

FREEDOM OF CONSCIENCE AND RELIGION
IN THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

A Submission to the Special Joint Committee on the Constitution of Canada, Parliament of Canada, Ottawa, from Mennonite Central Committee (Canada), 201-1483 Pembina Highway, Winnipeg, Manitoba R3T 2C8, November 12, 1980.

I INTRODUCTION

The current effort to renew the constitution of Canada is an occasion to acknowledge our indebtedness to the many men and women who have contributed to the legal framework which has served us to date. It is also an opportunity in our own time to contribute to the framework for the future in the on-going hope that our social order will be one in which the highest values of life can be reflected and pursued. To this end we want to give our support and encouragement to the members of the Special Joint Committee. In addition, we want to propose two changes for the Canadian Charter of Human Rights and Freedoms. We believe that these would represent valuable improvements. We will describe them in a brief way and if the Committee needs more information we will be pleased to try to provide it.

II FREEDOM OF RELIGION: IS IT FOR INDIVIDUALS OR FOR COMMUNITIES?

The proposed Charter states: "Everyone has ... freedom of conscience and religion;". This implies that this freedom will be for individuals. We do not disagree with this in an absolute way. However, there are occasional situations when we would see it as right that the freedom of the individual be restricted for the sake of the freedom of a community. We are concerned that the proposed wording might not allow for this. We would like to see a clause providing for freedom of religion without specifying that it be for individuals or for communities. Such a change would be in keeping with the 1960 Canadian Bill of Rights and would mean that this question could be decided in relation to the particular problems as they arise. We will set forth three illustrations which support our concern.

The first illustration comes from the Hutterites who live in small colonies in various parts of the prairie provinces. One of the basic tenets of their religion is communal ownership of property. They try to follow the example of the early Christian church of which the Bible says: "the company of those who believed were of one heart and soul, and no one said that any of the things which he possessed was his own, but they had everything in common ... There was not a needy person among them" (Acts 5:32-34). The Hutterites have followed this way of life for more than 400 years. When they wanted to immigrate to Canada in 1899 they asked whether they would be allowed to live in this way in Canada. A Deputy Minister of the Interior then stated, among other things: "There will be no interference with their living as a commonwealth"1 Although this statement was made in 1899, their actual immigration was postponed until around 1918.

Their life in Canada has been affected by various governmental measures but one encounter is particularly significant. It began in the mid-1960's when several individual Hutterites decided to change their religion. For a period of time thereafter, other Hutterites tried to persuade them to reconsider their stand. When these efforts failed the individuals were asked to leave the colony. At this they requested shares of the colony's assets. The colony, however, did not want to give them individual shares. It held that to look upon their property

in terms of individual shares was fundamentally incompatible with their religion. The resulting dispute was judged by the Supreme Court of Canada in 1970.² It ruled that the colony was not obligated to give shares of its assets to the individuals. The ruling was not unanimous, however. The arguments on both sides were strong. A choice had to be made. In effect the court ruled that the freedom of the individuals would be restricted for the sake of the freedom of the community. We quote the words of Justice Ritchie:

There is no doubt that the Hutterian way of life is not that of the vast majority of Canadians, but it makes manifest a form of religious philosophy to which any Canadian can subscribe and it appears to me that if any individual either through birth within the community or by choice wishes to subscribe to such a rigid form of life and to subject himself to the harsh disciplines of the Hutterian Church, he is free to do so. I can see nothing contrary to public policy in the continued existence of these communities living as they do in accordance with their own rules and beliefs, ...³

A second illustration relates to the Canada Pension Plan enacted in 1965. The Amish and Old Order Mennonites, as well as the Hutterites, did not want to participate in this program. They had always felt that taking care of the material needs of one another was an integral part of their religious life. They did not see how they could delegate this important function of the church to the government. They willingly paid taxes for the many social welfare programs even though they did not accept the benefits of those programs but the Canada Pension Plan was different. Participation in it would mean that their individuals would accumulate private personal possessions somewhere else. The bonds among the people in their communities would be weakened. They did not want to participate in the Plan.

In the years following the enactment of the Plan, these groups made numerous petitions and pleas to the government in an effort to gain an exemption from it. However until late in 1971 they were always rejected. The opposition was based on various grounds. In one "Memorandum To The Cabinet" it was argued that leaders of these groups, "strive continuously to maintain their communities against 'worldly' temptations, even to the point of objecting to high school education. This raises the question of whether the weight of government legislation should be employed in a way which would help to keep members of some religious sects economically dependent on their sects."⁴ Eventually, the government agreed to amend the Canada Pension Plan Act so as to allow an exemption for such groups and in 1974 the amendment was passed by Parliament.

