through the lens of the individual denudes religious activities of their communal aspects. Without going into empirical detail, it stands to reason that for many people, many religious experiences are unattainable in a purely individual setting. How else could one explain the congregational aspect of so many religious traditions? Why else would the ability to have a communal house of worship be so important to religious communities that they would be willing to pursue their cases to the

5 Ibid. at 288.
6 Ibid. at 287.
Supreme Court of Canada? This gives rise to a problem of recognition, a concept explained principally by Charles Taylor. As discussed in Chapter 2, Canadian multiculturalism policy repeatedly stresses the idea that the recognition of all cultures is a cornerstone of the state’s approach to the facts of social diversity. If Canadians do not experience their religion as an individual phenomenon, it is arguable that the state has an obligation to recognize this fact, and use it to animate the interpretation of the Charter, as nothing in the Charter itself demands an individualist approach.

The second individualist element that Berger identifies in Canadian law’s approach to religion is the treatment of religion as a matter personal choice. While an emphasis on autonomy and choice may have parallels with Will Kymlicka’s views on multiculturalism policy, few (if any) provisions of Canada’s multiculturalism legislation show a commitment this view (see Chapter 3). Rather, as discussed previously, the principle of recognition, as developed principally by Charles Taylor, is much more prevalent in Canadian legislation. The idea that a person’s religion is a matter of pure autonomy and choice can be problematic from this perspective. Consider the example of a devout monotheist. It is plausible (and arguably likely) the person does not experience his or her belief in a single, omnipotent God as a matter of


8 As discussed in Chapter 2, Taylor writes that “[n]onrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being (Charles Taylor, Multiculturalism and the Politics of Recognition: An Essay (Princeton: Princeton Univ. Press 1992) at 25).”

9 Berger, supra note 3 at 299. As Berger notes (at 282), the Supreme Court held in Amselem that religion is “integally linked with an individual’s self-definition and fulfillment and is a function of personal autonomy and choice (Amselem, supra note 2 at para. 42 (emphasis added)).”; This view is also consistent with the Supreme Court’s basic understanding of freedom as being the absence of constraint or coercion, which is discussed in the next section.
personal choice; for that person, God continues to exist regardless of his or her actions.\textsuperscript{10} To that person, the Court’s expression of the idea that religious belief is a matter of personal choice might constitute the harm of misrecognition, to use Taylor’s language. If Canadian multiculturalism legislation is committed to avoiding this type of harm (as I argued in Chapter 2), and given also there is nothing explicit in the Charter that necessitates the view that religion is a matter of personal autonomy, there is good reason to reconsider this aspect of the judicial treatment of religion.

The third strand of individualism that Berger identifies in Canada’s freedom of religion jurisprudence is the tendency to treat religion as a private matter. This is a related but distinct notion to courts’ treatment of religion as individual. In addition to viewing religion as something that each person works out for him- or herself, the court sees the private sphere as the proper place for religion’s exercise. This is manifested in courts’ tendency to discuss religion in terms of belief rather than practice, or to reinterpret practices as matters of belief.\textsuperscript{11} Berger shows how the tendency to treat religion as private shaped the Supreme Court’s decision in Trinity Western. There, a training program for teachers run by a religious institution was held to be valid despite the fact that trainees were required to sign a code of conduct that condemned, among other things, homosexual behaviour.\textsuperscript{12} With respect to this holding, Berger notes:

Even if the code of conduct was an accurate insight into the beliefs held by the graduates of Trinity Western University, the constitutional ethics of equal treatment and non-discrimination are concerned with public conduct, and the

\textsuperscript{10} I acknowledge that this is a simplistic presentation of how a person might experience a monotheistic faith; I use it simply for the purposes of illustration.

\textsuperscript{11} Berger, supra note 3 at 303.

\textsuperscript{12} For a fuller discussion of this case, see Chapter 3.
Court was not prepared to predict future conduct based on past evidence of belief. In so ruling, the Court effectively translated the issue into an evidentiary matter, but one that discloses the strong manner in which the constitutional imagination associates religion with the realm of the private. As belief only, religion is a preference that remains solidly and unproblematically within the realm of the personal.\(^{13}\)

The Québec Superior Court’s holding in *Rosenberg* (the *eruv* case), discussed in Chapter 3, provides another example of this tendency. In determining that the City of Outremont was not entitled to dismantle *eruvin* set up by members of the Jewish community, the court held that “the area within an *eruv* is only a religious zone for those who believe it to be one.”\(^{14}\) While this statement served to protect a religious practice, it did so by reducing the *eruv* to a matter of private belief. An *eruv*, however, is a public religious practice in the sense that it is designed primarily to allow for communal activity on the Sabbath and adds a publicly visible boundary around a neighbourhood inhabited by practicing Jews. This is significant, first, because the court’s logic could serve to justify the presence of religious symbols in other public institutions, such as crucifixes in courtrooms or legislatures. To say that a cross in a courtroom only has religious significance for faithful Christians is to neglect the perspectives of other religious minorities, who may view the cross as representing a history of oppression, or, in more purely religious terms, as idolatry. This result flows from viewing religion as a purely private matter.

Second, treating religion as private creates similar recognition problems to treating religion as individual and as a matter of personal choice or autonomy. For religiously devout people, religion can be experienced as something that guides their whole lives, both public and private. For these people, viewing religion as a private matter is not only inaccurate, it is offensive to

\(^{13}\) Berger, *supra* note 3 at 304.

Their sense of identity. Further, if religion is relegated to the private sphere, people’s ability to express their own identities is seriously curtailed. As Berger notes,

a thicker understanding of religion… would have to account for the possibility that a hard ethical divide between the private and public might make little sense to religion as culture. As a symbolic system expressing not only a general order for the world but distinct ontological claims, religion might also have the capacity to touch upon the whole of the committed individual or even the community. Furthermore, a robust sense of religion as culture would have to cope with the possibility that religion provokes action as much as it evokes emotion or internal dispositions. By contrast, in rendering religion through the mechanism of Charter protections, contemporary Canadian constitutionalism engages in a profound context-stripping that attempts to make religion much more digestible within the symbolic and normative system of constitutional cultural commitments.

This rendering of religion is significant in part because of the powers wielded by courts. Despite courts’ (likely honest) claim that they do not intend to engage with the truth value of a particular religion, courts’ powerful place in the public imagination means that courts’ understandings of religion are given a privileged place in the Canadian cultural landscape.

Berger notes,

Because it both commands the coercive power of the state and always implicitly assumes the ultimacy of its authority, law's rendering of religion assumes the force and significance of a total claim about what matters about religion, what religion relevantly is. This is the essence of Robert Cover's insight that law is jurispathic: that, whether it intends to or not, the very nature of law is that it kills other normative arrangements and interpretations.

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16 Berger, supra note 3 at 313.

Berger offers an explanation for why the problems of recognition identified in this section persist in Canadian law. He argues that law is itself a kind of culture that seeks to understand religion in law’s own terms. But by defining religion in terms external to religion, the law misrecognizes religion, and this has detrimental consequences. Berger writes:

Law seeks to understand religion in terms that make sense within the horizon of significance endogenous to law. Canadian constitutional law's understanding of religion is "cultural" in the sense that it is demonstrative of the culture of Canadian constitutional law, understood as the framework of symbolic meaning out of which law makes sense of the world... But the corollary is that law therefore processes religion in terms exogenous to religious cultures; in so doing, it may fail to take seriously the meanings and structures of significance of religions as cultures... it moulds religion to the shape of its own set of normative and symbolic commitments.

In sum, the various ways in which law treats religion as an individual matter each raise problems of recognition. The jurisprudence tends to neglect the communal aspects of religion, fails to properly address the fact that religion is often not experienced by adherents as a matter of choice, and sits uneasily the fact that people’s religions are often drawn on to guide their public actions. If the Canadian state is committed, in principle, to recognizing minority cultures and religious viewpoints, these moments of misrecognition inherent in the legal doctrine of freedom of religion are worth taking seriously.

4.3 Avoiding Coercion

As discussed in Chapter 3, a second major theme in Canada’s freedom of religion jurisprudence is the avoidance of coercion. State policies that have the effect of coercing people

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18 This aspect of Berger’s view is consistent with the writings of McLachlin C.J. as discussed in Chapter 2.

19 Berger, supra note 3 at 311. For Berger, this understanding of religion is inevitable for a legal system that grows out of a political culture of liberalism. The reductionist view of religion that law offers “is not simply a defect that calls for remedy; rather, the law has no choice but to conceive of religion in terms cognizable within constitutional liberalism (at 281).” I do not adopt this view, and in Chapter 5 explore an alternative, difference-based approach that might allow Canadian courts to maintain a richer conception of religion.
into compromising their religious views have generally been seen as constitutionally invalid. In accordance with this principle, courts have prohibited religious exercises and religious curricula in public schools and the recitation of the Lord’s Prayer at town council meetings. It is hard to imagine a principled approach to multiculturalism that could find fault with the avoidance of coercion per se.

