

# How Much Diversity Can Canadian Courts Tolerate?

**By: Thomas M. J. Bateman**

There was a time in American politics when people believed that anything coming from the US Supreme Court was what the constitution required. In the last 15 or so years a decidedly more conservative court than the one from the Warren era of the 1960s has put its stamp on the American legal landscape. Now those same people no longer believe the Court to be the necessary voice of the Constitution. For many this has been a step toward constitutional maturity and political awareness.

Canada has yet to experience such an awakening. Our judges, with few exceptions, have adopted a uniform approach to constitutional rights. We are lulled into thinking, as a result, that basic political questions do not inform judicial decision making. "Rights are rights are rights", said a Canadian politician many years ago.[1] This, in a highly developed liberal democracy, is not a good thing.

In Canada as in most such polities, there is no uncontroversial understanding of rights because there is no uncontroversial understanding of liberal political philosophy. Constitutions do not interpret themselves. They are interpreted by people with political ideas, and these colour their decisions. We need to understand these political ideas in order to understand civil liberties jurisprudence.

Three religious freedom decisions in the last couple of years provide the springboard for what one can only hope will be a searching debate about Canadian liberalism and the kinds of diversity Canadians will be asked to tolerate.

In the first case, (*Chamberlain v. Surrey School District #36*) the B.C. Court of Appeal considered whether a public school board in Surrey, B.C. could ban from the kindergarten curriculum three books containing sympathetic depictions of families with same-sex parents. The issue was whether the decision was improperly based on "religious considerations" and whether the decision comported with the inculcation of the "highest morality" as mandated by the B.C. School Act. The trial judge decided that the board's decision was unduly influenced by religious considerations, and ruled the book-banning resolution an unconstitutional breach of the Charter's anti-discrimination provision.

The Appeal Court disagreed, arguing that "moral positions must be accorded equal access to the public square without regard to religious influence...." It did say, however, that the "highest morality" public schools are to foster "must stand independently of its origins [in Christian ethics] to maintain the allegiance of the whole of society...." Further, it said, human dignity, Christian in origin, requires toleration of different ways of life: non-discrimination is part of the highest morality, and must be taught in the schools. The appeal court suggested that while the books are subject to the Board's decision regarding use as recommended classroom resources, they were always available to teachers and students in the library and could be used at the teachers' discretion. The appeal court decision is under appeal to the Supreme Court of Canada.

The second case (*Brockie v. Brillinger et al*) regards an owner (Brockie) of a printing shop who refused to provide printing service to a homosexual advocacy organization, claiming it was against his religious conscience to support the advocacy of a lifestyle he found immoral. A human rights complaint was decided against him. On appeal, the Ontario Divisional Court in June, 2002 substantially upheld the human rights order. It did find that Brockie's religious freedom was abridged by the decision, but that the order was substantially saved by the Charter's "reasonable limits" clause. Only when the materials the printer is asked to print come into "direct conflict with the core elements of his religious belief or creed" could Brockie legitimately refuse to print them. In court, Brockie argued that he had printed materials for homosexuals in the past; it was the vicarious support for the lifestyle of homosexuals represented in the pamphlets that he could not abide. He objected not to persons but to the cause. The court did not buy the distinction. One cannot distinguish, wrote the judge, a "characteristic" (sexual orientation) from efforts to promote "understanding" thereof.

Finally, in May of 2002, an Ontario court in *Hall v. Powers* granted Marc Hall an interlocutory injunction preventing a Catholic School Board from barring him and his same-sex "boyfriend" from attending a high school graduation prom. Homosexual practices are contrary to Catholic teaching and Catholic schools have a constitutionally protected right to exist in Canada, and to receive public funding. This was not a full court proceeding on the merits; it was a chambers judgement on an application for an order pending a full hearing. One test the court had to impose on the application was whether there was a case to be made out. It answered wholly in the affirmative, making arguments that will undoubtedly be part of a full hearing in the near future. It considered a graduation prom to be peripheral to Catholic education and therefore less deserving of protection from legal interference. The court found a diversity of views within the Catholic Church on homosexuality and so doubted the centrality of the traditional doctrine in any event. As a recipient of public funds, Catholic school boards must submit to public standards. In conclusion, the court wrote, "Mark Hall is a Roman Catholic trying to be himself. He is gay."

The courts in the three decisions deploy a variety of arguments – analytical tools, really – to assess the claims at issue. Each argument is plausible, and for many persuasive. But each is essentially indeterminate and contestable. One's view of the argument depends on one's view of liberalism.

One kind of argument is a core/periphery analysis. With this tool a court determines whether a practice or teaching or materials is so central to the religious integrity of a believer that it falls under the constitutional protection of religious freedom and so trumps competing considerations like equality rights. But can we be sure that this or that thing is peripheral to a faith or creed? Whose word should be taken on the subject? At the very least, conflicts will arise between the judgements of believers themselves and outsiders, in these cases, judges. In *Brockie*, the judge declared that "Service of the public in a commercial service must be considered at the periphery of activities protected by freedom of religion." Mr. Brockie evidently and profoundly disagreed. I accept the conundrum described by the court in *Hall*, namely that "If individuals in Canada were permitted to simply assert that their religious beliefs required them to discriminate against homosexuals without objective scrutiny, there would be no protection at all from discrimination for gays and lesbians in Canada...."

