

# Religious Freedom and Sexual Orientation: Equality Jurisprudence and Intersecting Identities

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*La relation entre la liberté de religion et du droit à l'égalité fondé sur l'orientation sexuelle au Canada (et ailleurs) est souvent marquée par la tension et le conflit. Durant les trois décennies depuis l'enchâssement de la Charte canadienne des droits et libertés, la nature de cette relation s'est dévoilée davantage sur la scène publique où elle est de plus en plus débattue, à mesure que la jurisprudence concernant les droits à l'égalité et la liberté de religion tente de se définir elle-même, et que les perceptions publiques des revendications de ces droits font de plus en plus partie du paysage. Cependant, il n'est pas surprenant que la relation telle qu'elle est présentée dans les discours juridiques et publics, et dans les couvertures médiatiques, rende un portrait très limité de la complexité de l'identité religieuse et des diverses identités sexuelles. Dans le présent article, je résume le développement de la jurisprudence au Canada en ce qu'elle touche des cas ayant trait à la diversité sexuelle et à la religion (en conflit ou en intersection). Un petit groupe d'opposants virulents à la diversité sexuelle et aux droits à l'égalité pour les membres de cette diversité sont fréquemment vus comme exprimant le seul point de vue « religieux » sur la sexualité et l'identité sexuelle. Par conséquent, la représentation publique de la religion est associée aux attitudes anti-homosexuelles ou antiféministes, bien que dans la réalité, les voix religieuses représentées dans ces débats et dans ces litiges soient souvent les mêmes particuliers et les mêmes groupes, et ne représentent qu'une partie des traditions plus larges auxquelles ils appartiennent.*

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and Freedoms, *the nature of this relationship has become more publicly visible and more publicly debated, as jurisprudence regarding equality rights and freedom of religion has sought to define itself and as public perceptions about rights claims increasingly become part of the landscape. However, unsurprisingly, the relationship as it is portrayed in legal and public discourses and as it is represented in media coverage, is a very narrow picture of the complexity of both religious identity and sexually diverse identities. In this article, I will summarize the development of jurisprudence in Canada as it connects with cases to do with sexual diversity and religion (in conflict or at the intersections). A small group of vocal opponents to sexual diversity and equality rights for the sexually diverse frequently become generalized as representing “the religious” view regarding sexuality and sexual identity. Subsequently, the public representation of religion is tied to anti-homosexual or anti-feminist attitudes, although the reality is that the religious voices that are represented within these debates and cases are recurring individuals and groups and represent only a portion of the broader traditions to which they belong.*

### **Introduction**

The relationship between freedom of religion and sexual orientation equality rights in Canada (and elsewhere) is frequently seen as one of inherent tension and conflict. In the three decades since the entrenchment of the *Canadian Charter of Rights and Freedoms (Charter)*,<sup>1</sup> the nature of this relationship has become more publicly visible and more publicly debated,<sup>2</sup> as jurisprudence regarding equality rights and freedom of religion has sought to define itself and as public perceptions about rights claims increasingly become part of the landscape.

However, unsurprisingly, the relationship, as it is portrayed in legal and public discourses and as it is represented in media coverage, is a very narrow picture of the complexity of both religious identity and sexually diverse identities. Although the majority of cases to do with lesbian, gay, bisexual, transgender, queer, and intersexed (LGBTQI) equality rights are not “about” religious opposition to those

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1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitutional Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].
  2. See, for example, Iain Benson, “Buttiglione Affair: ‘Homophobia’, ‘Heterosexism,’ Deep Intolerance and Threats to Religions” (22 October 2004), *Cardus* (blog), *Cardus* <[www.cardus.ca/columns/2536/](http://www.cardus.ca/columns/2536/)>; Ezra Levant, “Ban on Christian Values”, *TheRebel.media* (blog) (3 July 2014), *TheRebel.media* <[www.ezralevant.com/ban-on-christian-values/](http://www.ezralevant.com/ban-on-christian-values/)>; “Ontario’s Sex-Ed Curriculum”, *CBC Player* (15 April 2015), *CBC* <[www.cbc.ca/player/News/Politics/1D/2664214688/](http://www.cbc.ca/player/News/Politics/1D/2664214688/)> [CBC, “Ontario’s Sex-Ed Curriculum”].

rights,<sup>3</sup> the cases where religion and sexual diversity appear “in conflict” form the majority of opinion on the relationship of religion to sexual diversity and vice versa.<sup>4</sup> This article provides a brief overview of the development of jurisprudence in Canada as it connects with cases to do with sexual diversity and religion (in conflict or at the intersections). Since LGBT(QI)<sup>5</sup> claims are framed within section 15, the history of equality rights in Canada and the ways the standard for claims of discrimination were developed offer insights into some of the ways these standards necessitate a narrowed identity description, both for religion and also for sexual diversity. This narrowed identity requirement feeds into problematic essentializations about both religion and sexual diversity. Representations of “religion” in the public sphere, often when conservative religious opponents vocally respond to rights based on gender or sexual orientation,<sup>6</sup> become translated more broadly into the notion that to be religious is to be anti-feminist or anti-homosexual.<sup>7</sup>

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3. Primarily challenges have been about access to services, employment, housing, health care, and so on because most policies used heteronormative configurations to determine what constituted a family—that is, in order to access services or housing or seek leave based on family circumstance. See Canada, Parliamentary Information and Research Service, *Charter Equality Rights: Interpretation of Section 15 in Supreme Court of Canada Decisions*, prepared by Mary C Hurley for the Law and Government Division, Background Paper BP-402E (Ottawa: Parliamentary Information and Research Service, 2007).
  4. As I discuss later on in this article, this perception forms the basis of much of the media coverage when cases where both religion and sexual diversity “appear.” It is also often cited as the source of discrimination, see, for example, Bruce MacDougall & Donn Short, “Religion-based Claims for Impinging on Queer Citizenship” (2010) 33:2 *Dalhousie Law Journal* 133.
  5. I have bracketed queer and intersexed here because the jurisprudence deals primarily with lesbian and gay discrimination claims, with a growing body on trans identities and still smaller body developing on bisexuality (largely in refugee claims). However, I want to acknowledge the breadth of communities that can be, or are being, discriminated against for whom this framework of religion as an opponent often applies.
  6. See, for example, Heather Shipley, “The Spaces in Between: Religion, Sexual Identity, Media and Education in Ontario” in Lori G Beaman & Leo Van Arragon, eds, *Issues in Religion and Education: Whose Religion?* (Leiden, Netherlands: Koninklijke Brill, 2015) 211 [Shipley, “The Spaces in Between”] (on debates about education curricula, such as the recent debate about Ontario’s sex education curriculum, where religion “opposes” sexual orientation).
  7. Research among eighteen to twenty-five year olds across Canada has shown that many young religious people choose to remain silent about their religious identities because they feel that the perception about religion is inherently negative not only among their peers but also within Canadian society. *Ibid.*

I am interested in examining the ways both religious identity<sup>8</sup> and sexually diverse identities<sup>9</sup> are framed in cases where the two appear. Although they are often portrayed in combat, religion has appeared on both sides of many cases, whether it is overtly recognized or not.<sup>10</sup> I want to consider which religious groups are investing in these challenges and how this investment subsequently connects to shifting notions about religion in public. I am also interested in considering which religions do not appear in any of these cases (in particular, First Nations involvement). In some instances, this lack of involvement might simply be a matter of which religious individuals and institutions have enough of a position of power in Canada to be in possession of a religious space that could be considered under threat (such as schools, institutions, or businesses). However, it is important to consider which groups get involved in opposition (or in support) and how those groups become represented more broadly post-decision. The requirements of the law necessitate a narrowed identity claim,<sup>11</sup> which is problematic, but the narrowed claim becomes inaccurately portrayed (often in media coverage of a decision) as the “reality” of the identity categories in question.<sup>12</sup> This article examines how

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8. I speak both about religious identities and religious freedom, but I am deliberately using these terms separately from one another. When I reference religious freedom, I mean specifically the way the courts attend to claims about religious freedom and, in particular, the way individuals frame their religiosity in relation to the notion and legal parameters of religious freedom. Religious identity, however, is used from a social scientific standpoint; the ways that research has uncovered the nuance and fluidity of religious identities, which can connect for litigants or claimants to legal notions about religious freedom, but which predominantly are the experience, belief, and practices of “being religious.”
  9. A note regarding my usage of certain terminology: when I use the term “homosexual”, I am deliberately using the term that is referenced in either theology or the legal decision. In some instances, I bracket (QI) because although many of the decisions I discuss have direct impact and implications for all of these sexual and gender identities, the case itself might only respond to some of the identities directly.
  10. See *Reference re Same-Sex Marriage*, 2004 SCC 79 [*Marriage Reference*] (involved religious interveners both in support and in opposition); *Halpern v Canada* (2003), 65 OR (3d) 161 (Ont CA) [*Halpern*] (the Metropolitan Community Church of Toronto argued that their inability to perform same-sex marriages was a violation of their religious freedom).
  11. See, for example, Daphne Gilbert & Diana Majury, “Critical Comparisons: The Supreme Court of Canada DooMS Section 15” (2006) 24:1 Windsor Yearbook Access to Justice 111 (where the determination (need) for a comparator group imposes a restrictive definition of the group seeking rights and protections and perpetuates an us/them dichotomy).
  12. A media study of the debate about Ontario’s sex education curriculum proposal from 2010 demonstrates this problematic regarding religious identity; “religion” is used uncritically and without specification in the majority of articles about the curriculum and its opponents, regardless of the fact that articles themselves are citing the same source (Charles McVety) repeatedly. See Shipley, “The Spaces in Between”, *supra* note 6.

religion and sexual diversity become represented in legal and social discourses as a way of critiquing both the legal narrowing and the subsequent over-representation of these categories post-decision.

Much contemporary discourse about a “culture” of human rights is laden with critique from groups who see human rights commissions as a mechanism for repressing particular forms of identity, such as conservative religious identities.<sup>13</sup> Although an in-depth exploration of this debate is outside the scope of this article, it will be touched on in brief in order to consider the debates about religious freedom as they extend outside the *Charter* into the quasi-constitutional sphere of human rights policy.

The *Charter*'s freedom of religion provision<sup>14</sup> has been the subject of many recent decisions and, subsequently, the source of much public debate as courts attempt to negotiate, define, and respond to diverse religiosities.<sup>15</sup> Frequently, cases involving section 15 infringement claims made by members of the gay and lesbian community involve section 2 claims by those who are seen as the cause of the discrimination against sexual diversity.<sup>16</sup> In light of this somewhat unruly context, the article examines the development of jurisprudence at the crossroads of religion and sexual diversity; it challenges the contemporary framing of these two categories of identity by incorporating the historical role religion has played specifically in the realm of marriage equality; and it reflects on the shift in public perceptions regarding religion and rights since the inception of human rights legislation and the entrenchment of the *Charter*. The role of legal decisions and their effect on public perceptions about religious identity will also be considered. Legal decisions as spaces where identity claims are narrated and subsequently broadened to become

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13. See, for example, Benson, *supra* note 2; Levant, *supra* note 2.

14. *Charter*, *supra* note 1, s 15.

15. See, for example, *R v Big M Drug Mart Ltd* [1985] 1 SCR 295; *Bhinder v CN* [1985] 2 SCR 561; *R v Edwards Books and Art Ltd* [1986] 2 SCR 713; *Central Alberta Dairy Pool v Alberta (Human Rights Commission)* [1990] 2 SCR 489; *Syndicat Northcrest v Amselem*, 2004 SCC 47 [*Amselem*]; *R v NS*, 2012 SCC 72 [*NS*]; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*]. This collection of cases will hereafter be referred to as “Case List.”

16. See, for example, *Knodel v British Columbia (Medical Services Commission)* (1991), 58 BCLR (2d) 356; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 [*Whatcott*]; *Reference re Constitutional Act, 1978 (Saskatchewan)*, 2011 SKCA 3 [*Marriage Commissioners*]; *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 [*TWU*]; *Chamberlain v Surrey School District No 36*, 2002 SCC 86 [*Chamberlain*]; *Marriage Reference*, *supra* note 10.

representative<sup>17</sup> deserves some consideration as one component of public understanding about religious identity.

