

## Religion and the State in Canada

LAWS 4006A

2017-2018

**INSTRUCTOR:** Professor M.H. Ogilvie  
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**OFFICE HOURS:** Wednesday 2:30-5:00  
by appointment

**REQUIRED TEXT:** M.H. Ogilvie, Religious Institutions and the Law in Canada, 4th ed. (Toronto: Irwin Law, 2017).

**BACKGROUND READING:**

- Robert Choquette, Canada's Religions (University of Ottawa Press, 2004).
- Robert T. Handy, A History of the Churches in United States and Canada, (Oxford U.P., 1976).
- Terence Murphy and Roberto Perin, A Concise History of Christianity in Canada (Oxford U.P., 1996).
- Mark A. Noll, A History of Christianity in the United States and Canada, (Grand Rapids: Eerdmans, 1992).

Other course materials are either placed on reserve at the MacOdrum Library and in the Law Resource Centre or are to be found in the law reports and law journals to which reference is made in the Syllabus which follows.

Students who wish to remind themselves of the fundamentals of English and Canadian constitutional history may wish to re-read: M.H. Ogilvie, Historical Introduction to Legal Studies, (Toronto: Carswell, 1982).

**EVALUATION:**

Class Participation	20%
Class Presentation	30%
Essay	50%

Essays may be submitted in print at any time prior to the final submission date of the final class in Week Twelve and must be submitted in a printed hard copy to the Instructor.

### **PURPOSE OF THIS COURSE:**

This course is designed to achieve two goals. The first goal is to deepen students' historical understanding of the religion and state divisions within Canadian public life today; in particular, by studying the historical background to the constitutional settlement in Canada and the theological traditions on which that historical evolution and understanding of the relationship between religion and state are based. The second goal is to study some of the public law dimensions of contemporary religion and state relations in Canada after the Charter. Although theological and religious views are voiced on a wide variety of legal issues today, the course will focus on those issues which are immediately derived from the written constitution.

The course will trace the historical evolution in constitutional law from the unified vision of Western Christendom through the divisions of Christianity into competing denominations to the religiously pluralistic society of twenty-first century Canada.

**WEEK ONE: Introduction****WEEK TWO: The Political Theology of Church and State in the Western Tradition**

- Ogilvie, ch. 1.
- Charles Villa-Vicenzio, Between Christ and Caesar. Classic and Contemporary Texts on Church and State, (Grand Rapids, Mich: Eerdmans, 1986) pp. xv-xxvi; 20-125. (Readings from Augustine, Aquinas, Luther, Calvin, Radical Reformers, Knox, Barth, Bonhoeffer and Vatican II.)

**WEEK THREE: Canada I: Constitutional Inheritances**

- Ogilvie, chs. 2, 4.
- M.H. Ogilvie, "What is a Church By Law Established?" (1990) 28 Osgoode Hall Law Journal 179.
- Paul Horwitz, "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2 (a) and Beyond" (1996) 54 University of Toronto Faculty of Law Review 1.
- F.C. DeCoste, "What's the Charter Got to do With It?" In Daniel Cere and Douglas Farrow (eds.), Divorcing Marriage. Unveiling the Dangers in Canada's New Social Experiment, (Montreal: McGill-Queens, 2004) 120-131.

**WEEK FOUR: Canada II: Interpreting the Charter**

- Ogilvie, chs. 4 and 13.
- R. v. Big M. Drug Mart Ltd. (1985) 18 D.L.R. (4th) 321 (S.C.C.).
- Edwards Books and Art Ltd. et al. v. R. (1986) 35 D.L.R. (4th) 1 (S.C.C.).
- Syndicat Northcrest v. Amselem (2004) 241 D.L.R. (4<sup>th</sup>) 1 (S.C.C.).
- Mouvement laïque québécois v. Saguenay (City), 2015 SCC 16 (CanLII).

**WEEK FIVE: Education I: Denominational Schools**

- Ogilvie, chs. 4 and 10.
- Adler v. Ontario (1996) 140 D.L.R. (4th) 385 (S.C.C.).
- Re Caldwell and Stuart et al. (1984) 15 D.L.R. (4th) 1 (S.C.C.).
- Casagrande v. Hinton Roman Catholic Separate School District No. 155 (1987) 38 D.L.R. (4th) 382 (Alta. Q.B.).
- Re Black and Metropolitan Separate School Board (1988) 52 D.L.R. (4th) 736 (Ont. H.C.).
- Hall (Litigation Guardian of) v. Powers (2002) 59 O.R. (3d) 423 (Ont. S.C.J.).
- Erazo v. Dufferin-Peel Catholic District School Board, 2014 ONSC 2072 (CanLII).

