



The English Speaking Catholic Council

Le conseil catholique d'expression anglaise

REASONABLE ACCOMMODATION

AND

FREEDOM OF RELIGION IN QUEBEC

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REASONABLE ACCOMMODATION AND FREEDOM OF RELIGION IN QUEBEC

The English Speaking Catholic Council (ESCC) was formed in 1981 as a focal point for coordinating community activities among English-speaking Catholics in Montreal and later across Quebec. Inspired by the contemporary Catholic understanding of the role of the laity in the modern world, the ESCC identifies, analyses and assists in the promotion of the English-speaking Catholic community's values and advocates those values in the resolution of issues affecting this community in education, health and social services, social justice and cultural domains. English-speaking Catholics are more than 385,000 strong in Quebec¹ and are an active presence in this society. The ESCC regularly represents their interests with local, provincial and federal government leaders.

I. PLURALISM, RELIGION, AND QUEBEC SOCIETY

We agree with the Commission that “the management of diversity, especially religious diversity... appears above all to pose a problem.”² The appearance of a problem seems to have been provoked in large measure by post 9/11 “alarmist media coverage.”³ Careful reflection will show that there is no problem in reality and that the alarm is not worthy of Quebecers. The ESCC therefore counsels strongly against the temptation to tamper with the current constellation of relevant rights and privileges in Quebec; it is a product of the unique evolution of Quebec society and functions well as “a fair, original model of collective life of which we are proud.”⁴

¹ This represents about 42% of all Quebecers with English as their first official language across all 17 administrative regions of Quebec, according to 2001 Canadian census data.

² Consultation document p. 3. See Janice Gross Stein et al, *Uneasy Partners: Multiculturalism and Rights in Canada*, Wilfrid Laurier University Press, 2007. John Ibbitson, a political affairs columnist for the *Globe & Mail*, writes in his chapter, “Let Sleeping Dogs Lie”: “This isn’t about churches and synagogues. This is about mosques.” (p.65) He argues on liberal democratic grounds that nothing should be done, saying that handwringers should: “Get over it.” (p.64)

³ Ibid, p. 2.

⁴ Ibid, p. 6.

The ESCC welcomes the evolution of modern Quebec society away from a society that was excessively controlled by one religious tradition. But we do not share the hopes of some for a society dominated by “radical or integral secularism.”⁵ Neither extreme is acceptable nor warranted in Quebec as a liberal democracy. We call for reasonable accommodation, generously conceived and provided. We call for “open secularism” as an aspect of accommodation pluralism⁶. These calls underpin the policy positions that we commend to the Commission.

I.1. Convergence pluralism or accommodation pluralism for Quebec?

Diversity is inescapable. The diverse ways in which we pursue human flourishing must be recognized, welcomed and accommodated if it is to perform a constructive and not a destructive role in our common life. There are two basic approaches to liberal pluralism in the face of diversity: convergence pluralism and accommodation pluralism. Quebec must choose one of these two approaches. We recommend conscious and committed acceptance of accommodation pluralism by Quebec.

Accommodation pluralism is a form of social coexistence in which: “toleration is valued as a condition of peace, and divergent ways of living are welcomed as marks of diversity in the good life.”⁷ John Gray offers this definition: “Liberalism's future lies in turning its face away from the ideal of rational consensus and looking instead to *modus vivendi*. We will come to think of human rights as convenient articles of peace, whereby individuals and communities with conflicting values and interests may consent to coexist.” John Rawls draws a similar distinction between “political liberalism” and “comprehensive liberalism.”⁸ Political liberalism rejects any attempt to legislate or impose “comprehensive liberalism” as the dominant public ethos. This form of liberalism recognizes that there are conflicting, often incommensurable, conceptions of human goods within society.

⁵ In the senses of these terms used by the Commission, *ibid*, p. 25, 43.

⁶ *Ibid*, p. 25.

⁷ John Gray, *Two Faces of Liberalism*, (New York: The New Press, 2000), p. 105. (References to lines of argument by specific authors should not be interpreted to mean agreement with the overall approach of these authors or agreement with their positions on other issues.)

⁸ John Rawls, *Political Liberalism* New York: Columbia University, 1996

This vision underlays Justice Charles Gonthier's trenchant remarks on respect for religious freedom and diversity, with which we concur: "A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct... Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. 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."⁹

The ESCC believes there must be reasonable accommodation of diverse ways of living and the diverse values they represent in Quebec's polity and society if there is to be peace, order and good government. Needless to say, debate is reasonable and predictable around the meanings of each of these pregnant concepts and the ways that they should relate in public policy.

Accommodation pluralism is not an isolationist philosophy. Individuals and communities must gather to resolve their conflicts because they live together in a common geographic space. There can be no sealed off communities because they must coexist, which is precisely the fact that accommodation pluralism was formulated to address.

Convergence pluralism seeks to impose a comprehensive vision of liberal values that would govern all aspects of public life. The imposition of comprehensive liberalism requires the suppression of rival conceptions of the good in the public sphere. In this view, "toleration is an instrument of rational consensus, and a diversity of ways of life is endured in the faith that it is destined to disappear."¹⁰ Convergence pluralism expects that in the future everybody will converge on a shared vision of core liberal values and ideals. This version of liberalism has been described as a form of "liberal fundamentalism."¹¹ Convergence pluralism can be as intolerant an ideology as any religious fundamentalism.

⁹ *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, para. 135.

