

Religious Freedom in North America

By Eric Rassbach and Adèle Keim

The USA

The federal constitution has several provisions protecting religion, in particular the “Free Exercise Clause” which protects the free exercise of religion. Federal statutory law also contains many religious freedom protections, including the Religious Freedom Restoration Act of 1993 (“RFRA”), and the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”). Both statutes prohibit government imposition of substantial burdens on religious exercise absent compelling justification.

In June 2014, the United States Supreme Court decided *Burwell v. Hobby Lobby Stores, Inc.*, a case involving application of RFRA to a federal regulation issued by the Department of Health and Human Services that requires many employers to pay for health insurance packages that include contraceptives. Hobby Lobby’s owners, the Green family, are Protestants who object to contraceptives that can cause early abortions, but not to contraceptives generally. The Supreme Court held in a 5-4 vote that the Greens could exclude the abortifacient contraceptives without government penalty. It is anticipated that the Supreme Court may hear a similar case concerning non-profit institutions and the federal contraceptive mandate sometime in early 2015. The Court has already granted interim relief both to the religious order Little Sisters of the Poor, and to Protestant college Wheaton College.

In July 2014, President Obama issued an executive order prohibiting federal contractors from discriminating on the basis of sexual orientation or gender identity. Despite the request of many religious organisations, the order included no exception for religious practice. Therefore there may be litigation over whether religious institutions that contract with the federal government—for instance to provide social services to the poor or homeless—are engaging in prohibited sexual orientation discrimination if they require their employees to adhere to a religious standard of personal conduct.

In October 2014, the United States Supreme Court will hear argument in *Holt v. Hobbs*, a RLUIPA case involving a Muslim prisoner in Arkansas who wishes to grow a half-inch beard in accordance with his faith. This religious practice would be permitted in almost all federal and state prison systems, but Arkansas prohibits it. The Supreme Court will decide whether the RLUIPA statute protects the prisoner plaintiff’s religious activity despite the government’s stated interests in combating contraband and making prisoners easier to identify.

State constitutions and statutes also protect religious freedom. Many of these protections are now at issue in lawsuits that pit anti-discrimination norms against religious liberty. For example, in the case of *Elane Photography v. Willock*, a Christian photographer refused based on her convictions to photograph a same-sex wedding and was later fined for violating anti-discrimination law. The New Mexico Supreme Court ruled against the photographer, with one Justice stating that sacrificing religious freedom was part of the “price” that the photographer had to pay for being part of American society. The Court ruled this way despite the existence of the New Mexico Religious Freedom Restoration Act. The United States Supreme Court declined to review the case, but it is clear that religious freedom on the one hand and anti-discrimination norms (particularly as they apply to LGBT individuals) are increasingly coming into conflict and that the high court will have to address the conflict in the near future.

Canada

“Freedom of conscience and religion” is protected by the Charter of Rights and Freedoms. Many provinces provide partial state funding for religious primary and secondary schools. In cases such as *Daly v. Attorney General of Ontario* (1999) and *Trinity Western University v. British Columbia College of Teachers* (2001), Canadian courts have protected the right of religious schools—including those funded by the state—to hire teachers whose beliefs and conduct reflect the schools’ religious commitments.

Recently, however, this freedom has come under fire. In 2008, the government of Quebec sought to implement a province-wide religion curriculum in all public and private schools. A century-old private Jesuit high school in Montreal challenged the government curriculum on the basis that it required the teaching of all religions, including Catholicism, from a “neutral” perspective. The Supreme Court heard the case in March 2014 and has not yet issued a decision.

In the 2006 case *Multani v. Commission scolaire Marguerite-Bourgeoys*, the Supreme Court of Canada ruled that a Sikh student could wear a kirpan—a religiously-required sheathed knife—in Quebec public school. Partly in response to this decision, the government of Quebec proposed a ban on the wearing of “ostentatious” religious symbols by state employees, including doctors and daycare workers. The proposed ban was withdrawn in 2014 after the party that proposed it lost the next election, but the issue of public expression of religious identity remains controversial in some areas, particularly in Quebec.

Finally, the evangelical Protestant college Trinity Western University, which limits its faculty to those who share its faith, has faced a public campaign opposing its attempt to open a law school. Opponents of the law school argue that Trinity Western’s religious belief in the traditional definition of marriage is discriminatory and disqualifies it from offering legal education. The outcome of this dispute will affect all religious institutions that demonstrate a preference for co-religionists in the selection of leadership or faculty.

Freedom of conscience has recently come under attack in other areas of Canadian life as well. Doctors in Ontario and Alberta who have refused to prescribe contraceptives on religious grounds have been the subject of complaints, and the Ontario College of Physicians and Surgeons is currently reconsidering its guidance to physicians who have moral or religious beliefs that may affect the provision of medical services.

Note

This analysis forms part of Aid to the Church in Need’s *Religious Freedom in the World Report – 2014*. To view the report in full please visit: www.religion-freedom-report.org