**WEEK SIX: Education II: Public Schools and Private Religious Schools**

- Ogilvie, chs. 4 and 10.
- Re Zylberberg et al. and Director of Education of Sudbury Board of Education; League for Human Rights of B'Nai Brith Canada et al., Intervenors (1988) 65 O.R. (2d) 641 (Ont. C.A.).
- Re Corporation of the Civil Liberties Association et al. and Minister of Education et al. (1990) 71 O.R. (2d) 341 (C.A.).
- SL v. Commission scolaire des Chênes, 2012 SCC 7 (CanLII).
- Loyola High School v. Quebec (Attorney-General), 2015 SCC 12 (CanLII).
- Chamberlain v. School District #36 (Surrey) (2002) 221 D.L.R. (4<sup>th</sup>) 156 (S.C.C.).

- Ross v. New Brunswick School District No. 15 (1996) 133 D.L.R. (4<sup>th</sup>) 1 (S.C.C.).
- Kempling v. College of Teachers (British Columbia) (2005) 255 D.L.R. (4<sup>th</sup>) 169 (B.C.C.A.).
- Jones v. The Queen (1986) 31 D.L.R. (4th) 569 (S.C.C.).

**WEEK SEVEN: Employment I: Accommodating Religious Practices**

- Ogilvie, ch. 13
- Re Ontario Human Rights Commission and Simpson Sears Ltd. (1985) 23 D.L.R. (4th) 321 (S.C.C.).
- Alberta Human Rights Commission v. Central Alberta Dairy Pool: Canadian Human Rights Commission et al., Intervenors (1990) 72 D.L.R. (4th) 417 (S.C.C.).
- Board of School Trustees, School District No. 23 (Central Okanagan) et al. v. Renaud et al; Ontario Human Rights Commission et al., Intervenors (1992) 95 D.L.R. (4th) 577 (S.C.C.).
- H.T. v. ES Holdings Inc. o/a Country Herbs, 2015 HRTO 1067 (CanLII).
- Bhinder v. C.N.R. (1985) 23 D.L.R. (4th) 481 (S.C.C.).
- Ontario (Human Rights Commission) v. Brockie (2000) 37 C.H.R.R. D/15 (Ont. Bd. of Inquiry); (2002) 222 D.L.R. (4<sup>th</sup>) 174 (Ont. Div. Ct.).
- Hellquist v. Owens (2006) 267 D.L.R. (4<sup>th</sup>) 733 (Sask. C.A.).
- Reference re: Marriage Commissioners etc. (2010) 327 D.L.R. (4<sup>th</sup>) 669 (Sask. C.A.).

**WEEK EIGHT: Employment II: Requiring Religious Practices**

- Ogilvie, ch. 13.
- Parks v. Christian Horizons (1991) 92 C.L.L.C. 17,008 (Ont. Bd. of Inquiry); (1993) 14 O.R. (3d) 374 (Gen. Div.).
- Garrod v. Rehema Christian School (1991) 92 C.L.L.C. 17,003 (Ont. Bd. of Inquiry).
- Heintz v. Christian Horizons (2010) 319 D.L.R. (4<sup>th</sup>) 477 (Ont. Div. Ct.).
- Schroen v. Steinbach Bible College (1999) 35 C.H.R.R. D/1 (Man. Bd. of Inquiry)
- Vriend v. Alberta (1998) 156 D.L.R. (4th) 385 (S.C.C.).
- Trinity Western University v. B.C. College of Teachers (2001) 199 D.L.R. (4<sup>th</sup>) 1 (S.C.C.).
- Trinity Western University v. The Law Society of Upper Canada, 2016 ONCA 518(CanLII).
- Trinity Western University v. The Law Society of British Columbia, 2016 BCCA 423 (CanLII).

**WEEK NINE: Expression I: Believing, Saying and Acting**

- Multani v. Commission scolaire Marguerite-Bourgeoys (2006) 264 D.L.R. (4<sup>th</sup>) 577 (S.C.C.).
- R. v. N.S., 2012 SCC 72 (CanLII).
- Ishaq v. Canada (Citizenship and Immigration), 2015 FC 156 (CanLII); 2015 FCA 151 (CanLII); 2015 FCA 194 (CanLII); 2015 FCA 212 (CanLII).
- Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37 (CanLII).
- Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11 (CanLII).