Although a socio-legal analysis of the ways legal decisions translate into public discourse (and how litigation practices are implicated in public representations of identities), the goal of this article is to reflect on what is being presented within legal decisions, how that is then translated outside the decision itself, and what it is we “ask” of religious and sexually diverse individuals and groups when they argue for rights and protections. This article is part of a larger project that considers the multiple ways identity is (de)constructed, in particular, as identities are regulated, constrained, excluded, or included.<sup>18</sup>

### ***Brief Overview: Human Rights, Equality Rights, and Religious Freedom***

In response to the holocaust and human rights abuses in the Second World War, widespread support was garnered for the *Universal Declaration of Human Rights (Universal Declaration)*<sup>19</sup> as well as the implementation of national human rights policies across multiple nations, including Canada. Although Canada followed the British “implied bill of rights,” provinces began adopting human rights legislation in 1947, resulting in the *Canadian Human Rights Act* in 1977.<sup>20</sup> While the *Universal Declaration* was non-binding, human rights are referred to within it, in some

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17. Jane B Baron & Julia Epstein, “Is Law Narrative?” (1997) 45:1 *Buffalo Law Review* 141. See also James Phelan, “Who’s Here? Thoughts on Narrative Identity and Narrative Imperialism”, editor’s column (2005) 13:3 *Narrative* 205; Andreea Deciu Ritivoi, “Explaining People: Narrative and the Study of Identity” (2009) 1 *StoryWorlds: A Journal of Narrative Studies* 25; see also Galen Strawson, “Against Narrativity” (2004) 17:4 *Ratio* 428.
  18. As argued particularly in Shipley, “The Spaces in Between”, *supra* note 6.
  19. *Universal Declaration of Human Rights*, UNGA Res A/RES/3/217 (10 December 1948) [*Universal Declaration*]. The *Universal Declaration* was adopted in 1948 by the United Nations General Assembly in response to the atrocities of the Second World War. Forty-eight countries voted in favour of the *Universal Declaration*, with some notable abstentions including the Soviet Union (as it was then known), South Africa (perhaps as a means of protecting the system of apartheid), and Saudi Arabia, to name a few. See “V. Social, Humanitarian and Cultural Questions” in *Yearbook of the United Nations: 1948–49* (New York: United Nations, 1950) at 535. Although previous statements of rights had existed, the *Universal Declaration* is the first global expression that humans are inherently entitled to rights, see generally Commission on Human Rights, *History of the Document, Universal Declaration of Human Rights* (blog), United Nations <[www.un.org/en/documents/udhr/](http://www.un.org/en/documents/udhr/)>.
  20. *Canadian Human Rights Act*, RSC 1985, c H-6.

instances, as “the last utopia.”<sup>21</sup> Thus, whether pragmatically implemented or not,<sup>22</sup> an idealized notion about the treatment of other humans still lives within the notion of human rights.<sup>23</sup>

Signed into law in 1982, the *Charter* replaced the more easily amended *Canadian Bill of Rights*, with the aim of improving rights protections in Canada.<sup>24</sup> The expanded role of the judiciary has led to charges of “judicial activism”<sup>25</sup> from critics of *Charter* application.<sup>26</sup> Since the adoption of the *Charter*, Canada has seen

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21. Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Belknap Press, 2010) at 4.
  22. There continues to be debate as to the extent of the *Universal Declaration*, for example, when it comes to disadvantaged groups such as the Roma or in implementation in the face of human rights abuses. The experiences of the Roma, or Romani people, are often under-documented. However, they were also systematically persecuted by the Nazis and other groups; Romani women were sterilized in Czechoslovakia (who had not signed on to the *Universal Declaration*) after the Second World War, but an inquiry into their treatment was not conducted until 2005. This is one example of numerous cases of human rights abuses that are systemic, state sanctioned, and violate international human rights codes and receive very little international attention. See Gwendolyn Albert, “Forced Sterilization and Romani Women’s Resistance in Central Europe” (2011) 71:4 *Different Takes* 1. In a Canadian context, First Nations rights and violence experienced by First Nations women also challenge the space between rights ideology and rights in application. The United Nations (UN) has found that Canada has committed a “grave violation” of First Nations women’s rights in its failure to investigate thoroughly the disappearances and murders of First Nations women. See “Canada’s Failure to Effectively Address Murder and Disappearance of Aboriginal Women ‘Grave Rights Violation’: UN Experts”, *United Nations* (6 March 2015), UN Human Rights <[www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15656&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15656&LangID=E)>.
  23. Moyn, *supra* note 21.
  24. Peter W Hogg, *Constitutional Law of Canada* (Scarborough, ON: Thomson Canada, 2003). *Canadian Bill of Rights*, SC 1960, c 44.
  25. See, for example, Rory Leishman, *Against Judicial Activism: The Decline of Freedom and Democracy in Canada* (Montreal & Kingston: McGill-Queen’s University Press, 2006). For a critique of how “judicial activism” is regularly (mis)framed, see Carissima Mathen, “Judge in Hijab Ruling Is the Real Face of Judicial Activism”, *Globe and Mail* (4 March 2015), *Globe and Mail* <[www.theglobeandmail.com/globe-debate/judge-in-hijab-ruling-is-the-real-face-of-judicial-activism/article23278325/](http://www.theglobeandmail.com/globe-debate/judge-in-hijab-ruling-is-the-real-face-of-judicial-activism/article23278325/)>.
  26. *Charter* interpretation is not without controversy nor are the results of expanded definitions of rights from *Charter* cases left uncriticized. Criticism has come from both the left and right. See, for example, Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989) (on the *Charter* being an “Americanization” of Canadian politics); while criticism on the right includes FL Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview Press, 2000) (judicial activism, accusations that crown counsel intentionally lose cases); Charles Blattberg, *Shall We Dance?: A Patriotic*

widespread developments regarding minority rights, be it regarding gender, religion, race, ethnicity, or another protected category. Perception of human rights commissions in Canada has also shifted since their inception—in a post Second World War environment, the need for protection for minority groups, particularly religious minority groups, was both pressing and widely agreed upon.<sup>27</sup> However, contemporary critics of human rights commissions and tribunals in Canada frequently see the commissions as the oppressors of religious freedom for particular religious minorities.<sup>28</sup> Especially within the last decade, the perception that commissions and tribunals are knee-jerk, politically correct institutions has become more prevalent,<sup>29</sup> with the federal commission becoming embroiled in a hate speech controversy, and an increasingly vocal contingent expressing opposition to the commissions and their authority.<sup>30</sup> Further, the role and reach of human rights acts and tribunals are often not well understood, and, in Canada, they are at times conflated with the role and reach of the *Charter*.<sup>31</sup>

### *Religious Freedom and Sexual Orientation*

In the era of the *Charter*, freedom of religion<sup>32</sup> cases in Canada have consisted of challenges regarding normative assumptions about religion and religious identity

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*Politics for Canada* (Montreal & Kingston: McGill-Queen's University Press, 2003) (arguments that the *Charter* in fact fragments, rather than unites, Canada); James B Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (Vancouver: UBC Press, 2005). See also Christopher P Manfredi, "The Canadian Supreme Court and American Judicial Review: United States Constitutional Jurisprudence and the Canadian Charter of Rights and Freedoms" (1992) 40:1 *American Journal of Comparative Law* 213.

27. R Brian Howe & David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (Toronto: University of Toronto Press, 2000).

28. Levant, *supra* note 2; Benson, *supra* note 2.

29. Richard Moon, "Freedom of Religion under the Charter of Rights: The Limits of State Neutrality" (2012) 45:2 *UBC Law Review* 497.

30. "Writers Call for Probe into Human Rights Commission", *CBC News* (5 October 2009), [CBC <www.cbc.ca/news/canada/writers-call-for-probe-into-human-rights-commission-1.855438>](http://www.cbc.ca/news/canada/writers-call-for-probe-into-human-rights-commission-1.855438).

31. Although largely anecdotal experience, numerous documents outline the difference between the application of a human rights policy and the *Charter* in Canada, many of them produced by government agencies. See, for example, Canada, Law and Government Division, *Human Rights and the Courts in Canada*, prepared by Nancy Holmes, Doc BP-279E (Ottawa: Government of Canada, November 1991), [Government of Canada <publications.gc.ca/Collection-R/LoPBdP/BP/bp279-e.htm>](http://publications.gc.ca/Collection-R/LoPBdP/BP/bp279-e.htm).

32. *Charter*, *supra* note 1, s 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."



within Canada, a predominantly Christian country.<sup>33</sup> The framework for what is considered normative, and, therefore, what needs to be challenged by “non-normative” religious practitioners, has shifted in the last three decades.<sup>34</sup> In these decisions, the Supreme Court of Canada has considered norms of practice and dress across traditions and the diversity of religious expression within traditions.<sup>35</sup> In recent decisions, the court has been required to reflect anew on religious dress (specifically Muslim women who wear the niqab),<sup>36</sup> has set new precedents for Hutterian members regarding photographs on driver’s licences,<sup>37</sup> has responded to a request for exemption from a Catholic school in Québec regarding the mandatory “Ethics and Religious Culture” curriculum,<sup>38</sup> and has ruled against Catholic prayers at a municipal council meeting in Québec.<sup>39</sup>

The jurisprudence that has developed regarding religious freedom becomes especially pertinent when considering how decisions are rendered in cases where

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33. See Case List, *supra* note 15. Canada’s predominant Christian makeup is demonstrated statistically through census data. See Statistics Canada, *Population by Religion, by Province, by Territory (2001 Census)* (Ottawa: Statistics Canada, 2005), Government of Canada <[www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo30a-eng.htm](http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo30a-eng.htm)> (the most recent available from 2006). Although many debate the “reality” of religiosity regarding census data (a challenge I think is very pertinent), the history of settlement in Canada, the importation of norms from England, and the Christianization of the Canadian landscape are all historical realities of the way the contemporary nation (legal and social norms) was developed. See, for example, Paul Bramadat & David Seljak, eds, *Christianity and Ethnicity in Canada* (Toronto: University of Toronto Press, 2008); Robert Choquette, *Canada’s Religions: An Historical Introduction* (Ottawa: University of Ottawa Press, 2004).
34. *Amsalem*, *supra* note 15, resulted in the sincerity of belief test to assess the right to religious practices if an individual has a sincere belief that the practice is connected to their religion, regardless of doctrinal teachings. The sincerity test is set out by the courts with a low threshold, however, it does not override other rights. The sincerity of a claimant’s assessment is seen to connect their practice to their religion, but it seems an unnecessary step in a process that would already determine that. This is admittedly a very brief synopsis. For more detailed analysis, see Lori G Beaman, “Assessing Religious Identity in Law: Sincerity, Accommodation, and Harm” in Avigail Eisenberg & Will Kymlicka, eds, *Identity Politics in the Public Realm: Bringing Institutions Back In* (Vancouver: UBC Press, 2011) 238; Richard Moon, “Religious Commitment and Identity: *Syndicat Northcrest v. Amsalem*” (2005) 29 *Supreme Court Law Review* 201; Howard Kislowicz, “Sacred Laws in Earthly Courts: Legal Pluralism in Canadian Religious Freedom Litigation” (2013) 39:1 *Queen’s Law Journal* 175.
35. See Beaman, *supra* note 34; Case List, *supra* note 15.
36. *NS*, *supra* note 15.
37. *Hutterian Brethren*, *supra* note 15.
38. *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 [*Loyola*].
39. *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 [*Saguenay*].

religion appears in conflict with sexual orientation equality rights; courts draw on the considerations for assessing the rights of belief and practice for religious individuals by looking to tests, such as those laid out in *Syndicat Northcrest v Amselem*.<sup>40</sup> Changing perceptions about acceptable public expressions of religious identity feed into notions about what constitutes “non-normative” practices in contemporary Canadian society and where the limits on practices are drawn.<sup>41</sup> When considering religious freedom assertions as being under attack in relation to sexual orientation protections, the courts necessarily consider norms of religious practice and identity as developed through religious freedom jurisprudence.

