Justice Centre
for Constitutional Freedoms

Religion and the *Charter*: the freedom to practice, critique, and offend

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"Only by accepting the freedom to criticize religion alongside the freedom to practice religion will a society be truly tolerant and free."

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Introduction

This paper, with some modifications, was originally presented at the 24th Annual International Law and Religion Symposium at Brigham Young University (Provo, Utah) in October 2017.

"Fundamental freedoms" have been constitutionally protected in Canada since the adoption of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") in 1982. From the outset, the *Charter* protects "fundamental freedoms" under Section 2:

2. Everyone has the following fundamental freedoms:

- (*a*) freedom of conscience and religion;
- (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (*c*) freedom of peaceful assembly; and
- (*d*) freedom of association. [emphasis added]

Section 2 of the *Charter* thus protects individuals from government interference with their fundamental liberties, notably freedom of religion and freedom of expression. However, the federal and provincial governments have what is said to be limited discretion under section 1 of the *Charter* to curtail fundamental freedoms. In practice, however, the courts have widened this discretion considerably.[1]

There is a troubling trend in Canada, at both the governmental and social level, to disregard constitutionally entrenched freedoms. Religion is currently at the forefront of such movements. Indeed, religion is paradoxically seen as victim and aggressor, conveniently used as a pawn in the game of identity politics. This comes at a time when the public perception of the importance of freedom of religion, belief, and expression is on the decline.[2]

This short paper will outline the importance of maintaining a principled approach towards constitutional freedoms vis-à-vis religion, including the freedom to practice religion, as well as the freedom to criticize religion. Underpinning these freedoms is tolerance, of both religion and dissenting expression. Necessarily, this tolerance will encompass religious practice and critique that is lawful, yet possibly offensive to some. Being inherently subjective, offense must be

[1] Section 1 provides that such limits must be reasonable, "prescribed by law" and "demonstrably justified in a free and democratic society". Canadian jurisprudence has developed a test to determine whether such limitations can be justified under section 1, known as the *Oakes Test*. Under the *Oakes Test*, a *Charter* limit will be justified if there is a "pressing and substantial concern" and if the freedom that is violated by government action is proportionally limited in the following ways: (1) rational connection between the measures and the objectives behind them; (2) minimal impairment to the *Charter* right in question; and (3) proportionality between the effects of the measures and the objective.

[2] See the results of the following study: "Generation Z: Global Citizenship Survey," *Varkey Foundation*, (January 2017), online: <https://www.varkeyfoundation.org/sites/default/files/Global%20Young%20People%20Report%20%28digital%29%20NEW%20%281%29.pdf> at 26, 28.

tolerated and accepted as inevitable, rather than prohibited, in a religiously pluralistic and democratically free society such as Canada.

The freedom to practice religion

As noted earlier, the freedom to practice religion is constitutionally protected under section 2(a) of the *Charter*. Supreme Court of Canada ("SCC") jurisprudence has confirmed this right as protecting sincerely held beliefs that have a nexus with religion from "non-trivial" government interference.[3] This has led the SCC to affirm freedom of religion in cases involving, for example, the right for a Sikh student to wear a kirpan to school[4], the right for religious Ministers to abstain from performing same-sex marriages[5], and the right for a private Catholic school to teach students Catholicism from a non-neutral, Catholic perspective.[6]

In the province of Quebec, the right to freedom of religion is extended to the private sphere, where freedom of religion must be respected even in situations that do not concern government. This led the SCC to find that the freedom of religion of Orthodox Jews was violated by condo by-laws that prohibited them from building succahs (huts) on their balconies to observe a religious festival.[7]

Importantly, SCC case law has also condemned state interference in religious matters, notably in the *Mouvement Laïque Québécois v Saguenay (City)* case. In this case, the SCC was asked to determine whether the recital of a prayer under a municipal by-law before meetings of the municipal council violated freedom of religion under the *Quebec Charter*. In striking down the by-law, the SCC affirmed the importance of religious neutrality from the state, noting that:

> *The state may not act in such a way as to create a preferential public space that favours certain religious groups and is hostile to others. It follows that the state may not, by expressing its own religious preference, promote the participation of believers to the exclusion of non-believers or vice versa.*
>
> *When all is said and done, the state's duty to protect every person's freedom of conscience and religion means that it may not use its powers in such a way as to promote the participation of certain believers or non-believers in public life to the detriment of others.*[8]

A review of the above-mentioned SCC case law clearly demonstrates the importance that has been afforded to religion in Canada. Religion is both afforded the freedom to be professed publicly, and protected from public interference by the state. The importance of freedom of religion in Canada has been stressed by Canadian lawyer Barry Bussey, who argues that Western countries have an important interest in protecting freedom of religion as a "foundational right and principle