**WEEK TEN: Health and Marriage I: Accommodating Personal Choice**

- Ogilvie, chs 11 and 12.
- Malette v. Shulman et al. (1990) 67 D.L.R. (4th) 321 (Ont. C.A.).
- Manitoba (Director of Child and Family Services) v. C.(A.) (2009) 309 D.L.R. (4<sup>th</sup>) 581(S.C.C.)
- Hamilton Health Sciences Corp. v. D.H., 2014 ONCJ 603 (CanLII); 2015 ONCJ 229 (CanLII).
- Egale Canada Inc. v. Canada (Attorney General) (2003) 225 D.L.R. (4th) 472 (B.C.C.A.); (2003) 228 D.L.R. (4th) 416 (B.C.C.A.).
- Halpern v. Canada (Attorney General) (2003) 225 D.L. R. (4th) 529 (Ont. C.A.).

- Reference re: Same-Sex Marriage (2004) 246 D.L.R. (4th) 193 (S.C.C.).
- F.L. Morton, "Taking Section 33 Seriously", in Cere and Farrow, Divorcing Marriage, 135-154.
- Bruker v. Marcovitz (2008) 288 D.L.R. (4<sup>th</sup>) 257 (S.C.C.).

#### **WEEK ELEVEN: Churches I: Using and Disputing Property**

- Ogilvie, ch. 8.
- Religious Organizations Lands Act, R.S.O. 1990, c. R. 23.
- Re Incorporated Synod of the Diocese of Toronto and H.E.C. Hotels Ltd. (1987) 44 D.L.R. (4th) 161 (Ont. C.A.).
- M.H. Ogilvie, "The Legal Status of Ecclesiastical Corporations" (1989) 15 Canadian Business Law Journal 74.
- M.H. Ogilvie, "Church Property Disputes: Some Organizing Principles", (1992) 42 University of Toronto Law Journal 377.
- Bentley v. Anglican Diocese of New Westminster (2010) 326 D.L.R. (4<sup>th</sup>) 280 (B.C.C.A.)
- Delicata v. Incorporated Synod of the Diocese of Huron, 2013 ONCA 540 (CanLII).
- Pankerichan v. Djokic, 2014 ONCA 709 (CanLII).
- Syndicat Northcrest v. Amselem (2004) 241 D.L.R. (4th) 1 (S.C.C.)
- Congregation des témoins de Jéhovah etc. v. Lafontaine (Village) (2004) 241 D.L.R. (4th) 83 (S.C.C.)

#### **WEEK TWELVE: Churches II: Disciplining Laity and Clergy**

- Ogilvie, ch. 9.
- Hofer v. Hofer (1970) 13 D.L.R. (3d) 1 (S.C.C.).
- Lakeside Colony of Hutterian Brethren v. Hofer (1992) 97 D.L.R. (4th) 17 (S.C.C.).
- M.H. Ogilvie, "Ecclesiastical Law - Jurisdiction of Civil Courts - Governing Documents of Religious Organizations - Natural Justice: Lakeside Colony of Hutterian Brethren v. Hofer", (1993) 72 Canadian Bar Review 238.
- Ogilvie, ch. 9.
- Wall v. Judicial Committee of the Highwood Congregation of Jehovah's Witnesses, 2016 ABCA 255 (CanLII).
- McCaw v. United Church of Canada (1988) 51 D.L.R. (4th) 86 (Ont. H.C.); (1991) 82 D.L.R. (4th) 289 (Ont. C.A.).
- Davis v. United Church of Canada (1992) 8 O.R. (3d) 75 (Gen. Div.).
- M.H. Ogilvie, "Ecclesiastical Law - Jurisdiction of the Civil Courts - Status of Clergy: McCaw v. United Church of Canada", (1992) 71 Canadian Bar Review 597.
- Pederson v. Fulton (1994) 11 D.L.R. (4th) 367 (Ont. Gen. Div.).
- Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston, 2011 ONCA 728 (CanLII).
- M.H. Ogilvie; "Are Members of the Clergy Without the Law? Hart v. Roman Catholic Episcopal Corporation of the Diocese of Kingston" (2014) 39 Queens Law Journal 441.