The acquisition of protections based on sexual orientation first required enhancing the provisions and parameters of equality rights within the *Charter*. It was not until the decision in *Egan v Canada*<sup>42</sup> in 1995 that claims based on sexual orientation achieved success in *Charter* cases. The build towards legal assertions for access to rights and protection from discrimination based on sexual orientation connects first to the enhanced provisions for section 15's equality rights guarantees.<sup>43</sup> Challenges put forward by lesbian and gay<sup>44</sup> communities frequently included access to service challenges such as loss of employment<sup>45</sup> or harassment at employment,<sup>46</sup> access to housing,<sup>47</sup> and access to services within the public marketplace, such as printing services.<sup>48</sup> Challenges for the sexually diverse continue in Canada. Although developments have occurred and certain rights have been secured, cases continue to come before the courts regarding the limits of free speech,<sup>49</sup> discriminatory attitudes,<sup>50</sup> and the rights of marriage commissioners to refuse to marry same-sex couples.<sup>51</sup>

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40. *Amselem*, *supra* note 15. With the recent *Saguenay* decision, however, there is perhaps newly found space for the consideration of non-belief (*Saguenay*, *supra* note 39).

41. Peter Beyer & Rubina Ramji, eds, *Growing Up Canadian: Muslims, Hindus, Buddhists* (Montreal: McGill-Queen's University Press, 2013).

42. *Egan v Canada*, [1995] 2 SCR 513.

43. The elaborated framework found in *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, was short lived since *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, subsequently signalled a return to the previously held formal equality standard.

44. My use of lesbian and gay here is not intended to be exclusive but, rather, to reflect the self-expressed identities of claimants within the cases I discuss here.

45. *Crozier v Asselstine* (1994), 22 CHRR D/244 (Ont Bd Inq); *DeGuerre v Pony's Holdings Ltd* (1999), 36 CHRR D/439 (BCHRT).

46. *Ibid.*

47. *Grace v Mercedes Homes Inc (No 1)* (1995), 23 CHRR D/350 (Ont Bd Inq); *Quebec (Commission des droits de la personne) c Michaud*, 1998 CanLII 19166 (Qc TDP), CanLII <canlii.ca/t/ggj8d>.

48. *Ontario (Human Rights Commission) v Brockie* (2000), 37 CHRR D/15.

49. *Whatcott*, *supra* note 16.

50. *Ibid.*

51. *Marriage Commissioners*, *supra* note 16.

At the provincial level, both gender identity and trans identity have been successfully integrated recently into some provincial and human rights policies.<sup>52</sup> However, Bill C-279, proposed by Randall Garrison, which seeks to add “gender identity” as a protected group under the *Canadian Human Rights Act*<sup>53</sup> and as an identifiable group under the *Criminal Code*<sup>54</sup> has been languishing in the Senate, after a decade’s worth of work to pass this legislation and protect gender identity.<sup>55</sup> In its latest reading in the Senate, Conservative Senator Don Plett proposed an amendment that would bar trans people from public washrooms, crisis facilities, and other “sex-specific” facilities, ultimately defeating the purpose of the bill’s intent.<sup>56</sup> And Ontarians might be surprised to find out that their Ontario Health Insurance Plan coverage can more easily be used for conversion therapy for LGBTQI youth than for dental work, a reality that Cheri DiNovo is challenging<sup>57</sup> with the newly passed *Affirming Sexual Orientation and Gender Identity Act*.<sup>58</sup>

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52. See Saskatchewan Human Rights Commission (SHRC), *Human Rights of Transgender People* (Saskatchewan: SHRC, 2015), SHRC <[saskatchewanhumanrights.ca/+pub/documents/publications/SHRC\\_Transgender.pdf](http://saskatchewanhumanrights.ca/+pub/documents/publications/SHRC_Transgender.pdf)>; The Manitoba Human Rights Commission (MHRC), *Protections from Discrimination Based on Gender Identity* (Manitoba: MHRC, 2010), MHRC <[www.manitobahumanrights.ca/publications/guidelines/gender\\_identity.html](http://www.manitobahumanrights.ca/publications/guidelines/gender_identity.html)>; Canadian Press, “Gender Identity to Guide Housing of Ontario’s Transgender Inmates”, *CBC News* (26 January 2015), CBCNews <[www.cbc.ca/news/canada/toronto/gender-identity-to-guide-housing-of-ontario-s-transgender-inmates-1.2932304](http://www.cbc.ca/news/canada/toronto/gender-identity-to-guide-housing-of-ontario-s-transgender-inmates-1.2932304)>.
  53. Bill C-279, *An Act to Amend the Canadian Human Rights Act and the Criminal Code (Gender Identity)*, 2nd Sess, 41st Parl, 2013.
  54. *Canadian Human Rights Act*, *supra* note 20.
  55. See Justin Ling, “The Harper Government Is Thwarting a Bill Designed to Protect the Transgender Community from Hate Crimes”, *Vice* (23 June 2014), Vice <[www.vice.com/en\\_ca/read/trans-rights-bill-c-29-senate](http://www.vice.com/en_ca/read/trans-rights-bill-c-29-senate)>; Josh Wingrove, “Transgender Rights Bill Stirs Heated Debate in Senate”, *Globe and Mail* (2 October 2014), *Globe and Mail* <[www.theglobeandmail.com/news/politics/transgender-rights-bill-stirs-heated-debate-in-the-senate/article20902322/](http://www.theglobeandmail.com/news/politics/transgender-rights-bill-stirs-heated-debate-in-the-senate/article20902322/)>.
  56. Robin Levinson King, “Trans Rights Bill Amendment Would Bar Trans People from Public Washrooms”, *Toronto Star* (25 February 2015), *Toronto Star* <[www.thestar.com/news/canada/2015/02/25/trans-rights-bill-amendment-would-bar-trans-people-from-public-washrooms.html](http://www.thestar.com/news/canada/2015/02/25/trans-rights-bill-amendment-would-bar-trans-people-from-public-washrooms.html)>.
  57. “MPP Cheri DiNovo Demands Premier Wynne Ban Conversion Therapy for LGBT Youth” (26 March 2015), *Cheri DiNovo: Parkdale—High Park* (blog), Cheri DiNovo: Parkdale—High Park <[cheridinovo.ca/mpp-cheri-dinovo-demands-premier-wynne-ban-conversion-therapy-for-lgbt-youth/](http://cheridinovo.ca/mpp-cheri-dinovo-demands-premier-wynne-ban-conversion-therapy-for-lgbt-youth/)>.
  58. Bill 77, *An Act to Amend the Health Insurance Act and the Regulated Health Professions Act, 1991 Regarding Efforts to Change Sexual Orientation or Gender Identity*, 1st Sess, 41st Parl, Ontario, 2015 (assented to 4 June 2015), SO 2015, c 18.

## *Religion's Role: Marriage Equality and LGBTQI Support*

While many cases regarding sexual orientation equality and protection do not include religion as the “challenger” to such rights, some notable cases of identity conflict have occurred. These cases often seem to capture the public imagination in ways that the more “mundane” cases do not. The relationship of religious freedom rights and sexual orientation equality rights has included the role of belief and practice for educators,<sup>59</sup> the inclusion of same-sex parented teaching in curriculum,<sup>60</sup> access to marriage rights and equal treatment for same-sex couples,<sup>61</sup> whether protection for religious officials regarding marriage extends to marriage commissioners,<sup>62</sup> and, recently, the relationship of belief to action,<sup>63</sup> to name a few.<sup>64</sup>

Although these cases respond to multiple challenges regarding important issues in teaching, service, and the right to be free from discrimination, these cases are perceived as dealing mostly with the rights of the gay and lesbian community against the rights of a particular religious individual or religious group(s).<sup>65</sup> The number of cases that deal specifically with these two categories as oppositional in comparison with cases about sexual orientation that do not involve religious opponents is actually smaller than what is popularly perceived. However, they form a

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59. *TWU*, *supra* note 16. Most recently, Trinity Western University has been in the media as a debate about whether an evangelical university with discriminatory policies towards the gay and lesbian community ought to have a law school.

60. *Chamberlain*, *supra* note 16.

61. *Marriage Reference*, *supra* note 10.

62. *Marriage Commissioners*, *supra* note 16.

63. *Whatcott*, *supra* note 16.

64. Trinity Western University's proposed law school has reignited debates about the “clash” of religious beliefs with rights and protections for LGBTQI communities. See Elaine Craig, “The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program” (2013) 25:1 *Canadian Journal of Women and the Law* 148; Gillian Calder, “UVic Law and the Debate over Accreditation of a New Law School at Trinity Western University” (2014) 72:5 *Advocate* (Vancouver Bar Association) 731; Angela Cameron, Angela Chaisson & Jena McGill, *The Law Society of Upper Canada Must Not Accredite Trinity Western University's Law School*, Ottawa Faculty of Law Working Paper No 2015-11 (2015), SSRN <[ssrn.com/abstract=2513417](http://ssrn.com/abstract=2513417)>.

65. Heather Shipley, “Religious and Sexual Orientation Intersections in Education and Media: A Canadian Perspective”, Special Issue: “Sexuality and Religion: ‘International’ and ‘Early Career’ Perspectives”, edited by Yvette Taylor & Ria Snowden (2014) 17:5/6 *Sexualities* 512. For analysis of this problematic in the UK context, see Stephen Hunt, “Negotiating Sexual Rights in the UK: Christian Constituencies and Contested Moralities” in Heather Shipley, ed, *Globalized Religion and Sexual Identity: Contexts, Contestations, Voices* (Leiden, Netherlands: Koninklijke Brill, 2014) 193 [Shipley, *Globalized Religion*].

preponderance of the discourse about the relationship of religious freedom and sexual diversity in law and serve to continue the misunderstood complexity of the relationship of these identity categories and further the reality of cases to do with LGBTQI rights. What often is lost in contemporary cases regarding religion and sexual orientation is the way in which religion has supported sexual diversity and marriage equality in Canada, such as in *Layland v Ontario (Minister of Consumer and Commercial Relations)*,<sup>66</sup> the “first post-Charter case to deal with gay marriage,”<sup>67</sup> *Halpern v Canada*,<sup>68</sup> and *Reference re Same-Sex Marriage*.<sup>69</sup>

In 1974, the Unitarian Church performed the marriage of Chris Vogel and Richard North using the system of “banns” to announce the marriage.<sup>70</sup> Norman Naylor, the minister who performed the marriage, informed Vogel and North that in the rewriting of Manitoba’s *Marriage Act*,<sup>71</sup> the omission of gender references had been deliberate to “modernize the legislation.”<sup>72</sup> Following this example, the Metropolitan Community Church of Toronto (MCCT) began making arguments that the church’s inability to perform same-sex marriages was a violation of their religious beliefs in the early 2000s.<sup>73</sup> The MCCT used the system of “banns of marriage” to announce an upcoming wedding of a same-sex couple; although out of common usage, the proclamation of banns is used to announce a wedding and allow congregants time to raise a challenge to the wedding before it occurs. The strategy allowed the MCCT to marry a same-sex couple without the need for a marriage license, which would not have been granted to the couple. The major success in marriage equality litigation came in 2003, in *Halpern*.<sup>74</sup> The strategy initiated in 1974 by the Unitarian Church of publishing banns of marriage for same-sex couples<sup>75</sup> was implemented by the MCCT, and this time the challenge that was brought to the courts was successful. In *Halpern*, the MCCT and Egale

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66. *Layland v Ontario (Minister of Consumer and Commercial Relations)* (1993), 14 OR (3d) 658 (Div Ct).

67. Christine Davies, “Canadian Same-Sex Marriage Litigation: Individual Rights, Community Strategy” (2008) 66 *University of Toronto Faculty of Law Review* 101 at 111.

68. *Halpern*, *supra* note 10.

69. *Marriage Reference*, *supra* note 10 (religious organizations were listed as interveners in support of marriage equality).

70. *North v Matheson* (1974), 52 DLR (3d) 280 (Man Country Ct) [*North*]; Rich North, “Forty-Year Struggle to Have Groundbreaking Same-Sex Marriage Recognized Still Not Over”, *Winnipeg Free Press* (19 September 2013), [Winnipeg Free Press <www.winnipegfreepress.com/opinion/analysis/justice-denied-224361471.html>](http://www.winnipegfreepress.com/opinion/analysis/justice-denied-224361471.html) [*North*, “Forty-Year Struggle”].

71. *Marriage Act*, CCSM 1970, c M50.

72. North, “Forty-Year Struggle”, *supra* note 70; *North*, *supra* note 70.

73. *Halpern*, *supra* note 10.

74. *Ibid.*

75. *North*, *supra* note 70.