A third illustration relates to the control of schools. It took place in an earlier period of Canadian history. Some Mennonites from Europe had immigrated to the Canadian prairies and set up their own schools. The language of instruction was German and the curriculum was oriented toward their religious ideals and the needs of life in their communities. After several decades, however, the provincial governments began to promote the public schools. But some of these Mennonites did not want to send their children to the public schools. They felt that the responsibility of educating their children belonged to their church community and that they could not delegate this task to the government without betraying their faith. Their critics charged that their

children were being deprived of their right to a good Canadian education. Some critics said that the government by not intervening was tolerating a form of tyranny. During the time of World War I, the governments began to force these people to accept the public schools. As a result these Mennonites paid tens of thousands of dollars in fines. Some were imprisoned. Eventually more than 6000 emigrated to Latin America.⁵

Among the issues in these three situations was the question of whether the freedom would be for the individuals or for the communities. A choice had to be made. It could not be given to both. Giving it to the individuals would undermine the communities while giving it to the communities would indicate a limitation on the freedom of the individuals. We do not say that such disputes should always be resolved in favour of the communities. However, the present wording in the Charter suggests that they might always be resolved in favour of the individual. If this would happen then these communities would be threatened in a most serious way. It is worthy of note that in the third illustration, which was resolved in favour of individualism, the community emigrated while in the first and second illustrations there were serious discussions about the possibility of emigrating before the disputes were finally resolved in favour of the communities.

The question of whether this freedom should be for individuals or for communities is important and complex. We ask only that the Charter not determine that such disputes will always be resolved in favour of the individuals. We propose that there be a simple provision for "freedom of religion" without a reference to individuals or communities. In this way, the question could be dealt with in relation to the particular problems as they arise.

III CONSCIENTIOUS OBJECTION TO THE TAKING OF HUMAN LIFE

Our second request is for a clause to protect those who on grounds of conscience or religion feel themselves unable to take human life. Usually this is thought of in terms of exemption from military service. Our concern for this derives from our faith in Jesus Christ whose life and teachings are recorded in the Bible. Among the many implications of His message, as we understand it, is the call to seek the good of all people including our enemies and to approach them not with violence but with love, even sacrificial love. Our efforts to do this are most imperfect but in addition to exemption from military service in times of war, we have carried out sizeable programs of relief, development, and service, in many parts of the world. (The current annual budget of Mennonite Central Committee (Canada) is about \$8.5 million.)

To further support our request we will review the history of such protective provisions in Canada. Late in the eighteenth century Lord Simcoe, Governor of Upper Canada, promised an exemption from militia duties to some prospective settlers. This promise then became part of the Militia Act of 1793 which stated that "persons called Quakers, Mennonists, and Tunkers, who from certain scruples of conscience decline to bear arms, shall not be compelled to serve in the said Militia, ...". (The Tunker church is now known as the Brethren in Christ Church.) This exemption was respected in the War of 1812, although horses, wagons and other things belonging to members of these groups were pressed into service.⁶ The exemption was confirmed further in numerous subsequent Militia Acts. Especially noteworthy is the one of 1868 which broadened the provision to include "ever inhabitant of Canada of any religious denomination,

otherwise subject to military duty, who, from the doctrines of his religion, is averse to bearing arms and refuses personal military service, ".

In the 1870's another group of Mennonites wanted to immigrate to Canada. These would settle on the prairies. Before coming they entered into negotiations with the government of Canada and received an Order in Council, dated August 13, 1873, of which the first paragraph stated: "an entire exemption from military service as is provided by law and Order in Council will be granted to the denomination of Christians called Mennonites". A second Order in Council with such a provision was passed on December 6, 1898, to facilitate the immigration of the Doukhobors. And a third such Order in Council was passed on August 12, 1899, to facilitate the immigration of the Hutterites.

In World War I, these promises were tested in a severe way. The Military Service Act of 1917 had two provisions for dealing with them. One provision was in a "Schedule of Exceptions" which identified certain categories of people and stated that they had no duty to perform under the Act. These included those "exempted from military service by Order in Council of August 13, 1873 and by Order in Council of December 6, 1898". The second provision exempted any person from combatant service on a condition stated as follows:

That he conscientiously objects to the undertaking of combatant service and is prohibited from so doing by the tenets and articles of faith, in effect on the sixth day of July, 1917, of any organized religious denomination existing and well recognized in Canada at such date, and to which he in good faith belongs.

Of these two provisions, the first can be referred to as the "exception" provision and the second as the "exemption" provision. Most of the Mennonites in the west, as well as the Doukhobors there, were protected under the "exception" provision because of the Orders in Council. However those Mennonites and Tunkers in Ontario, who had come to Canada much earlier, had to wrestle with the "exemption" provision which still held them liable for non-combatant service which most of them also found unacceptable. Moreover, in April of 1918, when the need for more recruits was felt in a particularly strong way, the government cancelled all exemptions for a certain age category. In October of that year an Order in Council made Mennonites ineligible for the "exemption" provision altogether. These restrictions left the people in Ontario in a most difficult situation. The pleas of their leaders and the imprisonment of several young men make a moving story. Fortunately, the war ended in November.