¹⁰ John Gray, *supra*, p. 105

¹¹ *Id.* p. 110

Convergence liberalism is committed to a particular vision of the individual and the state. It views society as atomized into autonomous individuals shorn of particular social identities, especially religious ones, who join together on the basis of a shared commitment to liberal values and democratic action. Religious diversity is perceived to be an impediment to the project of building civic solidarity.

Convergence liberalism is doomed to fail for a number of reasons. First, it does not offer any meaningful recognition of real people embedded in diverse communities and diverse ways of living. While most individuals think of themselves from time to time as autonomous, they also understand themselves to be and often want to be recognized as socially embedded. They do not want to surrender or suppress their identities.¹²

Second, the idea that a diverse modern society like Quebec can converge on a certain set of comprehensive agreed values beyond the minimal is unrealistic and, in any event, doing so would not obviate practical conflicts about values in specific situations, especially where religion is engaged. Immigration, the erosion of cohesive national cultures, internal cultural experimentation and the phenomenon of "hybridity"¹³, or "plural identities"¹⁴ in which individuals are simultaneously members of different communities and autonomous all contribute to the degree of diversity and value pluralism that exists in Quebec.

Third, soft or hard coercion will not ultimately be effective, but instead will be provocatively reactionary. Nor is coercion consistent with traditional liberal understanding of the proper role of the state.

I.2. The need for sober reflection

In Quebec today, as in other liberal societies around the world, we are wrestling with these two concepts of liberalism. What works against accommodation in the post 9/11 era is the strong desire for the sense of security that seems to come with a commitment to common values, homogeneous communities, and the fear of violent consequences thought to result

¹² See Charles Taylor, *Multiculturalism*, (Princeton N.J.: Princeton University Press, 1994).

¹³ Gray, 13, 119.

¹⁴ Gray, 125

from social, especially religious, fragmentation. There is a nostalgic impulse to preserve those old identities that now seem to be under threat.

However, if we agree that there are many incommensurable goods that individuals and groups may rightly choose to pursue, and that there is therefore no single way of life that is the highest and best for all individuals, a prescribed orthodoxy in areas beyond what is needed for basic security and interpersonal justice is objectionable in principle and must be resisted. The ESCC believes that Quebec society needs to consciously step away from convergence pluralism and embrace accommodation pluralism.

There is a need for political humility. A liberal polity like Quebec should be guided, in the words of one political theorist, by a commitment to moral and political pluralism that: “will be parsimonious in specifying binding public principles and cautious about employing such principles to intervene in the internal affairs of civil associations. It will, rather, pursue a policy of *maximum feasible accommodation*, limited only by the core requirements of individual security and civic unity.”¹⁵

The accommodation pluralism that we are suggesting rests on a concept of limited government. There are five basic arguments in favour of limited government in this sensitive area. The first is that the political structure of the liberal state is meant to serve society and is not meant to be served by society. It is not an end in itself. It is not enough that the state merely forebear from using coercive state power to impose one group’s views on others. There must be active resistance within liberal government against the temptation to take over all aspects of life as if it were an immense tutelary power¹⁶. A critical element is “the creation of social space within which individuals and groups can freely pursue their distinctive visions of what gives meaning and worth to human existence.”¹⁷

Second, the state is not the ultimate repository of authority over the lives of individuals as individuals or as members of groups. This is a corollary of the first argument but has its own focus. It is not the state’s business, for example, to ensure that religious groups are democratic in their governance and not hierarchical, or that they adhere to societal understandings of gender equality. Nor is it the role of a liberal democratic state to create a sense of “belonging”

¹⁵ William A. Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice*, (New York, Cambridge University Press 2002), p. 20.

¹⁶ Charles Taylor, *Philosophical Arguments*, (Cambridge Mass: Harvard University Press, 1995), “Invoking Civil Society” at p. 282.

¹⁷ William A. Galston, *The Practice of Liberal Pluralism* (New York: Cambridge University Press, 2005) p.3.

or “membership” or “identity” that is so notably absent in modern life with the ascendancy of individualism. This is the proper role of social life, including families, civil associations and faith-based institutions, which have a sphere of autonomy and authority that neither derives from nor is subordinate to the state. The state may encourage a sense of mild belonging in some national community, so long as it is not antagonistic to a person’s other deeper identities, but care must be taken because this venture has produced oppression in the past in many societies.

Third, pluralism has a social dimension. Community is a key element in religion because people gather themselves together in religious groups. Religious adherents separate from others for the purpose of worship and ritual. The need for separation also exists for cultural and linguistic groups. Indeed, the Canadian constitution recognizes that certain rights can only be exercised appropriately through the recognition of distinct forms of religious, cultural, or linguistic identity.¹⁸ Some rights, particularly linguistic and religious rights, cannot be exercised in any other way.

The fourth basic argument builds on the others and holds that ours is a “culture of authenticity.”¹⁹ This ideal in a social setting leads back to the golden rule. One may not value, for example, religion or religious experience, and one may not consider that to be part of one’s particular form of self-fulfillment, but others do and one’s responsibility in a social setting is to recognize the legitimacy of another’s choice of a self-fulfilling approach to life. Nevertheless, every person is entitled to respond to the invitation of religion, positive or negative, and has reason to allow others that same opportunity for authenticity and autonomy in approaching ultimate questions. If one supports the ideal of authenticity then one can not deny it to people who find their self-fulfillment in religion.

Finally, as William Galston notes, “genuine civic unity rests on unforced consent. States that permit their citizens to live in ways that express their values are likely to enjoy wide-shared support, even gratitude. By contrast, state coercion is likely to produce dissent, resistance and withdrawal.”²⁰ The ESCC believes that accommodation pluralism has a fair prospect of success

¹⁸ Examples include minority language education rights under s. 23 of the *Charter*, denominational education rights under the *Constitution* and aboriginal rights under s. 35 of the *Constitution Act, 1982* that are group rights by nature.