Canada were able to persuade the court that same-sex couples are discriminated against by the refusal to recognize their marriages as being valid.<sup>76</sup>

Notably in the *Halpern* factum,<sup>77</sup> the MCCT made a religious freedom argument in support of same-sex marriages. The MCCT argued that its inability to perform marriages for same-sex couples violated their section 2(a) *Charter* rights, stating that “any restriction that [exists] is a common law restriction that reflects traditional Christian theology.”<sup>78</sup> *Egale Canada* and the MCCT argued that marriage is one of the most basic elements of civic life,<sup>79</sup> the denial of which infringed the human dignity of same-sex individuals and violated constitutional rights.

The MCCT, which had been performing marriages for same-sex couples through the banns system, claimed that its rights as a religious institution under sections 2(a) and 15(1) were infringed by the heterosexual definition of marriage. The MCCT argued that the court’s refusal to recognize same-sex marriages was discriminatory because it imposed “one sectarian religious view of marriage” on those who do not share the same belief.<sup>80</sup> Comparing the traditional Christian theological stance that homosexuality is sinful to traditional Christian views that supported slavery, inter-racial marriage, and anti-Semitism, the MCCT argued that Christian attitudes do and must evolve as part of an ongoing process of revelation.<sup>81</sup>

The court did not accept that the MCCT’s religious freedoms were restricted by its inability to perform same-sex marriages. While *Halpern* marks a success for marriage equality,<sup>82</sup> religious freedom in support of same-sex marriage largely disappears in future cases. The unintended result of the MCCT’s less active role in future LGBT(QI) litigation is that the “location” of religion regarding LGBTQI equality became firmly entrenched on the side of the opponents. Religious involvement has primarily been as an opponent to LGBTQI equality in public controversies, which does not accurately represent the relationship of “religion” to “sexual diversity” but which further contributes to the ongoing assumption that religion is inherently opposed to sexual diversity.

In *Reference re Same-Sex Marriage*,<sup>83</sup> although religious organizations were listed as interveners in support of marriage equality, controversy focused on the “harm” that same-sex marriage would have on religious communities. Further, one of the questions asked of the Court also highlighted the possibility of a threat

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76. *Halpern*, *supra* note 10.

77. *Ibid* (Factum of the Applicant: Metropolitan Community Church of Toronto (MCCT)) [*Halpern*, Factum MCCT].

78. *Ibid* at para 2.

79. *Ibid* at para 6.

80. *Halpern*, Factum MCCT, *supra* note 77 at para 2.

81. *Ibid* at para 4.

82. *Halpern*, *supra* note 10.

83. *Marriage Reference*, *supra* note 10.

to religion and religious officials (Question 3).<sup>84</sup> While the original push for marriage equality came from a religious organization (the MCCT), arguing that the heterosexual definition of marriage violated its religious freedoms, the way the Court was required to consider potential challenges to religious officials suggested that religion was under threat by marriage equality.

Although the perception has become one of inherent conflict between religion and sexual diversity, the following two cases also stand out as spaces where religious identity and sexual diversity are not solely conceived as being oppositional. Few decisions offer space to reflect on religion and sexual orientation across boundaries, which necessarily means that the two categories remain frozen in their current combative positions—both in legal and public discourses. The two categories continue, therefore, to remain in silos, repeatedly framed as “competing,” while I argue, as do others, that identity does not exist within such narrow boundaries.<sup>85</sup>

Marc Hall challenged the decision, made first by his principal and then by his school board, preventing him from bringing his boyfriend to the prom.<sup>86</sup> The school board claimed that interaction between romantic partners was a form of sexual activity and that permitting same-sex couples to attend the prom would be seen “both as an endorsement and condonation of conduct which is contrary to Catholic church teachings.”<sup>87</sup> The board’s defence of their decision to uphold Principal Michael Powers’ initial refusal was based within the protective auspices of section 93 of the *Constitution Act, 1867*<sup>88</sup> and their right to exercise freedom of religion, as guaranteed under section 2(a) of the *Charter*.<sup>89</sup>

84. Question three of the *Marriage Reference*, *supra* note 10, was: “Does the freedom of religion guaranteed by paragraph 2(a) of the Canadian Charter of Rights and Freedoms protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?” For further analysis of the Court’s responses, or lack thereof, of the reference questions, see Carissima Mathen, “Mutability and Method in the Marriage Reference” (2005) 54:1 *University of New Brunswick Law Journal* 43.

85. It is outside the scope of this article, however, there is also some current critique of the ways the section 2 provision of the *Charter* requires a particular “performance” of religious identity that further creates these narrow perspectives of religion and sexual diversity. See Benjamin L Berger, “Inducing Fundamentalisms: Law As a Cultural Force in the Domain of Religion” (2012) 9:3 *Canadian Diversity* 25.

86. *Hall (Litigation Guardian of) v Powers*, 59 OR (3d) 423 (Ont Sup Ct of Justice) [*Hall*].

87. *Ibid* at para 4.

88. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5. Section 93 of the *Constitution Act, 1867* deals specifically with the powers of education systems and reads: “In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions: (1) Nothing in any such law shall prejudicially affect an Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union.”

89. *Charter*, *supra* note 1.

Hall argued that the school and board were violating his section 15 rights; Justice Robert MacKinnon agreed and granted an interlocutory injunction that Hall be allowed to attend the prom with his boyfriend, Dumond. MacKinnon J found that, in response to testimony from the defendants, there was no evidence that the school board's position regarding homosexuality and the Roman Catholic Church was the majority position.<sup>90</sup> MacKinnon J stated that the prom is not a space of religious instruction in and of itself, and, therefore, the board's arguments about Catholic teachings did not apply in its refusal of Hall's prom date.

Connie Heintz argued that the ending of her employment at Christian Horizons as a support worker due to her sexual orientation violated the Ontario *Human Rights Code*.<sup>91</sup> After Heintz confirmed to her supervisor, Dorothy Girling, that she was a lesbian, Heintz testified that Girling told her she would be terminated or would have to find work elsewhere, citing incompliance with the Lifestyle and Morality Statement Heintz signed when she first became employed by Christian Horizons.<sup>92</sup> The Lifestyle and Morality Statement, among other things, prohibits homosexual relationships. What is interesting to note is that Heintz herself stated she discovered her changing sexual orientation during the course of her employment with Christian Horizons and that, as a woman of deep Christian faith, this required a process of understanding on her own part. Christian Horizons argued that they fell within the protective auspices of section 24(1)(a) of the Ontario *Human Rights Code*, which permits restrictive hiring or hiring preferences for certain organizations based on one of the proscribed grounds of the code—in this case, creed.<sup>93</sup> The Ontario Human Rights Tribunal found in Heintz's favour,<sup>94</sup> stating that

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90. *Hall*, *supra* note 86 at para 30.

91. *Human Rights Code*, RSO 1990, c H 19. *Heintz v Christian Horizons* (2008), 63 CHRR D/12 (Ont HRT) [*Christian Horizons* 2008].

92. *Christian Horizons* 2008, *supra* note 91 at para 76.

93. *Ibid*. It was noted by the Ontario Human Rights Tribunal (chaired by Michael Gottheil), however, that although all parties made arguments about *Charter* values, "there was no *Charter* challenge to the *Code*, and no Notice of Constitutional Question was filed by any party." *Christian Horizons* 2008, *supra* note 91 at para 88.

94. Subsequent to the tribunal's decision, Christian Horizons appealed in a case that was seen before the Ontario Superior Court of Justice. See *Ontario Human Rights Commission v Christian Horizons*, 2010 ONSC 2105 [*Christian Horizons* 2010]. Christian Horizons stated they would concede they had discriminated against Connie Heintz, which was contrary to the *Human Rights Code*, were it not for the fact that the organization came within section 24(1)(a). Interpreting the French version of the code, Christian Horizons argued that the French version's focus in section 24(1)(a) is on the "principal objective of the religious organization" (*ibid* at para 55) and the "subjective purpose of the group" (*ibid* at para 56) to determine whether Christian



the issue in this case as whether an organization which is effectively 100 per cent publicly funded, which provides social services on behalf of the government to the broader community, and offers those services to individuals without regard to their race, creed or cultural background, may discriminate in its hiring policies on the basis of one of the proscribed grounds in the *Code*.<sup>95</sup>

Marc Hall's and Connie Heintz's cases challenge the typical constructions of the categories of identity by the courts that are outlined here (religion and sexual diversity) because they both claim sexually diverse identities (gay and lesbian) and also religious identities. The diversity of opinions evidenced in Catholicism on the subject of same-sex relations were part of the reason MacKinnon J ruled in Hall's favour. Ultimately, MacKinnon J stated that the prom was not a religious activity, and, as such, the arguments made by the school board regarding religious teaching did not apply.<sup>96</sup> In Heintz's case, MacKinnon J's reflections on religious diversity were included in the tribunal's decision, but the arguments in favour of Heintz focused more specifically on the role of Christian Horizons as a public, not private, institution.<sup>97</sup> In both *Hall (Litigation guardian of) v Powers* and *Heintz v Christian Horizons*, it was the "lack" of religious specificity of the cases (the prom and the community that Christian Horizons serves) that moved forward the success for both Hall and Heintz.

Although religion is part of both Hall's and Heintz's claims, the weighing of religious considerations falls to the side of the opponents—those who are seen as potentially suffering harm for their religious beliefs. There is no space given to consider the potential harm that is done to Hall's or Heintz's religious beliefs, similar to the earlier *Halpern*<sup>98</sup> decision, which did not consider the MCCT's claims of religious freedoms to be justifiable infringements. Analytic consideration of religious freedom continues to focus on the religion that is seen to be oppressed by sexual diversity in these cases, rather than recognition of the complexity of a religious freedom that in fact supports the equality rights claim. This narrowing of religious identity feeds into media coverage regarding these cases and the popular

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Horizons' principal objective was to serve a religious community or whether it was to serve a religious calling in carrying out their work. The court agreed with Christian Horizons, stating that the tribunal's interpretation of section 24(1)(a) was too narrow in that it would require Christian Horizons to confine their services to members of their religious community in order to be availed of that exemption. *Christian Horizons* 2010 did not deal with Heintz's religious and sexual identities at all, rather Christian Horizons focused their arguments on linguistic interpretation of the English versus French *Human Rights Code* provisions for section 24(1)(a).

95. *Christian Horizons* 2008, *supra* note 91 at para 12.

96. *Hall*, *supra* note 86.

97. *Christian Horizons* 2008, *supra* note 91.

98. *Halpern*, *supra* note 10.

misconceptions about the relationship of religion to sexual diversity.<sup>99</sup> Religion is seen as always already in opposition to sexual diversity, regardless of those religious individuals and groups that have continued to support LGBTQI rights and those individuals who live at the intersections of these identity categories.

