Wading into murky waters: Courts and the complexities of organized religion

Introduction

An old maxim has it that there are three things one should never discuss around the dinner table: sex, politics, and religion. In some way, the same holds true at Canada's highest court. Though the Supreme Court of Canada hears many cases that touch on one or more of those topics, it is careful never to get too deep into the merits of any particular topic or position. With religion, it has traditionally expressed the opinion that the *Charter* should be interpreted broadly to cover all but the most extreme religious beliefs. This has saved the Supreme Court from being dragged into thorny and convoluted areas of debate such as which religions are 'legitimate'?

However, the Supreme Court has recently been hearing increasingly complex cases involving religion – when it is engaged and what is considered a religious belief for example. As a result, it appears to be retreating from its previously non-interventionist position. In other words, the Supreme Court seems to be stepping beyond the role to which it had initially limited itself and growing less friendly to claimants with religious beliefs.

The Traditional Position

Religion has been a concern ever since the *Charter* came into force in 1982. Faced with claimants from many different religions and in all sorts of scenarios, the Supreme Court of Canada has had to define what exactly is meant by "religion." The question this was to answer, of course, was what exactly should be protected by "freedom of religion" under section 2(a) of the *Canadian Charter of Rights and Freedoms*. It has been a tricky question for courts to answer, largely because of the variety of claims that come before them.

Courts have traditionally taken the approach that religion is best defined by the claimant, and not the court. The Supreme Court said as much in a 2004 case: "the State is in no position to be … the arbiter of religious dogma."[1] The Supreme Court said that courts should avoid interpreting or determining the content of a person's own understanding of religious rules, customs, or rituals. Determining religious disputes would "unjustifiably entangle the court in the affairs of religion."[2] The focus should instead be on whether, more generally, the claimant has a sincere belief or practice. The claimant must either believe the belief or practice is mandatory or customary, or that it supports "a personal connection with the divine."[3] For the Supreme Court, this reflected that the purpose of

freedom of religion is to protect the ability of religious people to define themselves and to be spiritually fulfilled through connecting with the object of their faith—usually a divine being.

Since setting out this approach however, the Supreme Court appears to be moving away from a broader focus on the purpose of freedom of religion (connecting with the divine) towards a more rigid focus on actual beliefs and practices. Despite claiming not to be an "arbiter of religious dogma," it has been inquiring more deeply into the beliefs of claimants. In recent cases, the Supreme Court has drawn lines between which religious practices are mandatory or not, and between religious practices and beliefs and the spiritual fulfilment they are meant to foster.

Obligatory vs. Voluntary Practices

The Supreme Court in the *Amselem* case made a point of saying that religious freedom protects both obligatory and voluntary expressions of faith.[4] Inquiring into whether a practice is mandatory is "inappropriate," as it is the "spiritual essence" of the action that matters, and not whether or not it is perceived as mandatory.[5] Moreover, requiring a claimant to prove that they acted according to a "mandatory" doctrine of faith would mean that courts would be inappropriately interfering with profoundly personal beliefs.[6] Finally, the Supreme Court instructed that courts should avoid "interpreting" or "determining" the contents of a claimant's personal understanding of a religious belief or practice, except to determine whether the claimant holds the belief sincerely.[7]

Recently, in the case of *Law Society of British Columbia v Trinity Western University* ,[8] the Supreme Court took another run at this idea and reached a seemingly contrary result. *TWU* featured a claimant who believed in the importance of studying law in an environment where other students acted according to his religious beliefs. After the Law Society of British Columbia denied the claimant the opportunity to have a law school that would have provided him this, the Supreme Court said that the effect of the denial on his religious freedom was minimal. This was because the mandatory covenant was not "absolutely required for the religious practice,"[9] and because studying law in a religious environment was "preferred (rather than necessary)" for spiritual growth.[10]

Both of these reasons seem to unnecessarily entangle courts in determining what is appropriate religious doctrine. To make these findings, a judge must step into the shoes of the religious claimant. The judge must determine whether the religious practice in question could still be followed without the mandatory covenant and whether the religious practice itself is mandatory. That is, they must decide whether choosing a different course of action would "allow the individual to stay true to his or her religious practices."[11] In *TWU*, Chief Justice McLachlin, who wrote her own reasons disagreeing with a majority of the Supreme Court on this point, said that the majority rightly saw that an individual did not have to have their own law school to follow their own religious beliefs. She added, however, that without a law school, the individual would have to give up the expressive and community-centered aspects of the belief—both of which are protected by the *Charter*. The fact that some

individuals may have been willing to do without a law school, therefore, did not mean that denying a law school was a minor infringement. Yet the majority's careful and intrusive distinction between mandatory and merely "preferred" practices carried the day.

Beliefs vs. Practices

For the courts to find an infringement of religious freedom, the state action must "interfere with the individual's ability to act in accordance with that practice or belief."[12] Religious freedom protects more than the mere right to hold a belief. Rather, it protects the actions necessary to manifest those beliefs—the "accordance" between action and belief. As religion is about making a "personal connection with the divine,"[13] a broad interpretation of religious freedom protects that connection from state interference. However, the Supreme Court has more recently been recognizing and protecting the ability of claimants to hold a belief *without* enabling them to effectively manifest that belief or take action to demonstrate it. In cases such as TWU, this has been done by *desacralizing* religious activity—removing the spiritual or religious significance from an action that the claimant may see as sacred.