[3] *Syndicat Northcrest v Amselem*, [2004] 2 SCR 47 at par 58.
[4] *Multani v Commission Scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256.
[5] *Reference Re Same-Sex Marriage*, [2004] 3 SCR 698.
[6] *Loyola High School v Quebec (Attorney General)*, [2015] 1 SCR 613.
[7] *Amselem*, *supra* note 3.
[8] *Mouvement Laïque Québécois v Saguenay (City)*, [2015] 2 SCR 3 at 75-76.

that was instrumental in creating the modern liberal democratic state"[9]. Bussey notes that freedom of religion has laid the ground for the creation of other individual freedoms, such as freedom of expression and association.[10]

The interplay between societal freedom and religion was stressed by the SCC in one of its earliest and most significant freedom of religion cases, *R v Big M Drug Mart Ltd*, where the Court noted:

> *The essence of the concept of freedom of religion is 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 dissemination. But the concept means more than that.*
>
> *[…]*
>
> *Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.*[11]

Against this backdrop, there are two contemporary cases that we would like to analyze in this paper regarding the freedom to practice religion in Canada. The first concerns the right to public religious expression in the "public sphere", and the second involves the right for a private Christian university to require its students to abide by a "Community Covenant" that is in line with its religious beliefs.

The freedom to pray in public

In July of 2017, controversy surrounded a decision made by a Quebec zoo, *Parc Safari*, to allow Muslims to pray on its grounds. This decision, likely in line with the zoo's legal obligations under the *Quebec Charter*, was met with some social backlash and condemnation. Many felt that the right to practice religion did not extend outside of religious establishments, such as mosques.[12] This phenomenon has also been noted by Bussey, who describes the cultural movement in favour of limiting the scope of freedom of religion exclusively to the private sphere.[13]

However, as was argued in the *National Post* in regard to this controversy, free and democratic societies tolerate public expression of religion.[14] Besides the legal right to do so, under both the Canadian and Quebec Charters, religious expression should also be socially tolerated in a

[9] Barry W Bussey, "The Legal Revolution Against the Place of Religion: The Case of Trinity Western University Law School," (2016) 4 *BYU L Rev* 1127 at 1129.
[10] *Ibid*.
[11] *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at par 94-95.
[12] John Carpay, "Free Societies Tolerate Public Expressions of Faith, Including Muslims Praying in a Park," *National Post*, (18 July 2017), online: < http://nationalpost.com/opinion/john-carpay-free-societies-tolerate-public-expressions-of-faith>.
[13] Bussey, *supra* note 9 at 1185-1186.
[14] Carpay, *supra* note 12.

religiously pluralistic country such as Canada. Importantly, this tolerance does not need to equate to approval.[15] As the SCC noted in *Chamberlain v. Surrey School District No. 36*:

> *[T]he demand for tolerance cannot be interpreted as the demand to approve of another person's beliefs or practices. When we ask people to be tolerant of others, we do not ask them to abandon their personal convictions. We merely ask them to respect the rights, values and ways of being of those who may not share those convictions. The belief that others are entitled to equal respect depends, not on the belief that their values are right, but on the belief that they have a claim to equal respect regardless of whether they are right. Learning about tolerance is therefore learning that other people's entitlement to respect from us does not depend on whether their views accord with our own.*[16]

Trinity Western University and religious neutrality

The recent controversy over religious prayer in a public park is a social and cultural phenomenon, removed from government action. In contrast, the litigation involving *Trinity Western University* ("TWU"), which will be heard by the SCC in December of 2017, is fundamentally concerned with freedom of religion and freedom of association under the *Charter*. This case arose when three provincial law societies refused to accredit TWU's law school because of TWU's religious beliefs and practices. The law societies of Nova Scotia, Ontario, and British Columbia object to this private, Christian university's Community Covenant (a code of behaviour), which prohibits sexual activity outside of the marriage between man and woman. Critics say that this requirement discriminates against the LGBTQ community. The highest courts in British Columbia and Nova Scotia ruled against the law societies in those provinces, but in Ontario the Law Society of Upper Canada was successful. The Ontario and British Columbia decisions are now before the SCC.