### ***Religion, Sexuality, Identity, and Discrimination***

Much contemporary research on identity challenges has challenged the notions about identity norms, arguing in favour of the nuance and complexity of lived identity.<sup>100</sup> Recent scholarship examining the role of identity impositions as managed through law and policy challenges the essentialist understanding that is often embedded within regulatory systems.<sup>101</sup> Drawing on existing literature on the fluidity of identity negotiations and understanding, the theoretical context from which lived religion<sup>102</sup> and lived sexuality are explored critiques the static impositions and assumptions upon which many ideas of identity norms are founded.<sup>103</sup>

Agendas that seek to disrupt assumptions about normativity have their own challenges, including the cooptation<sup>104</sup> of radical agendas (both theoretical and activist) in ways that support legislation and policies that do not advance rights claims of disadvantaged groups but, rather, support some claims within a group, leaving others on the outside of the “new normal.”<sup>105</sup> The ongoing exclusion of some

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99. For one example of how particular voices become seen as stand-ins for larger communities and identities, see Shipley, “The Spaces in Between”, *supra* note 6 (discussing the misrepresentation of religious and sexually diverse identities as related to the debate about Ontario’s sex education curriculum in 2010).
100. See, for example, Yvette Taylor & Ria Snowdon, “Mapping Queer, Mapping Me: Visualizing Queer Religious Identity” in Shipley, *Globalized Religion*, *supra* note 65, 295 [Taylor & Snowdon, “Mapping Queer”]; Andrew Kam-Tuck Yip & Sarah-Jane Page, *Religious and Sexual Identities: A Multi-Faith Exploration of Young Adults* (Surrey, UK: Ashgate, 2013).
101. Didi Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (Toronto: University of Toronto Press, 1994); Janet R Jakobsen & Ann Pellegrini, *Love the Sin: Sexual Regulation and the Limits of Religious Tolerance* (Boston: Beacon Press, 2004).
102. Meredith B McGuire, *Lived Religion: Faith and Practice in Everyday Life* (New York: Oxford University Press, 2008).
103. Michel Foucault, *The History of Sexuality, Volume 1: An Introduction*, translated by Robert Hurley (New York: Pantheon Books, 1978).
104. Herman, *supra* note 101; Jasbir K Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Durham, NC: Duke University Press, 2007).
105. Lisa Duggan, “The New Homonormativity: The Sexual Politics of Neoliberalism” in Russ Castronovo & Dana D Nelson, eds, *Materializing Democracy: Toward a Revitalized Cultural Politics* (Durham, NC: Duke University Press, 2002) 175.

sexualities is both the responsibility of the dominant hegemony and also rests at the feet of the queer theoretical movement and politics.<sup>106</sup>

Discrimination towards the LGBTQI community transcends the religious/secular divide,<sup>107</sup> although much media coverage regarding religion places it as the source of discriminatory attitudes and the space in which LGBTQI identities are most under threat.<sup>108</sup> (Correspondingly, the discourse posits that religious freedom is largely under threat by LGBTQI rights and “judicial activism.”)<sup>109</sup> What has been demonstrated in recent research regarding LGBTQI experiences of discrimination is that in high schools in Canada, homophobic, biphobic, and transphobic language is heard on a regular basis (in public schools as well as in the Catholic school system). In some instances, students report it on a daily basis, by both teachers and students.<sup>110</sup> Anti-gay sentiment in Western democracies shows that the levels of hostility towards the LGBTQI community are determined by the following factors: gender, tendencies of prejudice based on other characteristics, and affiliation with fundamental religious groups.<sup>111</sup>

Openly gay athletes have recently made their way into the public imagination,<sup>112</sup> although the subject of homophobia in sport is underdeveloped.<sup>113</sup> Initiatives, such as the “You Can Play” National Hockey League promotion, involving

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106. Robert Leckey & Kim Brooks, eds, *Queer Theory: Law, Culture, Empire* (Oxon, UK: Routledge, 2010).
107. Catherine Taylor & Tracey Peter, *Every Class in Every School: Final Report on the First National Climate Survey on Homophobia, Biphobia, and Transphobia in Canadian Schools* (Toronto: Egale Canada Human Rights Trust, 2011).
108. See, for example, Antonella Artuso, “Religious Group Attacks Anti-Bullying Law: Says McGuinty Not a Good Catholic”, *Sault Star* (7 December 2011), Sault Star <[www.saultstar.com/2011/12/07/religious-group-attacks-anti-bullying-law-says-mcguinty-not-a-good-catholic](http://www.saultstar.com/2011/12/07/religious-group-attacks-anti-bullying-law-says-mcguinty-not-a-good-catholic)>; for more discussion of media coverage, see Shipley, “The Spaces in Between”, *supra* note 6.
109. Benson, *supra* note 2; Nathaniel Christopher, “Christians Silenced in Canada, Says Anti-Gay Activist”, *Daily Xtra* (24 March 2015), Daily Xtra <[www.dailyxtra.com/news-and-ideas/news/christians-silenced-in-canada-says-anti-gay-activist-100986](http://www.dailyxtra.com/news-and-ideas/news/christians-silenced-in-canada-says-anti-gay-activist-100986)>.
110. Taylor & Peter, *supra* note 107. Further research on gay teachers demonstrates the ongoing hostility and anxiety that is caused by gay educators. See Shaun Dellenty, “The Issue: Being Out and Proud Is Easier Said Than Done”, *Times Educational Supplement* (8 November 2013), issue 2342, 36.
111. Marc Hooghe et al, “Anti-Gay Sentiment among Adolescents in Belgium and Canada: A Comparative Investigation into the Role of Gender and Religion” (2010) 57:3 *Journal of Homosexuality* 384.
112. See Eric Andrew-Gee, “Gay Athletes Finally Welcome in Sports”, *Toronto Star* (2 December 2014), Toronto Star <[www.thestar.com/sports/amateur/2014/12/02/gay\\_athletes\\_finally\\_welcome\\_in\\_sports.html](http://www.thestar.com/sports/amateur/2014/12/02/gay_athletes_finally_welcome_in_sports.html)>.
113. See Eric Anderson, “Updating the Outcome: Gay Athletes, Straight Teams, and Coming Out in Educationally Based Sport Teams” (2011) 25:2 *Gender & Society* 250.

a number of hockey players in a campaign aimed at inclusiveness in hockey, have only recently been instituted.<sup>114</sup> The experience of discrimination at the professional level as well as in schools and at the amateur level has only begun to be of interest in the public domain. Some professional sporting associations have created policies of non-discrimination or inclusion,<sup>115</sup> but the experience among sports teams continues to be one of discomfort or open hostility towards lesbian and gay<sup>116</sup> individuals.<sup>117</sup> The influences on discriminatory attitudes involve multiple factors, and the perpetration of discrimination based on sexual orientation is found across public/private and religious/secular lines. These spaces and experiences of discrimination, therefore, are not relegated to “the religious”—the experience of discrimination towards the LGBTQI communities exist across religious/secular differences and are still regularly occurring problems.<sup>118</sup>

In the last several years, the New Atheist Movement, spearheaded by Richard Dawkins and Christopher Hitchens, has come under fire for sexist and dismissive attitudes towards women within the movement. Numerous articles have been published highlighting experiences of sexism towards female members,<sup>119</sup> and

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114. “Why We Exist”, *You Can Play* (blog) (2015), You Can Play <[youcanplayproject.org/pages/why-we-exist](http://youcanplayproject.org/pages/why-we-exist)>.
115. Notably the Australian Sports Commission has recently produced a policy of non-discrimination in sport. See Australian Human Rights Commission & Australian Sports Commission, *Anti-Homophobia and Inclusion Framework for Australian Sports* by Sydney Convicts Rugby Club (Sydney, Australia: issuu, 2014); other sporting agencies also have formal policies, although the incidence of homophobia in sport is high.
116. Again, most of the coverage and the voices speaking up about discrimination in sports has been from lesbian and gay perspectives; trans, bi, and intersexed identities are not widely included in these discussions.
117. Rachel Corbett, “Seeing the Invisible, Speaking About the Unspoken: A Position Paper on Homophobia in Sport” (Ottawa: Canadian Association for the Advancement of Women in Sport and Physical Activity, 2013). Recently, the story of Michael Sam, an openly gay football prospect in the United States spurred media and public debate about acceptance (or the lack thereof) of homosexuality in the National Football League.
118. Compare Danielle Bell, “Gatineau Riverfront Robbery Gay Bashing: Cops”, *Ottawa Sun* (14 July 2014), *Ottawa Sun* <[www.ottawasun.com/2014/07/14/gatineau-riverfront-robbery-gay-bashing-cops](http://www.ottawasun.com/2014/07/14/gatineau-riverfront-robbery-gay-bashing-cops)>.
119. See, for example, Rebecca Watson, “It Stands to Reason, Skeptics Can Be Sexist Too”, *Slate* (24 October 2012), *Slate* <[www.slate.com/articles/double\\_x/doublex/2012/10/sexism\\_in\\_the\\_skeptic\\_community\\_i\\_spoke\\_out\\_then\\_came\\_the\\_rape\\_threats.html](http://www.slate.com/articles/double_x/doublex/2012/10/sexism_in_the_skeptic_community_i_spoke_out_then_came_the_rape_threats.html)>; Katha Pollitt, “Atheists Show Their Sexist Side: What Is Wrong with the Men at the Helm of the Movement?” *The Nation* (24 September 2014), *The Nation* <[www.thenation.com/article/181736/atheists-show-their-sexist-side#](http://www.thenation.com/article/181736/atheists-show-their-sexist-side#)>; Adam Lee, “Richard Dawkins Has Lost It: Ignorant Sexism Gives Atheists a Bad Name”, *The Guardian* (18 September 2014), *The Guardian* <[www.theguardian.com/commentisfree/2014/sep/18/richard-dawkins-sexist-atheists-bad-name](http://www.theguardian.com/commentisfree/2014/sep/18/richard-dawkins-sexist-atheists-bad-name)>.

Dawkins has stated that he thinks the greatest threat to women is Islamism and jihadism, disparaging the experiences of “Western” women as being trivial in comparison.<sup>120</sup> With these realities exposed within non-religious spaces, it is important to consider the role “religion” plays in discriminatory attitudes and whether in fact the attitudes are any more religious than they are secular. Discrimination that is perpetuated in education or athletics is not “tied” to religion but, rather, is evidence of ongoing spaces of anti-LGBTQI attitudes.

Although the subject of religion’s relationship to gender is outside the scope of this article, there are parallel discourses between the religion/gender framework and the religion/sexually diverse framework. Feminist critiques of gender roles in religion ran parallel to the women’s movement of the 1960s and 1970s. Much feminist critique of religion has posited that religion is inherently oppressive towards women and that within some institutions such as the Roman Catholic Church women will never be fully accepted or treated equally.<sup>121</sup> These charges have led many to state that women must exit these traditions in order to be free from the oppressive nature that is embedded within religious hierarchies, particularly patriarchal traditions.<sup>122</sup>

Feminist theo(a)logy seeks to redefine the experiences of women within religious institutions and traditions.<sup>123</sup> Women have sought out leadership roles within their religious traditions, challenging the gendered notion that only males could lead a congregation. Movements such as the Roman Catholic Womenpriest movement<sup>124</sup> have further challenged the singular notion that one can “divorce” their religious identity so easily from the rest of their identity. Rather, the Womenpriest

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120. Kimberly Winston, “Richard Dawkins Stands by Remarks on Sexism, Pedophilia, Down Syndrome”, *Religion News Service* (18 November 2014), Religion News Service <[www.religionnews.com/2014/11/18/richard-dawkins-stands-remarks-sexism-pedophilia-syndrome/](http://www.religionnews.com/2014/11/18/richard-dawkins-stands-remarks-sexism-pedophilia-syndrome/)>. Although I recognize these comments are not about LGBTQI inclusivity, anti-feminist and gender negative attitudes are clearly not possessed solely within “religion” ideologies.
121. Mary Daly, *Beyond God the Father: Toward a Philosophy of Women’s Liberation* (Boston: Beacon Press, 1973).
122. Naomi R Goldenberg, “What’s God Got to Do with It?—a Call for Problematizing Basic Terms in the Feminist Analysis of Religion” (2007) 15:3 *Feminist Theology* 275; Carol P Christ & Judith Plaskow, eds, *Womanspirit Rising: A Feminist Reader in Religion* (New York: HarperCollins, 1992); Daly, *supra* note 121.
123. Melissa Raphael, *Introducing Theology: Discourse on the Goddess* (Cleveland, OH: Pilgrim Press, 2000). See also Marcella Althaus-Reid, *From Feminist Theology to Indecent Theology: Readings on Poverty, Sexual Identity and God* (London, UK: SCM Press, 2004).
124. Beginning by the ordination of seven women on the Danube River in 2002, the Womenpriest movement has grown substantially, reporting over 145 womenpriests worldwide. See “History of the Roman Catholic Womenpriests Movement”, *Roman Catholic Womenpriests* (blog) (2014), Roman Catholic Womenpriests <[romancatholicwomenpriests.org/NEWhistory.htm](http://romancatholicwomenpriests.org/NEWhistory.htm)>.

movement continues to seek to change the Catholic tradition from within.<sup>125</sup> Contemporary notions of gender as being related to religious traditions vary widely, although feminist challenges to rigid notions about the roles of males and females within a religious organization continue to redefine perceptions about religion and gender.<sup>126</sup>

Similarly, where sexual diversity has long been seen as being oppressed and discriminated against by religious beliefs and religious institutions, the argument that the LGBTQI community should “exit” religious traditions has been increasingly popular.<sup>127</sup> Again, the idea that one can simply shut off their religious identity is problematic, but coupled with the popular perception that religion only ever opposes sexual diversity, the queer subject is continually framed “as the quintessentially secular subject.”<sup>128</sup> Disparate views about both religion and sexual diversity often mean that individuals are required to repress aspects of their identity, depending on their environment.<sup>129</sup> And the popular notion that to be religious is to be homophobic (or anti-feminist) similarly places social strain on individuals to “exit” religious traditions or to disavow their religious beliefs.<sup>130</sup>

The relationship of religious and sexually (or gender) diverse identities is frequently misrepresented or overlooked. What is lost when these intersectional identities are ignored is the reality that discrimination based on sexual orientation

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125. See generally “About RCWP”, *Roman Catholic Womenpriests* (blog) (2014), Roman Catholic Womenpriests <romancatholicwomenpriests.org>.