However, while a critique of the anti-coercion element of the jurisprudence might be misplaced, the courts’ concern with avoiding coercion can inspire questions about the rights-based approach in general. For instance, is it possible that the rights-based approach to freedom of religion itself has coercive effects on litigants? In this section, I will suggest that there is good reason to think so. In two important respects, the jurisprudential imperative to speak in rights language can pressure (or coerce) litigants into adopting positions that are inconsistent with their religious views. First, rights language discursively treats the state as the ultimate authority, and thus subordinates other sources of normative authority. This may be inconsistent with the views of litigants who view a divine actor as the most authoritative, or have religiously based objections to reposing all authority in the state. Second, rights language can encourage litigants to put forward a simplified version of their religious beliefs or their sense of identity; it tends to neglect the reality that people often have multiple, overlapping identities. Litigants may end up presenting themselves as caricaturized or distorted representations of who they believe themselves to be. Of course, it might be said that all legal doctrines require litigants to discuss their disputes in specific ways. For example, a negligence claim could not be made in Canada’s

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21 Freitag v. Penetanguishene (1999), 47 O.R. (3d) 301 (C.A.) [Freitag].
common law jurisdictions without reference to the concepts of a duty of care and a failure to prevent reasonably foreseeable damage, even though these concepts may not be significant to the litigants’ understanding of their dispute. However, because questions of religious freedom are so closely bound up with the personal and communal identities of litigants, the harm inflicted upon them when they are forced to adopt the language of rights is qualitatively different because it relates to the harm of misrecognition that has been explored earlier in this chapter. In the following paragraphs, I will delve more deeply into the particular damage that rights language can do to religious claims and claimants.

4.3.1 The Controversial Unity of Rights Language

In mainstream thought, rights granted within a legal system tend to be viewed as zones of autonomy granted by the state. Indeed, as seen in Chapter 2, McLachlin C.J. sees the rule of law as doing exactly this when she speaks of courts being able to “find space for these religious practices within the rule of law.” This view evokes an image where all (acceptable) worldviews are gathered under the state’s umbrella. Martha Minow explains how rights claims made in the name of cultural difference support this kind of unified vision:

Rights claims deployed to ensure respect for ethnic, racial, or cultural differences… do not jeopardize unity because they channel dissent and opposition into a communal language and secure participation and respect for the dominant structures of law… Framing their assertions in rights terms, the claimants at least

22 See the section discussing Charles Taylor’s work in Chapter 3 for a deeper examination of the harms of non- and misrecognition.

gesture toward obedience to the dominant legal system and the state that maintains it.  

Minow notes that pursuing this kind of unity is a “controversial goal,” arguing that “the preservation of multiple communities promotes the correction of errors in one community, permits challenges to the ideology of the dominant elite, and provides space against oppression.”

More importantly, the conception of the state as all-encompassing and as the ultimate authority may prove unacceptable to members of religious minority groups because non-state sources of authority are always inferior to the state; in Minow’s words, “rights claims subordinate the subcommunity to the power of the dominant society.” In support of this claim, Minow cites the well known American case of Wisconsin v. Yoder, in which Amish groups in Wisconsin successfully claimed the right to remove their children from compulsory public education at age 14. The Amish claim was unusual, however, in an important respect. In their brief in Yoder, the Amish respondents wrote:

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25 Ibid. at 348.
26 Ibid. at 351. This view shares much in common with Bhiku Parekh’s argument that cultural diversity is valuable per se (see the discussion of Parekh’s writings in Chapter 2). Jacob Levy makes a nuanced argument that against the view that cultural diversity is inherently valuable, which he says stems from “anti-Procrusteanism.” Levy writes: “Starting with a belief that diversity has value may help us to act respectfully where we otherwise would not. But none of this makes it so… Saying that diversity is valuable does give an account of what’s wrong with [imperialism, injustice, cruelty, and hypocrisy], but it’s over inclusive. It doesn’t distinguish between a language dying off because the state kills all its speakers and a language dying off because its speakers voluntarily abandon it for a language that has wider use (Jacob Levy, The Multiculturalism of Fear (Oxford: Oxford University Press, 2000) at 107-108).”
27 Minow, ibid. at 357.
28 406 U.S. 205 (1972) [Yoder].
The Amish answer to forms of legal harassment, which would force them to violate their religion, has been to sell their farms and to [move]... [I]t would, if this Court sustains the prosecution, sound the death knell, in this country, for an old, distinctive and innocent culture.29

For Minow, the significance of this formulation lies in the fact that the Amish community presented itself as willing to leave the United States if it lost its legal battle. Thus, the Amish did not necessarily “[submit] themselves to that court as final adjudicator,” as the Amish worldview does not sit comfortably with a view of society in which the state reigns supreme.30

In several of the cases discussed in Chapter 3, litigants likewise left or promised to leave their locales in the event of unsuccessful litigation. In Allen v. Renfrew, for example, a litigant who was uncomfortable with the theistic nature of the opening prayer reciting at County Council meetings “indicated that he was planning to relocate to Ottawa where he hoped he would feel more comfortable in terms of his beliefs.”31 In Zylberberg v. Sudbury Board of Education, though their reasons for doing so are not stated in the case, two of the five parents who commenced the lawsuit had moved to other locales by the time the case reached Ontario’s Court of Appeal.32

The promise to leave a locale is troubling in two respects. First, the fact that a person or group would find a Canadian locality inhospitable to their cultural or religious difference is, at least prima facie, worrisome for the state of Canadian multiculturalism policy. Second, and

29 Ibid. (Brief of the Respondents), as cited Cover, supra note 17 at 152. Robert Cover has characterized this element of the Amish position as emerging from the “special jurisprudence of exile and martyrdom” known to some minority religious communities.

30 Minow, “Rights”, supra note 24 at 358.


32 Zylberberg, supra note 20 at 646.
more particular to the legal context, it might be that not all individuals or groups are prepared to
make this threat. The thought may simply be too frightening, or the litigant may be
uncomfortable with such a confrontational approach, fearing that it could backfire. Indeed,
courts’ sympathy for religious freedom claims seems to be affected, at least in part, by whether
and how much the litigant has attempted to reach a compromise solution before coming to
court.33 As such, litigants may be pressured to adopt a position that recognizes the final
authority of the state, despite this being contrary to their religious beliefs.

In addition, Minow identifies the tendency of rights claims to unwittingly invite the state to
act as a competing culture as a second problem of rights-based claims: “when phrased in terms of
rights, state norms veil their competition with the norms of other communities behind a guise of
neutrality and universality.”34 Rights-based discourse obscures the fact that state norms and
values are not shared by all subcommunities. The state is made out to be neutral, but it is not: it,
like all subcommunities, adheres to a particular value structure that views the state as the
ultimate arbiter of all disputes. Faced with this veiled competition, it is likely that state judges
will prefer state norms to communal norms, especially because the dispute is never actually
framed in these terms. Thus, in Témoins de Jéhovah,35 when a religious congregation’s ability
to use a building as a Kingdom Hall is distilled to a question of rights, the majority of the Court

33 See Multani v. Commission scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256 at para. 54, where the Court
contrasts the “absolute” position of the school board with the more flexible position of the litigant: “The council of
commissioners’ decision establishes an absolute prohibition against Gurbaj Singh wearing his kirpan to school. The
respondents contend that this prohibition is necessary, because the presence of the kirpan at the school poses
numerous risks for the school’s pupils and staff. It is important to note that Gurbaj Singh has never claimed a right
to wear his kirpan to school without restrictions. Rather, he says that he is prepared to wear his kirpan under the
above mentioned conditions imposed by Grenier J. of the Superior Court. Thus, the issue is whether the respondents
have succeeded in demonstrating that an absolute prohibition is justified.” Arguably, the subtext here is that the
Court favours the party who has shown itself more amenable to compromise.

34 Minow, “Rights”, supra note 24 at 361.

35 Supra note 7.
drew on an element of state culture (the principles of procedural fairness) to resolve the dispute. The minority, for its part, insisted on the rights of municipalities to organize the use of space through zoning by-laws except in limited circumstances. On both sets of reasons, the governing norms are state norms.

Further, because state norms are understood by the courts as being secular, the fact that courts always draw on state norms to resolve disputes has important consequences for the image of the religious citizen in the public discourse. The citizen with religious commitments is treated as an “Other” whom the secular state sometimes accommodates and tolerates. As James Tully has noted, the tendency to view the dominant culture as neutral can frustrate the demands of minority groups for recognition:

If we listen to what people are trying to say in actual cases, the demands of minorities are often made in the face of the majority having the power to suppress or misrecognize minorities, to assimilate them to the majority’s cultural norms, to rule over and remake their identities by destroying their languages, and to present this as if it were universal. These cases are not conflicts between ‘difference’ and ‘equality’ but among groups with tremendous inequalities in power and resources… and corresponding inequalities in the power to construct the identities of others through the day-to-day exercise of the prevailing norms of governance and cooperation.

