Religious Freedom and the State in Canada and the U.S.: A Comparative Analysis of *Saguenay, Town of Greece, Loyola,* and *Hobby Lobby*

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RELIGIOUS FREEDOM AND THE STATE IN CANADA AND THE U.S.: A COMPARATIVE ANALYSIS OF *SAGUENAY*, *TOWN OF GREECE*, *LOYOLA*, AND *HOBBY LOBBY*

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INTRODUCTION

Four prominent and controversial decisions have been released by the top courts in Canada and the United States since 2014. All four cases involve the relationship between religious freedom and the state. The Supreme Court of the United States (SCOTUS) released *Town of Greece v Galloway*[1] in 2014, which determined whether sectarian prayers at town council meetings violated the constitutional rights of meeting attendees. The Supreme Court of Canada (SCC) released *Mouvement laïque québécois v Saguenay (City)*[2] in 2015, which addressed the same issue. The SCOTUS faced another divisive question in *Burwell v Hobby Lobby Stores Inc.*[3], where corporations objected to the provision of certain contraceptives in employee benefit programs. The for-profit corporations that brought the claim asserted that their freedom of religion was burdened by regulations passed under the *Patient Protection and Affordable Care Act*[4]. The SCC was also confronted with a corporation advancing a religious freedom claim in *Loyola High School v Quebec (AG)*[5], which was released in 2015. Here, however, Loyola High School was a non-profit religious organization seeking an exemption from provincial curriculum requirements.

This paper will analyze and compare these four decisions, illustrating the different approaches taken by Canadian and U.S. courts when interpreting the limits of religious freedom. Both countries have broad constitutional guarantees protecting the exercise of religion, however the U.S. has an additional layer of protection set out in the Establishment Clause and the *Religious Freedom Restoration Act*[6] (RFRA). This paper canvasses the frameworks for religious freedom as analyzed by Canadian and American courts to provide context for the discussion. *Saguenay* and *Town of Greece* are compared to show how differently courts in both countries interpret the principle of state neutrality in religious affairs. *Loyola* and *Hobby Lobby* are then contrasted to show how the two courts approached the issue of corporations gaining entitlement to religious freedom. This paper will argue that, because Canada and the U.S. are guided by different legal frameworks and principles,

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[1] 134 S. Ct. 1811 (2014) [*Town of Greece*].
[2] 2015 SCC 16, 2015 CarswellQue 2626 (WLNext) [*Saguenay*].
[3] 134 S. Ct. 2751 (2014) [*Hobby Lobby*].
[4] 42 U.S.C. §18001 (2010).
[5] 2015 SCC 12, 2015 CarswellQue 1534 (WLNext) [*Loyola*].
[6] 42 U.S.C. §§ 2000bb-2000bb-4 (Supp. V 1993) [*RFRA*].

their courts diverged on these decisions affecting religious freedom notwithstanding the similar issues in dispute. The four recent judgments show that the SCOTUS is prepared to go further than its Canadian counterpart to protect the exercise of religious freedom and preserve national history.

CANADIAN AND AMERICAN INTERPRETATIONS OF RELIGION AND THE STATE

The Canadian Framework

Protection for religious freedom in Canada has several sources: the *Canadian Charter of Rights and Freedoms* (the *Charter*)[7], the Québec *Charter of Human Rights and Freedoms*[8] (the *Québec Charter*), and provincial human rights codes. The analysis in this paper is confined to the *Charter* for the purposes of comparison with American jurisprudence. Section 2(a) of the *Charter* provides broad protection for freedom of conscience and religion. Section 15(1) of the *Charter* protects equality rights, which include freedom from discrimination on the basis of religion. Although litigants may invoke the equality provisions in section 15 to support religious freedom infringement arguments, this paper will focus on the guarantee provided in section 2(a) of the *Charter*.

An analysis of religious freedom in Canada begins with the foundational case of *R v Big M Drug Mart Ltd.*[9] (*Big M*). The SCC, led by Chief Justice Dickson (as he then was), provided guidance for interpreting the newly-enacted *Charter* provisions. Chief Justice Dickson explained what is protected under subsection 2(a):

> Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices…What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of "the tyranny of the majority".[10]

Big M also emphasized that the religious freedom guarantee in section 2(a) equally protects non-believers and their refusal to participate in religious traditions or practice.[11] Even though non-belief may not be characterized as a religion, it would be protected under freedom of conscience.[12]

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[7] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[8] CQLR, c C-12 [*Québec Charter*].
[9] [1985] 1 SCR 295, 1985 CarswellAlta 316 (WLNext) [*Big M*].
[10] Ibid. at paras 95-96.
[11] *Big M*, *supra* note 9 at para 124.
[12] Peter W. Hogg, *Constitutional Law of Canada, 5th Edition Supplemented* (Toronto, Ont: Carswell) (loose-leaf revision), ch 42 at 3. Hogg explains that the guarantee of freedom of conscience is designed to protect moral beliefs not based on religion.