126. As mentioned earlier, the New Atheist Movement was critiqued for sexist and dismissive attitudes towards women within the movement. With these realities exposed within non-religious spaces, it is important to consider the role “religion” plays in discriminatory attitudes and whether in fact the attitudes are any more religious than they are secular.

127. Yip & Page, *supra* note 100; Heather Shipley & Pamela Dickey Young, “Values and Practices: How Are Youth in Canada Integrating Religion and Sexuality in Their Daily Lives?” in Shipley, *Globalized Religion*, *supra* note 65, 276 at 276. This notion is also found in much of the opposition to redefining marriage, arguing that “marriage” is a religious institution and that same-sex couples could “have the same rights” via civil unions, assuming that same-sex couples cannot also be religious couples. See Pamela Dickey Young, *Religion, Sex and Politics: Christian Churches and Same-Sex Marriage in Canada* (Black Point, NS: Fernwood, 2012).

128. Molly McGarry, “‘The Quick, the Dead, and the Yet Unborn’: Untimely Sexualities and Secular Hauntings” in Janet R Jakobsen & Ann Pellegrini, eds, *Secularisms* (Durham, NC: Duke University Press, 2008) 247 at 248.

129. Andrew Kam-Tuck Yip, Michael Keenan & Sarah-Jane Page, *Religion, Youth and Sexuality: Selected Key Findings from a Multi-faith Exploration* (Nottingham, UK: University of Nottingham, 2011).

130. Avigail Eisenberg & Jeff Spinner-Halev, eds, *Minorities within Minorities: Equality, Rights and Diversity* (Cambridge, UK: Cambridge University Press, 2005); Shipley & Dickey Young, *supra* note 127.

is not uniquely situated within religious communities; it transcends the religious/secular divide. Further, the way in which religious identities and sexually diverse identities shape one another is demonstrated when young people project their identities onto their “imagined futures,” placing the development of these intertwined narratives in the past, present, and future in hopes of reaching “a successful endpoint on their sexual and religious journeys.”<sup>131</sup> Online communities have offered safe spaces for many to discuss religion and sexuality, free from the experience of hostility that might otherwise be found within their communities.<sup>132</sup>

Understanding about religion and religious identity has shifted dramatically, in part in response to the greater representation of religiously diverse groups in public spaces.<sup>133</sup> More nuanced discussion about religious identity and religious difference has challenged the standards of normative religiosity in multiple spheres, including law, and has provided a broader working framework for what it means to be religious, spiritual, or non-religious.<sup>134</sup> Although there is greater representation of religiosity in many venues (including movies, television, media, and so on), popular notions about religiosity are continually framed narrowly. Our working grammar of religion has not yet caught up with the reality of diverse expressions of religion.<sup>135</sup> Some individuals point to the way in which religion is taught in schools as being part of the issue.<sup>136</sup> World religions courses often provide a survey of religious traditions, with static lists of what it means to “be” Christian, Jewish, Hindu, Muslim, for example.<sup>137</sup> These lists (which are typified by items such as particular beliefs, ritual practices, and the celebration of particular holidays) might factually represent a typology of a particular tradition, but they do not represent the experience of belief among congregants and practitioners.<sup>138</sup>

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131. Sarah-Jane Page, Andrew Kam-Tuck Yip & Michael Keenan, “Risk and the Imagined Future: Young Adults Negotiating Religious and Sexual Identities” in Stephen J Hunt & Andrew KT Yip, eds, *The Ashgate Research Companion to Contemporary Religion and Sexuality* (Surrey, UK: Ashgate, 2012) 255 at 268.
132. Taylor & Snowdon, “Mapping Queer”, *supra* note 100.
133. Beyer & Ramji, *supra* note 41.
134. *Ibid.*
135. Heather Shipley, “Apathy or Misunderstanding? Youth’s Reflections on their Religious Identity in Canada” in Peter Beyer, Paul Gareau & Spencer Bullivant, eds, *Religion, Youth and Identity* [forthcoming in 2016]; Elizabeth Ursic, “Bi the Way: Rethinking Categories of Religious Identity” (2014) 3:4 *International Journal of Religion and Spirituality in Society* 29.
136. Simeon Wallis, “Ticking ‘No Religion’: A Case Study amongst ‘Young Nones’” (2014) 16:2 *DISKUS: Journal of the British Association for the Study of Religions* 70.
137. *Ibid.*
138. McGuire, *supra* note 102; Robert A Orsi, *Between Heaven and Earth: the Religious Worlds People Make and the Scholars Who Study Them* (Princeton, NJ: Princeton University Press, 2005); Grace Davie, *Religion in Britain since 1945: Believing without Belonging* (Oxford, UK: Blackwell, 1994).

Although legislation regarding discrimination based on sexual orientation has developed significantly in the last several decades, public perception regarding religious identities and sexually diverse identities continues to misunderstand the two identity categories in ways that require individuals to downplay their own identities.<sup>139</sup> Further, in a troubling recent legal decision, Justice Jamie Campbell stated that “[m]ainstream values no longer stigmatize LGBT people.”<sup>140</sup> Although policy might be in place to protect (some) members of LGBTQI communities, ongoing discrimination towards the LGBTQI community shows the clear gap between policy (and legal decisions) and the experience of sexual diversity in everyday life.<sup>141</sup>

### ***Religion and Sexual Diversity at the Intersections: Voices and Experiences***

#### *Who Participates in Public Debates about Religion and Sexuality?*

If we are talking about religious opposition to sexual diversity or rights based on sexual orientation, which religions are involved and by whom are they represented?<sup>142</sup> The most prevalent voices in opposition to sexual diversity rights protections in Canada have been the Evangelical Fellowship of Canada (EFC) and the Interfaith Coalition on Marriage and Family (The Coalition).<sup>143</sup> The Coalition often makes expansive claims about the religious groups that it represents, stating that because there are Catholic individuals and groups involved in their cases, and Catholics make up over 40 percent of the religious identities of Canadians, they in turn represent the majority of voices in Canada.<sup>144</sup> The Coalition has seen involvement from a variety of religious organizations, from Christian, to Jewish, to Sikh, to Muslim; however, it is important to note that they represent only the organizations that sign on to their facts or statements and not all members of those

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139. Yip, Keenan & Page, *supra* note 129.

140. *Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25 at para 22 [NSBS].

141. Taylor & Peter, *supra* note 107; Hooghe et al, *supra* note 111; Heather Shipley, “Globalization, Religion and Sexuality: Plus Ça Change?” (2014) 28:2 *Estudos de Religião* 74.

142. Pamela Dickey Young, “Who Speaks for Religion?” in Beaman & Van Arragon, *supra* note 6, 307.

143. More recently, Canada Christian College has taken on a central role in the opposition to the sex education curriculum proposed for Ontario. See Shipley, “The Spaces in Between”, *supra* note 6.

144. *Halpern*, *supra* note 10 at 1 (Factum of the Intervener: The Interfaith Coalition on Marriage and Family).



traditions. The Coalition focuses on a number of family-related issues beyond same-sex marriage and sexual orientation, although they have engaged regularly as interveners or in support of interveners (such as the EFC) in cases related to marriage equality and same-sex families.<sup>145</sup>

Concerns expressed by the Coalition (or the EFC or others who engage in legal disputes) are concerns that are already in place for these groups. They pre-exist the legal dispute and, frequently, have become singularly narrated as “core” issues for these particular religious organizations and communities. As the courts respond to the set of issues presented to them, the identity characteristics they are responding to (either religious freedoms that feel under threat by sexual diversity or sexually diverse identities that feel harmed by religious or legal restrictions) become over-broadened in the resulting decision. These over-broad representations of “religion” and “sexual diversity,” unfortunately, do not attend to the reality of diversity within and across religious and sexually diverse communities, and they also do not highlight the fact that it is frequently a small number of repeat opponents appearing within the legal disputes to challenge claims for inclusion based on sexual orientation.<sup>146</sup> Although it continues to be the Coalition, the EFC, and the Canadian Council of Christian Charities expressing concerns about sexual diversity and LGBTQI communities, the legal decisions made about these cases are required to attend to the protections of religious freedom more broadly, these organizations subsequently become represented as stand-ins for religion at large.

Correspondingly, as particular conservative religious voices are becoming more widely heard (and are claiming broad membership), the voices of the religious support for the LGBTQI are less widely heard. Subsequent to the *Halpern* decision,<sup>147</sup> the inclusion of religious freedom arguments on behalf of the plaintiffs was removed from the litigation strategy,<sup>148</sup> although religion continues to appear in the ongoing fight for LGBTQI equality rights. Prior to, and continuing since, the

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145. For cases where the Coalition has intervened, see, for example, *Halpern*, *supra* note 10; *Marriage Reference*, *supra* note 10. The organizations that compose the Coalition can vary but frequently include the Catholic Civil Rights League, the Evangelical Fellowship of Canada (EFC) (when it is not filing an independent submission), and the Islamic Society of North America. According to the EFC website, “the Coalition has intervened at every level of court in the marriage cases in British Columbia and Ontario.” See EFC, “Interfaith Coalition Files Written Arguments in Supreme Court Marriage Reference”, Press Release (13 May 2014), EFC <[www.evangelicalfellowship.ca/page.aspx?pid=1014](http://www.evangelicalfellowship.ca/page.aspx?pid=1014)>.

146. See CBC, “Ontario’s Sex-Ed Curriculum”, *supra* note 2 (Michael Coren specifically wanted to challenge Charles McVety’s mis-characterization of the curriculum and his misrepresentation of Christianity).

147. *Halpern*, *supra* note 10.

148. Davies, *supra* note 67 at 121.

*Marriage Reference*,<sup>149</sup> contentious debates about sexual orientation equality rights occurred across Canada on a variety of related subjects, including the inclusion of same-sex parented teaching in curriculums,<sup>150</sup> the relationship of belief to action,<sup>151</sup> particularly for educators,<sup>152</sup> what constitutes religious education within a Catholic school,<sup>153</sup> and the grounds on which a religious organization is classified as such.<sup>154</sup> Subsequent to the same-sex marriage debates,<sup>155</sup> the contentious relationship of religion and sexual diversity has appeared in many cases.

All of these cases consider religion and sexual diversity to be already in conflict, reflected both in the parties to the cases and in the lack of religious freedom arguments from the side of the LGBTQI claims. Although both *Hall*<sup>156</sup> and *Christian Horizons*<sup>157</sup> involve claimants who argue that they are both religious and sexually diverse, and these aspects of their identity inform their reasons for remaining within the religious institution in question, ultimately the decisions boil down to whether religious freedom or sexual orientation equality rights “win.”

Beyond the claimants who identify at the intersections and demonstrated by early litigation regarding marriage equality, which was being led by a queer religious organization, support for LGBTQI communities has also included individuals and groups who identify as religious but are not sexually diverse and who argue that equality rights are in fact part of their religious ethos.<sup>158</sup> In addition to those voices, Marc Hooghe and his colleagues have determined that support for LGBT rights among youth is similar across non-religious and Jewish respondents;<sup>159</sup> Catherine Taylor and Tracey Peter’s study found that First Nations youth in Canada were more disturbed by phobic language towards LGBTQI students than other ethnic minority students.<sup>160</sup> Taylor and Peter posit that this demonstrates an affinity

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149. *Marriage Reference*, *supra* note 10.

150. *Chamberlain*, *supra* note 16.

151. *Whatcott*, *supra* note 16.

152. *TWU*, *supra* note 16.

153. *Hall*, *supra* note 86.

154. *Christian Horizons* 2008, *supra* note 91.

155. And, of course, at the same time litigation regarding same-sex marriage was underway, other notable cases regarding the relationship of religion to sexual orientation equality rights were also in process, producing additional narratives regarding the relationship of the two categories. See Davies, *supra* note 67.

156. *Hall*, *supra* note 86.

157. *Christian Horizons* 2008, *supra* note 91.