This issue is intensified by courts’ persistent reliance on the value of tolerance, which, while sometimes supporting peaceful relationships between communities, can also further marginalize minority communities. I will return to this idea below, when I examine the

36 In this regard, Sherene Razack has noted: “[t]he companion idea installed by the notion that a secular state provides the best protection is the idea that the normative citizen is one without group-based loyalties, a figure for whom communitarian identities are best kept at home (Sherene Razack, “‘Sharia Law Debate’ in Ontario: The Modernity/Premodernity Distinction in Legal Efforts to Protect Women from Culture” (2007) 15 Feminist Legal Studies 3 at 18).”

discourse of tolerance in more detail. Before doing so, I will examine another coercive effect of rights-based jurisprudence: the pressure on litigants to paint themselves as one-dimensional.

4.3.2 Simplifying Complex People

In analyzing judicial approaches to equality and discrimination, authors in the Canadian and English contexts have identified the difficulty that courts have in treating litigants as multi-dimensional. Drawing on feminist theory, these authors have argued in favour of courts adopting an “intersectional approach” that aims at “complex equality.” Writing in the context of Canadian anti-discrimination law, Daphne Gilbert and Diana Majury provide a succinct explanation of intersectional analysis:

Intersectional analysis is based on the recognition that an individual’s experiences are based on multiple, intersecting identities. While these multiple identities can be linked to more than one ground of discrimination, the experiences that flow from them cannot be assigned to a single or even multiple grounds.\(^{38}\)

By honouring people’s complex identities, this approach more fully implements the Taylorian ideal of recognition that is, according to the multiculturalism legislation examined in Chapter 2, a central aspiration of Canadian policy.

English author Maleiha Malik explains how courts’ persistent use of a “single axis” framework can filter out important aspects of litigants’ lived experiences from the analysis. On the issue of litigation surrounding Muslim headscarves, she writes:

One reason that the ‘gender’ aspects disappears within the analysis is because it uses ‘single axis’ definitions of equality which are designed to focus exclusively on one ground of inequality, e.g. sex or religion or race. However, the discrimination that Muslim women suffer through headscarf bans operates at the

\(^{38}\) Daphne Gilbert and Diana Majury, “Critical Comparisons: The Supreme Court of Canada Dooms Section 15” (2006) 24 Windsor Y.B. Access Just. 111 at 134. In formulating this description, Gilbert and Majury draw upon, among other writings, the seminal work of Prof. Kimberlé Crenshaw.
margins of race, religion and gender… Methods that treat equality around a single axis – e.g. as an either/or choice between criteria such as gender and religion – are inadequate to address acute and subtle forms of intersectional discrimination.\(^{39}\)

Moreover, in addition to potentially obscuring elements of identity, Malik argues that the “single axis approach… often assumes that a protected ground such as gender or religion is a fixed immutable category that is beyond renegotiation or reconstruction. As Angela Harris has noted, single axis equality’s essentialism entrenches the viewpoint of those who have greater power.”\(^{40}\) In other words, the same kind of thinking that reduces people’s identities to a single trait tends also to have reductive understandings of that trait. Malik explains how this plays out in the context of an equality claim that is based in part on religious discrimination:

Of all the substantive characteristics that a religious minority may have the one that becomes predominant is the one characteristic which emerges from a comparison with the dominant majority group: i.e. they are not Christian or not secular. The fact that other characteristics such as gender are also relevant and related to religious experience diminishes within the analysis. Characteristics such as religion then become entrenched and an ‘identifier’ for the whole social group.\(^{41}\)

This reductionist thinking is intimately associated with rights-based approach, which encourages litigants to slot themselves into pre-defined by categories by being highly specific about the right they are claiming.

The considerations that Gilbert, Majury and Malik bring to bear in the equality context have purchase in the freedom of religion context as well. When litigants make a freedom of religion claim, they must explain to the court the religious practice or principle that they say is


\(^{41}\) Malik, *ibid.* at 136-137.
offended by state action or by the actions of others. There is little room within this paradigm for a litigant to show how other aspects of their identity are implicated in the practice. For example, within some strains of Judaism, groups of women have since the 1970s implemented more widespread celebration of the beginning of each new month (Rosh Chodesh celebrations).\textsuperscript{42} These celebrations may be seen by some group members as expressions of religious and gendered elements of their identities. If a woman sought time off work in order to participate in these rituals, she might be able to convince a Court that these holidays were connected to her religious faith.\textsuperscript{43} Indeed, the freedom of religion jurisprudence encourages her to express it as such. But that would only be telling part of the story. The history of gender imbalances might also inform the meaning of the ritual, but these would likely be lost on the court, as a woman’s right to leave work in order to participate in a celebration of her identity as a woman is not as clearly protected by the Charter. Throughout the experience of the litigation, the litigant will have to tell her story over and over; in the retelling, the person’s understanding of her own narrative can be altered. Thus, a woman might come to a new, more impoverished understanding of her participation in the particular ritual. Put otherwise, the simplified understanding of identity encouraged by a discourse of rights not only fails to give due recognition to people’s complex identities, its reductionism might also come to colour the experiences of litigants, the very subjects that the rights are meant to protect. This, surely, cannot be the objective of protecting freedom of religion.

\textsuperscript{42} See e.g. “How to Use the Rosh Chodesh Groups Guide” Hillel: The Foundation for Jewish Life on Campus, online: <http://www.hillel.org/jewish/rituals/roshchodesh/how_to_guide.htm>.

\textsuperscript{43} To be successful, she would also need to convince the court that the accommodation of her religious practice would not constitute undue hardship for her employer, see Ont. Human Rights Comm. v. Simpsons-Sears, [1985] 2 S.C.R. 536.
4.4 Tolerance

As seen in Chapter 3, the value of tolerance is a third important theme that runs through Canada’s freedom of religion jurisprudence. This is perhaps most pointedly exemplified in *Chamberlain*, where the idea of tolerance is so powerful that it effectively redefines the term “secular” to mean inclusive instead of non-religious.\(^{44}\) Certainly, there is much to be said in favour of tolerance. When placed in contrast with the inter-communal strife described by Jacob Levy,\(^ {45}\) a state that advocates tolerance is clearly the better option than one that engages in violence or oppression of minority groups. However, some scholars have recently begun to rethink the idea of tolerance, and expose some of its harmful side-effects. In this vein, Wendy Brown argues that while tolerance can be positive as compared to some alternatives, it still falls short of the ideals of full equality:

> Comprehending tolerance in terms of power and as a productive force… does not lead to a roundly negative judgment… The recognition that discourses of tolerance inevitably articulate identity and difference, belonging and marginality, civilization and barbarism, and that they invariably do so on behalf of hegemonic social or political powers, does not automatically negate the worth of tolerance in attenuating certain kinds of violence or abuse… For example, though tolerance of homosexuals today is often advocated as an alternative to full legal equality, this stance is significantly different from promulgating tolerance of homosexuals as an alternative to harassing, incarcerating, or institutionalizing them.\(^ {46}\)

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\(^{45}\) See the discussion of Levy’s writings in Chapter 2.

Nonetheless, Brown explains that there is good reason to reconsider the mainstream comfort with tolerance, as the notion has a dubious past. In the United States, many civil rights activists employed the idea of racial tolerance in their discourse, but this came to be recognized as a problematic way to address the racial inequality. Brown notes:

Early in the civil rights era, many white northerners staked their superiority to their southern brethren on a contrast between northern tolerance and southern bigotry. But racial tolerance was soon exposed as a subtle form of Jim Crow, one that did not resort to routine violence, formal segregation, or other overt tactics of superordination but reproduced white supremacy all the same. This exposé in turn metamorphosed into an artifact of social knowledge: well into the 1970s, racial tolerance remained a term of left and liberal derision, while religious tolerance seemed so basic to liberal orders that it was as rarely discussed as it was tested.47

In the Canadian context, as Lorne Sossin has noted, the narrative of tolerance and accommodation is opposed in important ways to the competing narrative of pluralism:

There are two competing narratives that have come to define Canada, both to itself and the world.

The first narrative is of a vibrant, pluralist immigrant society. This narrative begins with the founding of the Canadian state in 1867 as a compromise federation between the English Protestant and French Catholic communities which resided in what was then British North America…

This narrative has culminated in the celebration of religious, ethnic and cultural pluralism in Canada…

The second narrative is that Canada began as and has remained a conservative English Protestant society which tolerated, but never considered as equal, all other minority religious communities… As religious communities become established, the Jewish, Muslim, Hindu and Buddhist communities are accommodated, but only within a paradigm that accepts English Protestants as the “norm” and other religious communities as “minorities”. For example, Christmas Day and Easter remain publicly enforced “statutory holidays” despite the obvious religious

47 Brown, *ibid.* at 1.
connotation of both holidays. No other religious community’s holy days are accorded this state recognition.48

For present purposes, two main problems with the discourse of tolerance are most relevant. First, the language of tolerance implies that there is a tolerating group (which I will call the “tolerator,” for lack of a better term), which is in a position of power, and a tolerated group, which seeks exemptions and accommodations from the tolerator. This paradigm reinforces existing power imbalances and can tend to further marginalize minority communities. Second, the language of tolerance can lead to an unfair focus on the troubling aspects of minority practices without an equal reflection on the disconcerting elements of dominant practices. Instead, the dominant culture is painted as neutral and normal, and can be left unexamined. I will discuss each of these issues in turn.