A ruling against TWU by the SCC would represent a severe and crippling assault on freedom of religion in Canada. Essentially, it would hold that Christians are not free to voluntarily study in a private setting according to shared religious values.[17] In doing so, the SCC would be confirming the decision of the *Law Society of Upper Canada*, a governmental body tasked with regulating the legal profession in Ontario, to refuse recognition of a law school for considerations unrelated to the competence of its students to practice law.[18] Moreover, as Bussey notes, such a decision may create a hierarchy of constitutional rights in Canada, contrary to prior jurisprudence.[19] In this respect, a very broadly defined right to "equality" would prevail over freedom of religion, despite the fact that TWU, as a private institution, does not have legal obligations under the *Charter*[20]. Importantly, and despite the fact that TWU has noted that its doors

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[15] *Ibid*.
[16] *Chamberlain v. Surrey School District No. 36*, [2002] 4 SCR 710, at par 66.
[17] Faisal Bhabha, "Hanging in the Balance: The Rights of Minorities," in Dwight Newman (ed), *Religious Freedom and Communities*, (Toronto: LexisNexis, 2016) at 265, 282-283; Bussey, *supra* note 10 at 1169.
[18] Bussey, *ibid* at 1205 citing Faisal Bhabha, *ibid*.
[19] Bussey, *supra* note 9 at 1168.
[20] *Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25 at par 10.

are open to the LGBTQ community[21], the SCC has already affirmed in a prior case involving similar facts[22] that "TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions."[23] For this reason, the government should remain neutral towards TWU's religious beliefs, and recognize that it is geared towards a specific audience. As Bussey notes, free societies should be tolerant of religion, even when it expresses a dissenting viewpoint in regards to sexuality.[24] In support of his position, Bussey cites[25] a telling passage from the *British Columbia Court of Appeal* in its TWU decision:

> *A society that does not admit of and accommodate differences cannot be a free and democratic society—one in which its citizens are free to think, to disagree, to debate and to challenge the accepted view without fear of reprisal. This case demonstrates that a well-intentioned majority acting in the name of tolerance and liberalism, can, if unchecked, impose its views on the minority in a manner that is in itself intolerant and illiberal.*[26] [emphasis added]

The freedom to criticize religion

If it is true that free societies are tolerant towards religion, the opposite must also be noted: free societies also tolerate criticism of religion. This principle is rooted in the *Charter* right to freedom of expression, which has been described as arguably the most important right in a democratic society by Cory J. in *Edmonton Journal* v. *Alberta (Attorney General)*.[27] Indeed, similarly to freedom of religion, freedom of expression is a right intimately connected with the individual that requires freedom from government interference. In *Sierra Club of Canada v. Canada (Minister of Finance)*, the SCC noted that the core values of political participation, truth-finding, and self-fulfillment were found to underlie freedom of expression.[28]

Importantly, the right to freedom of expression does not enter into conflict with freedom of religion through religious critique. In fact, both freedoms protect individuals from state interference. Subject to Section 1 of the *Charter*, the state is therefore prohibited from interfering in an individual's religious practice and other expressive activity. Yet, when individuals critique religion under their right to free speech, no state activity is concerned. Perhaps more fundamentally, in normal circumstances, the critique of religion would in no way impair anyone's right to practice their faith, which is what freedom of religion protects.

Rather, in Canada, limits on freedom of expression and critique of religion are mainly grounded in criminal legislation prohibiting hate speech and violence, anti-discrimination and hate speech provisions in human rights legislation, and defamation law. In this respect, absent violation

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[21] Bussey, *supra* note 9 at 1187 citing Victor M Muñiz-Fraticelli, "The (Im)possibility of Christian Education," in *Religious Freedom and Communities*, supra note 17 at 219.
[22] In *Trinity Western University* v British Columbia College of Teachers, [2001] 1 SCR 772, the SCC ruled that TWU's rights under Section 2(a) of the *Charter* were violated by a decision not to accredit its education program.
[23] *Trinity Western University v British Columbia College of Teachers*, [2001] 1 SCR 772.
[24] Bussey, *supra* note 9 at 1168.
[25] Bussey, *ibid* at 1168 and footnote 176.
[26] *Trinity Western University v Law Society of British Columbia*, 2016 BCCA 423 at par 193.
[27] *Edmonton Journal* v. *Alberta (Attorney General)*, [1989] 2 SCR 1326 at page 1336.
[28] *Sierra Club of Canada v Canada (Minister of Finance)*, [2002] 2 SCR at par 75.

of other legal norms (that are justifiable exceptions to freedom of expression), religious critique is lawful and should be tolerated in Canada, despite the importance of freedom of religion. Indeed, in *Elmasry and Habib v Roger's Publishing and MacQueen*, the British Columbia Human Rights Tribunal found that an article that was critical of Islam, containing stereotypes of Muslims[29], and including "historical, religious, and factual inaccuracies"[30] did not violate the hate speech provision of British Columbia's *Human Rights Code*: "the Article, with all its inaccuracies and hyperbole, has resulted in political debate which, in our view, s.7(1)(b) was never intended to suppress."[31] In this respect, a bona fide critique or satire of Islam would not normally constitute a legal transgression under current Canadian law.[32]