¹⁹ Charles Taylor, *The Malaise of Modernity*, (Toronto: House of Anansi Press Limited, 2001), pp. 23, 72, 73.

²⁰ Galston, 2002, p.108.

in fostering social peace and harmony, but the attempt to impose convergence pluralism would provoke needless tensions and lead to ongoing religious and cultural resistance.

I.3. The permissible perpetuation of liberal democratic values by the state

The demand for political humility and responsibility does not deny that a liberal democracy must maintain appropriate conditions for its own survival, but accommodation pluralism does orient the demand more sensitively so that social space for diversity, including religious diversity, is created and maintained.

The ESCC supports respect for individual freedoms, solidarity, civic participation, democracy, equality, pluralism, French as the common public language, and the peaceful resolution of conflicts, among the basic values listed in the consultation document.²¹ There are other essential commitments, such as respect for the requirements of public order like the rule of law and the ability to enforce it, and for such elements as basic decency, being the preservation of human rights, and the provision of basic needs.²²

The jurisprudence of the Supreme Court of Canada has developed a list of “cardinal” liberal democratic values, including: respect for the inherent dignity of the human person, commitment to social justice and equality, the accommodation of a wide variety of beliefs, respect for cultural and group identity, respect for minority rights, and faith in social and liberal democratic political institutions, which enhance the participation of individuals and groups in society.²³ There is no need for particular neutrality on the part of a liberal democratic state on these values.

Accordingly, as Galston notes, “in securing the cultural conditions of its survival and perpetuation, for example, [the state] may legitimately engage in civic education, carefully restricted to the public essentials – the virtues and competences that citizens will need to fulfill diverse roles in a liberal pluralist economy, society and polity. One thing above all is clear: Because the likely result of liberal pluralist institutions and practices will be a highly diverse

²¹ Consultation document, p. 18.

²² Galston, 2005, p. 3.

²³ *R. v. Oakes* [1986] 1 S.C.R. 103 at para. 28, 64; *R. v. Labaye*, [2005] 3 S.C.R. 728; *Reference re Secession of Quebec*, [1998], 2 S.C.R. 217 at paras 48, 79, and 49.

society, the virtue of tolerance will be a core attribute of liberal pluralist citizenship."²⁴ The ESCC believes that reciprocity and mutual tolerance must be core values.²⁵

II. FREEDOM OF RELIGION: THE CORNERSTONE OF TOLERANCE AND HUMAN RIGHTS

II.1. What is religion about?

As the Supreme Court has said: "In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith."²⁶

Douglas Coupland's novel, Life after God, is a rich book for those who wonder why Generation X, the one that he called "the first generation to be raised without religion", is troubled. The protagonist writes:

"My secret is that I need God – that I am sick and can no longer make it alone. I need God to help me give, because I no longer seem to be capable of giving; to help me be kind, as I no longer seem capable of kindness; to help me love, as I seem beyond being able to love."

We owe it to people to take matters of faith seriously from their perspective. Religion and culture give religious people an identity and social structure, and give meaning and purpose to their lives. There is a transcendent human hunger for God. For us as believers, "The world is charged with the grandeur of God."²⁷ Religious faith also has a profoundly social or communal dimension. For many believers, the religious community has a sacred significance that transcends other forms of societal associations.

²⁴ Galston, 2005, p. 4. The system of education is a key component of the liberal state's efforts to perpetuate itself and a liberal democratic way of life. We return to this issue below.

²⁵ We do not interpret "tolerance" as "haughty" or patronizing, as the Commission views it in the consultation document on p.8.

²⁶ *Syndicat Northcrest v. Amselem* [2004] 2 S.C.R. 551 in para 39

²⁷ Gerard Manley Hopkins, "God's Grandeur"

Until recently freedom of religion was universally hailed as a cornerstone of the human rights tradition. John Locke's *Second Letter Concerning Toleration* places religious freedom at the very foundation of the liberal argument for toleration. The Canadian Charter of Human Rights and Freedoms also gives religious freedom this place of honour in its list of basic human rights.²⁸ Freedom of religion in Quebec is protected by the Quebec Charter of Human Rights and Freedoms,²⁹ which describes freedom of religion as a "fundamental freedom." American jurisprudence affirms religious liberty as "the first freedom."

II.2. The new detractors of religion and religious freedom

However, many who have not chosen to pursue a religious life are unwilling or unable to understand how such a life can be valuable for anyone. Accordingly, they see no harm in excluding room for religious expression, and are only moved to consider the religious when it threatens to upset the quiet of public life.

In addition, a new and troubling ideology has been surfacing in recent years. An aggressive comprehensive liberalism despises religion as a "toxic" source of conflict, violence, irrationalism, bigotry, and social fragmentation. Severe denunciations of religion and religious belief now have considerable appeal in some sectors of society.³⁰

This brand of secular liberalism claims that religious freedom poses a serious stumbling block to the advancement of basic human rights and equality. In this view, religious freedom creates protected havens for religious prejudice and discrimination. Accordingly, religious freedom must be deflated and demoted so that it can be trumped by more fundamental rights claims. This ideological attack defames religion and maligns positive social contributions. It challenges the historic status of religious freedom as one of the foundational human rights.

²⁸ Canadian Charter of Rights and Freedoms, s. 2(a), s. 15.

²⁹ Quebec Charter of Human Rights and Freedoms, R.S.Q. c.C.12, s. 3, 10, 41.