4.4.1 The Marginalizing Tendencies of Tolerance

The notion of tolerance implies a binary relationship between those who tolerate and those who are tolerated. Those who are tolerated, always members of minority groups, are marked as different, and negatively so. In contrast, the tolerator is pictured as benevolent, and also as the party with the necessary authority to decide what will be tolerated and what will not be. As Brown notes:

Like patience, tolerance is necessitated by something one would prefer did not exist… As compensation, tolerance anoints the bearer with virtue… It offers a robe of modest superiority in exchange for yielding…

Not simply power… but authority is a presupposition of tolerance as a moral and political value.49


Three consequences flow from this discursive manoeuvre. First, “[w]hat is tolerated remains distinct even as it is incorporated.” While the theorists of multiculturalism discussed in Chapter 2 uniformly oppose policies aimed at assimilating minority communities, and would likely support a framework within which members of minority groups can retain their distinctive practices, the language of tolerance adds an important layer to the language of pluralism. Minority practices remain not only distinct but “tolerated.” The implication is that the tolerator would prefer them not to exist, but forebears their existence, remaining aware of this unwelcome presence. As Brown argues, “[s]ince the object of tolerance does not dissolve into or become one with the host, its threatening and heterogeneous aspect remains alive inside the tolerating body.” Instead of viewing this difference in relative terms whereby the tolerator and tolerated are different from each other, the tolerated group is made to bear the whole weight of the difference. It is they who deviate from the norm, and thus they who must be accommodated through the benevolence of the tolerator. Minority groups are thus recurrently made aware of their less powerful place, and further marginalized. As Brown notes, “[a]ll otherness is deposited in that which is tolerated, thereby reinscribing the marginalization of the already marginal by reifying and opposing their difference to the normal, the secular, or the neutral.”

This is troubling because, according to Canada’s multiculturalism legislation, social diversity has

50 Ibid. at 28.
51 Ibid. at 28.
52 See Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law (Ithaca: Cornell University Press, 1990) at 11. The notion of treating difference as a relative concept instead of belonging to the minority group is developed below in Chapter 5.
53 Brown, supra note 46 at 45.
inherent value.\textsuperscript{54} Cultural and religious differences should thus not be treated as a burden that is borne by dominant group or a deviation that must be forgiven.

Moreover, the concern with otherness ultimately essentializes those groups that are the objects of tolerance:

homosexuals discursively appear as more thoroughly defined by their sexuality and hence less capable of participation in the universal than are heterosexuals, just as Jews, Catholics, Mormons, and Muslims appear more relentlessly saturated by their religions/ethnic identity than are other Americans.\textsuperscript{55}

This raises a problem of recognition similar to those discussed above; when a member of a minority group is reduced to a single defining trait, he or she is misrecognized in a manner inconsistent with Canada’s multicultural promises.

A second related consequence of the discourse of tolerance is the reaffirmation of the moral superiority and authority of the dominant group. As Brown writes,

Tolerance is generally conferred by those who do not require it on those who do... The heterosexual proffers tolerance to the homosexual, the Christian tolerates the Muslim or Jew, the dominant race tolerates minority races... each of these only up to a point. However, the matter is rarely phrased this way. Rather, power discursively disappears when a hegemonic population tolerates a marked or minoritized one. The scene materializes instead as one in which the universal tolerates the particular in its particularity, in which the putative universal therefore always appears superior to that unassimilated particular.\textsuperscript{56}

Further, tolerance is something that is granted on particular conditions, and can be withdrawn. It involves a “licensing action [that] specifies the conditions within which the tolerated practice

\textsuperscript{54} See also the discussion of Bhiku Parekh’s writings in Chapter 2.

\textsuperscript{55} Brown, \textit{supra} note 46 at 186.

\textsuperscript{56} \textit{Ibid.} at 186.
remains tolerable.\textsuperscript{57} Thus, in Canada, the \textit{kirpan} is tolerated in public schools, where the policy is one of reasonable and not absolute safety, but not in courtrooms, where, presumably, safety must be absolute, or the wearer of the \textit{kirpan} may reasonably be thought to be a violent person.\textsuperscript{58} The notion that tolerance is bestowed by a superior group with high moral authority is incompatible with the ideals of equality that are said to underlie Canada’s multiculturalism policies; this should give pause for reconsideration of the use of the language of tolerance.

Finally, the discourse of tolerance may also frustrate the Parekhian goal of cross-cultural dialogue that is an aspiration of Canada’s multiculturalism legislation.\textsuperscript{59} Because minority communities are marked as different in primordial and immutable ways, the discourse of tolerance makes dialogue between groups seem more difficult. In Brown’s words,

\begin{quote}
    tolerance as a dominant political ethos and idea abandons not only equality projects but also the project of connection across differences, let alone solidarity or community in a world of differences. It aims to separate and disperse us, and then naturalizes this social isolation as both a necessity (produced by difference) and a good (achieved by tolerance).\textsuperscript{60}
\end{quote}

Put otherwise, a commitment to fostering dialogue between communities is at odds with the discourse of tolerance.

\section*{4.4.2 Tolerance as Mask}

In addition to reinforcing the “otherness” of minority communities, the language of tolerance can mask the situated perspective of the dominant group. The tolerator is always

\begin{footnotes}
\item[57] \textit{Ibid.} at 29.
\item[59] See Chapter 2.
\item[60] Brown, \textit{supra} note 46 at 88-89.
\end{footnotes}
pictured as neutral; in the context of disputes involving religion, this neutrality is identified with
secularism, and not in the inclusive sense that the Supreme Court uses the term in
*Chamberlain*, but rather in the sense of having no religion. As Brown puts it, the dominant
perspectives “are so hegemonic as to not even register as cultures or religions.” In important
ways, however, and as seen in the writings of Benjamin Berger discussed above, the perspectives
of the liberal states are not neutral; they adopt particular perspectives that are not shared by all
citizens. As, Brown writes: “liberalism is not more above or outside culture than is any other
political form.”

The identification of the liberal, secular state with neutrality has significant implications
for how citizens are imagined. The secular citizen, or the citizen who keeps his or religious and
cultural practices private, is pictured as more thoroughly evolved and autonomous. As Brown
notes, “though ‘culture’ is what nonliberal peoples are imagined to be ruled and ordered by,
liberal peoples are considered to have culture or cultures.” Razack likewise writes that a
common consequence of identifying the state with secularism can obscure the situated nature of
the state and reinforce essentialized perceptions of minority groups:

The idea of a monocultural, secular state works to consolidate who is understood
as the ideal citizen. Since the ideal citizen is an individual without any sort of
group-based identity, a non-citizen is someone who remains trapped within
group-based identities.

61 See the discussion of *Chamberlain* in Chapter 3.
63 Ibid. at 22-23.
64 Ibid. at 150.
65 Razack, *supra* note 36 at 23.
In response to these implied claims of neutrality, Brown shows how the conceit of neutrality is false by analyzing differing attitudes towards covering and exposing women’s bodies:

Liberal tolerance discourse... sheaths the cultural chauvinism that liberalism carries to its encounters with nonliberal cultures. For example, when Western liberals express dismay at (what is perceived as mandatory) veiling in fundamentalist Islamic contexts, this dismay is justified through the idiom of women’s choice. But the contrast between the nearly compulsory baring of skin by American teenage girls and compulsory veiling in a few Islamic societies is drawn routinely as absolute lack of choice, indeed tyranny, “over there” and absolute freedom of choice... “over here.” This is not to deny differences between the two dress codes and the costs of defying them, but rather to note the means and effects of converting these differences into hierarchalized opposites. If successful American women are not free to veil, are not free to dress like men or boys, are not free to wear whatever they choose on any occasion without severe economic or social consequences, then what sleight of hand recasts their condition as freedom and individuality contrasted with hypostasized tyranny and lack of agency?66

This discussion is relevant in the Canadian context as well, where public ire is raised over Muslim girls wearing their *hijabs* to schools and sporting events, but little is heard about the pressures on non-Muslims to dress in particular ways.

In sum, the language of tolerance allows for a continuing focus on that which is pictured as foreign, and little reflection on dominant norms that are taken to be neutral and invisible. Canadian courts have at times shown themselves to be sensitive to the dangers of such a one-sided view. In *Multani*, for example, the Court went to some lengths to show how, despite its appearance to those unfamiliar with the Sikhism, a *kirpan* is above all a religious symbol and not a weapon.67 Further, the Court noted that objects that are not typically regarded as weapons

67 *Multani*, *supra* note 33 at para. 47.
might be as dangerous as a kirpan, such as “scissors, compasses, baseball bats and table knives.”68 Similarly, in Rosenberg, the Court was careful to draw comparisons between the Jewish community’s eruv, which inhabits a public space, and “Christmas decorations… on City property, or… the ringing of church bells on Sunday morning.”69 This offers some hope that the language of tolerance can be used without fully blinding a court to similar problems inherent in the dominant culture. Nonetheless, the tendencies of the discourse of tolerance to paint dominant cultural institutions and practices as neutral remain. Thus, the theistic nature of a county council’s opening prayer can be justified as neutral,70 as can the reference to God in the preamble to the Charter, which provides that “Canada is founded upon principles that recognize the supremacy of God and the rule of law.”71 This is troubling from the perspective of the notions of equality which are said to be essential to Canada’s form of multiculturalism and lead, according to Charles Taylor, to the imperatives of recognition. If all cultures and religions are equal and should be recognized as such, none can be neutral.

