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Constitutional Protection of Fundamental Freedoms in the Decisions of the Supreme Court of Canada

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Abstract

This paper provides a brief analysis of Section 2 of the Canadian *Charter of Rights and Freedoms*, which deals with Canadians' "fundamental freedoms". Provisions of the *Charter* guarantee freedom of conscience and religion; freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication; freedom of peaceful assembly; and freedom of association.

Streszczenie

Konstytucyjna ochrona podstawowych wolności w orzecznictwie Sądu Najwyższego Kanady

Artykuł zawiera krótką charakterystykę sekcji 2 kanadyjskiej Karty Praw i Wolności, która dotyczy „podstawowych wolności” Kanadyjczyków. Postanowienia Karty gwarantują wolność sumienia i wyznania; wolność myśli, przekonań, opinii i wypowiedzi, w tym wolność prasy i innych środków komunikacji; wolność pokojowych zgromadzeń; i wolność zrzeszania się.

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I. Introduction

Canada was created by an act of the Parliament of the United Kingdom called the British North America Act (now known as the Constitution Act), 1867², uniting the British colonies of the United Province of Canada, Nova Scotia, and New Brunswick.

The Constitution of Canada includes the Constitution Act, 1867, and the Constitution Act, 1982³. According to the Canadian constitution, Canada is a constitutional monarchy, which means that the Queen or King is recognized as the Head of State, while the Prime Minister is the Head of Government. Parliament is made up of the monarch (represented by the governor-general), appointed senators, and all elected members of the House of Commons. Government is responsible for managing the business of the country. It usually is formed by the political party that has the most elected representatives, and it is led by the prime minister. Canada is a bijural country – that means it has both common and civil law systems. Federal bills and regulations must respect both types of systems, and the legal concepts within these laws must be expressed in both English and French.

In Canada, human rights are protected by federal, provincial, and territorial laws but the most important law is the Canadian Charter of Rights and Freedoms. “The Charter came into force on April 17, 1982. One Section of the Charter, Section 15, came into effect three years after the rest of the Charter, on April 17, 1985, to give governments time to bring their laws into line with the equality rights guaranteed in Section 15³⁴”. The Charter is a part of Canada’s Constitution. It is a document that protects the interests of Canadians and provides a way to challenge perceived abuses of basic rights and freedoms through the Canadian court system. The Charter protects every Canadian’s

² The British North America Act 1867, <https://www.legislation.gov.uk/ukpga/Vict/30-31/3/enacted> (26.10.2020).

³ The Canada Act 1982, <https://www.legislation.gov.uk/ukpga/1982/11> (26.10.2020).

⁴ <https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html> (26.10.2020).

right to be treated equally under the law. The Charter guarantees broad equality rights and other fundamental rights such as the freedom of expression, freedom of assembly, and freedom of religion. The Charter falls into seven distinct categories: fundamental freedoms, democratic rights, language rights, mobility rights, minority language educational rights, legal rights, and equality rights. The rights and freedoms in the Charter are not absolute. They can be limited to protect other rights or important national values.

II. Freedom of Conscience and Religion

M.H. Ogilvie sums up the nature of Canadian culture until the 1960s as follows: “immigration of Christian religious groups to Canada ensured that until the second half of the twentieth century, Canada remained a strongly Christian country. While the intensity with which some aspects of the Christian life should be led might differ from denomination to denomination, there was a widely-held consensus as to how the Christian life should be led and that Canada should be a Christian society. Indeed, until the 1960s Canada was a much more strongly church-going country than the United States and was so regarded throughout the Western world. It was only in the 1970s that Canadian and American church-going statistics started to reverse, for reasons that are not yet entirely clear to social scientists”⁵. Nowadays, says Ogilvie, “changing global immigration patterns have introduced religious pluralism on a scale hitherto unknown, bringing to Canada members of non-Christian religious traditions, whether Moslem, Sikh, or Buddhist. The result is that since 1982, the religious history of Canada has come to be shaped more by the judiciary than by the religious institutions themselves as adherents of all religions try to make a space for themselves within Canada through the law, as well as the adherents of none”⁶. This new cultural background led the Supreme Court of Canada to develop the meaning of freedom of religion. This fundamental freedom is protected under the Section 2(a) of the Charter.

The purpose of Section 2(a) is to protect freedom of religion and freedom of conscience. The role of this Section “is to ensure that society does not in-

⁵ M.H. Ogilvie, *Religious Institutions and the Law in Canada*, Toronto Irwin Law 2003, p. 52.

⁶ *Ibidem*, p. 57.

terfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being"⁷. Freedom of religion has been defined by the Supreme Court of Canada as the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination⁸. In other words, the right to freedom of religion encompasses the right to believe and entertain the religious beliefs of one's choice, the right to declare one's religious beliefs openly, and the right to manifest religious belief by worship, teaching, dissemination, and religious practice⁹. Freedom of religion is not unlimited. In general, it can be limited where it interferes with the fundamental rights of others (i.e. by the right of others to hold and to manifest beliefs and opinions of their own, and to be free from injury from the exercise of the freedom of religion of others). Freedom of religion is subject to such limitations as are necessary to protect public safety, order, health or morals, and the fundamental rights and freedoms of others¹⁰.