158. See, for example, “Religion, Faith and Values”, *GLAAD* (blog) (2015), GLAAD <[www.glaad.org/programs/faith](http://www.glaad.org/programs/faith)> (GLAAD maintains a list of religious organizations that they collaborate with, which offer inclusive and supportive environments for LGBTQI communities).

159. Hooghe et al, *supra* note 111.

160. Taylor & Peter, *supra* note 107 at 75.

based on shared experiences of discriminatory attitudes.<sup>161</sup> We can only speculate that this affinity might also provide human rights motivation among Jewish respondents in Hooghe and his colleague's study. They also point out that among Christian and Jewish respondents attitudes towards LGBT rights vary and, in fact, diverge from biblical or doctrinal teaching, which they suggest is reflective of the effect of cultural influence and interpretation of the texts.<sup>162</sup> Although their respondents indicated more accepting attitudes towards LGBT individuals, there were high levels of discriminatory attitudes and behaviours in school settings, coming from teachers and students.<sup>163</sup>

Studies conducted among young people who identify as both religious and queer demonstrate the challenges that are experienced when living across identity intersections that are most commonly framed as oppositional.<sup>164</sup> For some, the expression of their sexual identities was the cause of tension within religious spaces, but, at the same time, the expression of a religious identity was frowned upon in sexually diverse spaces (among friends or LGBTQI-friendly associations).<sup>165</sup> The experience of intersectional identities and the support from non-LGBTQI religious voices exemplifies the complexity of the relationship between religion and sexual diversity.

### *First Nations*

One religious<sup>166</sup> voice that has not been heard in any of the disputes regarding freedom of religion and sexual orientation<sup>167</sup> has been the voice of First Nations communities in Canada. Although there are numerous cases that have gone before the courts involving First Nations, to date they have not been involved in the debates regarding sexual diversity and sexual orientation. The relationship of First Nations' religion to sexual diversity and difference might offer a unique and insightful counterpoint to the frequently represented "big six" religious institutions

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161. *Ibid.*

162. Hooghe et al, *supra* note 111 at 395–96.

163. *Ibid* at 396.

164. Taylor & Snowdon, "Mapping Queer", *supra* note 100; Yip & Page, *supra* note 100.

165. Taylor & Snowdon, "Mapping Queer", *supra* note 100.

166. There is a lot of academic debate about the differences one ascribes to "religion" and "spirituality." For the purposes of this article, I am using religion to discuss First Nations as a general term, recognizing both that this debate exists and also that "religion" is often attached to institutionalized practices that First Nations do not participate in. This is not to devalue spirituality but, rather, to create a continuous argument about the kinds of ideologies that seek to oppose sexual diversity.

167. As noted earlier, the frequent opponents to sexual diversity are the Coalition and the EFC, who have overstated their religious representation in court submissions. See Halpern, *supra* note 10.

(Christianity, Judaism, Islam, Hinduism, Sikhism, and Buddhism). Considering positions of privilege, as mentioned at the outset, perhaps First Nations do not possess the spaces of privilege that could be seen as being under threat by sexual diversity (as, for example, faith-based schools might). However, there might be other reasons for First Nations not to engage in these debates as well, reasons related to Taylor and Peter's findings and reasons related to the complex relationship of sexual diversity to religion within First Nations communities.

Researching sexuality and sexual diversity within First Nations is complex and shifting, as approaches vary across traditions and over time (as is true with all religious or spiritual traditions). Notions about sexual normativity are generally seen as being imported by European colonizers and further entrenched socially and legally.<sup>168</sup> Historically, First Nations in Canada had six possible alternative gender lifestyles,<sup>169</sup> and many more terms within each band, to describe LGBTQI people. Same-sex marriages were not uncommon, although again variation is seen to be different across different First Nations groups and bands.<sup>170</sup> The use of "two-spirited" has become more common in contemporary discourse, which has been defined as a

self-descriptor increasingly used by Aboriginal gay, lesbian, bisexual and transgendered Canadians who live within a traditional Aboriginal worldview. It asserts that all aspects of identity (including sexuality, race, gender and spirituality) are interconnected and that one's experience of sexuality is inseparable from experiences of culture and community.<sup>171</sup>

However, acceptance and recognition for LGBTQI individuals within First Nations communities has not been without difficulty. And it has been attributed to the resistance to acceptance<sup>172</sup> within Canadian Aboriginal communities partly resulting from the impact of Christianity on traditional views.<sup>173</sup> Additionally, in

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168. Will Roscoe, *Changing Ones: Third and Fourth Genders in Native North America* (New York: St. Martin's Press, 1998) [Roscoe, *Changing Ones*]; Jill Alaers, "Two-Spirited People and Social Work Practice: Exploring the History of Aboriginal Gender and Sexual Diversity" (2010) 11:1 *Critical Social Work* 63.

169. Alaers, *supra* note 168 at 67.

170. Sabine Lang, *Men As Women, Women As Men: Changing Gender in Native American Cultures*, translated by John L Vantine (Austin, TX: University of Texas Press, 1998).

171. Alexandria M Wilson, "N'tacimowin inna nah': Coming in to Two-Spirit Identities" (DEd thesis, Harvard University Graduate School of Education, 2007) (Ann Arbor, MI: UMI Microform, 2007) at i.

172. Roscoe, *Changing Ones*, *supra* note 168.

173. I think it is important to consider here that discriminatory attitudes towards sexual diversity are rarely only "about" religious attitudes; it strikes me that we have perhaps romanticized Aboriginal attitudes towards gender and sexuality and that, while the influence of Christianity likely play some part in this, the reality is that we do not really "know" historically that all gender or sexual non-conforming Aboriginal individuals were valourized.

regard to *berdache* or two-spirited identities, the lack of a comprehensive, translatable terminology has created difficulty in understanding “terms [used] for describing a social role so unlike any we find in contemporary society.”<sup>174</sup> Misunderstanding about roles that combine occupation, gender, sexuality, and social elements,<sup>175</sup> paired with discriminatory attitudes towards “otherness,” has exacerbated the challenge of studying and representing First Nations sexuality and sexually diverse identities.

Interviews conducted with Aboriginal men and women in Saskatchewan about their identities as two-spirited within their communities have also exposed the ways in which First Nations sexualities are negatively perceived.<sup>176</sup> Many shared their experiences of homophobia after coming out in their communities and reported both familial and community rejection based on their sexual identities.<sup>177</sup> Coupling ongoing racism against First Nations communities and a lack of resources for LGBTQI individuals within Aboriginal communities has meant that many individuals have felt extreme isolation in the face of inadequate support.<sup>178</sup>

Although there is some support for a more fluid notion about sexual diversity in First Nations communities, it appears that the multiple forms of discrimination within and outside these communities has overshadowed earlier acceptance for sexual difference and diversity. The complex changes within First Nations communities are not well understood and are also under-researched. However, there is seemingly a relationship between experiences of discrimination felt by First Nations youth in their empathy towards sexually diverse youth who are also discriminated against.<sup>179</sup> First Nations youth in Canada have become active in creating spaces for conversations about sexuality, sexual health, and First Nations experiences, including the launch of a national campaign to fight homophobia and transphobia in First Nations.<sup>180</sup>

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174. Will Roscoe, “Was We’Wha a Homosexual?: Native American Survivance and the Two-Spirit Tradition” (1995) 2:3 *GLQ: A Journal of Lesbian and Gay Studies* 193 at 193.

175. *Ibid.*

176. Alaers, *supra* note 168.

177. *Ibid.*

178. Groups that have begun to create safe spaces for LGBTQI First Nations youth include the Native Youth Sexual Health Network. See *Native Youth Sexual Health Network* (blog), Native Youth Sexual Health Network <[www.nativeyouthsexualhealth.com/](http://www.nativeyouthsexualhealth.com/)>. Additionally, LGBTQI support organizations have begun offering support specific to First Nations individuals. See Egale, “Egale Launches New Program in Honour of National Aboriginal Day and World Pride”, Press Release (20 June 2014), Egale <[egale.ca/discrimination-and-hate-crimes/2s1v-launch/](http://egale.ca/discrimination-and-hate-crimes/2s1v-launch/)>.

179. Taylor & Peter, *supra* note 107 at 75.

180. See Native Youth Sexual Health Network, *supra* note 178 at <[www.nativeyouthsexual-health.com/youthphotoproject.html](http://www.nativeyouthsexual-health.com/youthphotoproject.html)>.

The cases that see First Nations involvement are cases where treaty and negotiated settlement rights have been violated.<sup>181</sup> Priorities for First Nations, if considering legal involvement, are priorities regarding retaining or reclaiming land and ancillary rights<sup>182</sup> and protection of First Nations' women from violence.<sup>183</sup> First Nations legal challenges do not primarily seek to restrict the actions or behaviours of sexually diverse individuals in protection of First Nations rights. Rather, First Nations legal challenges seek to attain, defend, and protect their rights against a larger system of injustice and prejudice. As mentioned earlier, First Nations' lack of involvement regarding sexual diversity cases is perhaps the result of not having spaces that could be considered to be "under threat" by sexual diversity. But perhaps it is also the result of shared experiences of discrimination and the more nuanced perceptions regarding sexual diversity within many First Nations communities that is why they do not see sexual diversity or rights based on sexual difference as being a threat to their community.

### *Living Identity Research*

Although the legal narratives, and public perception, about the relationship of religion to sexual diversity remains one of inherent opposition and combat, research on identity and, specifically, on religion and sexual orientation demonstrates the complex ways that religious identity and sexually diverse identities are lived and experienced in day-to-day life.<sup>184</sup> Research among young adults shows that young people's own understanding of religious identity is shifting and fluid. Although doctrine and tradition might teach that homosexuality is "wrong," the personalization of religious attitudes and beliefs among young adults is one of inclusivity.<sup>185</sup> Youth

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181. *Delgamuukw v British Columbia*, [1997] 3 SCR 1010; *Daniels v Canada*, 2014 FCA 101; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.

182. *Ibid.*

183. *Support for Missing and Murdered Indigenous Women and Their Families* (blog), Support for Missing and Murdered Indigenous Women and Their Families <[www.itstartswithus-mmiw.com/](http://www.itstartswithus-mmiw.com/)>; Committee on the Elimination of Discrimination against Women (UNCEDAW), *Report of the Inquiry Concerning Canada of the Committee of the Elimination of Discrimination against Women under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc C/OP.8/CAN/1 (2015), UN CEDAW <[tinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CAN/CEDAW\\_C\\_OP-8\\_CAN\\_1\\_7643\\_E.pdf](http://internet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CAN/CEDAW_C_OP-8_CAN_1_7643_E.pdf)>.

184. Taylor & Snowden, "Mapping Queer", *supra* note 100; Shipley & Dickey Young, *supra* note 127; Yip, Keenan & Page, *supra* note 129; Hunt, *supra* note 65.

185. Shipley & Dickey Young, *supra* note 129; Yip, Keenan & Page, *supra* note 131; Shipley, "The Spaces in Between", *supra* note 6.

and young adults<sup>186</sup> clearly frame religious tradition and doctrine as being separate from their own experiences of their religious identities, so that they can “pick and choose” the ways that they respond to traditional notions about sexual diversity in light of contemporary social norms and understanding of sexuality.<sup>187</sup>

There is a divergence between these research results and studies about attitudes towards specific religious groups in Canada, as mentioned already.<sup>188</sup> One can only speculate as to the reasons for this divergence, but it is clear from the studies among youth in Canada that their own religion is something highly personalized and malleable and that when discussing “religion” more broadly, they attach a more rigid set of parameters to what religion outside their own belief systems “looks like.”<sup>189</sup> Perhaps this divergence between “my” religion and “religion” more broadly transmits itself into perceptions about religion in the public sphere, enhanced by narrowed representations through media and public discourse. “My” religion is seen as nuanced and fluid, incorporating social norms and religious teachings as a personal expression of religiosity, while “religion” as it is ascribed more broadly to religious institutions or traditions is rigidly conceived as being a set of determined beliefs and practices.<sup>190</sup>

Additionally, perceptions about religion and religious identity, as fed through social and public discourses, increasingly have negative associations and connotations. Religion is frequently tied to conservative values (anti-abortion, anti-homosexuality),<sup>191</sup> which are reflective of public discourses where dominant religious voices are often socially conservative voices.<sup>192</sup> Research in Canada demonstrates that there is a sense among religiously identified individuals of an increasing hostility

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186. To date, there is a paucity of research that examines religion and sexuality in dialogue; what has been conducted recently among youth and young adults. See Shipley & Dickey Young, *supra* note 127. However, the trend of increasingly inclusive and affirming congregations is also evidence of acceptance within religious communities beyond young adults. See Melissa M Wilcox, *Queer Women and Religious Individualism* (Bloomington, IN: Indiana University Press, 2009).