³⁰ See Christopher Hitchens, *God is Not Great: How Religion Poisons Everything* (Twelve Books, 2007) Christopher Hitchens has described religion as a "plague" and the sacred scriptures as "rats" carrying vermin. Another version of this stigmatizing metaphor was employed by one of the most notorious anti-Semitic Nazi propaganda films. (<http://www.theatlantic.com/doc/200707u/christopher-hitchens>)

II. 3. Why protect religious freedom?

Why is freedom of religion a free-standing right and not simply understood as an amalgam of freedom of conscience, expression and association? The answer is both principled and pragmatic.

The first has to do with the nature of human dignity and the role of the conscience. As Vatican II noted: “[T]he right to religious freedom has its foundation in the very dignity of the human person as this dignity is known through the revealed Word of God and by reason itself. [which] is to be recognized in the constitutional law whereby society is governed. [and] Thus it is to become a civil right. It is in accordance with their dignity as persons – that is, beings endowed with reason and free will and therefore privileged to bear personal responsibility – that all men should be at once impelled by nature and also bound by a moral obligation to seek the truth, especially religious truth.”³¹ “The truth cannot impose itself except by virtue of its own truth, as it makes its entrance into the mind at once quietly and with power. Religious freedom, in turn, which men demand as necessary to fulfill their duty to worship God, has to do with immunity from coercion in civil society.”³²

Second, societies are often tempted to repress and suppress minority religious traditions. Religious freedom liberates us from the long history of the persecution of minority religious groups. In Canadian society, all religious traditions are now minorities, and all need the protection afforded by this fundamental right. Newer religious minorities that are visibly different are particularly vulnerable. Even with the strong affirmation of religious freedom in Canada, they are still vulnerable to systematic patterns of discrimination.³³ In recent years, spokespersons from these minority traditions have become Canada’s most ardent defenders of religious freedom.

Third, religions are unique expressions of “deep diversity” within society. They offer alternative visions, as well as experiences, of human flourishing. Religious freedom strives to protect these unique and, at times, fragile expressions of the deep diversity in human life.

³¹ Declaration on Religious Faith (*Dignitatis Humanae Personae* – 1965) c. 2

³² Ibid. c.1.

³³ For a discussion of minority traditions in Canada see: Paul Bramadat and David Seljak, *Religion and Ethnicity in Canada*, Toronto: Pearson Longman, 2005.

Fourth, religious freedom protects the prophetic and provocative voice of religion. Religions advance beliefs that tend to relativize any absolute claims by political or secular views. The “I obey God, not man” dimension of religious freedom underscores the transcendent nature of human freedom in the face of any human claims to sovereign authority. In many societies, faith-based movements have been at the centre of resistance to authoritarian regimes. The protection of religious freedom ensures respect for this religious rejection of authoritarian temporal claims.

Fifth, religious freedom protects religions as longstanding forms of communal life with diverse, but recognizable, forms of public belief and practice. Religious freedom protects the autonomy and independence of religious institutions from state intervention. It resists attempts by the state to enforce its legal and political norms, however laudable in their own sphere, on religious communities.

It is this communal dimension that seems to need protection the most, because it is provocative. Both the Quebec and the Canadian Charters reflect Article 18 of the Universal Declaration of Human Rights (1948) but only imperfectly, since Article 18 goes on to reflect the essential communal dimension of religion:

Article 18 – Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief in teaching, practice, worship and observance.

Freedom of religion in the Quebec and Canadian context is seen as almost exclusively individualistic. This misunderstands substantially the nature of religious belief, which has both an individual and a communal dimension.³⁴

Sixth, religious freedom defends the civic rights of religious believers to participate and contribute to democratic debate and decision-making. Members of faith groups routinely advocate their social and moral concerns publicly, particularly their disapproval of what they deem to be unjust trends or practices, such as abortion, euthanasia, the erosion of marriage and the family, social injustice, conspicuous consumption, environmental degradation, the

³⁴ Benjamin L. Berger, “Law’s Religion: Rendering Culture,” (2007), 45 Osgoode Hall L. J. 277 at 283.

failure to help the poor at home and abroad. Religious believers and associations, like other groups in society, do not hesitate to urge the adoption of government policies that are consistent with their principles when this seems possible. This would seem to be a simple example of democracy, yet such efforts are objectionable to convergence liberals on a substantive basis, because the ethical commitments of religious believers often seem to offend a particular vision of liberal values. Religious freedom resists protects the right of religious believers to be participants in democratic debate.

So while religion may share certain characteristics with other fundamental freedoms like association and expression, the constellation of these features, including its transcendent nature, is unique. History shows that failing to recognize freedom of religion leads to civil strife, and as Santayana warned: “Those who cannot learn from history are condemned to repeat it.” Minority religious groups are usually perceived to be publicly irritating and troublesome by some sectors in society. Accordingly, these communities need and warrant the permanent protection offered by freedom of religion.

II. 4. Freedom of religion in the courts

The nature of freedom of religion has been extensively described by the Supreme Court of Canada in a number of decisions³⁵: “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 belief by worship and practice or by teaching and dissemination. But the concept means more than that.”

In the Court's view there is both a negative aspect to freedom of religion, i.e. freedom from hindrance or reprisal, and a positive aspect, i.e. the right to manifest belief. These two aspects are noted in the subsequent discussion: “Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain

³⁵ *Big M Drug Mart Ltd.* (1985) 18 D.L.R. (4th) 321 (S.C.C.). at p. 353, 354, 361,

of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices.”