As far as freedom of religion is concerned two problems are worth mentioning. Firstly, freedom from conformity to a religious dogma which means freedom to express and manifest religious non-belief and the freedom to refuse to participate in religious practice. Secondly, secularism and state neutrality. The idea of secularism has been addressed by the Supreme Court. Secularism implies equal recognition and respect to all members of a community. Religious views that deny equal recognition and respect to the members of a minority group cannot be used to exclude the concerns of the minority group¹¹. Discussing the meaning of state neutrality in respect of religion, the Supreme Court of Canada has articulated as follows: "(...) following a realistic and non-absolutist approach, state neutrality is assured when the state neither favors nor hinders any particular religious belief, that is, when it shows

⁷ Supreme Court Judgment, *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713.

⁸ Supreme Court Judgment, *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

⁹ Supreme Court Judgment, *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79.

¹⁰ Supreme Court Judgment, *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825.

¹¹ Supreme Court Judgment, *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710.

respect for all postures toward religion, including that of having no religious beliefs whatsoever, while taking into account the competing constitutional rights of the individuals affected”¹². One of Canadian academic says that “Courts in Canada at various levels have used the term ‘secularism’, suggesting that it is an aspect of Canadian culture. In his opinion, this is a significant error. Secularism is, in fact, a particular ideology with a particular history, content, and strategy—an anti-religious strategy”¹³.

The Supreme Court has not given much consideration to freedom of conscience but at least distinguished freedom of conscience from freedom of religion. The Court held that “Freedom of conscience and religion should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or a secular morality, and the terms ‘conscience’ and ‘religion’ should not be treated as tautologous if capable of independent, although related, meaning”¹⁴.

III. Freedom of Thought, Belief, Opinion, and Expression, Including Freedom of the Press and other Media of Communication

It is well known that the Canadian tradition of freedom of expression usually is traced back to the English common law. Yet the common law has not been particularly sympathetic to free speech claimants. The Constitution Act, 1867 brought to Canada a constitution “similar in principle to that of the United Kingdom”, though it was silent about liberties accruing to individuals. Nevertheless, the preamble suggested to courts that similar degrees of freedom

¹² Supreme Court Judgment, *S.L. v. Commission scolaire des Chênes*, [2012] 1 S.C.R. 235. B. Ryder explained the idea of state neutrality: “It is well established in Canadian jurisprudence that the state is subject to a duty of neutrality between religions. Freedom of religion prohibits laws or policies that have the purpose or effect of favoring or burdening some religious beliefs or practices over others. The state may not require a course of action for the purpose of compelling religious compliance or attempting religious indoctrination”. B. Ryder, *State Neutrality and Freedom of Conscience and Religion*, “The Supreme Court Law Review” 2005, vol. 29, pp. 171–172.

¹³ I.T. Benson, *The Freedom of Conscience and Religion in Canada: Challenges and Opportunities*, “Emory International Law Review” 2007, vol. 21, p. 154.

¹⁴ Supreme Court Judgment, *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

practically would be available in Canada. The Supreme Court of Canada, on occasion, has been prepared to vindicate the freedom of expression rights by denying jurisdiction to provinces to enact laws concerning speech¹⁵.

K. Roach and D. Schneiderman characterized freedom of expression as the ability to speak about matters that concern us — subjects that inspire and move us into action through expression — is central to contemporary ideas about liberty and democracy¹⁶. The Supreme Court of Canada says that the protection of freedom of expression under Section 2 (b) of the Charter is premised upon fundamental principles and values that promote the search for and attainment of truth, participation in social and political decision-making, and the opportunity for individual self-fulfillment through expression¹⁷. The Supreme Court defined the meaning of “expression” as “any activity or communication that conveys or attempts to convey meaning”¹⁸. Freedom of expression includes the right to express beliefs and opinions and give protection to both speakers and listeners. “Freedom of expression also protects the right not to express oneself. «[F]reedom of expression necessarily entails the right to say nothing or the right not to say certain things. Silence is in itself a form of expression which in some circumstances can express something more clearly than words could do»”¹⁹. The Supreme Court has found that protected expression includes such matters as music, art, dance, postering, physical movements, marching with banners, etc.; commercial advertising; posters on utility poles; peace camps; signs and billboards; handing out leaflets; picketing; expressing oneself in the language of choice and many other cases²⁰.

Freedom of expression is not unlimited. Under Section 1 of the Charter, the rights and freedoms set out in the Charter are guaranteed only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Not all expression will be treated equally in determining an appropriate balancing of competing values under a Section 1 anal-

¹⁵ K. Roach, D. Schneiderman, *Freedom of Expression in Canada*, “Supreme Court Law Review” 2013, No. 61 S.C.L.R. (2d), p. 431.