4.5 Hierarchies of Rights

The fourth major theme within Canadian freedom of religion jurisprudence that I identified in Chapter 3 is the tendency among courts, despite the legal principle that all constitutional rights are equal, to create a hierarchy of rights on a case-by-case basis. Because this analysis is generally done under the aegis of s. 1 of the Charter (or its provincial

68 Ibid. at para. 46.
69 Rosenberg, supra note 14 at para. 25.
70 Allen, supra note 31.
counterparts), the hierarchy is drawn with reference to the notion of reasonableness. Thus, in *Amselem*, the condominium board that wished to prevent some residents from erecting **succoth** on their balconies for an annual one-week period was painted by the majority of the Supreme Court as unreasonable in its insistence on conformity with the condominium’s rules and by-laws. Likewise, the municipality that sought to dismantle the Jewish community’s **eruvin** in *Rosenberg*, and the school board that instituted an absolute prohibition on carrying a **kirpan** in *Multani* were seen as behaving unreasonably.

In all of these cases, the rights and interests of the less reasonable party are seen as less weighty than those of the more reasonable party, who consequently “wins” the litigation. There are two troubling aspects to this pattern. First, the notion of reasonableness does not have any pre-defined content.72 It is a flexible concept that has the benefit of being able to change over time with prevailing attitudes and evolving social facts. What may have seemed reasonable 50 years ago may not seem reasonable today, and the kinds of problems courts face today cannot always be easily resolved by reference to the notion of reasonableness at work in past cases. As such, judges are required in their analysis to infuse the empty vessel of reasonableness with substance. But reasonableness, like tolerance, can have a masking effect on the subjectivity of the decision. Because the norms that judges refer to in making their decisions are “reasonable,” they are also thought to be neutral. But of course, they are not. In resolving disputes, judges “inevitably [see and judge] from a particular situated perspective.”73 Further, on a more basic


73 Martha Minow, *Making All the Difference*, supra note 52 at 50-52.
level, judges are required by the structure of the rights-based process to pick a “winner.” They cannot give equal recognition to all sides of a dispute and leave it at that.

This last point is connected to a second problem with courts’ tendency of establishing an *ad hoc* hierarchy of rights: in cases that involve freedom of religion where only one party can win, the stakes are often high, engaging aspects of litigants’ sense of identity. It is difficult to imagine how it could be otherwise. Both sides to a dispute engage in the lawsuit and ask the court to decide who is right. They would not likely proceed with their dispute if the matter was unimportant. But the way that legal doctrines of freedom of religion currently operate in Canada may make negotiated settlements less likely. The winner-take-all feature of the current approach to freedom of religion (and perhaps all rights-based adjudication) can make compromises harder to achieve and meaningful cross-cultural dialogue more elusive.

The view that legal doctrines provide a framework within which litigants may settle their disputes is not novel. In the 1970s, using divorce law as a case study, Robert H. Mnookin and Lewis Kornhauser famously observed that parties to a legal dispute negotiate settlements “in the shadow of the law.” These authors identified five factors that influence the outcomes of financial and custodial negotiations between divorcing parents:

1. the preferences of the divorcing parents; 2. the bargaining endowments created by legal rules that indicate the particular allocation a court will impose if the parties fail to reach agreement; 3. the degree of uncertainty concerning the legal outcome if the parties go to court, which is linked to the parties' attitudes towards risk; 4. transaction costs and the parties' respective abilities to bear them; and 5. strategic behavior.

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These factors can all be adapted to the freedom of religion litigation context. For the present discussion, the notion of “bargaining endowments created by legal rules” is particularly relevant.

In their essay, Mnookin and Kornhauser noted: “[d]ivorcing parents do not bargain over the division of family wealth and custodial prerogatives in a vacuum; they bargain in the shadow of the law.”\textsuperscript{76} The authors go on to provide a simplified hypothetical example in which the laws concerning divorce prescribe a standard set of terms for custodial and financial arrangements.\textsuperscript{77} In these circumstances, “neither spouse would ever consent to a division that left him or her worse off than if he or she insisted on going to court. The range of negotiated outcomes would be limited to those that leave both parents as well off as they would be in the absence of a bargain.”\textsuperscript{78} The question of what “worse off” means in this context is determined by the parents’ individual preferences and lifestyles. A father may be willing to increase his financial contributions if he is granted more visitation rights; conversely, a mother might be willing to accept less money if she “found custody burdensome and considered herself better off with less custody.”\textsuperscript{79}

How do these observations apply in the freedom of religion context? Because the current rights-based approach to freedom of religion tends to imagine the outcome of litigation as a winner-take-all scenario, there is little room for the parties to achieve compromise because

\textsuperscript{76} \textit{Ibid}. at 968.

\textsuperscript{77} In Mnookin & Kornhauser’s example, “all mothers had the right to custody of minor children and that all fathers only had the right to visitation two weekends a month… [and] the legal rules relating to marital property, alimony, and child support gave the mother some determinate share of the family's economic resources (\textit{ibid}. at 968-969).”

\textsuperscript{78} \textit{Ibid}. at 969.

\textsuperscript{79} \textit{Ibid}. This is, admittedly, a highly simplified example and is used only for illustrative purposes; a more nuanced version of the scenario might take into account the occupations of the spouses, their support networks, and other factors.
reducing the perceived range of compromise solutions is diminished.\textsuperscript{80} Whereas in divorces involving custodial issues, couples may negotiate on at least two issues (finances and custody), and trade off concessions on one issue for benefits with respect to the other, the rights-based approach tends to treat the entire dispute as a single issue, albeit with multiple analytic steps. This leads to a binary conception of possible outcomes: victory or loss. This, in turn, can lead parties to adopt entrenched positions, and be less open to hearing the compromises proposed by the other side. Canada’s legislative commitments to encouraging cross-cultural dialogue should give us pause before accepting the idea that freedom of religion disputes are best analyzed as a single issue. An approach that divides disputes into smaller sub-issues and analyzes them in terms of the costs borne by all parties this may be a more fruitful way of fostering dialogue and stimulating creative solutions at moments of conflict.\textsuperscript{81}

4.6 Conclusion

I have argued in this chapter that the rights-based approach to freedom of religion is given to several failures of recognition. Its persistent individualism misrecognizes the communal and public elements of the religious experience. Further, the pressure on litigants to adopt the language of rights, which reinforces this failure of recognition, can itself be seen as coercive, and at odds with the anti-coercion principles established by the jurisprudence. In addition, the

\textsuperscript{80} This does not mean, however, that no compromises are possible. In both \textit{Amselem} and \textit{Multani}, the Supreme Court noted some solutions that arose through negotiations but were eventually rejected by the parties. In \textit{Amselem}, the condominium syndicate proposed that Mr. Amselem and his co-appellants erect a communal succah in the condominium’s gardens but, ultimately, Mr. Amselem and his co-appellants elected to pursue the litigation instead (\textit{Amselem, supra} note 2 at paras. 13-14, 176). Indeed, the dissenting judges stress that Mr. Amselem had, for a time, responded positively to this offer; the dissenting judges agreed with the Québec Superior Court and Court of Appeal that this was the most reasonable solution to the dispute (at paras. 177-178). Similarly, in \textit{Multani}, the Court underscored the fact that Gurbaj Singh Multani had agreed, as a kind of compromise, to wear his kirpan under specified conditions, but the school board would not accede to the compromise and continued its litigation (\textit{Multani, supra} note 33 at para. 54).

\textsuperscript{81} I explore this idea in more detail in Chapter 5.
marginalizing effects of the discourse of tolerance and its tendency to treat dominant cultural practices as neutral are also problematic from the perspective of Canada’s commitments to recognition. Existing inequalities are reinforced as the language of pluralism gives way to the language of tolerance and accommodation, and minority communities are neither properly recognized nor valued.

The prevailing approach to freedom of religion is also troublesome in light of Canada’s stated commitment to foster dialogue between cultural communities. The discourse of tolerance can tend to view religious and cultural differences as primordial and immutable, making cross-cultural understanding seem less likely. Furthermore, the high stakes of litigation that emerge when courts create rights hierarchies on an *ad hoc* basis is likely to make litigants adopt more extreme positions, making compromise and dialogue harder to achieve. In Chapter 5, I will explore an alternative to the rights-based approach that takes as its aim the just distribution of the costs social diversity and difference.
Chapter 5
Focus on Difference: A Way Out of the Rights Conundrum?

5 Focus on Difference: A Way out of the Rights Conundrum?

5.1 Introduction

In Chapter 4, I argued that the current Canadian freedom of religion jurisprudence creates inconsistencies with Canada’s commitments to affording proper recognition to all cultures and to promoting cross-cultural dialogue. Further, I maintained that these problems are intimately bound up with a rights-based approach that tends to individualize matters of religion, speak in the discourse of tolerance, and create ad hoc hierarchies of rights. In this chapter, I will argue, inspired by the work of Martha Minow, that there is at least one way to reconceptualise the approach to freedom of religion such that the negative side-effects of the rights-based approach are minimized.