However, the freedom to criticize Islam has recently become a topic of debate. On March 23rd 2017, the Canadian House of Commons passed M-103, a motion that calls for governmental condemnation of "Islamophobia" and other forms of religion discrimination. M-103 also provides for a study to be conducted by the *Standing Committee on Canadian Heritage* as well as a report outlining recommendations and findings. According to the text of M-103, these findings would presumably relate to a "whole-of-government approach to reducing or eliminating systemic racism and religious discrimination including Islamophobia".[33] This Motion has spurred controversy in Canada, because of the appearance of the un-defined term "Islamophobia" and the fear that legislative action will follow, limiting the freedom to criticize Islam and certain beliefs and practices associated with Islam, such as sharia law, female genital mutilation, or jihad.[34] It is important to note that many Muslims have condemned M-103 in the strongest possible terms as an attack on their ability to criticize their own religion, which is a fundamental right in Canada.[35] It is also worth noting that the Motion's sponsor, MP Iqra Khalid, was specifically asked to amend her Motion to clarify that criticism of Islam does not constitute "Islamophobia", yet refused to do so.

Legislative amendments enacted as a result of M-103 could become a significant barrier to freedom of expression. Only by accepting the freedom to criticize religion alongside the freedom to practice religion will a society be truly tolerant and free. In fact, the absence of freedom of expression vis-à-vis religion, through blasphemy laws, is antithetical to Western values. Following the *Charlie Hebdo* and *Danish Cartoons* incidents, maintaining the freedom to express viewpoints that may offend religious worshippers remains paramount to any Western democracy.

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[29] *Elmasry and Habib v Roger's Publishing and MacQueen*, (No. 4), 2008 BCHRT 378 at par 142.
[30] *Ibid* at 140.
[31] *Ibid* at 159.
[32] David Di Sante, "Freedom of Expression at Canadian Universities: Censoring Hate Speech, or the Speech 'That We Hate,'" LL.M Diss. *London School of Economics and Political Science*, (8 August 2017) [Unpublished] at Section 5(c).
[33] M-103, *Systemic Racism and Religious Discrimination*, 1st Sess, 42nd Parl, 2017.
[34] See: Barbara Kay, "How Long Until my Honest Criticism of Islamism Constitutes a Speech Crime in Canada?" *National Post*, (7 Feb 2017), see online: <http://nationalpost.com/opinion/barbara-kay-how-long-until-my-honest-criticism-of-islamism-constitutes-a-speech-crime-in-canada/wcm/7b02b5c0-e409-480d-b30a-78fd98681d9e>; Rex Murphy, "M-103 Has Passed. And What Today Has Changed for the Better?" *National Post*, (24 March 2017), online: <http://nationalpost.com/opinion/rex-murphy-m-103-has-passed-and-what-today-has-changed-for-the-better>.
[35] See for example <http://torontosun.com/2017/09/19/are-mps-getting-the-wool-pulled-over-their-eyes-regarding-m-103/wcm/2eb5a127-f3a4-41af-9ffb-2fb89ad34165> <http://nationalpost.com/opinion/barbara-kay-liberals-left-reeling-by-clear-rational-criticisms-of-m-103>

As was the case in the earlier section on freedom of religion, a principled approach is necessary to deal with issues involving critique of religion and free speech. We must therefore recognize the importance of freedom of expression and uphold it, especially in difficult situations which may cause offense.[36] In *Mugesera v Canada*, the SCC clearly reaffirmed that the offensiveness of a message alone does not bring it within the purview of hate speech legislation.[37]

Conclusion

In this paper, we have argued for the importance of authentic tolerance vis-à-vis religion, encompassing both the right to practice religion and the right to criticize religion. There is no contradiction between freedom of religion and freedom of expression; individuals exercise both rights in a free and democratic society. While tolerance of religious expression is undoubtedly important, the tolerance of those who disagree with religious practices generally, or those of one particular religion, and express themselves accordingly, should not be forgotten. This is because tolerance for both freedom of religion and freedom of expression is not mutually incompatible. In the TWU case, this means that the freedom of religion of the university and its students to abide by a lawful Christian Community Covenant[38] is tolerated, while the rights of LGBTQ activists to freely express their disapproval of TWU's religious beliefs on sexuality is also recognized. Similarly, there is no discord in believing that Muslim prayer should be tolerated in public, alongside the right to criticize Islam freely and even vociferously. Of course, it must be noted that the exercise of these freedoms, both religion and expression, will be subjectively offensive to some. Yet, causing offence alone is not unlawful in Canada and is, in fact, a necessary corollary to our diverse and free society. The creation of a legal right to be free from offence would stifle diversity of belief and practice. Moreover, in a Western liberal democracy, unanimity is not required on contentious issues such as "the views and practices of human sexuality"[39], including situations that concern sexual minorities. The same is true of the practice, or critique, of religious minorities. In all of these cases, offence should not be used as barrier to the pursuit of freedom and tolerance.[40]