¹⁶ *Ibidem*, p. 429.

¹⁷ Supreme Court Judgment, *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

¹⁸ Supreme Court Judgment, *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877.

¹⁹ <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art2b.html> (2.11.2020).

²⁰ *Ibidem*.

ysis, since different types of expression will be relatively closer to or further from the core values behind the freedom, depending on the nature of the expression. The Supreme Court of Canada has maintained that “hate speech is at some distance from the spirit of Section 2 (b) because it does little to promote, and can impede, the values underlying freedom of expression. Hate speech can also distort or limit the robust and free exchange of ideas by its tendency to silence the voice of its target group”²¹. Hate speech is virtually always aimed at the minority subgroup²².

IV. Freedom of Peaceful Assembly

The right to assemble peacefully is closely related to freedom of expression. The right of peaceful assembly is essential for collective expression, and in particular for protests²³, and thus plays an important part in the civil, political, economic, social, and cultural life of all societies. Section 2 (c) of the Charter protects a person’s right to gather with others and express ideas. As B.S. Alexander argues “it is the least judicially explored freedom”²⁴. Freedom of assembly is called by the Supreme Court of Canada ‘speech in action’²⁵. According to Section 1 of the Charter, there must be a balance between the rights of the individual and the interests of society. Rights are not absolute and can be limited. Similarly, “none of the freedoms are unlimited in terms of what they include, and the limiting factors inevitably inform courts’ decisions about what is included or excluded in the scope of each freedom. (...) In the case of the freedom of peaceful assembly, the modifier ‘peaceful’ ultimately reinforces the approach already taken with respect to the other Charter freedoms”²⁶.

²¹ Supreme Court Judgment, *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 SCR 467.

²² K. Roach, D. Schneiderman, *Freedom...*, p. 462.

²³ B.S. Alexander, *Exploring a More Independent Freedom of Peaceful Assembly in Canada*, “Western Journal of Legal Studies” 2017, vol. 4, <https://ojs.lib.uwo.ca/index.php/uwojls/article/view/5715> (3.11.2020).

²⁴ *Ibidem*.

²⁵ <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art2c.html> (3.11.2020).

²⁶ B.S. Alexander, *Exploring...*

Unlawful assembly and riot are prohibited in Canada and are not protected under Section 2 (c) of the Charter. The Criminal Code contains the following provisions defining unlawful assembly and riot. Article 63 of Criminal Code provides: “an unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when they are assembled as to cause persons in the neighborhood of the assembly to fear, on reasonable grounds, that they (a) will disturb the peace tumultuously; or (b) will by that assembly needlessly and without reasonable cause provoke other persons to disturb the peace tumultuously. Persons who are lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in a manner that would have made the assembly unlawful if they had assembled in that manner for that purpose”²⁷. Article 64 of the Criminal Code defines a riot as an unlawful assembly that has begun to disturb the peace tumultuously²⁸. W. Wesley Pue explains that the provision of the Code prohibiting unlawful assemblies is to draw the line between a lawful meeting and an assembly, either unlawful in its inception, or which is deemed to have become unlawful either because of the action of those assembled or because of the improper action of others having no sympathy with the objects of the meeting²⁹.

V. Freedom of Association

The Charter declares that everyone has several “fundamental freedoms”, including “freedom of association” protected under Section 2 (d). Freedom of association recognizes the profoundly social nature of human endeavors and to protect the individual from state-enforced isolation in the pursuit of their ends³⁰. It protects the collective action of individuals in pursuit of their com-

²⁷ Criminal Code (R.S.C., 1985, c. C-46).

²⁸ Ibidem.

²⁹ W. Wesley Pue, *Police Powers, Trespass and Ex Expressive Rights Under the Canadian Constitution*, Allard Research Commons 2007, https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1268&context=fac_pubs (3.11.2020).

³⁰ Supreme Court Judgment, *Mounted Police Association of Ontario v. Canada*, [2015] SCC 1.

mon goals³¹. Canadian constitutional law regulations guarantee protection for trade union activities, including collective bargaining and striking.

In Canada, freedom of association is strictly related to labor law and relations between employers and employees. The Supreme Court of Canada has long recognized that to be in a position to exercise freedom of association, employees need protection from employer reprisals and interference³². In the Supreme Court's view "Freedom of association guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals, which includes a right to collective bargaining. That right is one that guarantees a process but does not guarantee an outcome or access to a particular model of labor relations"³³.

The Canadian Charter of Rights and Freedoms allows for limits on freedom of association but the limits must generally be reasonable, prescribed by law, and demonstrably justified in a free and democratic society.

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³² D.J. Doorey, *Graduated Freedom of Association: Worker Voice Beyond the Wagner Model*, "Queen's Law Journal" 2012, No. 38(2), p. 528.

³³ <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art2d.html> (4.11.2020).