Trinity Western Law School: "To Be or Not To Be—That Is the Question"

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> What is good, true, and just in religion will not always comport with the law's view of the matter, nor will society at large always properly respect conscientious adherence to alternate authorities and divergent normative, or ethical commitments. Where this is so, two comprehensive worldviews collide. (McLachlin, 2004, p. 21)

There is no doubt that Canadian society has advanced in the last 30 years in the creation of a healthier, fairer, and more just society through the recognition and protection of those who have for many years been oppressed, marginalized, or lacked a voice in the Canadian justice system. First Nations, Metis, and Inuit now rightfully demand an equal place in Canadian society and in some cases reparations for their horrendous treatment in the past. Women demand equal opportunity and an equal voice in the Canadian patriarchal society. Those dealing with mental, emotional, and physical challenges are recognized as being more than able and willing to contribute to Canadian society and rightfully demand an opportunity to do so. In sum, discrimination based upon one's faith, colour of skin, sexual orientation, gender, and other protected categories has been correctly labeled as bigoted, hurtful, and simply wrong. For the marginalized, legal rights and remedies have been articulated in provincial and territorial human rights codes, in the *Canadian Human Rights Act* (1967), and in the *Canadian Charter of Rights and Freedoms* (1982). These protections have been essential for giving voice to and support for the rights of the oppressed or marginalized, and for minorities.

Yet in addressing past and present injustices and inequities, can the law overstep, albeit with the best of intentions, in preferring what Berlin (1958/2002) called negative liberty over positive liberty? If that is so, then might Kymlicka (2001) be correct when he suggested that protections "become illegitimate if, rather than reducing a minority's vulnerability to the power of the larger society, they instead enable a minority to exercise economic or political dominance over some other group" (p. 28)? Has this in effect happened with the refusal of the majority of the members in the Nova Scotia Barristers' Society, the Law Society of Upper Canada, and the Law Society of British Columbia being unwilling to accredit the law school at Trinity Western University (TWU) in Langley, British Columbia (BC)?[1]

The effect of non-accreditation of the law school would disqualify graduates from taking the provincial bar course without having first to undergo a hurdle—as of yet unknown—not required of graduates from any other Canadian law school. This is so notwithstanding that the Federation of Law

[1] At this time the law school is not open pending litigation in various provinces.

Schools of Canada has found that TWU law school meets the standard of law schools across Canada and further that TWU's controversial Community Covenant (TWU, 2014b) is not a bar to that finding. What could be the basis for the opposition to this law school, and by consequence to its graduates, by a majority of the members of several law societies? Certainly they are not alone in their concerns; the Council of Canadian Law Deans (2012) wrote to the president of the Federation of Law Societies of Canada, stating,

> We would urge the Federation to investigate whether TWU's covenant is inconsistent with federal or provincial law. We would also urge the Federation to consider this covenant and its intentionally discriminatory impact on gay, lesbian and bi-sexual students when evaluating TWU's application to establish an approved common law program. (p. 2)

These are perplexing questions. The case of TWU's law school is fraught with legal, political, philosophical, and ethical issues which go to the root of what it means to live in a free, democratic society, where fundamental freedoms are protected and where the right not to be discriminated against, if one is in a protected category, is upheld. The incommensurate clash between positive and negative rights emerges in the TWU law school case as sides choose between two positions, one based upon the world view of citizens who claim a moral and legal obligation to redress the inequities of the past and ensure fairness in the present, and a group of citizens bound by conscience and religious beliefs seeking the right to express themselves in community without the state imposing its secular view upon them.

Ostensibly, the TWU case deals with three questions:

1. Does the law society have the statutory jurisdiction to refuse accreditation to TWU's law school?
2. If the answer is yes, what is the applicable standard on judicial review, correctness or reasonableness?
3. Has the applicable standard been met?

However, I suggest that the deeper question at the heart of this case is, "What should be the nature of Canadian society?" In part, that question may be answered when we respond to the questions, "How can a private corporate entity, albeit established by provincial statute, expect to receive the imprimatur of a statutorily created body bound by law to abide by a provincial human rights code and the *Charter*? On what basis could that statutory decision maker give its approval to an entity that prima facie discriminates against a historically marginalized and oppressed segment of Canadian society?" Those questions are at the heart of this paper, what I have called Trinity Western Law