Conversion Therapy Ban: Does Calgary's New Bylaw Violate Religious Freedom?

On May 25th, 2020, the City of Calgary passed the *Prohibited Businesses Bylaw* that prohibits the practice of "conversion therapy".[1] Conversion therapy is any form of treatment that seeks to change someone's sexual orientation, gender identity, or gender expression.[2] The therapy can take the form of talk therapy, behavioural or aversion therapy, spiritual prayer, exorcism, and medical or drug-based treatments.[3]

There have been concerns that municipal conversion therapy bylaws will violate individual's freedom of religion,[4] which is protected under section 2(a) of the *Canadian Charter of Rights and Freedoms*.[5] Many religious faiths have moral codes that guide individual behaviour, including sexual behaviour. Some argue that banning conversion therapy prevents them from following their faith's moral code.[6] An individual or group may launch a constitutional challenge on religious grounds, which if successful, could see the new bylaw changed or scrapped.

If a constitutional challenge were to be raised, the question that would need to be addressed is: Does a ban on conversion therapy violate religious freedom? If it does, will the City of Calgary be able to convince a court that banning conversion therapy is reasonable and justifiable? In other words, do the reasons for passing this bylaw outweigh the right of religious groups to practice conversion therapy?

The purpose of this article is to outline the factors a court would need to consider in deciding if Calgary's conversion therapy ban is a violation of religious freedom, and if it is found to be a violation, whether it is justifiable.

What does Calgary's bylaw prohibit?

The *Prohibited Businesses Bylaw* prohibits a business from engaging in practices designed to change, repress, or discourage a person's sexual orientation, gender identity, or gender expression. It also prohibits practices designed to reduce non-heterosexual attraction or behaviour.[7] The bylaw defines a business as (1) a commercial, merchandising, or industrial activity; (2) a profession, trade, occupation, calling or employment; or (3) an activity providing goods and services.[8] The penalty for violating this bylaw is a $10,000 fine.[9] There is no specific reference in the bylaw to religious organizations such as churches or prayer groups, nor is there any indication that private, non-business-related practices are included under this bylaw.

What are some of the concerns this bylaw raises as it relates to the freedom of religion?

The Justice Centre for Constitutional Freedoms (JCCF) has expressed concern regarding the bylaw's violation of freedom of religion. Section 2(a) of the *Canadian Charter of Rights and Freedoms* (*Charter*) states that everyone has the fundamental freedom of religion.[10] The JCCF argues that the bylaw attacks the core tenets of religious faith. They argue that the bylaw can intrude on an individual's religious beliefs, such as their belief that marriage is only permissible if it is between a man and a woman. It may also violate religious freedom by discouraging individuals from seeking support to stop their non-heterosexual activity to conform with their own religious beliefs.[11] They also argue that the bylaw's definition of business is broad enough to include houses of worship and prayer groups, as well as people working as pastors or performing various informal religious callings.[12]

What is required for a freedom of religion *Charter* challenge?

The Supreme Court of Canada asks certain questions to determine if government action violates an individual's freedom of religion.[13] The Court will determine if the rights claimant has a practice or belief that is connected to religion, and if their belief is sincerely held.[14] The practice does not have to be an official part of their religion, but claimants must still show that their belief in it is sincere.[15] It must then be determined if the interference with that religious practice is substantial enough to constitute an infringement of freedom of religion. In other words, the interference must be non-trivial.[16]

What might a court require to establish a violation of freedom of religion?

Without a specific set of facts, it is hard to determine how exactly a religious freedom *Charter* challenge of the bylaw would play out. Some parts of a court's determination require analysis of contextual factors,[17] so examining a hypothetical *Charter* challenge does not give us definitive answers. It would depend on who the rights claimant is, what their specific circumstances are, what religious practices/beliefs are interfered with, and how the law has affected them. For example, the JCCF can advise the government of their position on the bylaw, but they could not initiate a *Charter* challenge unless they were representing someone affected by the bylaw.

The threshold for finding a violation of religious freedom is low. The Supreme Court of Canada has said that it is inappropriate for a court to scrutinize the validity of someone's belief.[18] The rights claimant just has to show that they have a sincere religious belief or practice. However, the rights claimant must also show that there has been an actual interference with that practice, not merely a perceived one.[19] A court will find an infringement of religious freedom when a law impedes an individual from engaging in a practice integral to their religious beliefs.[20]

For example, if an individual seeking conversion therapy for religious reasons, was denied the service because of the bylaw, then they would likely be able to establish a violation of their freedom of religion.

Can the City of Calgary justify its bylaw?

Assuming that a rights claimant could establish that the *Prohibited Businesses Bylaw* has violated their religious freedom, it would become the City's responsibility to justify the bylaw to a court. *Charter* rights can only be limited in a way that is reasonable and justifiable in a free and democratic society.[21] In determining whether the City's bylaw is justified, the court would consider the purpose of the law, whether its effects are connected to that purpose, whether the law impairs rights as little as possible, and whether the benefits of the law outweigh the harms of the rights violation.[22]

The City of Calgary will likely suggest that the purpose of its bylaw is to protect Calgarians from the foreseeable risks of harm of conversion therapy.[23]

Next Calgary would have to show that the bylaw is connected to that purpose. This can be demonstrated, as the bylaw targets the practice of conversion therapy conducted by businesses and imposes a fine for violating the bylaw. The fine may act as a deterrent to discourage people from engaging in the practice.