But this does not resolve the ineradicable arbitrariness of the decisions nonetheless to be made. At best it goes some distance to excuse it.

Another kind of argument that came up in the above cases is the distinction between belief and conduct. As the Supreme Court said in *Trinity Western University v. B.C. College of Teachers* (2001), “The freedom to hold beliefs is broader than the freedom to act on them.” This is a tidy and persuasive distinction, but only because of its association with the more general proposition that people cannot be allowed to do whatever they want. In fact, there is no real distinction between belief and conduct because to have a belief is to be able to act on it. A regime that protects only belief and not conduct does not protect religious diversity at all. The real issue is what religiously-informed way of life will be permitted.

Which leads us to the third argument: the storied harm principle. People in the liberal polity, argued John Stuart Mill,<sup>[2]</sup> should enjoy maximal liberty subject only to the harm their conduct may cause others. The morality or not of their conduct is not grounds for regulation. My right to do with my fist what I will ends at your nose. Here again, while persuasive in the abstract, and plausible when applied to obvious examples, the harm principle suffers from pathological elasticity. Harm is the inflatable concept of liberalism. While a punch harms, many now insist that words and attitudes are just as injurious, perhaps more so. One even hears references to “moral harm” – an idea that entirely frustrates the original purpose and meaning of the harm principle.

A fourth argument at least has the merit of candour. It holds that freedoms must be restricted in the name of “morality”. Most Charter decision making states or tacitly assumes that constitutional rights are part of a basic public morality which limits the exercise of other freedoms.<sup>[3]</sup> Rights in turn are based on the idea of human dignity, which the appeal court in *Chamberlain* recognized as Christian in origin but which has now evolved into a “cultural rather than religious norm.” The emphasis on morality is surprising in light of the fact that liberal societies are not supposed to dwell much at all on authoritative moralities. Their bias is in favour of liberty. Even the B.C. Civil Liberties Association, an intervener in *Chamberlain*, stressed moral concerns over libertarian ones. It urged in its factum an interpretation of the B.C. School Act “to empower the respondent Board with the authority to inculcate moral values that foster respect for the inherent dignity and the inviolable rights of the human person, including the right of all individuals to their personal sexual orientation.” In *Brockie*, the court described the Ontario Human Rights Code in terms normally reserved for the criminal law, claiming it “punishes” wrongdoers.

A fifth argument, prominent in *Hall*, is that with state recognition and funding come public obligations. If you take the state’s money, you are saddled with state-defined conditions. While s. 93 of the *Constitution Act, 1867*, protects publicly-funded Catholic education in Canada, that same recognition and funding implies minimal obligations. The court in *Hall* calls the Catholic Board a “religious government actor”! Fair enough, but the problem is that this argument justifies too much. The state is involved in all aspects of our lives. We can trace all conduct to some form of state support. Walking down the street is made possible by state-supplied sidewalks. Taken to its extreme, this argument wipes out the private realm. The point is that regardless of state presence in one form or another, realms of human activity should be free of state regulation. The state action argument does not tell us where to draw the line.

Finally, courts refer frequently to “balancing”. Here, rights are acknowledged to be in perennial and unavoidable conflict. It is for the judges in particular cases to “weigh” one rights claim against another and see how the scale tips. Indeed the symbol of justice is the scale. Here again, impressive in the abstract, indeterminate in the particular. Scales and weighing conjure up the fruit stand and how much we pay for a bunch of grapes. Legal claims are not of this character. They are matters of judgement, not quantification.

These six arguments are frequently seen not only in litigation on religious freedoms but in rights-based litigation of all kinds. While litigation is often unavoidable – at some point, conflicts do have to be authoritatively decided – this fact alone does not dispel concerns about the indeterminacy of the tests judges apply to persuade us of the wisdom of their decisions. These tests are not self-executing: deploying them does not produce the result. The arguments are tools, conceptual means to give effect to more fundamental principles and commitments judges and others bring to disputes in liberal societies. Disagreements about the use of these tools are really disagreements about the nature of liberalism in Canada.

American political theorist William Galston has thought deeply about liberalism and diversity, and his understanding of tensions within the liberal tradition can help us understand the issues beneath the surface of the three court decisions.[4] Galston suggests that there are really two liberal traditions in tension, one emanating from the Reformation and the other inspired by the Enlightenment.