In *TWU*, the claimant believed in the importance of studying law at an institution where other students held the same values as him. His participation in that community of students would have "'engender[ed] a personal connection with the divine' over and above the connection achieved by his own personal adherence" to those values.[14] Faced with this belief, the Supreme Court essentially desacralized the mandatory covenant that manifested this belief. Instead of recognizing the spiritual significance of practicing religious values as a community, the Supreme Court characterized it as something that merely made it "easier" to practice those values individually, and thus had no spiritual significance of its own.[15]So, while the claimant was entitled to believe in the importance of living in community and to practice religious values, he was not entitled to study in a school with the mandatory covenant which would have joined practice with belief.

Another example comes from the Supreme Court's decision in *Ktunaxa Nation v British Columbia (Forest, Lands and Natural Resource Operations)*.[16] This case concerned a First Nation which sought to prevent a ski resort development in an area with spiritual significance to them. Their perspective was that the development would have driven Grizzly Bear Spirit from the area and impaired the First Nation's religious practices. When deciding whether allowing the development would infringe the religious freedom of the First Nation, the Supreme Court cited a different test than the one it had previously used in *Amselem*. It asked merely whether the "decision to approve the development interferes either with their freedom to believe in Grizzly Bear Spirit or their freedom to manifest that belief."[17] It characterized the First Nation's claim as trying to gain protection for Grizzly Bear Spirit itself.[18]

Here, as in *TWU*, the Supreme Court allowed the claimants' beliefs to be desacralized. Allowing the ski resort development left the First Nation's religious practices with no spiritual significance, as Grizzly Bear Spirit would have been driven from the area.

Government action severed the connection between the First Nation's practices and their idea of the "divine." It also interfered with their ability to act in accordance with their beliefs, as their actions were no longer in *accordance* with the spiritual significance behind them. Again, the claimants were allowed to believe in Grizzly Bear Spirit's presence and to continue their religious practices, but the Supreme Court declined to protect their right to actually *connect* with Grizzly Bear Spirit through their religious practices.

Conclusion

The Supreme Court seems increasingly willing to wade into religion and draw lines between concepts and ideas which were previously left alone. This means that claimants with religious beliefs may have a tougher time convincing a court that their particular beliefs should be protected by the *Charter* and that those beliefs have been infringed in any given case. *TWU* and *Ktunaxa* provide two examples where this was the case, and hint that courts may take similar approaches in future cases.

TWU, for example, has already been cited in an Alberta decision with similar reasoning. Alberta requires that schools allow for the establishment of Gay-Straight Alliances and to state in their policies that they will not discriminate against employees or students. Several religious-based Independent Schools are challenging this legislation based on *Charter* guarantees of freedom of religion, expression, and association. The schools applied for a temporary injunction which would have prevented the law from operating until the Court could hold a full hearing. In response to the Independent Schools' argument, the Court cited a long passage from *TWU*, after which it refused to give an injunction.[19] Similar to *TWU*, the Court ignored the expressive and community-centred elements of the religious belief and merely pointed out that the legislation at issue did not force the schools to "forsake their religious principles or teachings."[20] Similar reasoning may apply to future litigation over Canada's Summer Jobs Program.

Ktunaxa may have a particular impact for Indigenous groups with religious freedom claims. The religious claim in *Ktunaxa* was based on the First Nation's connection with the land—a connection that is a feature of many Indigenous beliefs.[21] Many have criticized the Supreme Court's decision in *Ktunaxa* for focusing too narrowly on beliefs and not recognizing the complexity of religious experience, which often involves physical and community aspects, and not just private beliefs.[22] This would apply not only to Indigenous groups, but also other religions that feature connections with physical objects and lands held to be sacred, such as Islam.[23] As a result, and disturbingly, the religious freedom of Indigenous and other non-Western belief systems could be less protected by the *Charter* than those with which the courts are more familiar.

[1] *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 50, [2004] 2 SCR 551.

[2] *Ibid*.

[3] *Ibid* at para 56.

[4] *Ibid* at para 47.

[5] *Ibid*.

[6] *Ibid* at para 49.

[7] *Ibid* at para 50.

[8] 2018 SCC 32 .

[9] *Ibid* at para 87

[10] *Ibid* at para 88.

[11] *Ibid* at para 132.

[12] *Amselem*, *supra* note 1 at para 65.

[13] *Ibid* at para 56.

[14] *Trinity Western University v The Law Society of Upper Canada*, 2016 ONCA 518 at para 92.

[15] *TWU*, *supra* note 8 at para 89.

[16] 2017 SCC 54, [2017] 2 SCR 386 .

[17] *Ibid* at para 70.

[18] *Ibid*.

[19] *PT v Alberta*, 2018 ABQB 496 at paras 48-49.

[20] *Ibid* at para 49.

[21] Sarah Morales, "Religious Freedom of Indigenous Canadians" in Dwight Neman, ed, *Religious Freedom and Communities* (Toronto: LexisNexis, 2016) 287 at 297.

[22] See, e.g. Nicholas Shrubsole, "A recent ruling on religious freedom shows the Supreme Court is unable to recognize its own colonial and culturally located position under the Charter" (13 November 2017), online: *Policy Options* < http://policyoptions.irpp.org/magazines/november-2017/the-impossibility-of-indigenous-religious-freedom/> [https://perma.cc/LR9A-89KX].

[23] Avnish Nanda, "This is an absolutely terrible decision by the Court that fails to recognize diverse forms of faith in Canada

https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16816/index.do …" (2 November 2017 at 10:03), online: *Twitter* <https://twitter.com/avnishnanda/status/926132607036903424> [https://perma.cc/BGT2-WUPJ].