The experience in World War II was different. In June of 1940 the National Resources Mobilization Act came into force. It empowered the government to call up virtually all young men for military training. It was very brief and general and did not provide for those who conscientiously objected to such training. However, the National War Service Regulations, first announced on August 27, 1940, stated that Mennonites and Doukhobors who had immigrated to Canada pursuant to the Orders in Council of August 13, 1873 and December 6, 1898 would be entitled to receive an "indefinite postponement of their military training". The Regulations also provided that anyone else could apply for such an indefinite postponement on the condition that he conscientiously objected to the bearing of arms and belonged to an organized religious denomination which prohibited the bearing of arms. This was a narrow provision and soon the Regulations were

amended so that it was no longer necessary to belong to a religious denomination which prohibited the bearing of arms. From 1941 onwards, anyone who claimed that he conscientiously objected to bearing arms could apply for an indefinite postponement of his military training regardless of any religious affiliation.⁷ These provisions were satisfactory, however, there were difficulties in the procedures for obtaining the "indefinite postponement". Sometimes the administrative boards questioned the young men most rigorously. In several instances men were imprisoned but generally the conviction against military service was respected.

Also important about the World War II situation is the Alternative Service Program. Soon after the war started Mennonite leaders indicated to the government that they wanted to render a non-military form of national service. They made various proposals and by December of 1940 some of them were accepted and included in the Regulations. By June of 1941 men were on their way to civilian work camps. At first much of the work was done in National Parks. It included re-forestation, road-building and fire-fighting. Later it became more diversified. Some men were assigned to agricultural work and late in the war a few did ambulance and hospital work on the front lines. Altogether, some 10,900 men served in the Alternative Service Program. Of these 7,500 were Mennonites. Some of their work was recognized as being of national importance.

A conscientious objector clause in the Charter might have implications for areas other than military service. People in police work or in medical work sometimes have to face the question of taking human life too. The areas of euthanasia and abortion are examples but because of technological and other changes the number of areas may increase. In 1969, when the abortion issue was debated in Parliament, along with other amendments to the Criminal Code, it was emphasized that medical personnel would not be forced to be involved with them. Because of this, a conscientious objector clause, which was considered at the time was viewed as unnecessary. However, the government's Badgley study of 1977 found that some strong pressures are brought to bear on medical workers.⁸

We recognize that the question of taking human life is complex, that there are many arguments to the effect that it may be morally permissible, perhaps even obligatory, to take human life in certain circumstances or when that life is in certain forms. Even the constituency of Mennonite Central Committee (Canada) is not in complete agreement on all aspects of these matters. We believe, however, that people's sense of the sacredness of human life is of infinite value, that it should be respected as highly as possible, and that there should be a provision for this in the Canadian Charter of Human Rights and Freedoms.

IV/ CONCLUSION

In submitting these two concerns to the Special Joint Committee, we have not proposed an exact wording for dealing with them. Nor have we surveyed the provisions in the constitutions and statutes of other countries that deal with them, although we would point out that the basic constitutional document of West Germany states that "No one may be forced against his conscience into armed war service". We recognize too that the Committee will be expected to consider a broad range of other concerns some of which we would also support. In this submission, however, we have dealt with only two concerns. We ask that they be considered. We believe that they would improve the legal framework for our society.

Footnotes

1. Letter, James A. Smart, Deputy Minister of Department of the Interior to W.F. McCreary, Commissioner of Immigration, Winnipeg, Manitoba, October 27, 1899.
2. Hofer et. al. v. Hofer et. al. (1970), S.C.R. 958.
3. Ibid.
4. Memorandum to the Cabinet, Canada Pension Plan Exemption From Coverage On Religious Grounds, signed by Jean-Pierre Cote, Minister of National Revenue, October 10, 1969.
5. Adolf Ens, "Mennonite Relations With Governments Western Canada 1870-1925", an unpublished doctoral dissertation submitted to the Department of Religious Studies, University of Ottawa, 1979. Although this study provides a good description of the encounter, it does not deal at length with the amount of money paid in fines. Information about that can be obtained from Mennonite Central Committee (Canada).
6. Frank H. Epp, Mennonites in Canada: The History of a Separate People 1786-1920, Toronto, MacMillan of Canada Ltd., 1974, p. 93 ff.
7. J.A. Toews, Alternative Service in Canada during World War II, Publications Committee of the Canadian Conference of the Mennonite Brethren Church, Winnipeg, Canada, 1959.
8. Government of Canada, Report of the Committee on the Operation of the Abortion Law, (Prepared under the Chairmanship of Robin Badgley), Ottawa, Ontario, 1977, p. 227.