In Minow’s view, one of the most fundamental difficulties in the legal treatment of claims from minority populations is that the differences between people are often understood as belonging to the member(s) of the minority community. For example, if a Muslim person celebrates Ramadan, the Muslim person is seen as the one who is different. This articulation of the differences between people, like the discourse of tolerance discussed in Chapter 4, assumes an un-stated norm from which the member of a minority community deviates. It is his or her difference that might be tolerated and accommodated. Minow, however, insists that difference is properly understood as a relative concept: the Muslim is only as different from the Protestant, the Catholic, the Jew, the secular humanist, or the person of no religious faith as the latter are from the Muslim. The difference does not belong to the Muslim; it is a feature of the larger group.
This change in outlook, which I will call a “difference-based approach,” fits into the larger project of managing and governing a socially diverse polity like Canada that, in part because it depends in part on immigration to achieve policy goals such as filling labour shortages, will become increasingly diverse over time.¹ In this chapter, I will argue that a workable framework for resolving disputes involving religion can be established on the basis of this conception, and that this framework is more consistent with Canada’s commitments to multiculturalism than the existing right-based approach. I will begin by fleshing out the difference-based approach and go on to explain its implications for the various types of freedom of religion cases discussed in Chapter 3.

5.2 Minow’s Alternate Approach to Difference

Minow claims that the drive towards categorization and boundary-drawing that characterizes much legal thought permeates the way that the law understands relationships between people.² She argues that, though this individualistic discourse appears to value all persons, it can contribute to the increased “labeling” of people, who are pigeonholed into pre-defined categories. She notes:

Boundaries based on difference have been critical to what has counted as legal analysis, and boundaries also figure prominently in legal assumptions about the self and about society. Traditional legal rules presume that there is a clear and knowable boundary between each individual and all others… Constitutional law recognizes the rights of each distinct individual, not groups… Each of these legal rules may seem to avoid labels because it emphasizes the importance of each

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² Though Minow writes in the American context, much of her thinking is applicable to Canadian legal thought, with its strong rights-based tradition evidenced in legislation like the Canadian Bill of Rights, S.C. 1960, c. 44, the Charter, provincial human rights legislation, and the associated jurisprudence.
individual. And yet, these rules contribute to labeling by favoring a view of certain and clear boundaries rather than relationships.⁴

Through this labeling, “law ends up contributing to rather than challenging assigned categories of difference that manifest social prejudice and misunderstanding.”⁴ Further, the persistent drawing of boundaries can be detrimental to building understandings and relationships between various social groups: “[n]aming differences to distinguish people isolates those who do the naming as well, and naming differences may deny the humanity of those who seem different.”⁵

But the problems posed by the labeling are not solved by ignoring differences. Like the theorists of multiculturalism discussed in Chapter 2, Minow believes that cultural particularities can be important markers of personal and communal identity, and provide meaning to the lives of many people. Ignoring differences can lead to problems of non-recognition, which may be as severe as or worse than misrecognition.⁶ For Minow, decisions that ignore the differences between people often rely on a number of unstated and vulnerable assumptions:

First, we often assume that “differences” are intrinsic, rather than viewing them as expressions of comparisons between people on the basis of particular traits…

Second, we typically adopt an unstated point of reference when assessing who is different and who is normal…

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⁶ *Ibid.* at 9. Minow calls the struggle to decide when to treat people differently and when to treat them the same the “dilemma of difference.” She writes: “The dilemma of difference [i.e. when does treating people differently emphasize their differences and stigmatize them on that basis? and when does treating people the same become insensitive to their difference and likely stigmatize them on that basis?] grows from the ways in which the society assigns individuals to categories and, on that basis, determines whom to include in and whom to exclude from political, social, and economic activities. Because the activities are designed, in turn, with only the included participants in mind, the excluded seem not to fit because of something in their own nature (at 21).” On the subject of non- and misrecognition, see the discussion of Charles Taylor’s writings in Chapter 2.
Third, we treat the person doing the seeing or judging as without a perspective, rather than as inevitably seeing and judging from a particular situated perspective…

Fourth, we assume that the perspectives of those being judged are either irrelevant or are already taken into account through the perspective of the judge. This assumption is a luxury of those with more power or authority, for those with less power often have to consider the views of people unlike themselves…

Finally, there is an assumption that the existing social and economic arrangements are natural and neutral. If workplaces and living arrangements are natural, they are inevitable. It follows, then, that differences in the work and home lives of particular individuals arise because of personal choice.7

Due to the weaknesses in these assumptions,8 and because both labeling and ignoring differences can lead to such severe problems, Minow argues for a fundamental change in how legal thought constructs and understands the differences between people. She posits that difference is best understood as “as a pervasive feature of communal life.”9 Significantly, the Canadian Multiculturalism Act articulates the same view; its preamble states that “the Government of Canada recognizes the diversity of Canadians as regards race, national or ethnic origin, colour and religion as a fundamental characteristic of Canadian society.”10

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7 Minow, Making All the Difference, supra note 3 at 51-52.
8 Minow persuasively exposes the weaknesses in the five assumptions: “These interrelated assumptions, once made explicit, can be countered with some contrary ones… Difference is relational, not intrinsic. Who or what should be taken as the point of reference for defining differences is debatable. There is no single, superior perspective for judging questions of difference… Difference is a clue to the social arrangements that make some people less accepted and less integrating while expressing the needs and interests of others who constitute the presumed model… Maintaining these historical patterns embedded in the status quo is not neutral and cannot be justified by the claim that everyone has freely chosen to do so (Ibid. at 52-53).”
9 Ibid. at 11.
10 Canadian Multiculturalism Act, R.S.C., 1985, c. 24 (4th Supp.), preamble (emphasis added). The same view is arguably restated in the body of the Act, which states that “multiculturalism is a fundamental characteristic of the Canadian heritage and identity (s. 3(1)(b)).” Further, in speaking in favour of the Act, Hon. Gerry Weiner (Minister of State (Multiculturalism)) said: “This Bill deals with relationships among Canadians, about a fundamental characteristic of Canada (House of Commons Debates, 14 (11 July 1988) at 17385 (Hon. Gerry Weiner)).”
When this view is adopted, disagreements about the accommodation of differences in religious practices take new shape: “Accommodation of religious practices may look nonneutral, but failure to accommodate may also seem nonneutral by burdening the religious minority whose needs were not built into the structure of mainstream institutions.”\(^{11}\) The most appropriate role for institutions of justice, in Minow’s view, is to “consider ways to structure social institutions to distribute the burdens attached to difference.”\(^{12}\)

Minow’s approach offers three main benefits in terms of harmonizing the judicial treatment of freedom of religion with Canada’s multicultural commitments. First, it provides a new vantage point from which to reevaluate entrenched practices and preferences. She insists that it is certainly unfair for minority groups to bear the full costs of difference, and that the most just solution is one that reshapes institutions such that the costs of difference are distributed more evenly. The justice of such a distribution is supported by the view that all difference is relative; if difference does not belong to one group but is rather a pervasive characteristic of an entire society, there is little fairness in concentrating the costs of that difference with minority groups. Some might be counter that a difference-based approach will lead to resolutions that are too costly. It is perhaps inevitable that any redistribution of the costs of difference will lead to some

\(^{11}\) Minow, *Making All the Difference*, *supra* note 3 at 43.

\(^{12}\) *Ibid.* at 11. Notably, Minow is not entirely opposed to the use of rights-based discourse. Instead, she argues for the deployment of rights claims within a framework that treats all human existence as relational. She writes:

> There is something too valuable in the aspiration of rights, and something too neglectful of the power embedded in assertions of another’s need, to abandon the rhetoric of rights. That is why I join the effort to reclaim and reinvent rights. Whether and how to use words to constrain power are questions that should be answered by those with less of it. For this task, rights rhetoric is remarkably well suited. It enables a devastating, if rhetorical, exposure of and challenge to the hierarchies of power… Interpreting rights as features of relationships, contingent upon renegotiations within a community committed to this mode of solving problems, pins law not on some force beyond human control but on human responsibility for the patterns of relationships promoted or hindered by this process. In this way the notion of rights as tools in continuing, communal discourse helps to locate responsibility in human beings for legal action and inaction (at 307-309).
form of additional costs for dominant groups. In this view, taxpayers should not be made to shoulder the extra burdens associated with people’s particularities. But Minow’s view is powerful here, holding that the costs of treating all people fairly always persist, and that the only real question is who bears them. This outlook is more likely to achieve the ideal of equality that underpins the promise to give due recognition to all communities.13

A second benefit of the difference-based approach is that it can be more effective at encouraging cross-cultural dialogue and compromise. Minow maintains that there are significant benefits to be had from communicating across cultural differences, and that understanding new perspectives can enrich one’s own experience. In this way, Minow’s view echoes Bhiku Parekh and the ideas underscored in Canada’s multiculturalism legislation.14 The difference-based approach developed below takes this into account by encouraging a detailed consideration of the costs of difference. When disputes are framed in this fashion as opposed to the “winner-take-all” framework of the rights-based approach, parties have more potential trade-offs and more bases on which to achieve compromise.15

The third way in which the difference-based approach is more consistent with Canada’s multicultural commitments is that it requires courts and judges to remain self-conscious about their own situated perspectives. Pretensions of neutrality can mask unfair or oppressive practices, and blind courts to the historic privilege of some groups over others; these pretensions must be abandoned in order to avoid or at least mitigate the problems of non- or misrecognition

13 See the discussion of Charles Taylor in Section 2.2.1.
14 See Section 2.2.4.
15 See the discussion of Mnookin & Kornhauser in Section 4.5.
inherent in the rights-based approach. In keeping with the critique of the language of tolerance in Chapter 4, this may mean looking for alternative discourses and accommodation, and a renewed commitment to the Canadian narrative of pluralism.