The Court accepted: “the centrality of individual conscience and the inappropriateness of governmental intervention to compel or to constrain its manifestation,” and went on to relate freedom of religion both to other rights and to the political sphere: “Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided, *inter alia*, only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion.”³⁶

The *Amselem* case was about the construction of temporary huts which were set up on balconies in apartment buildings in Montreal in order to comply with Jewish religious practice. The Court held that, so long as the owners constructed the huts so as not to compromise safety or security, and so long as the huts conformed as much as possible with the general aesthetics of the property, they were to be permitted as a reasonable exercise of freedom of religion under s. 9.1 of the Quebec Charter of Human Rights and Freedoms, which the Court held was similar to the Canadian Charter.

The Court identified: “respect for and tolerance of the rights and practices of religious minorities is one of the hallmarks of an enlightened democracy. But respect for religious minorities is not a stand-alone absolute right; like other rights, freedom of religion exists in a

³⁶ The ESCC accepts without reservation Article 9.1 of the *Quebec Charter* which provides that: “9.1 In exercising his fundamental freedoms and rights, a person shall maintain proper regard for democratic values, public order and the general well-being of the citizens of Quebec.” The concept of limitations is also contained in s.1 of the *Canadian Charter*. Article 9.1 reflects concepts in Article 29 of the Universal Declaration (1948), Article 4 of the International Covenant on Economic, Social and Culture Rights (1976).

matrix of other correspondingly important rights that attach to individuals. Respect for minority rights must also coexist alongside societal values that are central to the make-up and functioning of a free and democratic society.”³⁷

The Court concluded: “In a multi-ethnic and multicultural country such as ours, which accentuates and advertises its modern record of respecting cultural diversity and human rights and of promoting tolerance of religious and ethnic minorities - and is in many ways an example thereof for other societies -, the argument of the respondent that nominal, minimally intruded-upon aesthetic interests should outweigh the exercise of the appellants' religious freedom is unacceptable. Indeed, mutual tolerance is one of the cornerstones of all democratic societies. Living in a community that attempts to maximize human rights invariably requires openness to and recognition of the rights of others. In this regard, I must point out, with respect, that labelling an individual's steadfast adherence to his or her religious beliefs' "intransigence," as Morin J.A. asserted, does not further an enlightened resolution of the dispute before us.”³⁸

II.5. The limits of religious freedom

No right is absolute, including freedom of religion. All rights are subject to limits. Many of the cases illustrate the need to balance rights in considering limits. The ESCC accepts without reservation Article 9.1 of the Quebec Charter which provides that: “In exercising his fundamental freedoms and rights, a person shall maintain proper regard for democratic values, public order and the general well-being of the citizens of Quebec.” The concept of limitations is also contained in s.1 of the Canadian Charter³⁹.

Religious freedom and freedom of association do not provide protection for any religious or civil society association that employs coercion, violence or the threat of violence in the promotion of their interests, goals or mission. In fact, religious freedom and freedom of association require the defence of public order and the vigorous prosecution of criminal organizations that threaten innocent life whether they carry a religious or non-religious label.

³⁷ *Syndicat Northcrest v. Amselem, supra*, para. 1.

³⁸ *Syndicat Northcrest v. Amselem, supra*, para. 87.

³⁹ Article 9.1 reflects concepts in Article 29 of the Universal Declaration (1948), Article 4 of the International Covenant on Economic, Social and Culture Rights (1976).

But great care must be taken before the decision is made to criminalize or regulate religious behaviour. It must meet certain standards applicable to such law. In *Labaye*⁴⁰ the Supreme Court laid out some rules concerning the criminalization of certain conduct which are adaptable in this context: “The first is that by its nature the conduct at issue causes harm or presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and thus formally endorsed through the Constitution or similar fundamental laws by (a) confronting members of the public with conduct that significantly interferes with their autonomy and liberty, (b) predisposing others to anti-social behaviour, or (c) physically or psychologically harming persons involved in the conduct. The categories of harm capable of satisfying the first branch of the inquiry are not closed. The second requirement is that the harm or risk of harm is of a degree that is incompatible with the proper functioning of society. This two-branch test must be applied objectively and on the basis of evidence.”

There is wisdom in the Supreme Court of Canada’s repeated assertion that there is no hierarchy of rights in the *Canadian Charter of Rights and Freedoms*. In respect of competing rights, a critical element must always be sensitivity to context. Supreme Court Justice Frank Iacobucci has noted that “Context determines where the line should be drawn between the competing Charter rights in a given case,” since “Rights reconciliation is highly contextually sensitive.”⁴¹ The Court has noted: “Considered in the abstract, these principles of fundamental justice may seem to conflict. The conflict is resolved by considering conflicting rights in the factual context of each particular case.”⁴² “The ultimate protection of any Charter right must be measured in relation to other rights and with a view to the underlying contexts in which the apparent conflict arises.”⁴³

⁴⁰ *R. v. Labaye*, [2005] 3 S.C.R. 728

⁴¹ F. Iacobucci, “Reconciling Rights: The Supreme Court of Canada’s Approach to Competing Charter Rights”, (2003), 20 S.C.L.R. (2d) 137 at page 159. In support he drew on the Supreme Court’s decision in *R. v. Mills* [1999] 3 S.C.R. 668, at para. 63. and *Amselem supra*, para. 62.

⁴² *R. v. Mills* [1999] 3 S.C.R. 668, at para. 63; emphasis by Iacobucci, J..

⁴³ *Syndicat Northcrest v. Amselem* [2004] 2 S.C.R. 551 at para 62. This was a case about accommodating religious practices.