Taking the latter first, the Enlightenment prized the ideal of the autonomous, rational individual and its representatives search for political conditions to realize this ideal. Liberal institutions and culture were favoured for their ability to dampen superstition, tribalism, and parochialism. Liberalism in this tradition is a worldview, an ideology, a political ideal; its elements are to be diffused in relations not just among institutions and associations in civil society but within them as well. This is the idea of congruence, described ably by Nancy Rosenblum: the principles governing political relations must govern relations *within* civil society institutions and associations.[5] Liberal ideas must penetrate down into the lives of liberal citizens. The ideal of autonomy should remake civil life. According to this view, and to cite the example in *Hall*, Catholicism’s ‘retrograde’ views on sexuality need reform and state institutions should foster it.

The Reformation tradition is more about diversity than autonomy. It is about the toleration of ethical diversity rather than remaking people’s ethical lives. The liberal polity, properly, is more a *modus vivendi*, to use British theorist John Gray’s words, than a regime implementing a comprehensive view of life.[6] This is the liberalism favoured by Galston. “Rightly understood,” he argues, “liberalism is about the protection of diversity, not the promotion of autonomy.” Any state, including a liberal “diversity state,” requires minimal conditions of order, decency, and the respect for life (the substance of which requires more discussion than space permits) that makes any kind of human flourishing possible. Public principles will, however, be parsimonious and will be guided by “maximum feasible accommodation” of ways of life and the autonomy of civil associations. As the Supreme Court of Canada said of the university accused by its detractors as being less than open to homosexuality, Trinity Western “is not for everybody.” In fact, very few institutions are.

Objections to Galston's position come readily to mind and indeed are echoed in the court decisions discussed above. They add up to a concern that too much diversity is dangerous and illiberal, dangerous because it fragments and undermines the common stock of affections and dispositions on which citizenship is based, and illiberal because the diverse ways of life protected by the principle of maximal feasible accommodation themselves may not conform to liberal principles. Charles de Gaulle once asked, "How can anyone be expected to govern a country with two hundred and forty-six cheeses?" All the worse with as many ways of living, presumably. According to Stephen Macedo, another American theorist, "Diversity is often a great liberal resource, but not always."<sup>[7]</sup> The reference to "resource" should give pause to those whose worldview does not line up with the assumptions of liberal thought.

Concerns about diversity are often empirical claims that the polity will be endangered if it harbours illiberal elements. We have been through this before, in regard to immigration policy. Many Americans thought the election of a Catholic as President would be disastrous.

Note also that the recently assassinated Dutch politician Pym Fortuyn advocated immigration limits, but for Enlightenment liberal reasons. "In Holland," he said, "homosexuality is treated the same way as heterosexuality: in what Islamic country does that happen?" Again: "How can you respect a culture if the woman has to walk several steps behind her man, has to stay in the kitchen and keep her mouth shut?" Is Holland in danger of succumbing to Islamic illiberalism?

The two liberalisms described here help sort out the reasons behind the reasons offered in the religious freedom cases discussed above. For all the contemporary emphasis placed on diversity, in fact the decisions reveal an anxiety about ethical diversity and a search for persuasive ways to limit associational diversity in Canada, especially, if these cases are any indication, about conservative, illiberal associational diversity. What is implicit in the case law needs to be made clear: one's view of the legal reasons is conditioned by one's view of the contending liberalisms at play behind them.

Legal decisions will always be controversial. But we must be clear about why they are controversial. One is tempted to say that these cases are controversial because conservative morality is being challenged by right-thinking liberals. Perhaps. But consider a rule governing membership on the board of the organization represented by Mr. Brillinger when he asked Mr. Brockie to print pamphlets. The Canadian Gay and Lesbian Archives restricts board membership to homosexuals. Why cannot sympathetic heterosexuals be eligible? The Reformation liberal tradition says that this is the organization's business, not the state's.

In other words, the debate is not a partisan one; it goes deeper than that, to basic principles governing a liberal polity. Christians and all others should be able to engage in that debate and know what is at stake.

#### **Notes**

*1. Clifford Lincoln, Quebec Liberal MNA, speaking against the Meech Lake Accord's distinct society clause, which he thought would limit Anglophone language rights. It is ironic that such*

*a categorical assertion of rights against political judgement should be made in reference to language rights, among the least fundamental of rights to be placed in a constitution.*

2. *On Liberty* [1959] (London: Penguin, 1974)

3. *American rights talk is among the most absolutist in the world. Whatever the courts say, American popular culture takes rights to be goods without limits. See Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse. (New York: Free Press, 1991) Canadian rights talk is more European by comparison; limits on rights are more candidly theorized and implemented. For an analysis of European rights culture, see Michael J. Perry , The Idea of Human Rights: Four Inquiries. (New York: Oxford university Press, 1998).*

4. *William A. Galston, Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice. (New York: Cambridge University Press, 2002).*

5. *Nancy Rosenblum, Membership & Morals: The Personal Uses of Pluralism in America. (Princeton: Princeton University Press, 1998).*

6. *John Gray, The Two Faces of Liberalism. (New York: New Press, 2000).*

7. *Stephen Macedo, "Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?" Ethics. 105 (April 1995), 496.*

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