Indeed, despite the potential offence caused by the exercise of the freedoms of religion and expression, it is of paramount importance to defend these freedoms. According to Bussey, one of the keys to maintaining a Western liberal democracy is the "bifurcation" between the "law of the land" and matters related to "individual conscience".[41]

Fundamentally, this means that the endeavour to deal with religion in a pluralistic country like Canada should be premised around the notion of tolerance, as well as a principled interpretation of constitutional freedoms. In turn, this would grant freedom of religion and freedom of expression their full force and protection, contributing to the flourishing and preservation of a truly free

[36] See: Di Sante, *supra* note 32 at Sections 3(B) and 5(C).
[37] *Mugesera v Canada (Minister of Citizenship and Immigration*), [2005] 2 SCR 100 at par 103 citing *R v Keegstra*, [1990] 3 SCR 697 at page 778.
[38] *Trinity Western University v Nova Scotia Barristers' Society*, *supra* note 20.
[39] Bussey, *supra* note 9 at 1168.
[40] For a discussion on identity politics, offence, and human rights, see: Jeremy Waldron, *The Harm in Hate Speech*, (Cambridge: Harvard University Press, 2012) at 135.
[41] Bussey, *ibid* at 1139.

society. In doing so, we can ensure that religion and the *Charter* each maintains its important, yet different, roles in Canadian society. As noted by the Supreme Court of Nova Scotia in its decision in *Trinity Western University v. Nova Scotia Barristers' Society*: "[t]he *Charter* is not a blueprint for moral conformity. Its purpose is to protect the citizen from the power of the state, not to enforce compliance by citizens or private institutions with the moral judgments of the state."[42]

About the Justice Centre

Founded in 2010 as a voice for freedom in Canada's courtrooms, the Justice Centre for Constitutional Freedoms defends the constitutional freedoms of Canadians through litigation and education. The Justice Centre's vision is for a Canada where:

- each and every Canadian is treated equally by governments and by the courts, regardless of race, ancestry, ethnicity, age, gender, beliefs, or other personal characteristics.
- all Canadians are free to express peacefully their thoughts, opinions and beliefs without fear of persecution or oppression.
- every person has the knowledge and the perseverance to control his or her own destiny as a free and responsible member of our society.
- every Canadian has the understanding and determination to recognize, protect and preserve their human rights and constitutional freedoms.
- people can enjoy individual freedom as responsible members of a free society.

About the Authors

David Di Sante is working as a legal intern and researcher for the Justice Centre, involved with litigation files as well as legal analyses, studies and reports. Previous to his employment with the Justice Centre, David earned his LL.L. *magna cum laude* from the University of Ottawa, and studied at the London School of Economics and Political Science (LSE), completing his LL.M. in August 2017. While at the LSE, David submitted his Masters dissertation on the philosophical and legal issues surrounding freedom of expression at Canadian universities.

John Carpay was born in the Netherlands, and grew up in British Columbia. He earned his B.A. in Political Science at Laval University in Quebec City, and his LL.B. from the University of Calgary. Fluent in English, French, and Dutch, John served the Canadian Taxpayers Federation as Alberta Director from 2001 to 2005, advocating for lower taxes, less waste, and accountable government. Called to the Bar in 1999, he has been an advocate for freedom and the rule of law in constitutional cases across Canada. As the founder and president of the Justice Centre for Constitutional Freedoms, John has devoted his legal career to defending constitutional freedoms through litigation and education. He considers it a privilege to advocate for courageous and principled clients who take great risks – and make tremendous personal sacrifices – by resisting the unjust demands of intolerant government authorities. In 2010, John received the *Pyramid Award for Ideas and Public Policy* in recognition of his work in constitutional advocacy, and his success in building up and managing a non-profit organization to defend citizens' freedoms. He serves on the Board of Advisors of iJustice, an initiative of the Centre for Civil Society, India.

[42] *Trinity Western University v Nova Scotia Barristers' Society*, *supra* note 20.