II. 6. Against the subordination of religious freedom

The ESCC opposes efforts to elevate some individual freedoms above others. In particular there are those who argue that gender equality must trump religious freedom.⁴⁴ Others argue that ordinary legislation should privilege religious groups that accept politically correct norms and penalize those that do not.⁴⁵ These are examples of the sort of coercion that the Supreme Court outlawed in *Big M*.

It is quite plain that freedom of religion has a place in the Constitution and cannot be subordinated in the manner suggested, nor should it be. The ESCC opposes any effort via amendments to the Quebec Charter or ordinary legislations to subordinate freedom of religion, and notes that such efforts would be unconstitutional.

II.6.A. Against “radical” or “integral secularism”

Some imagine that they have heard the “melancholy, long, withdrawing roar” of the “Sea of Faith”⁴⁶ and some would like to hasten it⁴⁷. Others have come to see that the effort to denude the public sphere of religion by imposing secularistic standards governing “public reason” as oppressive and unenforceable.⁴⁸

As noted above, the ESCC calls for “open secularism” as an aspect of accommodation pluralism⁴⁹. We also favour “interculturalism”⁵⁰ as a legitimate public policy goal over

⁴⁴ We refer to the submission of *le Conseil du statut de la femme*. It is important to note that such an amendment to the Quebec Charter would not bring it into line with s. 28 of the Canadian Charter. This is because the latter only applies to the exercise of government power, while the former also applies to civil life. So such an amendment has the potential to be extremely intrusive into the internal affairs of religious organizations.

⁴⁵ This is the thrust of several authors in Janice Gross Stein et al, *Uneasy Partners: Multiculturalism and Rights in Canada*, Wilfrid Laurier University Press, 2007

⁴⁶ Matthew Arnold, “Dover Beach”.

⁴⁷ The concept is redolent of the concept of J-J. Rousseau, in “The Social Contract” Book 1, c. 6: “...whoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing less than that he will be forced to be free;...” in *The Social Contract and Discourses* (London: J.M. Dent & Sons Ltd. 1973) at 177

⁴⁸ Jürgen Habermas, “Religion in the Public Sphere” *Between Naturalism and Religion* (Cambridge: Polity Press, 2006)

⁴⁹ Consultation document, p. 25.

⁵⁰ Consultation document, p. 21.

“assimilation,” which is both wrong in principle and unworkable. Radical or integral secularism is simply a variant of convergence pluralism, and is completely inconsistent with interculturalism.

As noted above, convergence pluralism is doomed to fail. The effect of adopting radical or integral secularism would be to stigmatize members of religious communities and ostracize them from the institutions that are part of the machinery of government or from the entire public sphere. This is not a neutral stance but is profoundly anti-religious. Those who are uncomfortable with it will exclude themselves from participation in public affairs. This runs the risk of fragmenting society. If it is the public policy goal to facilitate interculturalism, this strategy would surely be counter-productive.

Nor will it be successful, since people will say what they think in terms that are comfortable for them privately and in the public square. Both religious freedom and free expression demand that they be permitted to do so. They will use religious imagery and language. Sometimes it will be persuasive. Other times it will not. They will learn in the marketplace of ideas what will work. So there is no need or justification for more coercive measures.⁵¹

II.6.B. The “separation of church and state”

The consultation document uses the metaphor of the “the separation of church and state.” This metaphor can be misleading because in reality there cannot be a true separation between the modern state and religious organizations⁵², which, as corporate bodies, are engaged in civil life and do many things such as buying and selling property, hiring employees, and routinely utilize public services. The real question, which should be addressed directly and not by means of a metaphor, is how and to what extent the state and religious organizations should be permitted to affect each other.⁵³ This is the Commission’s task. The ESCC agrees,

⁵¹ Will Kymlicka advocates a more subtle approach arguing that “the gravitational pull of liberal democratic institutions may be a more effective tool in this regard than aggressive intervention into every nook and cranny of civil society.” See “Disentangling the Debate” in Stein, *supra* p.137 at p. 153-4.

⁵² In *Big M*, the Supreme Court declined to adopt American law concerning the First Amendment to the Constitution of the United States, including the “separation of church and state” metaphor.

⁵³ Christopher L. Eisgruber and Lawrence G. Sager, Religious Freedom and the Constitution (Harvard University Press – 2007), p. 6.

however, with a couple of core ideas in the metaphor that are commonly accepted: the state ought not to play favourites among the denominations and the state should not interfere in the internal affairs of religious organizations.

II.6.C. Demoting or trumping religious freedom?

The ESCC is particularly troubled, however, by the third proposal concerning secularism, in which the state would be given a positive duty “to protect citizens from the oppression that one religious or secular group may exercise over its members or other citizens just as it would do to suppress different forms of oppression exercised for whatever reason by some citizens over other citizens.”⁵⁴ This is a highly ambiguous proposal because it does not define the term “oppression.”⁵⁵ The ESCC believes that unless the conduct meets the test of ‘harm’ referred to above, it should not be regulated or criminalized.

Take, for example, the proposed elevation of gender equality as a trump right. The ESCC agrees without reservation that religious doctrine should not trump criminal laws that outlaw physical harm, such as female genital mutilation. We agree that family law norms around support for spouses and children should prevail despite any religious laws to the contrary. We agree that the right of exit should be legally protected. These are all harm-based concepts.

But to go further and direct religious organizations to change gender roles in leadership and worship would be illegitimate and outside of the proper jurisdiction of a liberal state. While there is force in the idea that the right of exit as the only remedy may be too hard on women especially⁵⁶, for the civil law to set rules for community membership would go too far.