Given the potential benefits of the difference-based approach, it is worthwhile to assess the practicality of the difference-based approach. I will therefore now reconsider some of the cases discussed in Chapter 3, and analyze them under the difference-based framework.

5.3 Difference-Based Approaches in Practice: Freedom of Religion

The prevailing approach to freedom of religion in Canada might certainly be understood as progressive on many fronts. The results in the more recent Canadian cases discussed in Chapter 3 have tended to favour the positions adopted by members of religious minorities. However, a difference-based approach offers a way to arrive at just results without producing the negative side-effects explored in Chapter 4. For example, the Supreme Court’s decision to treat inquiries into the religious commitments of litigants as matters of sincerity of belief rather than questions of objective validity can be seen as one way of taking each person’s perspective seriously and recognizing that judges are ill-suited to determining the validity of a religious belief or practice. And yet, as Benjamin Berger persuasively argues (see Chapter 4), this individualized treatment of religion is connected to relegating religious practices to the private sphere, ignoring the communal aspects of much religious practice, and treating religion as a

16 See Chapter 4 for a full discussion of these problems.
17 See Lorne Sossin, “God at Work Religion in the Workplace and the Limits of Pluralism in Canada” (2008), unpublished manuscript on file with author. I discuss this point further below in Section 5.3.2.
18 See discussion of Amselem in Chapters 3 and 4.
matter of personal choice. The difference-based approach shifts the focus to inquiring into the way social institutions distribute the costs of the religious differences.

In this section, I will investigate how a difference-based approach might yield a new jurisprudence in matters of freedom of religion, tracking the thematic division of the case law that I developed in Chapter 3. As discussed in Chapter 3, freedom of religion cases involving shared physical spaces can be subdivided into three categories: shared ownership disputes, disagreements over the character of public spaces, and arguments over zoning rules which organize and regulate the uses of space in a given locale. The difference-based approach would, in my view, provide a compelling alternative way of resolving all these types of cases.

5.3.1 Shared Physical Spaces

A difference-based approach would make a dramatic impact in the resolution of disputes over zoning rules. As seen in Chapter 3, a dissenting minority of the Supreme Court of Canada and a unanimous Québec Court of Appeal both held that as long as there is land available for purchase in a properly zoned area, the constitutional protection of freedom of religion does not ground a claim to an exception to zoning rules for a communal place of worship.19 A difference-based approach would not treat the zoning by-laws as neutral matters of fact that give rise to exceptions only when there are no other options. Rather, through the lens of the difference-

19 Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village), [2004] 2 S.C.R. 650 [Témoins de Jéhovah]; Congregation of the Followers of the Rabbis of Belz to Strengthen Torah c. Val-Morin (Municipalité de), 2008 QCCA 577, [2008] 4 R.J.Q. 879, (2008), 66 C.C.E.L. (3e) 280, leave to appeal to S.C.C. denied, 2008 CanLII 48619. As discussed in Chapter 2, the majority of the Supreme Court of Canada resolved the Témoins de Jéhovah case on procedural justice grounds, and therefore did not directly consider the freedom of religion arguments raised by the case. In Belz, which was decided after Témoins de Jéhovah, the Québec Court of Appeal followed the dissenting opinion on the freedom of religion issue. The Supreme Court of Canada denied leave to appeal in the Belz case. Accordingly, the dissenting opinion in Témoins de Jéhovah is the prevailing law on freedom of religion cases involving the zoning of communal houses of worship, at least in Québec. The law in the rest of the country is will remain unclear unless and until other appellate courts deal with the issue, or the Supreme Court revisits it.
based approach, zoning rules are seen as institutional arrangements that condition the relationships between individuals and communities. The difference-based approach would take into account that the large churches that dominate the main streets of many Canadian municipalities do not typically have any issues with zoning rules. Zoning rules may thus reflect the historically privileged position of whichever religious community was dominant in a particular locale. A difference-based approach would therefore ask whether existing zoning rules cause minority religious communities to bear a disproportionate share of the costs of difference. In other words, a court employing the difference-based approach might ask whether the zoning rules make life more difficult for members of minority religious communities than it is for members of larger communities, and if so, whether this is justifiable.

For example, in a situation like Belz, instead of focusing on the minority community’s history of non-compliance with zoning rules as the did the Québec Superior Court and Court of Appeal, a court using the difference-based approach might engage more directly with the religiously-based needs of the minority community. The court would need to address the facts that synagogues and religious schools are centres of communal life, and members of the community see themselves as religiously prohibited from driving or pushing strollers to synagogue on the Sabbath and other holy days. The costs of these obligations, and of having to relocate a synagogue, would need to be considered in comparison to the costs of belonging to the dominant religious community whose house of worship has no zoning problems. Then, the Court could consider the costs of the increased noise and traffic associated with a house of worship that must be borne by those who live in neighbouring properties. In other words, instead of first asking whether members of the minority community have a right to an exception from the zoning rules, the difference-based approach would start with comparison. Though the answer is not pre-determined (indeed, it may be that the costs to the Jewish community of moving the
synagogue are minimal), the framework is more consistent with Canada’s commitment to recognizing the unique needs of minority communities because it does not treat the existing and historic arrangement of a locale as neutral.

The difference-based approach would also have an impact in cases that deal with shared ownership. Consider, for example, the Supreme Court of Canada’s decision in *Amselem*, which dealt with a dispute in a condominium-type complex. The chief critique of that decision developed in Chapter 4 was the Court’s highly individualistic approach to religion. As noted above, the Court held:

> 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.²⁰

It seems natural that, when analyzing disputes in a rights-based framework, the Court would seek a definition of “religion” as a first step in order to give substance to the protected right. Providing any kind of definition to the term “religion,” which is experienced in widely diverging ways by different people, will almost inevitably be too narrow and thus fail to properly recognize some people’s understandings of religion, or be so broad that it does not advance the analysis.²¹ In Canada, the former has occurred; the individualist understanding proposed by the Supreme Court of Canada is too narrow to encompass all people’s views of religion.

If, however, a Court began its analysis in a difference-based framework, it is not clear that a definition of religion would be required in order to resolve the dispute. To use the *Amselem*

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example, the difference between the litigants was that Mr. Amselem and his co-appellants felt compelled by their faith to install *succoth* on their balconies, while the syndicate of co-ownership 22 opposed the installation of anything on the building’s balconies. The condominium rules and bylaws that structured the relationship among the co-owners, if applied without exception, would place the entire cost of this difference on the members of the religious minority, because they were drafted without the needs of Orthodox Jews in mind. 23 Thus, as the syndicate would have had it, if Mr. Amselem wanted to have a *succah* on his own balcony, he should have borne the cost of his difference in the first place by either living with a more limited range of housing choices, agreeing not have a *succah* on his balcony, or absorbing the financial cost of moving. The Court might then have compared these costs with the costs to the other co-owners of granting an exception to the condominium’s rules. This comparison certainly informed the Supreme Court’s analysis in *Amselem*, and a difference-based approach would not have guaranteed a favourable resolution of the dispute for Mr. Amselem and his co-appellants. However, had these considerations been front and centre in the Court’s reasons, the problems of non- or misrecognition posed by the Court’s individualistic approach to religion (see Chapter 4) might have been avoided. The Court might not have felt compelled to give any definition of religion, allowing instead for litigants to articulate the religious aspects of their dispute in their own terms.