Perhaps the most complex issue for the City to justify is that the conversion therapy ban is the least impairing way to address the harms caused by conversion therapy. The question would be: Can the City achieve its objective of protecting people from the harms of conversion therapy, while impairing religious freedom as little as possible? Are there better ways for the harms of conversion therapy to be addressed than an outright ban? The JCCF argues the ban is unnecessary because harmful practices like conversion therapy are already banned by provincial bodies that regulate doctors, counsellors, psychologists, and therapists. The JCCF also argues that some of these harmful practices are already prohibited in Canada's *Criminal Code*.[24] Further, the JCCF suggests that the bylaw is too expansive as it does not focus on actual harmful or abusive practices.[25] However, the Supreme Court has stated that religious freedoms are not absolute and can be limited in order to protect the health, safety, and the fundamental rights and freedoms of others.[26] The Supreme Court of Canada recognized that governments may find it difficult to tailor laws such that they avoid all possible ways of infringing religious freedoms.[27] A court's final determination on this point will depend on the facts presented.

Finally, in deciding whether the bylaw can be justified, a court would weigh the effects of the violation of religious freedoms against the benefits of banning conversion therapy. This essentially boils down to weighing religious interests against the health and safety of LGBTQ individuals.[28] Credible research for the benefits of conversion therapy are lacking; however much research has documented the harms associated with conversion therapy.[29] Additionally, in 2013, the American Psychiatric Association (APA) issued a statement that no credible research exists to suggest mental health intervention can safely change a person's sexual orientation, nor does sexual orientation need to be changed.[30]

Conclusion

Conversion therapy is a demonstrated harmful practice, and the City of Calgary has taken active steps to stop its practice there. While there are concerns that the bylaw violates freedom of religion, currently it is only possible to speculate what a possible *Charter*

challenge outcome might be.

A court reviewing a *Charter* challenge on the basis of freedom of religion would have to weigh the harm to those whose religious beliefs are in keeping with conversion therapy against the harm to those who are exposed to its effects. What we know is that the City of Calgary and the Justice Centre for Constitutional Freedoms have competing interests. It will be interesting to see what a court decides as to whether the City of Calgary bylaw is constitutional, when this matter makes its way there, as it seems destined to.

[1] Madeline Smith, "Calgary's conversion therapy ban gets final approval at city council", *Calgary Herald* (25 May, 2020), online: <https://calgaryherald.com/news/calgarys-conversion-therapy-ban-gets-final-approval-at-city-council/wcm/6f856695-1a3b-47e6-aafb-6742adfeca16/>.

[2] Kristopher Wells, "Conversion Therapy in Canada: The Roles and Responsibilities of Municipalities" (2019) MacEwan University, Edmonton AB at 4 [Wells].

[3] *Ibid*.

[4] Marty Moore & Jocelyn Gerke, "Interfering with Liberty, Sexuality and Gender: Overbroad Bans on 'Conversion Therapy" (2020) Justice Centre for Constitutional Freedoms, Calgary AB at 1-2 [Moore & Gerke].

[5] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), c 11, s2(a) .

[6] Moore & Gerke, *supra* note 4 at 7.

[7] Calgary, by-law No 20M2020, *Prohibited Businesses Bylaw* (25 May, 2020) at 5.

[8] *Ibid* at 1-2.

[9] *Ibid* at 3

[10] *Charter*, *supra* note 5 s 2(a).

[11] Gerke & Moore, *supra* note 4 at 7.

[12] *Ibid* at 8.

[13] *Syndicat Northcrest v Amselem*, 2004 SCC 47 .

[14] *Ibid* at para 56.

[15] *Ibid*.

[16] *Ibid* at paras 57, 59.

[17] *Ibid* at para 60.

[18] *R v Jones*, 2 SCR 284 at 295, 31 DLR (4th) 569; cited in *Amselem*, *supra* note 11 at para 44.

[19] *SL v Commission scolaire des Chenes*, 2012 SCC 7 at paras 2, 24.

[20] *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713, 35 DLR (4th) 1 at para 99.

[21] *Charter*, *supra* note 5 s1.

[22] See *Oakes* Test; see also *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 at paras 69-71.

[23] Calgary, City Council, *Notice of Motion*, PFC2020-0116 (14 January 2020).

[24] Gerke & Moore, *supra* note 4 at 1.

[25] *Ibid* at 2.

[26] *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825, 133 DLR (4th) 1 at para 72.

[27] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 61.

[28] Potential *Charter* rights interests for LGBTQ individuals could include their right to security of the person under section 7, or their equality rights under section 15; *Charter*, *supra* note 5 s7, 15.

[29] Some of the documented harms include "… increased anxiety, depression, self-hatred, compromised mental health, post-traumatic stress disorder, suicide or suicidal thoughts, and many other lifelong psychological and social issues"; Wells, *supra* note 2 at 4.

[30] David Scasta & Phillip Bialer, "American Psychiatric Association Position Statement on Issues Related to Homosexuality" (2013); cited in *Ibid*.