Beneath the so-called conflict between gender equality and religious freedom is, in large part, an unresolved conflict over divergent conceptions of gender equality. Robust affirmations of the fundamental equality of men and women can be found in the official statements of most of the major world religions. However, many religious traditions also wed this affirmation of

⁵⁴ Consultation document, p. 26.

⁵⁵ The Oxford English Dictionary includes “bodily or mental uneasiness or distress” as forms of oppression.

⁵⁶ Will Kymlicka, Politics in the Vernacular, (2001), p.9, p22-23; and see Ayelet Shachar, Multicultural Jurisdictions, (2001); See Janice Gross Stein et al, Uneasy Partners: Multiculturalism and Rights in Canada, Wilfrid Laurier University Press, 2007.

gender equality to an affirmation of the fundamental significance of sexual difference in the social ecology of human life⁵⁷. This puts them at odds with proponents of gender equality who reject as discriminatory all attempts to recognize or affirm the significance of sexual difference as a core feature of human life. Proposals to trump religious freedom by gender equality may be an effort to impose a particular conception of gender equality on society as a whole and to suppress alternative accounts. Religious freedom provides protection against various forms of ideological coercion.

III. RELIGION AND ACCOMMODATION IN EDUCATION, PUBLIC INSTITUTIONS, AND THE WORKPLACE

There are a number of important domains of human life, such as where religious communities and the state overlap. Religious education, the free exercise of religion, and the conflict between religious obligations and the workplace are some of the critical areas of overlap. We do have a few specific recommendations in the areas of religious education, the free exercise of religion, and conflicts over religious obligations in the workplace.

III. 1. Religion and Education

Since religion and culture give believers an identity and give meaning and purpose to their lives, it is no surprise that they want to pass the gift of faith on to their children. These parents consider it crucial for education to have a religious dimension, and they wish to collaborate with the schools to add an intellectual foundation to the faith the children experience at home and in their religious communities. Immigrant families especially fear religious extinction in the face of an overwhelmingly secular society.

⁵⁷ While Christianity can claim some credit for embedding the idea of equality in the consciousness of Western society, its meaning often involved complementarity. This concept of equality has been rejected by certain sectors of Western society, but not in most religious traditions.

A long tradition recognizes the role of parents as the first teachers of their children.⁵⁸ Article 26(3) of the U.N. *Universal Declaration of Human Rights* (1948), for example, provides that: “Parents have a prior right to choose the kind of education that shall be given to their children.” There is really no dispute about the existence of this right.⁵⁹ The U.N International Covenant on Economic, Social and Cultural Rights (1976) affirms the right of parents to “require” that “to ensure that the religious and moral education of their children is in conformity with their own convictions.” (Art.13.3)

For their part, Canadian courts have recognized the central role of the parents. In the *Richard B.* decision the Supreme Court of Canada noted: “That constitutional freedom [of religion] includes the right to educate and rear their child in tenets of their faith. In effect, until the child reaches an age where she can make an independent decision regarding her own religious beliefs, parents may decide on her religion for her and raise her in accordance with that religion”.⁶⁰

⁵⁸ Article 26 of the U.N. *Universal Declaration of Human Rights* (1948) provides:

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children. (emphasis added)

In *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, Justice Gonthier, in dissent, discussed this tradition under the title “The Paramount Role of Parents in the Education of Children, the Best Interests of Children and the Charter” at paras. 102-118.

⁵⁹ And see also Article 2 and Article 26 relating to the rights of parents in terms of education. The U.N. Declaration of the Rights of the Child (1959) in principle 7. para 2 provides: “The best interests of the child shall be the guiding principle of those responsible for his education and guidance; the responsibility lies in the first place with his parents.” Article 18 para.4 of the International Covenant on Civil and Political Rights (1966) requires States Parties to “have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of the children in conformity with their own convictions.” And see also the Convention on the Rights of the Child (1989) particularly Article 14.

⁶⁰ *Richard B.*, [1995] 1 S.C.R. 315 at pp. 434-5.

In *Jones v. The Queen* the home-schooling parent was the pastor of a fundamentalist church and argued that any inspection by the school authority to determine that the quality of education he provided was sufficient breached his freedom of religion. While the Supreme Court disagreed, it was held that: “Those who administer the province's educational requirements may not do so in a manner that unreasonably infringes on the right of the parents to teach their children in accordance with their religious convictions. The interference must be demonstrably justified”.⁶¹

The original version of s. 41 of the Quebec Charter of Human Rights and Freedoms provided a robust affirmation of parental rights in moral and religious education of their children:

41. Parents or the persons acting in their stead have a right to require that, in the public educational establishments, their children receive a religious or moral education in conformity with their convictions, within the framework of the curricula provided for by law.

However, without public debate, this was replaced in 2005 by the following formulation⁶²:

41. Parents or the persons acting in their stead have a right to give their children a religious and moral education in keeping with their convictions and with proper regard for their children's rights and interests.

The ESCC recommends a stronger affirmation of the Charter rights of Quebec parents to “ensure” a moral and religious education for their children in conformity with their convictions. Article 41 should conform more closely to affirmations of parental rights found in article 13.3 of the United Nations International Covenant on Economic, Social and Cultural Rights and article 18.4 of the International Covenant on Civil and Political Rights. It also wishes to express its consternation about the absence of serious public debate concerning the amendment to a fundamental Charter document.

⁶¹ *Jones v. The Queen* [1986] 2 S.C.R. 284 at 298.