22 A syndicate of co-ownership is Quebec law’s analog to a condominium board of directors.

23 Of course, I do not mean to imply that the rules were drafted specifically to be exclusionary. It is far more likely that the rules were based on the aesthetic preferences of the condominium syndicate, and that the question of balcony *succoth* did not arise at the time.
5.3.2 Shared Institutions

Like the decisions rendered in the context of shared physical spaces, the results of Canadian judgments in the context of shared institutions such as town councils and schools have generally been favourable to members of religious minorities. From the early days of Charter jurisprudence, courts have held that religious exercises such as group prayers (whether in town councils or schools) and school curricula that favoured a particular religious perspective are inappropriate.\(^{24}\) Further, the trend in Canadian law has been towards greater sensitivity, self-consciousness and inclusiveness; whereas kirpans were excluded from courtrooms in the 1985 Hothi decision of the Manitoba Court of Appeal,\(^{25}\) the Supreme Court of Canada found a public school board’s prohibition on kirpans in a Québec high school to be unconstitutional.\(^{26}\)

However, as discussed in Chapter 4 of, there is reason to be concerned with the rhetoric of tolerance that is often used to justify the results in this type of case. While the Supreme Court of Canada has given primacy to the value of tolerance,\(^{27}\) the Charter itself does not use the word “tolerance” at all. Rather, as discussed in Chapter 2, s. 27 of the Charter mandates interpretation “in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”\(^{28}\) The commitment to the proper recognition of minority communities and the


\(^{28}\) Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 27.
promotion of cross-cultural dialogue that animates Canada’s multiculturalism legislation (see Chapter 2) should give courts pause before allowing the rhetoric of tolerance to play such a significant role in legal reasoning. As seen in Chapter 4, the language of tolerance can often reinforce existing power imbalances and the marginalized position of religious minorities. Like the language of rights, the discourse of tolerance tends to treat difference as belonging to minority communities. This means that, at least discursively, differences are understood as the responsibility of minority communities; it is they who deviate from the unstated norm, and if their differences are to be accommodated, it is out of the benevolence of the dominant group.

A difference-based approach could serve to avoid these problems. Instead of treating differences as features of religious minorities, the difference-based approach insists that difference is a pervasive feature of the entire polity, whether at the municipal, provincial, or federal level. It is therefore the entire polity’s responsibility to determine how to best and most fairly manage differences. Thus, a rule that excludes kirpans from public high schools can be seen as an unfair allocation of the costs of the differences that characterize the entire population of a school board’s jurisdiction, rather than as a failure of tolerance. The costs to baptized Sikh boys of having to seek private education are to be compared with the costs to other students of having kirpans in schools. The language of tolerance is unnecessary to this exercise.

As with the Court’s reasoning Amselem discussed earlier in this chapter, some of the cost considerations that would be central to a difference-based analysis are present in the Supreme Court’s reasoning in Multani. The Court was careful to point out that the safety concerns relied on by the school board to exclude kirpans from schools were not supported by the evidence. Further, the Court noted that the wholesale exclusion of kirpans was inconsistent with other school policies (i.e. other weapon-like objects such as compasses and baseball bats were
permitted in schools), and that there were benefits of cross-cultural understanding to be gained from allowing *kirpans* into schools. Still, the reliance on the notion of tolerance is troubling for the reasons expressed above and in Chapter 4. Though the result and some of the analysis may be the same, a difference-based conception of the problem is more consistent with Canada’s multicultural commitments.

### 5.3.3 Process in General

In Chapter 4, I argued that the high stakes in freedom of religion litigation can make compromise (which can be seen as a form of cross-cultural dialogue) more difficult to achieve. In the period leading up to trial and subsequent appeals, the parties always have opportunities to negotiate a settlement that they might all be able to accept. In a right-based framework, however, whatever nuances courts may import into their analyses, at bottom they must decide whether an individual or group has a legitimate right to carry out certain practices. This means that when disputes centre on the rights of minority communities, winning or losing a court battle often becomes perceived as an all-or-nothing scenario. If members of a religious minority sense a threat to their right to observe practices that are connected to their sense of identity, they may adopt more rigid positions and feel compelled to see the litigation through to its conclusion, even if that means taking on large legal expenses and assuming the risks of losing and being compelled to pay a portion of the other party’s legal costs.

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30 Canadian jurisdictions generally adopt a compromise between the English and American rules on the award of legal costs. While in England winning parties are generally entitled to their full legal costs and in the United States...
The difference-based approach offers a potential way out of this problem. A legal doctrine that explicitly focuses on the costs of managing difference would encourage parties to more explicitly set out the burdens that each must bear. With a longer and more varied list of costs, parties would have more bargaining chips to trade; one party’s concession on one cost could lead to another party’s concession on another. Further, under this approach, where one party is said to have a right to carry out a particular practice, the right is always understood in relation to the other people affected by the practice. This means that courts can be more flexible in their holdings, and, consequently, that the stakes are lowered for the parties by the chance of a divided “victory.”31 This would create an environment more hospitable to negotiation.

For example, in the Amselem scenario, Mr. Amselem’s list of costs might have included the potential costs of moving to another locale, and an estimate of the opportunity cost of having to live in a different building. The co-ownership syndicate’s costs could have included an estimate as to the reduction in property value associated with the week-long presence of a succah on a balcony, as well as the safety concerns raised by the syndicate in the litigation. The parties might have come to an arrangement on the basis of these estimated costs. It might have been the every party bears his or her own costs, in Canada, a losing party must generally pay a partial indemnity to the winning party. The rule is thought to “limit unmeritorious litigation and encourage settlement (Lara Friedlander, “Costs and the Public Interest Litigant” (1995) 40 McGill L.J. 55 at 59).” See also Mark M. Orkin, The Law of Costs (Aurora: Canada Law Book, 1993); Neil Gold, “Controlling Procedural Abuses: The Role of Costs and Inherent Judicial Authority” (1977) 9 Ottawa L. Rev. 44; Garry D. Watson & Paul Lantz, “Bringing Fairness to the Costs System An Indemnity Scheme for the Costs of Successful Appeals and Other Proceedings” (1981) 19 Osgoode Hall L.J. 447.

31 The Charter provides the legal basis for specially tailored decisions at s. 24(1), which provides: “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances (emphasis added).” With regard to this provision, L’Heureux-Dubé J. of the Supreme Court of Canada noted: “the Charter has now put into judges' hands a scalpel instead of an axe -- a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system (R. v. O’Connor, [1995] 4 S.C.R. 411 at para. 69).”
case that a financial settlement from Mr. Amselem and his co-appellants would have been cheaper than the legal costs of the litigation, and acceptable to all parties. It might also have been the case that Mr. Amselem would have been prepared to accept the solution of a communal *succah* if he felt that the syndicate had made a concession on another issue.\(^{32}\) What is significant here is that the difference-based approach offers multi-dimensional approach to disputes instead of the all-or-nothing options of the rights-based approach. The stakes of the dispute are lowered, and the possibilities for compromise multiplied.

### 5.4 Conclusion

I have argued in this Chapter that an approach that sees religious difference as a feature of the larger polity rather than as a feature of a minority group offers significant benefits over the current rights-based approach. The difference-based approach is more consistent with Canada’s multicultural commitments, and still provides a workable framework to arrive at just results. By focusing on the way in which the costs of religious differences are distributed across the whole polity, the difference-based approach provides a new angle from which to approach disputes over religion. It can help avoid an overly individualist understanding of religion that is at odds with Canada’s commitment to recognizing the lived experiences of religious populations. Further, it raises awareness on the part of judges to the ways in which existing social institutions and arrangements can perpetuate historic inequalities. Finally, because it is multi-dimensional, the

\(^{32}\) I do not mean to suggest that Mr. Amselem was insincere in his contention that he was religiously obliged to have a *succah* on his own balcony. However, a person in Mr. Amselem’s position may have been more comfortable with a compromise solution if given the sense that the syndicate was making serious concessions.
difference-based approach offers a greater opportunity for parties to achieve compromise solutions that are more uniquely tailored and less costly in terms of legal fees.
Chapter 6
Conclusion

6 Conclusion

I have argued that there is significant room for improvement in the current Canadian approach to freedom of religion. It would be an overstatement to claim that a rights-based approach to freedom of religion has done more harm than good for Canada’s minority communities. As seen in Chapter 3, members of minority religious groups have often been successful in litigation on the basis of a rights-based claim. Canadian courts have shown a special sensitivity to the needs of these minority populations. Nonetheless, the aspirational tone of the multicultural commitments discussed in Chapter 2 prompts a constant re-examination of how Canada can manage its social diversity in a manner more consistent with its stated ideals.

Because the right to freedom of religion is seen as an instrument designed for the protection of minority religious communities, the negative side-effects of the rights-based approach often go unnoticed. However, as seen in Chapter 4, there are a number of worrying aspects to the rights-based discourse that currently frames disputes involving religious matters. Given that Canada is committed to affording true recognition to all religious communities, the persistent individualism, the tendency to treat people as belonging to pre-defined categories, and the reliance on the rhetoric of tolerance are all troubling aspects of the current jurisprudence. Further, the high stakes of rights-based litigation can impede potential opportunities for cross-cultural dialogue.

The difference-based framework outlined in Chapter 5 provides an alternative to the drawbacks of rights-based analysis. By insisting that all Canadians should share the costs of religious difference and reframing disputes with reference to those costs, this alternative
approach can expose the sometimes unjust privileged position of dominant religious groups. It can provide a way of arriving at just decisions in a manner more faithful to Canada’s promises of recognition and the promotion of cross-cultural dialogue. In this way, the judicial doctrines of freedom of religion can better harmonize with Canada’s stated ideals of multiculturalism.
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LEGISLATION


*Education Act*, R.S.O. 1980, c. 129, s. 50.


O. Reg. 262, R.R.O. 1980, s. 28.

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