187. Shipley & Dickey Young, *supra* note 127; Yip, Keenan & Page, *supra* note 129.

188. Howard Duncan, “Canada’s Evolving Landscape: How Demographics Are Changing” (Panel for “Accommodation Works! Toward a More Inclusive Society”, delivered at the tenth Annual Canadian Association of Statutory Human Rights Agencies Conference in Ottawa, 11 June 2014) [unpublished].

189. Pamela Dickey Young & Heather Shipley, “Belief, Not Religion: Youth Negotiations of Religious Identity in Canada” in Johanna Wyn & Helen Cahill, eds, *Handbook of Child and Youth Studies* (Singapore: Springer Singapore, 2014) 861.

190. *Ibid.*

191. Shipley, “The Spaces in Between”, *supra* note 6.

192. *Ibid.*; Hunt, *supra* note 65; Dickey Young & Shipley, *supra* note 189.

towards Christianity and Christian identity, often represented by outspoken conservative evangelical individuals.<sup>193</sup> This sense of hostility, paired with a lack of outspoken representation from inclusive and affirming congregations, results in a picture of religion that is not necessarily accurate.<sup>194</sup>

Although the individuals and groups involved in these cases become painted with broad strokes as representing “the religious” voice, the reality is that it is a small number of repeat opponents involved in these various cases,<sup>195</sup> and a number of religious voices have to date not been heard at all in cases to do with sexual diversity equality. As mentioned already, the opposition to sexual orientation equality rights and marriage equality in Canada has come primarily from the same groups over time, such as the EFC, the Coalition, and the Canadian Council of Christian Charities. Less represented are the religious voices and individuals who support LGBTQI equality rights or who are in support of marriage equality as a function of their religious identities. Although the *Marriage Reference* includes interveners from religious organizations in support of marriage equality,<sup>196</sup> legal decisions are required to respond primarily to religious freedom claims from those who feel these changes could cause undue harm to their religious freedom.

The court requires, and therefore creates, an either/or framework for assessing identity claims by imposing a narrow comparator group framework<sup>197</sup> and also because claims represented by a specific individual or group become broadened in court decisions in their representation. However, this frequent either/or framework serves a larger dialogue about identities in conflict. Where the MCCT’s religious freedom argument in *Halpern* was not recognized as a justifiable infringement on their religious rights,<sup>198</sup> the weighting of religion is given to the opponents. Unsuccessful strategies are often not reused so that the religious freedom argument in

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193. Bruce L Guenther, “Ethnicity and Evangelical Protestants in Canada” in Bramadat & Seljak, *supra* note 33, 365 at 377.

194. Mark Jordan, “Marriage, Civil Unions, Domestic Partnerships, and Political Progress and/or Setbacks” (Gay Men’s Issues in Religion Group Response delivered at the Annual Meeting of the American Academy of Religion, Montreal, 7 November 2009) [unpublished].

195. Recent debates about Ontario’s sex education curriculum become particularly relevant in this discussion, where a small group of opponents, as represented primarily by Charles McVety, were initially portrayed as “the religious” response to the curriculum. In coverage of opposition to the curriculum in 2015, the media has begun to acknowledge that the opposition in 2010 was in fact only a small group of opponents and was not—as they originally described it—“religion” in a broad sense. See Shipley, “The Spaces in Between”, *supra* note 6.

196. *Marriage Reference*, *supra* note 10.

197. Gilbert & Majury, *supra* note 11.

198. *Halpern*, *supra* note 10.



support of marriage equality is removed from the larger discourse about religion and sexual diversity, at least as it pertains to marriage equality.

Further, dominant voices are repeatedly referenced in media coverage about sexual diversity and sexual equality. Although the same groups and voices continue to express the same opposition, the lack of nuance in the coverage identifies these specific vocalizations as being “the” religious attitudes. And, in a troubling turn, which is evidenced in *Trinity Western University v Nova Scotia Barristers’ Society*, there is a perception that LGBT equality is realized in society at large, while evangelical Christian religious freedoms are not.<sup>199</sup> Policies of inclusion and protections based on sexual orientation make the legal protections viable (whether they are attainable in every circumstance is a different matter), but this kind of framing ignores the reality of trans, bi, and homophobic discrimination in everyday experiences.

### *Concluding Thoughts*

Reflecting critically on both religious freedom jurisprudence and the equality rights jurisprudence that has been used to develop a body of protection for LGBTQI communities in Canada demonstrates that although “religion” is frequently associated with anti-LGBTQI identities, religion’s role in support of LGBTQI rights is often overlooked. The role that religious organizations such as the MCCT have played in advancing marriage equality is often lost in contemporary debates about religion and sexual diversity since the religious voices in support of LGBTQI communities become less widely heard and the voices who oppose sexual diversity become dominant. Numerous cases to do with sexual orientation equality rights have not involved religious opposition, and yet the cases where religion and sexual diversity “meet” become over-represented in media and public discourse, resulting in a skewed perception about the relationship of these identity categories.

Since the inception of human rights declarations and commissions post-Second World War and the development of the *Charter* in Canada, the public perception of religion, religious freedom, and religious persecution has changed dramatically. A number of global factors influence the ways people view religion and religiosity in public,<sup>200</sup> and the distinctions that have been drawn between religion and culture

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199. *NSBS*, *supra* note 140.

200. Proclamations as reported in media such as this certainly contribute to these notions. “Iraqi Jihadists Order Genital Mutilation”, *IOL News* (24 July 2014), *IOL News*, <[www.iol.co.za/news/world/iraqi-jihadists-order-genital-mutilation-1.1725252#.U9EnjmPyTKE](http://www.iol.co.za/news/world/iraqi-jihadists-order-genital-mutilation-1.1725252#.U9EnjmPyTKE)>.

have become more blurry over time.<sup>201</sup> However, the portrayal of legal debates in Canada about religion, and about religion as it connects to other identity categories, contributes to a larger discourse about religious freedom and accommodation and a sense of nostalgia or loss when it comes to “traditional” religions in Canada.<sup>202</sup> What is lost in this shifting perception about religion and religious freedom is the nuanced and complex reality of religiosity.

Restrictions imposed by the courts on *Charter* claims add another layer of complexity. Where comparator groups have been narrowly conceived<sup>203</sup> or where religiosity has been determined within set parameters,<sup>204</sup> the result is that each case can only partially represent the parties involved, and yet the way decisions travel through public discourse is such that cases become pieces in a puzzle that is called religious freedom in Canada (and religion’s relationship to gender or sexuality). Critiques of the narrow representations required by the court form one component of this problematic. The rigid possibilities for comparator groups,<sup>205</sup> the changing tests for religious belief and practice, and, subsequently, the ways in which individuals and groups select their representation before the courts in order to achieve a successful outcome serve to narrow the religious and sexually diverse identities within these legal contestations.<sup>206</sup> The identity narrations within these contexts are winnowed by claimants and opponents, through lawyers and interveners, and are then re-narrated in legal decisions. These identity narrations subsequently travel to public discourse, often through media representation<sup>207</sup> of a particular case, but in their transmission the scope of their representation widens so that the discourse about religion versus gender or sexual equality is painted in broad strokes through each decision involving those categories.

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201. Recent decisions in Europe and in Canada have shown a tendency to blur the boundaries between “religion” and “culture.” See Lori G Beaman, “Battles over Symbols: The ‘Religion’ of the Minority Versus the ‘Culture’ of the Majority” (2012–13) 28:1 *Journal of Law and Religion* 67 (some used “culture” arguments as a mechanism for protecting certain traditions such as having crosses in courtrooms or saying the Lord’s Prayer before a national assembly meeting). These boundaries between religion and culture, contentious across multiple disciplines, further complicate representations of what it is to “be religious” as argued by claimants, courts, and as represented in media. For more detailed analysis, see Effie Fokas, “Sociology at the Intersection between Law and Religion” in Silvio Ferrari, ed, *Routledge Handbook of Law and Religion* (Oxon, UK: Routledge, 2015) 59; Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton, NJ: Princeton University Press, 2005).

202. Bramadat & Seljak, *supra* note 33; Beyer & Ramji, *supra* note 41; *Loyola*, *supra* note 38.

203. Gilbert & Majury, *supra* note 11.

204. *Amselem*, *supra* note 15.

205. Gilbert & Majury, *supra* note 11.

206. Davies, *supra* note 67.

207. Shipley, “The Spaces in Between”, *supra* note 6.

Although the public perception about religion has become very broadly one of anti-homosexual or anti-feminist attitudes through this transference, the reality is that the religious voices that are represented within these debates and cases are recurring individuals and groups and represent only a portion of the broader traditions to which they belong.<sup>208</sup> The loss of the religious voices in support of sexual diversity, or gender equality, through the over-generalization of “religion” in dialogue about these contestations and through the strategic approaches undertaken in LGBTQI litigation, means that religion only ever is “seen” on one side of the issue and always on the side opposed to gender and sexual equality.

Shifting perceptions about religious practice in the public sphere has contributed to the changing notion about what is too much regarding the accommodation of religious practice.<sup>209</sup> The bar for determining religious freedom has transitioned from the understanding that the Christian majoritarian history of Canada has meant that non-Christian practices have not been considered (and ought to be).<sup>210</sup> This then moved to a requirement to consider intra-group differences and create a framework for assessing how to resolve disputes within varying modes of practice and belief within a religious tradition.<sup>211</sup> In more recent decisions, the potential harm of religious practices (such as photos on driver’s licences or veiling in court) are considered with reference to potential security threats more broadly,<sup>212</sup> as politicians deploy the rhetoric of Canadian “values” to justify policies and legislation.<sup>213</sup>

The role of law as it defines its requirements (which are here specific to religious freedom and equality rights) becomes an important space for transmitting norms about identity claims. Decisions also become narrowly transmitted through dis-

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208. CBC, “Ontario’s Sex-Ed Curriculum”, *supra* note 2.

209. Beyer & Ramji, *supra* note 41.

210. See Case List, *supra* note 15.

211. *Amselem*, *supra* note 15.

212. *Hutterian Brethren*, *supra* note 15; *NS*, *supra* note 15.

213. “Canadian values” are interestingly used across multiple debates and frequently on both sides of a given debate. It is a notion deployed by Stephen Harper regarding niqabs/face veils during the citizenship oath, see Morgan Lowrie, “Harper Says Ottawa Will Appeal Ruling Allowing Veil during Citizenship Oath”, *Globe and Mail* (12 February 2015), *Globe and Mail* <[www.theglobeandmail.com/news/national/harper-says-ottawa-will-appeal-ruling-allowing-veil-during-citizenship-oath/article22979142/](http://www.theglobeandmail.com/news/national/harper-says-ottawa-will-appeal-ruling-allowing-veil-during-citizenship-oath/article22979142/)>; as well as by Campbell J, in *NSBS*, *supra* note 140; and in a recent televised debate on CBC’s Power & Politics between Charles McVety and Ian Capstick, see “Anti-Evolution Tory MP James Lunney Defends Views”, *CBC Player* (1 April 2015), CBC <[www.cbc.ca/player/News/Politics/ID/2661902488/](http://www.cbc.ca/player/News/Politics/ID/2661902488/)> (both of whom made arguments that their view was in fact representative of “Canadian values”). Although outside the scope of this article, there is much that could be said about the strategic deployment of “Canadian values” as a mechanism for drawing support for particular viewpoints.

course, as each identity claim and its corresponding response in a legal decision become translated as broadly representative—of religion, of sexual diversity, and so on. As a result, the historical role that religion has taken regarding marriage equality is lost in the contemporary, combative, picture that has emerged regarding religion and sexual diversity. A small group of vocal opponents to sexual diversity and equality rights for the sexually diverse frequently become generalized as representing “the religious” view regarding sexuality and sexual identity. The goal of this article has been to challenge that representation by examining the relationship of religion to early equality challenges and by incorporating research regarding identity diversity.

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