⁶² Section 13 of Bill 95, An Act to amend various legislative provisions of a confessional nature in the education field, assented to June 17, 2005

The ESCC opposes the imposition of a mandatory program of religious instruction on private confessional schools. The existence of faith-based schools that still have a distinctive confessional character and mission should pose a very particular concern for the implementation of any program of religious instruction. We argue for an asymmetrical approach. The government should not impose this program on faith-based or confessional schools but collaborate with these schools to devise programs of instruction connected to their traditions and consistent with basic objectives of the ERC program. This asymmetrical approach would more appropriate given the distinctive nature of confessional institutions and consistent with the Charter recognition of a fundamental right to freedom of religion. We are confident that established confessional schools can assist in the design of programs of moral and religious instruction that fully meet the broad goals of the program in a manner consistent with their missions.

The ESCC also affirms the contributions of private religious schools and their right to continue to receive public funding.

The most recent ESCC public policy statements on education can be found in its 2005 report on the proposed implementation of a common ethics and religious culture program.

III.2. Religious freedom and public institutions

The ESCC affirms the right to the free exercise of religion in public and private. Religious freedom protects the right to speak and act in religious ways, including the right to wear religious dress and to pray in public. Christian cultures tend to find public expressions of religion, such as religious dress or public prayer, to be inappropriate in the lay or secular spheres of life. This reflects a long-standing tradition that goes back to bible admonitions against praying on street corners or making public displays of religious commitment. Lay Christians typically do not wear their religion on their sleeves. However, Western cultures are now confronted with religious traditions that have a very different understanding of the presence and visibility of religion in the secular sphere. Religious freedom invites us to expand our appreciation of religious diversity and welcome new forms of religious expression.

The ESCC also recognizes the validity of various expressions of the religious heritage of Quebec society in its public institutions. This could include displays of crucifixes and Christmas decorations in public institutions.

III.3. Conflicts over religious obligations in the workplace

In response to ongoing conflicts over religious holidays and the workplace, the ESCC proposes that the government establish a specific number of paid “personal days” each year which an employee could use for observing the religious holidays of their tradition, if he so desired, thus reasonably accommodating new immigrants (other than Christian or Jewish), without wreaking havoc in the operations of commercial and public institutions.

IV. CONCLUSION: RELIGION, SOCIAL CAPITAL AND PUBLIC POLICY

Religion remains an important feature of Quebec society. A large majority of Quebecers continue to identify with a specific religious affiliation. Churches, synagogues, mosques, and temples continue to be major features of the landscape of Quebec civil society.

Faith-based associations are also involved in almost all sectors of civil society: education, health care, social welfare, social justice, poverty, care of the elderly, youth work, hospices, chaplaincy work (military, hospital, university, etc.), human rights activism, immigration and refugee issues, environmental concerns, and international development. The interaction of the state with diverse religious associations and institutions in various sectors of Quebec society plays itself out in a wide array of public policy areas.

In recent years public discourse on religion in Quebec and beyond has tended to accent the problematic features of religion. Negative media portrayals typically characterize religion as a source of irrational social conflict, prejudice, and discriminatory practices. However, these stereotypes profoundly misrepresent the reality of religious pluralism in Quebec and its vital contributions to social life.

A large and growing body of social science research concludes that religious affiliation and involvement are correlated with positive outcomes in a number of critical indicators of individual and social well-being.⁶³ These include:

- higher levels of educational performance and achievement
- greater civic involvement
- reduced rates of delinquency
- reduced rates of drug and alcohol abuse
- reduced rates of teen pregnancy
- reduced rates of recidivism
- increased marital stability
- reduced marital conflict and violence
- better marital communication
- higher levels of maternal and paternal investment in and involvement with their children.

Religious affiliation and involvement appears to be particularly important for healthy child and adolescent development. Studies of the impact of religion in mental health research also indicate that religious affiliation and involvement is correlated with higher levels of psychological happiness, well-being, self-esteem, and lower levels of stress. Religious involvement is also correlated with reduced risk of depression and suicide. Religious involvement is also positively correlated with increased longevity.

Another body of research has underscored the importance of religions as critical players in the development of vibrant civil society associations and faith-based services that provide critical social support for numerous sectors of society. In particular, religious communities often provide crucial support for those sectors of society that are at risk due to marginalization, poverty, age (the elderly), or ethnicity (especially new immigrant communities). From the beginning until today, religious communities have been on the frontlines in welcoming and

⁶³ The literature is too vast to cite. A review of the literature is provided by Patrick Fagan, “Why Religion Matters Even More: The Impact of Religious Practice on Social Stability” (Background paper # 1992, Dec. 2006). Web site: <http://www.heritage.org/Research/Religion/bg1992.cfm>. Sociologist Reginald Bibby, author of numerous books and articles on religion in Canada, explores the data on religion and social capital. For a list of publications see: <http://www.reginaldbibby.com/reginaldwbibby.html>

integrating new immigrant communities and helping them adapt to the challenges of life in Quebec.

The detractors of religion propose the marginalization and exclusion of religion from the dynamism of Quebec's public life. While evidence-based utilitarian arguments are not critical to the defence of religious freedom as a fundamental human right, they, nevertheless, indicate that the detractors of religion often ignore or seriously misrepresent the positive social capital that religion creates for Quebec society.

The ESCC believes that a constructive approach to Quebec's future requires a more careful and well-researched assessment of the substantive contributions of Quebec's diverse religious communities to social well-being. It will also require more creative and innovative forms of collaboration between the state and this vital sector of civil society.

The English Speaking Catholic Council
Montreal, October 18, 2007

