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## **Freedom of conscience and religion. (FEATURE on religion and the law)**

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"In our country we have those three unspeakably precious things: freedom of speech, freedom of conscience and the prudence never to practice either of them."

--American novelist Mark Twain

### **Introduction**

There are many quips about conscience, such as "a clear conscience is usually the sign of a bad memory," or the French proverb, "there is no pillow so soft as a clear conscience." Harper Lee (1926-) said, "the one thing that doesn't abide by majority rule is a person's conscience." Many people would agree with the aphorism "a conscience is what hurts when all your other parts feel so good."

While international law and the Canadian Charter of Rights and Freedoms guarantee the freedom of conscience, it remains a little known and largely undeveloped freedom. It can be said that there are more quips about conscience than there are legal principles. This article considers the constitutional "freedom of conscience" and its relationship with religion.

### **International Freedoms of Conscience and Religion**

International Covenant on Civil and Political Rights, Part III, Article 18 reads:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

The European Convention, Section 1, Article 9 incorporates virtually identical wording as the International Covenant.

### Canadian Charter of Rights and Freedoms

The Canadian Bill of Rights Act of 1960 did not stipulate a freedom of conscience. The 1971 Canadian Constitutional Charter, known as "The Victoria Charter," first introduced "conscience and religion" as a fundamental freedom. The Victoria Charter served as a template for these freedoms in the Charter a decade later.

Today, the Charter, under the heading of "Fundamental Freedoms," in section 2 guarantees to "everyone", the following fundamental freedom: "(a) freedom of conscience and religion." The other freedoms in this section are: freedom of thought, belief, opinion and expression, freedom of the press, freedom of peaceful assembly and freedom of association. The constitutional right to a free conscience is not found in the US Constitution.

### Conscience and Religion Compared

Black's Law Dictionary defines "liberty of conscience" as the liberty for each individual to decide for oneself what is personally religious. Conscience is the moral sense of right or wrong, especially a moral sense applied to one's own judgment and actions. In 1985, the Manitoba Court of Appeal in *Mackay v. Manitoba* defined "conscience" as "self-judgment on the moral quality of one's conduct or the lack of it ..."

The "freedom of religion" is the right to adhere to any religion or none, to practice or abstain from practicing religious beliefs, and to be free from governmental interference with or promotion of religion.

Conscience and religion are clearly individual-specific constructs. One's conscience might be burdened about matters that are not purely religious (e.g., whistle-blowing), and one's religion often transcends conscience. Nevertheless, conscience and religion are both centred on an individual sense of morality. By their interlocking personal, enduring, and life-impacting natures, conscience and religion are also inextricably related to, or overlap, each other. For example, the moral rule that requires justice and honest dealings between people may be both conscience and religion.

A "conscientious objector" for moral or religious reasons opposes participation in war. That person may be exempt from military conscription but may still have to serve in some civilian capacity that is also in the nation's interest.

### Judicial Interpretations of Freedom of Conscience and Religion

The Supreme Court of Canada, in the 1985 case of *Big M Drug Mart*, said "... 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 beliefs by worship and practice or by teaching and dissemination. But

the concept means more than 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."

In the 1988 R. v. Morgentaler case, Justice Bertha Wilson of the Supreme Court of Canada concluded that section 2(a) of the Charter should be "... broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality ..." Justice Wilson had previously written in the case of R. v. Big M Drug Mart (SCC 1985), "whatever else freedom of conscience and religion [in s. 2(a) of the Charter] may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose ..."

## Conclusion

Conscience and religion are as old as human history itself. The international and constitutional protections of them are also well established. However, the question remains whether, and to what degree, these are independent fundamental freedoms. There is little judicial development of the Charter freedom of conscience, likely due to a paucity of instances in Canada in which it has been specifically asserted against government action to date. One expects that it is a freedom independent of religion. Cases dealing with government-permitted retaliation against whistle-blowers may provide the type of analysis to eventually determine the full reach and content of the freedom of conscience in Canada.

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